Texas Department *of* Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

Board Meeting Agenda Book

8:00 a.m.

Thursday, June 14, 2018

AGENDA
BOARD MEETING
TEXAS DEPARTMENT OF MOTOR VEHICLES
4000 JACKSON AVE., BUILDING 1, LONE STAR ROOM
AUSTIN, TEXAS 78731
THURSDAY, JUNE 14, 2018
8:00 A.M.

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 executive session where authorized by the Open Meetings Act.

1. **Roll Call and Establishment of Quorum**

2. **Pledge of Allegiance**

3. **Chair's Reports** - Chairman Raymond Palacios

4. **Executive Director's Reports** - Whitney Brewster
   A. Sunset Review Status Update
   B. Enterprise Projects Update
   C. Progress Report on Operations of Compliance and Investigations Division
   D. Survey of Employee Engagement (SEE) Results
   E. Performance Quality Recognition Program Awards
   F. Awards, Recognition of Years of Service, and Announcements

PAGE 5 **CONTESTED CASES**

5. **Denial of Renewal Application, Revocation of General Distinguishing Number, and Appeal to SOAH under Texas Occupations Code, §53.021 and §53.022; and 43 Texas Administrative Code, §§215.88(i), 215.89(b), and 215.306.** MVD Docket No. 17-0045.ENF; SOAH Docket No. 608-17-0908.ENF; *Texas Department of Motor Vehicles v. Putnam Darwin Richardson d/b/a Casual Car Sales* - Daniel Avitia and Brian Coats

24 6. **Dealership's Protest against New Point Application under Occupations Code, §2301.652.** MVD Docket No. 16-0028.LIC; SOAH Docket No. 608-17-1285.LIC; *Burns Motors, Ltd., Protestant v. Payne Edinburg, LLC d/b/a Payne Chrysler, Dodge, Jeep, Ram and FCA US, LLC, Applicant* - Daniel Avitia and Michelle Lingo

RULES - ADOPTION

187 7. **Chapter 217, Vehicle Titles and Registration** - Jeremiah Kuntz
   Amendments, §217.122 and §217.123
   New, §§217.125 - 217.130
   (Relating to motor vehicle record information and DPPA)
   (Proposal Published March 16, 2018 - 43 Tex. Reg. 1621)

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249 **8. Chapter 218, Motor Carriers** - Jimmy Archer
Amendments, §218.13
(Relating to the requirement for sole proprietor applicants to scan a copy of their identification document into the eLINC system, as well as rule language cleanup regarding HB 3254)
(Proposal Published March 2, 2018 - 43 Tex. Reg. 1245)

269 **9. Chapter 219, Oversize and Overweight Vehicles and Loads** - Jimmy Archer
Amendments, §§219.2, 219.34, 219.35, and 219.36
(Relating to definitions and clarification of statutory language)
(Proposal Published March 2, 2018 - 43 Tex. Reg. 1249)

RULES - PROPOSAL

314 **10. Chapter 215, Motor Vehicle Distribution** - Corrie Thompson
- Amendments, §215.85
(Relating to used motor vehicle referral fees)
- Amendments, §215.155
(Relating to exemptions from the vehicle inspection requirements under Transportation Code, Chapter 548)

BRIEFINGS AND ACTION ITEMS

329 **11.** Specialty Plate Designs - Jeremiah Kuntz
A. Gulf Coast, New Design Proposed by My Plates under Transportation Code, §504.851
B. Smokey Bear, New Design Proposed by Texas A&M's Forest Service under Transportation Code, §504.801

333 **12. Finance & Audit Committee Update** - Committee Chair Caraway
A. Consideration of Committee Recommendation for:
- Board Approval to Submit Carryforward and Capital Authority for Headquarters Maintenance Appropriation - Linda M. Flores and Renita Bankhead

B. Briefing Items

339
1. Preliminary FY 2020 - 2021 Legislative Appropriation Request, Baseline and Exceptional Items - Linda M. Flores and Renita Bankhead
2. Peer Review Results – Sandra Menjivar-Suddeath
3. FY 2019 Draft Internal Audit Plan - Sandra Menjivar-Suddeath
4. Internal Audit Division Status Report - Sandra Menjivar-Suddeath
- Training and Travel Audit
- Texas Commission on Law Enforcement (TCOLE) Advisory Service
- Social Media Audit
- FY 2018, Third Quarter, Follow-Up Results

443 **13.** Board Key Performance Indicators and Balanced Scorecard - Tom Shindell

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454 **14.** Legislative and Public Affairs Update - Caroline Love (BRIEFING ONLY)

459 **15.** Assembled Vehicles Workgroup Update - Jeremiah Kuntz (BRIEFING ONLY)

EXECUTIVE SESSION

16. 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.

- **Section 551.089** - Security devices or security audits:
  - the deployment, or specific occasions for implementation, of security personnel or devices; or
  - a security audit.

17. Action Items from Executive Session

18. Public Comment

19. 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.

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

Pursuant to Sections 30.06 and 30.07, Penal Code (trespass by license holder with a concealed or openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun or a handgun that is carried openly.

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 Carrie Fortner by telephone at (512) 465-3044.

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

CERTIFYING OFFICIAL: David D. Duncan, General Counsel, (512) 465-5665.

Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

DATE: June 14, 2018

Action Requested: Deny Renewal Application and Revoke GDN

To: **Texas Department of Motor Vehicles (TxDMV) Board**
From: **Daniel Avitia, Director, Motor Vehicle Division**
Agenda Item: **5**
Subject: ***Texas Department of Motor Vehicles v. Putnam Darwin Richardson d/b/a Casual Car Sales*; MVD Docket 17-0045 ENF, SOAH Docket No. 608-17-0908.ENF; Denial of Renewal Application and Revocation of GDN**

RECOMMENDATION

Staff recommends the Board adopt the ALJ's findings of fact and conclusions of law, as modified. A draft Final Order is attached to this Executive Summary for the Board's consideration.

PURPOSE AND EXECUTIVE SUMMARY

The State Office of Administrative Hearings (SOAH) issued a Proposal for Decision (PFD) for consideration by the Board of the Texas Department of Motor Vehicles.

FINANCIAL IMPACT

None

BACKGROUND AND DISCUSSION

On or about November 4, 2015, Putnam Darwin Richardson d/b/a Casual Car Sales (Respondent) submitted an application to renew his motor vehicle dealer license, General Distinguishing Number P50966. Based on Respondent's criminal history and pattern of criminal activity convictions, the Motor Vehicle Division (MVD) recommended the Board deny the renewal application and revoke the license. MVD referred the matter to the Enforcement Division to pursue denial of Respondent's renewal application and revocation of the existing motor vehicle dealer license.

The Enforcement Division referred the contested case matter to the State Office of Administrative Hearings (SOAH) on or about October 27, 2016. After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with the Administrative Law Judge (ALJ) Craig R. Bennett presiding.

The hearing convened on December 14, 2017. The ALJ issued a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on January 26, 2018. The PFD was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the record herein. No exceptions were filed.

The following documents are attached to this Executive Summary for consideration by the Board:

1. Enforcement's Second Amended Notice of Department Decision, October 24, 2016;
2. Applicant's Request for Administrative Hearing Form, October 18, 2016;
3. SOAH ALJ's PFD, January 26, 2018; and
4. Draft Final Order for Board Consideration.

MOTOR VEHICLE DIVISION
TEXAS DEPARTMENT OF MOTOR VEHICLES

IN THE MATTER OF THE LICENSE OF PUTNAM DARWIN RICHARDSON, d/b/a CASUAL CAR SALES	§ § § § §	**MVD CAUSE NO. 17-0045 ENF**

SECONDED AMENDED NOTICE OF DEPARTMENT DECISION

The Texas Department of Motor Vehicles, (hereinafter, "Department" or "Petitioner"), is the state agency with authority to administer and enforce Texas Occupations Code Chapter 2301; Texas Transportation Code Chapters 501, 502 and 503; and 43 Texas Administrative Code Chapter 215. An investigation of your business was conducted by the Department. As a result of that investigation, the Department determined that you, PUTNAM DARWIN RICHARDSON d/b/a CASUAL CAR SALES, (hereinafter "Respondent"), the holder of a license issued by the Department, violated certain provisions of Texas Occupations Code Chapter 2301; and/or Texas Transportation Code Chapters 501, 502 and 503 and/or 43 Texas Administrative Code Chapter 215. The Department alleges that Respondent committed the following violations:

1) On or about, 2/26/2004, Putnam Darwin Richardson, was issued a motor vehicle dealer license (General Distinguishing Number P50966) from the Texas Department of Motor Vehicles to operate as a motor vehicle dealer as a sole proprietor under the assumed business name Casual Car Sales.

2) On or about 11/4/2015, Putnam Darwin Richardson submitted an application to renew the motor vehicle dealer license.

3) On or about 3/8/1984, in the Criminal District Court of Jefferson County, Texas, Putnam Darwin Richardson, was convicted of the felony offense of Aggravated Kidnapping in Cause Number 44063.

4) On or about 10/24/2005, in the County Court of Jefferson County at Law No. 2 for Jefferson County, Texas, Putnam Darwin Richardson, was convicted of the misdemeanor offense of Theft-Class B in Cause No. 252292.

5) On or about 5/1/2015, in the 260th District Court of Orange County, Texas, Putnam Darwin Richardson, was convicted of the misdemeanor offense of Theft-Class B in Cause No. D150048-R.

6) On or about 5/7/2015, in the County Court at Law of Orange County, Texas, Putnam Darwin Richardson, was convicted of the misdemeanor offense of Criminal Trespass in Cause

No. C107349.

7) The conviction for the criminal offense stated in paragraph 3 above is an offense listed in TEX. CRIM. CODE Art. 42.12(3g). The conviction for the criminal offense stated in paragraph 4 is an offense that directly relate to the duties and responsibilities of the licensed occupation per TEX. OCC. CODE §§ 53.021 and 53.022 and TEX. ADMIN. CODE § 215.88(j). The convictions for the criminal offenses listed under paragraphs 5 and 6 above occurred less than five years before the application to renew the motor vehicle dealer license for Putnam Darwin Richardson. As such, the motor vehicle dealer license for Putnam Darwin Richardson d/b/a Casual Car Sales is subject to revocation and/or the application to renew the license is subject to denial per TEX. ADMIN. CODE § 215.88(i), TEX. ADMIN. CODE § 215.89(b) and TEX. OCC. CODE § 53.021.

The Department is authorized to deny an application for a license, revoke or suspend a license, under Texas Occupations Code § 2301.651; Texas Transportation Code § 503.038; and 43 Texas Administrative Code § 215.141(a). Further, Texas Transportation Code § 503.095 allows for a civil penalty of up to $1,000.00 for each violation of, or per day for a continuing violation, of Chapter 503, or a rule or order adopted under the chapter. Texas Occupations Code § 2301.801 allows for a civil penalty of up to $10,000.00 for each violation of, or per day for a continuing violation, of Chapter 2301, or a rule or order adopted under the chapter.

Based on the aforementioned investigation and allegations, **THE DEPARTMENT RECOMMENDS THAT DEALER GENERAL DISTINGUISHING NUMBER LICENSE NO. P50966 BE REVOKED, OR ALTERNATIVELY, THE APPLICATION TO RENEW THE LICENSE FOR DEALER DISTINGUISHING NUMBER LICENSE NO. P50966 BE DENIED.**

If you wish to contest the allegations, recommended civil penalty, or other sanction you must first request an administrative hearing in writing. You may send your own request for hearing or use the Request For Administrative Hearing form included in this packet. Send your request for hearing to the following address:

Patrick Coats
Attorney, Enforcement Division
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, Texas 78731
(512) 465-4009
(512) 465-5650 Fax

Work Item No. 903954

You must include your name and the MVD Cause Number appearing in the heading of this Decision in your hearing request. The Department must receive your written hearing request not later than the 26th day after the date of this Decision.

If you timely submitted a written request for a hearing, the Department may enter into an informal settlement agreement with you regarding these violations and enforcement action at any time before a final decision is rendered in this case.

If a timely written hearing request is received and no settlement is reached, an administrative hearing will be scheduled before the State Office of Administrative Hearings (SOAH). You will be notified of the hearing date and time. Hearings will be held at SOAH's offices located at 300 W. 15th St., Austin, Texas 78701. Increased penalties or other sanctions may be recommended by the Department at the hearing.

If you do not request a hearing by the 26th day from the date of this notice, the Department Decision becomes final. After that date the Department may issue a Final Order implementing the Decision.

Failure to pay a civil penalty assessed by a Final Order within 30 days after the order becomes final may result in additional civil penalties or other sanctions being assessed against you.

Should this cause be set for hearing, Petitioner prays that it be found that Respondent has violated the statutes and implementing rules alleged above; and, that, as appropriate, Respondent's application for a license be denied or that Respondent's license be revoked, canceled or suspended or that Respondent be placed on probation, or reprimanded; that civil penalties be imposed; and that the conduct alleged above be ceased and not resumed.

If you have any questions regarding this Decision, please contact me at (512) 465-4009.

DATE OF DECISION: October 24, 2016

Work Item No. 903954

Respectfully submitted,

Patrick Coats

Attorney, Enforcement Division
State Bar Card No. 24072999
4000 Jackson Avenue
Austin, Texas 78731
(512) 465-4009
(512) 465-5650 Fax

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, a true and correct copy of the foregoing First Amended Petition in this matter was forwarded to the Respondent by certified mail, return receipt requested, U.S. mail and email.

Patrick Coats
Patrick Coats
Attorney, Enforcement Division

Work Item No. 903954

WI 903954

REQUEST FOR ADMINISTRATIVE HEARING

If you intend to contest the allegations listed in the Notice of Department of Decision in this matter or negotiate a settlement with the assigned enforcement division attorney you must first request an administrative hearing. You may use this form to request a hearing.

I request a hearing in Texas Department of Motor Vehicles Cause No. 17-0045 ENF ENF. (The Cause Number is found in the heading of the Decision; i.e. MVD Cause No. 15-0000 ENF).

NOTE: Failure to include the Cause Number of this matter on this request may result in no hearing being scheduled and loss of the opportunity to settle this matter before a Final Order is issued.

Name of person requesting hearing: Putnam Richardson
(Please Print)

Phone Number of person requesting hearing: (409) 886-7223

Email Address of person requesting hearing: PutnamRich@msn.com

Would you like to discuss a resolution to this case without a hearing: ✓ Yes ___ No

If it will result in a informal settlement and NOT revoked, cancele or suspended l

This request for hearing must be received at the below address no later than 26 days from the date of the Notice of Department Decision in this matter.

TEXAS DEPARTMENT OF MOTOR VEHICLES
ENFORCEMENT DIVISION
4000 Jackson Avenue – Austin, Texas 78731

This request may also be faxed to phone number **(512) 465-5660.**

Work Item No. 903954

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State Office of Administrative Hearings

RECEIVED
FEB 06 2018
TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

Lesli G. Ginn
Chief Administrative Law Judge

January 26, 2018

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731

VIA INTERAGENCY MAIL

RE: **Docket No. 608-17-0908.ENF; MVD Docket No. 17-0045 ENF / *The Texas Department of Motor Vehicles, Enforcement Division v. Putnam Darwin Richardson d/b/a Casual Car Sales***

Dear Mr. Avitia:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 Tex. Admin. Code § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Craig R. Bennett
Administrative Law Judge

CRB/et
Enclosure
cc: Putnam Darwin Richardson, Casual Car Sales, 3805 Huntwick Drive, Orange, TX 77632-9071 - **VIA REGULAR MAIL**
Patrick Coats, Attorney, Enforcement Division, Texas Department of Motor Vehicles, Motor Vehicle Division, 400 Jackson Ave., Austin, TX 78731 - **VIA INTERAGENCY MAIL**
Putnam Darwin Richardson, d/b/a Casual Car Sales, 2600 Martin Luther King Dr., Orange, TX 77630 - **VIA REGULAR MAIL**
Melinda Moreno, Docket Clerk, Texas Department of Motor Vehicle, 4000 Jackson Avenue, Austin, Texas 78731 - **VIA INTERAGENCY MAIL** (with 1 hearing CD; Certified Exhibits)

SOAH DOCKET NO. 608-17-0908.ENF
MOTOR VEHICLE CAUSE NO. 17-0045 ENF

THE TEXAS DEPARTMENT OF MOTOR VEHICLES, ENFORCEMENT DIVISION	§	**BEFORE THE STATE OFFICE**
v.	§	**OF**
PUTNAM DARWIN RICHARDSON d/b/a CASUAL CAR SALES	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Department of Motor Vehicles (Department) seeks to revoke the existing license and deny the renewal application of Putnam Darwin Richardson d/b/a Casual Car Sales (Respondent) for a General Distinguishing Number (GDN) to operate as an independent motor vehicle dealer. Staff contends that Respondent is unfit for the GDN due to his criminal history. In this Proposal for Decision (PFD), the Administrative Law Judge (ALJ) recommends that Respondent's existing license be revoked and his renewal application be denied.[1]

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the Findings of Fact and Conclusions of Law sections of this PFD without further discussion.

The hearing was held on December 14, 2017, before ALJ Craig R. Bennett in Austin, Texas. Staff was represented by Patrick Coats, Enforcement Division attorney. Respondent appeared and represented himself. The hearing concluded that day and the record closed on December 19, 2017, after Respondent filed additional documents.

[1] It is not clear that Respondent's existing license is still in effect. However, to the extent it is, it is properly revoked in addition to his renewal application being denied.

II. DISCUSSION

A. Applicable Law

A "dealer" is as an independent motor vehicle dealer who holds a GDN issued by the Department pursuant to Chapter 503 of the Texas Transportation Code.[2] The GDN constitutes a dealer's license.[3] A dealer is defined as "a person who regularly and actively buys, sells, or exchanges vehicles at an established and permanent location."[4] A person may not legally engage in the business of a dealer unless he holds a GDN.[5]

The Department may deny a GDN application if the applicant has been convicted of a criminal offense that either (1) directly relates to the duties and responsibilities of a dealer, (2) was committed less than five years before the date the person applied for the license, or (3) is listed in Texas Code of Criminal Procedure, Article 42.12, Section 3g (now found in Texas Code of Criminal Procedure, Article 42A.054)(the ALJ will use the reference "Article 42.12" to refer to an offense in this third category).[6] Pursuant to Texas Occupations Code § 53.025, the Department has adopted a rule identifying which criminal convictions directly relate to the duties and responsibilities of a dealer and may indicate a lack of fitness for licensure.[7] The rule identifies the following crimes, among others, as directly relating to the duties and responsibilities of dealers: kidnapping, theft, and criminal trespass.[8] Further, the offense of aggravated kidnapping is an offense that is identified in Article 42.12.[9]

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[2] Tex. Occ. Code § 2301.002(7); Tex. Transp. Code § 503.021 *et seq.*

[3] Tex. Occ. Code § 2301.002(17).

[4] Tex. Transp. Code § 503.001(4).

[5] Tex. Occ. Code § 2301.251(a); Tex. Transp. Code § 503.021.

[6] Tex. Occ. Code § 53.021(a); Tex. Occ. Code § 2301.651; 43 Tex. Admin. Code § 215.88(b)(1), (i)(1)-(3). The Department's rule still refers to Texas Code of Criminal Procedure, Article 42.12, Section 3g, but that statute was repealed in 2015 when its provisions were recodified in the newly-created Chapter 42A of the Texas Code of Criminal Procedure. The substance of the statute was not changed, however, but simply recodified.

[7] 43 Tex. Admin. Code § 215.88(j).

[8] 43 Tex. Admin. Code § 215.88(j)(4), (11) and (12).

[9] Tex. Code of Crim. Proc. § 42A.054(a)(4).

If, as in this case, an applicant has been convicted of an offense that directly relates to the occupation at issue, the agency must determine whether the conviction affects the applicant's fitness to perform the duties and discharge the responsibilities of the licensed occupation. Factors for an agency to consider in determining the fitness of a person who has been convicted of a crime are:

(1) The extent and nature of the person's past criminal activity;

(2) The age of the person when the crime was committed;

(3) The amount of time that has elapsed since the person's last criminal activity;

(4) The conduct and work activity of the person before and after the criminal activity;

(5) Evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and

(6) Other evidence of the person's fitness, including letters of recommendation from prosecutors, law enforcement and correctional officers; the sheriff or chief of police in the community where the person resides; and any other person in contact with the convicted person.[10]

The applicant also may also furnish proof that he has:

(1) maintained a record of steady employment;

(2) supported the applicant's dependents;

(3) maintained a record of good conduct; and

(4) paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which the applicant has been convicted.[11]

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[10] Tex. Occ. Code § 53.023(a). The applicant has the responsibility, to the extent possible, to obtain and provide the required recommendations of the prosecution, law enforcement, and correctional authorities. Tex. Occ. Code § 53.023(b).

[11] Tex. Occ. Code § 53.023(c).

B. The Parties' Evidence and Arguments

At the hearing, Staff presented numerous exhibits and the testimony of Antonia Knight, a licensing manager with the Department. Respondent offered his own testimony as well as numerous documents.[12] The evidence establishes the following undisputed facts.

Respondent was first issued a GDN by the Department in 2004 to operate a sole-proprietorship motor vehicle dealership under the assumed business name Casual Car Sales. At the time of his original application, Respondent had a criminal conviction from 1984 for the felony offense of Aggravated Kidnapping. Despite being aware of Respondent's criminal convictions, the Department issued Respondent the GDN. In 2005, Respondent was convicted of the misdemeanor offense of Theft-Class B. Respondent's GDN was renewed multiple times after this conviction. In May 2015, Respondent was convicted of two misdemeanor offenses: Theft-Class B and Criminal Trespass. After these two convictions, the Department denied Respondent's renewal application filed in 2015 and began proceedings to revoke Respondent's GDN, resulting in this proceeding at SOAH.

As noted above, Respondent has been convicted of criminal offenses on four separate occasions. The details of his convictions are set out below:

- On or about March 8, 1984, in the Criminal District Court of Jefferson County, Texas, Respondent was convicted of the felony offense of Aggravated Kidnapping in Cause Number 44063.[13]

- On or about October 24, 2005, in the County Court of Jefferson County at Law No. 2 for Jefferson County, Texas, Respondent was convicted of the misdemeanor offense of Theft-Class B in Cause No. 252292.[14]

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[12] The packet of documents submitted by Respondent after the hearing is admitted as Respondent Ex. 1. However, because they contain much personally-identifying confidential information, the documents are admitted as a confidential exhibit.

[13] Dept. Ex. 2.

[14] Dept. Ex. 3.

- On or about May 1, 2015, in the 260th District Court of Orange County, Texas, Respondent was convicted of the misdemeanor offense of Theft-Class B in Cause No. D150048—R.[15]

- On or about May 7, 2015, in the County Court at Law of Orange County, Texas, Respondent was convicted of the misdemeanor offense of Criminal Trespass in Cause No. C107349.[16]

Respondent disclosed his criminal convictions, as they existed at the time of application, in his original application and his renewal applications. The Department by rule has determined that each of the convictions relates to the occupation for which the license is required.[17]

At the hearing, Respondent sought to challenge the underlying facts of the more recent criminal offenses, essentially collaterally attacking their validity. The ALJ finds that convictions properly entered are not subject to collateral attack here. Rather, the occurrence of the criminal acts is established by the convictions. Respondent also testified regarding his disclosure of the convictions when questioned on his applications for licensure. As noted, after the hearing, Respondent also submitted a package of documents, many of which were already in the record, including many on which Respondent had included handwritten comments.

C. The ALJ's Analysis

Respondent has four criminal convictions, each of which is for a crime that the Department has determined to be directly related to the duties and responsibilities of a dealer.[18] In other words, each of Respondent's four convictions may constitute grounds for the Department to deny his renewal application for licensure, pursuant to Texas Occupations Code § 53.021(a).[19] However, as noted by the use of the word "may," the Department has discretion

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[15] Dept. Ex. 4.

[16] Dept. Ex. 5.

[17] 43 Tex. Admin. Code § 215.88(j)(4), (11), (12).

[18] 43 Tex. Admin. Code § 215.89(b)(2).

[19] Further, even if they did not relate directly to the licensed profession, two of the crimes would still meet other grounds for which denial is appropriate under Texas Occupations Code § 53.021(a)—one is less than five years since the last conviction, and another is listed in Article 42.12.

as to whether Respondent should be licensed, after considering the factors listed in the Texas Occupations Code § 53.023. The ALJ has considered each of the factors and ultimately concludes they do not support licensure. For ease of reference, the ALJ finds it appropriate to set out the factors in a chart below, along with the ALJ's analysis of each:

FACTOR	ANALYSIS
The extent and nature of the person's past criminal activity	Respondent has four criminal convictions, spanning a period of 31 years, with at least a decade between convictions (except for the last two, which were related). This shows an ongoing pattern of criminal behavior by Respondent, rather than behavior occurring in an isolated period of time. Thus, this factor weighs **AGAINST** licensure.
The age of the person when the crime was committed	Respondent was approximately 39 years old when his first conviction occurred in 1984, and was approximately 60 and 69 years old when his subsequent convictions occurred. Thus, this factor weighs **AGAINST** licensure.
The amount of time that has elapsed since the person's last criminal activity	Respondent's most recent criminal convictions were for conduct occurring in October 2014. Therefore, a relatively short period of time has elapsed since Respondent's last criminal activity. Thus, this factor weighs **AGAINST** licensure.
The conduct and work activity of the person before and after the criminal activity	Respondent has maintained a continuous history of regularly working. Therefore, this activity weighs **FOR** licensure.
Evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release	Respondent studied and obtained education while incarcerated for his first criminal offense. This showed rehabilitative effort. However, he was subsequently convicted of three more criminal offenses after being released from prison. Given this, the ALJ finds that the evidence does not adequately display rehabilitation. Thus, this factor weighs **AGAINST** licensure.

FACTOR	ANALYSIS
Other evidence of the person's fitness, including letters of recommendation from prosecutors, law enforcement and correctional officers; the sheriff or chief of police in the community where the person resides; and any other person in contact with the convicted person	Respondent provided numerous reference letters of his character during the application process. However, these letters are of questionable reliability. The Department attempted to contact the alleged writers of the letters and was unable to verify their authenticity. Some of the letters were not actually signed and the Department was unable to reach the alleged writers. One person whose letter was not signed, when contacted, stated that the letter she had submitted was signed by her. She also went on to state that her opinion of Respondent had changed and it would no longer be positive. Given the evidence, the ALJ finds that the letters submitted by Respondent do not provide adequate evidence of his fitness. Therefore, this factor is **NEUTRAL**.
Evidence that Respondent maintained a record of steady employment	Respondent has maintained a continuous history of regularly working. Therefore, this activity weighs **FOR** licensure.
Evidence that Respondent has supported his dependents	There is no contention that Respondent has failed to provide for his dependents. This factor weighs **FOR** licensure.
Evidence that Respondent has maintained a record of good conduct	Respondent's numerous convictions over a span of decades indicate that Respondent has not been able to maintain a record of good conduct over an adequate period of time. Therefore, this factor weighs **AGAINST** licensure.
Evidence that Respondent has paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which the applicant has been convicted	Insufficient evidence was offered of this, so this factor is **NEUTRAL**.

After weighing the evidence and considering the totality of the applicable factors for licensure, the ALJ concludes that Respondent's renewal application should be denied and any existing active GDN be revoked. At best, the Chapter 53 factors are mixed, with the more

significant factors weighing against licensure. Given Respondent's extensive criminal history, over a span of decades, the ALJ concludes that the Chapter 53 factors should weigh strongly in favor of licensure before licensure would be appropriate. But, the factors do not weigh in favor licensure. Thus, the ALJ concludes the Department rightly denied Respondent's renewal application and properly revoked any existing GDN. In support of this determination, the ALJ makes the following findings of fact and conclusions of law.

III. FINDINGS OF FACT

1. On or about March 8, 1984, in the Criminal District Court of Jefferson County, Texas, Putnam Darwin Richardson was convicted of the felony offense of Aggravated Kidnapping in Cause Number 44063.

2. In 2004, Putnam Darwin Richardson d/b/a Casual Car Sales (Respondent) was first issued by the Texas Department of Motor Vehicles (Department) a General Distinguishing Number (GDN), so that he could operate as an independent wholesale motor vehicle dealer (dealer).

3. Respondent has operated a sole-proprietorship motor vehicle dealership under the assumed business name Casual Car Sales since issuance of the GDN in 2004.

4. On or about October 24, 2005, in the County Court of Jefferson County at Law No. 2 for Jefferson County, Texas, Respondent was convicted of the misdemeanor offense of Theft-Class B in Cause No. 252292.

5. On or about May 1, 2015, in the 260th District Court of Orange County, Texas, Respondent was convicted of the misdemeanor offense of Theft-Class B in Cause No. D150048—R.

6. On or about May 7, 2015, in the County Court at Law of Orange County, Texas, Respondent was convicted of the misdemeanor offense of Criminal Trespass in Cause No. C107349.

7. Respondent's convictions in May 2015 were for crimes committed in October 2014.

8. On November 4, 2015, Respondent filed his GDN renewal application.

9. On September 20, 2016, staff (Staff) of the Department notified Respondent that it was proposing to revoke his existing license and deny his renewal application.

10. Respondent timely requested a hearing.

11. On October 28, 2016, Staff mailed a notice of hearing to Respondent by certified mail and first class mail.

12. The notice of hearing, and attached documents, contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted.

13. The hearing was continued numerous times at the parties' request. All parties received proper notice of the new hearing settings, including the final setting.

14. The hearing on the merits was held on December 14, 2017, before Administrative Law Judge Craig R. Bennett in Austin, Texas. Staff was represented by Patrick Coats, Enforcement Division attorney. Respondent appeared and represented himself. The hearing concluded that day, and the record closed on December 19, 2017, after Respondent filed additional documents.

15. Respondent was approximately 39 years old when his first conviction occurred in 1984, and was approximately 60 and 69 years old when his subsequent convictions occurred.

16. Respondent's most recent convictions were for conduct occurring in October 2014. Thus, a short period of time has elapsed since Respondent's last criminal activity.

17. Respondent has maintained a continuous history of regularly working.

18. Respondent obtained education while incarcerated for his first criminal offense.

19. No letters of recommendation were provided from prosecutors, law enforcement and correctional officers, or the sheriff or chief of police in the community where Respondent resides, attesting to his overall character or fitness for licensure.

IV. CONCLUSIONS OF LAW

1. The Department has jurisdiction over dealers pursuant to Texas Occupations Code ch. 2301 and Tex. Transp. Code ch. 503.

2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a contested case in this matter, including the preparation of a Proposal for Decision with proposed Findings of Fact and Conclusions of Law, under Texas Government Code ch. 2003.

3. Respondent received proper and timely notice of hearing as required by Tex. Gov't Code §§ 2001.051-.052.

4. A GDN constitutes a dealer's license, and a person may not legally engage in the business of a dealer without a GDN. Tex. Occ. Code §§ 2301.002(17), 2301.251(a); Tex. Transp. Code § 503.21.

5. The Department may revoke a GDN or deny a GDN application if the applicant has been convicted of a criminal offense that (1) directly relates to the duties and responsibilities of a dealer, (2) was committed less than five years before the date the person applies for the license, or (3) is listed in Texas Code of Criminal Procedure, Article 42.12, Section 3g (now found in Texas Code of Criminal Procedure, Article 42A.054). Tex. Occ. Code § 53.021(a); Tex. Occ. Code § 2301.651; 43 Tex. Admin. Code § 215.88(b)(1) and (i)(1)-(3). (The Department's rule still refers to Texas Code of Criminal Procedure, Article 42.12, Section 3g, but that statute was repealed in 2015 when its provisions were recodified in the newly-created Chapter 42A of the Texas Code of Criminal Procedure. The substance of the statute was not changed, however, but simply recodified.)

6. The four crimes for which Respondent was convicted all directly relate to duties and responsibilities of a dealer. 43 Tex. Admin. Code § 215.88(j)(4), (11), (12).

7. The offense of aggravated kidnapping is an offense identified in Texas Code of Criminal Procedure, Article 42.12, Section 3g (now found in Texas Code of Criminal Procedure, Article 42A.054).

8. When determining whether to revoke or deny a GDN application because the applicant has been convicted of a crime, the Department must consider a number of additional factors. Tex. Occ. Code § 53.023.

9. In this case, the applicable factors do not support issuance of a license to Respondent.

10. The Department should deny renewal of Respondent's GDN and revoke any existing GDN.

SIGNED January 26, 2018.

CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

MOTOR VEHICLE DIVISION
TEXAS DEPARTMENT OF MOTOR VEHICLES

IN THE MATTER OF PUTNAM	§	**MVD DOCKET NO. 17-0045 ENF**
DARWIN RICHARDSON D/B/A	§	**SOAH DOCKET NO. 608-17-0908.ENF**
CASUAL CAR SALES	§	

FINAL ORDER

The referenced contested case matter is before the Board of the Texas Department of Motor Vehicles (TxDMV) in the form of a Proposal for Decision (PFD) from the State Office of Administrative Hearings (SOAH) and involves both the denial of the renewal application and the revocation of Putnam Darwin Richardson's (Respondent) motor vehicle dealer license, General Distinguishing Number P50966.

The specific reasons and legal basis for the Board's changes to the administrative law judge's (ALJ) Findings of Fact and Conclusions of Law follow:

Finding of Fact 2 is modified in accordance with Texas Government Code § 2001.058(e)(3) because the ALJ made a technical error regarding Respondent's license type. Respondent operates as an independent motor vehicle dealer, not as an independent wholesale motor vehicle dealer.

Conclusion of Law 1 is modified in accordance with Texas Government Code § 2001.058(e)(1) because the ALJ did not properly apply applicable law. Texas Occupations Code § 2301.151 provides the Board of the Texas Department of Motor Vehicles with exclusive original jurisdiction over the subject matter of this case.

Conclusion of Law 4 is modified in accordance with Texas Government Code § 2001.058(e)(1) because the ALJ did not properly apply applicable law. Texas Transportation Code § 503.001(4) provides the applicable definition of "dealer." Additionally, the ALJ's citation of Texas Transportation Code § 503.21 contains a technical error. Instead, it is Texas Transportation Code § 503.021 that requires a person to hold a general distinguishing number before engaging in business as a dealer.

Conclusion of Law 5 is modified in accordance with Texas Government Code Sec. 2301.058(e)(1) because the ALJ did not properly apply applicable law. Texas Occupations Code Sec. 2301.651 provides that the Board may revoke a license or deny an application for a license in this Enforcement proceeding.

Conclusion of Law 8 is modified in accordance with Texas Government Code § 2001.058(e)(1) because the ALJ did not properly apply applicable law. The Board, rather than the department, is the licensing authority authorized by Texas Occupations Code § 53.023 to deny a renewal application or to revoke an existing license.

Conclusion of Law 10 is modified in accordance with Texas Government Code § 2001.058(e)(1) because the ALJ did not properly apply applicable law. In this contested case matter, the Board, rather than the department, is authorized to deny a renewal application or to revoke an existing general distinguishing number license.

The Board adopts the Findings of Fact 1, and 3-19, and Conclusions of Law 2-3, 6-7, and 9, as presented in the ALJ's January 26, 2018, PFD. For the specific reasons and legal basis stated above, the Board modifies Finding of Fact 2 and Conclusions of Law 1, 4, 5, 8, and 10.

ACCORDINGLY, IT IS ORDERED:

1. That the Findings of Fact and Conclusions of law as set out in this Order are hereby adopted;
2. That Respondent's application to renew general distinguishing number P50966 is denied;
3. That Respondent's general distinguishing number P50966 is revoked; and
4. That all remaining motions, exceptions, or objections, of any party, if any, are hereby denied.

Date: _____

_____
Raymond Palacios, Chairman
Board of Texas Department of Motor Vehicles

ATTESTED:

_____
Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles

DRAFT

DATE: **June 14, 2018**
ACTION REQUESTED: ISSUE ORDER

To: **Texas Department of Motor Vehicles (TxDMV) Board**
From: **Daniel Avitia, Director, Motor Vehicle Division**
Agenda Item: **6**
Subject: **Dealership's Protest against New Point Application:**
Burns Motors, Ltd., Protestant v. Payne Edinburg, LLC d/b/a Payne Chrysler, Dodge, Jeep, Ram, Applicant; **MVD Docket No. 16-0028.LIC; SOAH Docket No. 608-17-1285.LIC**

PURPOSE AND EXECUTIVE SUMMARY
The State Office of Administrative Hearings (SOAH) issued the attached Proposal for Decision (PFD) for consideration by the Board of the Texas Department of Motor Vehicles.

FINANCIAL IMPACT
None

BACKGROUND AND DISCUSSION
On May 23, 2016, Payne Edinburg, LLC d/b/a Payne Chrysler, Dodge, Jeep, Ram (Applicant) filed an application for a new point dealership in Edinberg, Texas. On July 13, 2016, Burns Motors, Ltd. (Protestant) filed with the Motor Vehicle Division (MVD) of the Texas Department of Motor Vehicles (TxDMV) a statutory protest. MVD referred the contested case matter to the State Office of Administrative Hearings on November 22, 2016, for a Hearing on the merits to be conducted by an administrative law judge (ALJ). The manufacturer, FCA US, LLC, intervened. The ALJs conducted the hearing on the merits September 11-14 and 18-19, 2017; closed the administrative record December 19, 2017; and issued the PFD on February 15, 2018.

The ALJs found that the Applicant established—by a preponderance of the evidence—good cause exists for the establishment of a new Chrysler Jeep Dodge Ram (CJDR) dealership in Edinburg. The ALJs recommended the Board approve the new point application.

On March 22, 2018, the ALJ issued an exceptions letter, providing that no changes would be made to the proposal for decision (PFD) in response to the Exceptions to the PFD filed by the Protestant on March 2, 2018, or in response to the Reply to the Exceptions to the PFD filed by the Intervenor on March 16, 2018. SOAH returned this contested case matter to the TxDMV. The Board has jurisdiction to consider the contested case matter.

The issue presented in this case is whether the Applicant established—by a preponderance of the evidence[1]—that there is good cause for the establishment of a new CJDR dealership in Edinburg, Texas, per the considerations required by Texas Occupations Code §2301.652.

In determining whether the Applicant demonstrated good cause for the establishment of a new CJDR dealership in Edinburg, the Board shall consider the following seven statutory factors.

(1) Whether the manufacturer or distributor of the same line-make of new motor vehicle is being adequately represented as to sales and service;
(2) Whether the protesting franchised dealer representing the same line-make of new motor vehicle is in substantial compliance with the dealer's franchise, to the extent that the franchise is not in conflict with

[1] Tex. Occ. Code §2301.453(g) requires the Board to determine whether the party seeking the termination has established by a preponderance of the evidence that there is good cause for the proposed termination. Black's Law Dictionary defines "preponderance of the evidence" to mean the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to include a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in a civil trial, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

Occupations Code Chapter 2301;
(3) The desirability of a competitive marketplace;
(4) Any harm to the protesting franchised dealer;
(5) The public interest;
(6) Any harm to the applicant; and
(7) Current and reasonably foreseeable projections of economic conditions, financial expectations, and the market for new motor vehicles in the relevant market area.

1. ***FACTOR 1: Whether the manufacturer or distributor of the same line-make of new motor vehicle is being adequately represented as to sales and service*** (PFD pp. 59-63)
The ALJs decided this factor in favor of the Applicant. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs found that the Applicant established that the CJDR product lines are not being adequately represented as to sales and service in the McAllen sales locality.

2. ***FACTOR 2: Whether the protesting franchised dealer representing the same line-make of new motor vehicle is in substantial compliance with the dealer's franchise, to the extent that the franchise is not in conflict with Occupations Code Chapter 2301*** (PFD pp 63-68)
The ALJs decided this factor in favor of the Applicant. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs found that the Applicant established that the Protestant is not in substantial compliance with its dealer franchise agreements.

3. ***FACTOR 3: The desirability of a competitive marketplace*** (PFD pp 68-69)
The ALJs decided this factor in favor of the Applicant. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs found that a new CJDR dealership in Edinburg will promote healthy interbrand and intrabrand competition in the relevant markets.

4. ***FACTOR 4: Any harm to the protesting franchised dealer*** (PFD pp 69-74)
The ALJs decided this factor in favor of the Applicant. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs found that establishing a new CJDR dealership in Edinburg will not cause Protestant to suffer any significant harm.

5. ***FACTOR 5: The public interest*** (PFD pp 74-76)
The ALJs decided this factor in favor of the Applicant. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs found that establishing a new CJDR dealership in Edinburg is in the public interest.

6. ***FACTOR 6: Any harm to the applicant*** (PFD pp 76-77)
The ALJs decided this factor in favor of the Protestant. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs found that the evidence failed to establish that Applicant will be financially harmed if the Application for a new CJDR dealership in Edinburg is denied.

7. ***FACTOR 7: Current and reasonably foreseeable projections of economic conditions, financial expectations, and the market for new motor vehicles in the relevant market area*** (PFD pp 77-80)
The ALJs decided this factor in favor of the Applicant. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs found that Current and reasonably foreseeable projections of economic conditions, financial expectations, and the market for new motor vehicles in the relevant market area favor the establishment of a new CJDR dealership in Edinburg.

Board Authority
Tex. Occ. Code §2301.151 provides the Board's exclusive original jurisdiction, including original jurisdiction to determine its own jurisdiction. **Tex. Occ. Code Chapter 2301** provides the Board's authority, duties, and powers relating to the parties and to the decision in this contested case matter.

A. **Tex. Occ. Code §2301.652** authorizes the Board to deny an application to establish a dealership, if the applicant fails to establish good cause for establishing the dealership. Seven factors are provided by statute that the Board shall consider in determining whether the applicant established good cause for the dealership.

B. **Tex. Occ. Code §2301.711** requires an order of the Board:
   1. to include a separate finding of fact for each of the specific issues in Tex. Occ. Code §2301.455; and
   2. to set forth additional findings of fact and conclusions of law on which the order is based.

C. **Tex. Gov't Code §2001.058(e)** allows the Board to change a finding of fact or conclusion of law made by the ALJs… only if the Board determines:
   1. that the ALJs did not properly apply or interpret applicable law, agency rules,…or prior administrative decisions;
   2. that a prior administrative decision on which the ALJ relied is incorrect or should be changed; or
   3. that a technical error in a finding of fact should be changed.

   The Board shall state, in writing, the ***specific reason*** and ***legal basis*** for a change made under this subsection.

SOAH ALJs' Recommendations

The SOAH ALJs found that the Applicant met its burden of proof (preponderance of the evidence) and found that the evidence demonstrated good cause for establishment of a new CJDR dealership in Edinburg, Texas.

Documents

The following documents are attached to this Executive Summary for consideration by the Board:

1.	SOAH ALJs' Proposal for Decision (5 pages contain redacted information)	02/15/2018
2.	Protestant's Exceptions to the PFD	03/02/2018
3.	Intervenor's Reply to the Exceptions to the PFD	03/16/2018
4.	SOAH ALJ's Exceptions Letter	03/22/2018

State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

February 15, 2018

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731

VIA INTERAGENCY MAIL

RE: SOAH Docket No. 608-17-1285.LIC; MVD Docket No. 16-0028.LIC; *Burns Motors, Ltd. v. Payne Edinburg, LLC d/b/a Payne Chrysler, Dodge, Jeep, Ram and FCA US, LLC*

Dear Mr. Avitia:

Please find enclosed a Proposal for Decision (PFD) in this case. It contains our recommendation and underlying rationale.

The PFD includes discussion of information that the parties, at least at times, designated as confidential in their exhibits, and/or testified to under seal during the hearing. Because the parties appear to agree that disclosure of these matters should be limited, we are deeming the PFD to be confidential and issuing it under seal. If either party disagrees with the designation of the PFD as confidential, they may file an objection for our consideration.[1] The parties are cautioned that designation of the PFD as confidential in this proceeding is not determinative of whether it is subject to disclosure under the Public Information Act or other law.[2]

[1] 1 Tex. Admin. Code § 155.103(d).

[2] 1 Tex. Admin. Code § 155.103(e).

Exceptions to the PFD, and replies to exceptions, may be filed by any party in accordance with 1 Tex. Admin. Code § 155.507(b), a SOAH rule which may be found at www.soah.state.texas.gov.

Sincerely,

Sarah Starnes
Administrative Law Judge

Hunter Burkhalter
Administrative Law Judge

HB/ls
Enclosure
cc: Mark T. Clouatre and Adrienne L. Toon, Nelson Mullins Riley & Scarborough, LLP, 1400 Wewatta Street, Suite 500, Denver, CO 80202 - **VIA REGULAR MAIL**

Steven B. McFarland, Nelson Mullins Riley & Scarborough, LLP, Meridian/17th Floor, 1320 Main Street, Columbia, South Carolina, 29201- **VIA REGULAR MAIL**

William R. Crocker, 807 Brazos, Suite 1014, Austin, TX 78701 - **VIA REGULAR MAIL**

James E. Cousar, Thompson & Knight, LLP, 98 San Jacinto Blvd, Suite 1900, Austin, TX 78701 – **VIA REGULAR MAIL**

Frederick J. Biel, Atlas & Hall, LLP, 818 Pecan Boulevard, McAllen, TX 78501-2148 – **VIA REGULAR MAIL**

MVD Docket Clerk, Motor Vehicle Division, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 - **VIA INTERAGENCY MAIL**

SOAH DOCKET NO. 608-17-1285.LIC
MVD DOCKET NO. 16-0028.LIC

BURNS MOTORS, LTD.,	§	**BEFORE THE STATE OFFICE**
Protestant	§	
	§	
v.	§	
	§	
PAYNE EDINBURG, LLC D/B/A	§	
PAYNE CHRYSLER, DODGE, JEEP, RAM,	§	**OF**
Applicant	§	
	§	
and	§	
	§	
FCA US, LLC,	§	
Intervenor	§	**ADMINISTRATIVE HEARINGS**

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SOAH DOCKET NO. 608-17-1285.LIC
MVD DOCKET NO. 16-0028.LIC

BURNS MOTORS, LTD.,	§	**BEFORE THE STATE OFFICE**
Protestant	§	
	§	
v.	§	
	§	
PAYNE EDINBURG, LLC D/B/A	§	
PAYNE CHRYSLER, DODGE, JEEP,	§	**OF**
RAM,	§	
Applicant	§	
	§	
and	§	
	§	
FCA US, LLC,	§	
Intervenor	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

Payne Edinburg, LLC, d/b/a Payne Chrysler, Dodge, Jeep, Ram (Applicant)[1] filed a Franchised New Motor Dealer's License Application (Application) with the Motor Vehicle Division (Division) of the Texas Department of Transportation to establish a new Chrysler, Jeep, Dodge, Ram (CJDR) dealership in Edinburg, Texas. Burns Motors, Ltd. (Protestant or Burns Motors), which owns an existing CJDR dealership in McAllen, Texas, a few miles away from the proposed Edinburg dealership, initiated this proceeding to protest the Application. FCA US, LLC (Intervenor or FCA),[2] the national dealer of CJDR, intervened in the proceeding on Applicant's behalf.

Having considered the evidence and the arguments of the parties, and having examined the seven statutory factors applicable under Texas Occupations Code § 2301.652, the Administrative Law Judges (ALJs) find that Applicant and Intervenor proved by a

[1] Because the namesake owner of Payne Edinburg, LLC was a fact witness in this case, and because there are other similarly-named Payne entities referenced in this Proposal for Decision (PFD), in the interest of clarity, Payne Edinburg, LLC will simply be called "Applicant" in this PFD.

[2] FCA is an acronym for FIAT Chrysler Automotive. Tr. 539.

preponderance of the evidence that good cause exists for the establishment of a new CJDR dealership in Edinburg. Therefore, the ALJs recommend approval of the Application.

I. PROCEDURAL HISTORY

On May 23, 2016, Applicant submitted its Application to the Division for the new Edinburg dealership, to be located at 3460 South I-69C, Edinburg, Texas 78542.[3] After receiving the required statutory notice from the Division, Burns Motors filed a protest with the Division on July 13, 2016. On November 22, 2016, the Division referred the case to the State Office of Administrative Hearings (SOAH) for a contested case hearing, and issued a Notice of Hearing to the parties. FCA intervened in the case, aligned with Applicant, and participated in every stage of the proceeding.[4]

The hearing on the merits was held September 11-14 and 18-19, 2017, before ALJs Hunter Burkhalter and Sarah Starnes. At the hearing, Burns Motors was represented by its counsel, James E. Cousar; Applicant was represented by its counsel, William R. Crocker; and FCA was represented by its counsel, Mark T. Clouatre, Steven B. McFarland, and Adrienne L. Toon.

Ten witnesses testified live at the hearing. FCA presented testimony from (1) Theresa McDaniel, FCA's Dealer Placement Manager; (2) Todd Tunic, FCA's Dealer Network Development Manager; (3) Bashar Cholagh, FCA's Senior Manager for Market Representation, Dealer Diversity, and Technologies; (4) Chris Chandler, a regional FCA Dealer Network Manager; (5) Herbert E. Walter, an expert witness for FCA and Applicant; and (6) Sharif Farhat, another expert for FCA and Applicant. Applicant also presented testimony from its owner, Bud Payne. Burns Motors presented testimony from (1) its owner, Kyle Burns; (2) Richard Deleon, its General Manager; and (3) Ilhan Geckil, an expert witness for

[3] Applicant Ex. 1.

[4] No motion to intervene was ever filed, nor was any order entered formally granting leave for FCA to intervene. However, no objection was ever raised to FCA's intervention or participation.

Burns Motors. In addition, FCA offered excerpts from the deposition testimony from two witnesses, Xavier Contreras and Nancy Linville, both longtime employees of Burns Motors.

The record closed on December 19, 2017, after the parties' post-hearing briefs were submitted.

II. APPLICABLE LAW

A person has standing to protest an application to establish a dealership if the person filing the protest is a franchised dealer of the same line-make whose dealership is located either in the county in which the proposed dealership is to be located, or within a 15-mile radius of the proposed dealership.[5]

When a protest has been filed, the Division may deny the application if good cause is not shown for establishing the new dealership.[6] In determining whether there is good cause, the Division must consider the following factors enumerated in section 2301.652 of the Texas Occupations Code:

(1) whether the manufacturer or distributor of the same line-make of new motor vehicle is being adequately represented as to sales and service;

(2) whether the protesting dealer representing the same line-make of new motor vehicle is in substantial compliance with the dealer's franchise, to the extent that the franchise is not in conflict with this chapter;

(3) the desirability of a competitive marketplace;

(4) any harm to the protesting franchised dealer;

(5) the public interest;

(6) any harm to the applicant; and

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[5] Tex. Occ. Code § 2301.652(b). The parties agree that Burns Motors meets these standing requirements.

[6] Tex. Occ. Code § 2301.652(a).

(7) current and reasonably foreseeable projections of economic conditions, financial expectations, and the market for the new motor vehicles in the relevant market area.[7]

Under the statute, Applicant has the burden of demonstrating good cause for the establishment of its proposed Edinburg CJDR dealership.[8]

III. FACTUAL BACKGROUND

A. Overview of CJDR Brands and Dealership Management[9]

FCA is the exclusive dealer of Chrysler, Jeep, Dodge, and Ram vehicles in the United States. The brands had historically been sold in separate dealerships, but in the early 2000s, in an effort to boost brand performance, FCA initiated a project known as "Project Genesis" to consolidate the separate-brand dealerships into full-line CJDR dealerships and ensure those dealerships were situated in optimal locations and facilities.[10] Through Project Genesis, a number of dealerships were sold, closed, or terminated.[11] The project is "substantially complete" today, according to Chris Chandler, FCA's former National Dealer Placement Manager, and FCA now has about 2,600 dealers in the United States, including FIAT, Alfa, and CJDR dealers.[12]

In 2009, while Project Genesis was underway, the automotive market—along with much of the United States economy—plummeted. FCA's witnesses estimated that nationally, annual retail sales of all makes and lines of vehicles dropped from around 17 million units to

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[7] Tex. Occ. Code § 2301.652(a).

[8] Tex. Occ. Code § 2301.652(a).

[9] The CJDR parent company has been renamed or restructured several times over the years. For ease of reference they are all generally referred to as FCA in this PFD.

[10] Tr. 558.

[11] Tr. 558-60.

[12] Tr. 542, 559.

around 10 million units during this anomalous economic period.[13] For several years, the entire automotive industry was in a downturn, and CJDR vehicles sold relatively poorly from approximately 2008 to 2011.[14] FCA filed for bankruptcy protection in 2009, which further reduced the number of CJDR dealerships for a time.[15] Since then, the industry has rebounded, and 2016 saw the highest number of vehicle sales ever in the United States.[16] Mr. Chandler, a Dealer Network Manager who testified at the hearing, estimated that automakers are again selling around 17 million vehicles per year in the United States.[17]

While the automotive market as a whole has largely rebounded, FCA's witnesses generally agreed that CJDR sales have been trending downwards for a year or two. As of the date of the hearing in September 2017, CJDR sales were about 7 percent lower in 2017 than they had been in 2016.[18] Mr. Cholagh, the head of FCA's market representation division, explained this was largely because CJDR was in the process of phasing out a few vehicle models, while the new products that will replace them will not start to be launched until at least 2018.[19] Mr. Payne, Applicant's owner, also acknowledged that the Rio Grande Valley had been "going through a little bit of a flat area" in terms of vehicle sales over the previous year.[20] He attributed some of that to political uncertainty in the region, explaining that customers have been cautious because they do not know how the region will be impacted by issues like the construction of a border wall or renegotiation of the North American Free Trade Agreement.[21] Burns Motors argues that

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[13] Tr. 438-39, 576.

[14] Tr. 336, 353.

[15] Tr. 138-40.

[16] Tr. 438-39.

[17] Tr. 576.

[18] Tr. 317, 421.

[19] Tr. 421.

[20] Tr. 775.

[21] Tr. 834.

its own sales performance over the last decade, which is an issue in this case, should be considered in the context of these overall industry market trends.[22]

As explained by FCA's witnesses, generally speaking, when addressing whether to add a new dealership (or "point"), two sides of FCA's business come together to make a decision: the market representation side and the operations side. The market representation side analyzes geographic markets and makes recommendations on how to optimize dealer network performance, while the operations side works with individual dealers to implement those recommendations that are adopted.[23] At the hearing, three representatives from FCA's operations side testified. First was Teresa McDaniel, who has been a Dealer Placement Manager since 2003, a position that gives her responsibility for managing relationships between FCA and its franchise dealers, including opening new dealerships, terminating existing dealerships, and negotiating or amending the various agreements between FCA and its dealers.[24] Her current territory, called the Southwest Business Center, covers most of Texas (excluding the Houston area) as well as several other southern states.[25] Until April 2017, Ms. McDaniel's supervisor was Todd Tunic, then the Dealer Network Manager for the Southwest Business Center. Mr. Tunic testified that he has worked for FCA and its predecessors since 1984, and, since April 2017, has been employed as a Dealer Network Manager for a different region.[26] Christopher Chandler, who also testified for FCA, succeeded Mr. Tunic as the Dealer Network Manager for the Southwest Business Center.[27] Mr. Chandler has worked for FCA since 1983 in various positions; most recently, before becoming Dealer Network Manager, Mr. Chandler worked as the National Dealer Placement Manager for five years.[28]

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[22] Tr. 905-06.

[23] Tr. 542-43.

[24] Tr. 29-30.

[25] Tr. 30-31, 202.

[26] Tr. 198-99, 201.

[27] Tr. 539.

[28] Tr. 539-40.

FCA also presented testimony from Bashar Cholagh, the head of its market representation division since 2013.[29] He explained that, as the economy began to rebound from the 2009 downturn, FCA acted to position itself for future growth and the introduction of new vehicles.[30] Against this background, he was hired to conduct market-by-market analysis to determine whether and why CJDR brands were underperforming in any given area, analyzing factors like the number of vehicles in operation; household and population growth; local economic conditions; number and location of competing dealerships; and distances customers have to travel to a CJDR dealership.[31] Mr. Cholagh explained that FCA was generally focused on Texas because of the state's rapid growth, and within Texas, FCA was focused on the McAllen/Edinburg region because of the "tremendous household growth" the region was experiencing.[32] In addition to the Edinburg point at issue in this case, Mr. Cholagh said he has advocated for the establishment of 20 to 25 other new points throughout Texas.[33]

FCA uses several terms of art in its business and its relationships with its dealers that are relevant to this case and used throughout this PFD:

- **Dealer agreements** are the Sales and Service Agreements that FCA enters into with its dealers for each of the CJDR brands.[34] Burns Motors's most recent dealer agreements for the Chrysler, Dodge, and Ram brands were executed on February 20, 2013. The current dealer agreement for the Jeep line was executed in July 2017.[35]

- **Sales locality** is the geographical area of responsibility, or market area, that is assigned to a dealership.[36] Dealers are free to sell to customers anywhere in the United States,[37] but FCA generally measures a dealer's performance by the sales and vehicle registrations

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[29] Tr. 352.

[30] Tr. 361.

[31] Tr. 353, 356, 437.

[32] Tr. 361.

[33] Tr. 437-38.

[34] Tr. 32.

[35] FCA Ex. 50, 57.

[36] Tr. 32, 207.

[37] Tr. 35.

made within its own sales locality. Some sales localities are broken down further into trade zones. Burns Motors and the proposed Edinburg point are both in the McAllen sales locality, a single territory that would be broken down into two trade zones (one for McAllen, one for Edinburg) if the Application is approved.[38] The dealer agreements expressly reserve to FCA the right to add dealers to a sales locality.[39]

- **Minimum sales responsibility (MSR)** is the contractual sales performance standard that FCA sets for each of its dealers. A dealer's MSR is the number of vehicles a dealer must sell in order to capture the same market share in its sales locality that the CJDR brands average statewide; market share is calculated based on recent new vehicle registrations.[40] For example, if 10 percent of the new vehicles registered statewide were CJDR brands, then a CJDR dealer in a sales locality that had 1,000 total new vehicle registrations will have an MSR of 100 vehicles.[41] If that dealer sells 100 CJDR vehicles, it will have met 100 percent MSR; if it sells fewer than 100 vehicles, then it is below MSR. Dealers who fall below 100 percent MSR are considered underperforming and in breach of their dealer agreements.[42]

- **Registration effectiveness** is another metric FCA uses to measure brand performance, evaluating the percentage of all new vehicle registrations that are CJDR brands on a regional, statewide, and nationwide basis. FCA hopes that registrations in each sales locality in Texas will meet or exceed the averages in Texas and nationwide.[43] However, because vehicles can be registered in a sales locality even if the owner purchased them elsewhere, vehicle registrations cannot be directly correlated to the dealer in a sales locality.[44] Thus, registration effectiveness is primarily used to evaluate how the CJDR brands are performing in a market.

- **Planning potential** is a number FCA provides annually to each dealer that projects how many vehicles will be available to the dealer over the next several years, based on the anticipated production volume for each vehicle line, among other factors.[45] According to FCA's witnesses, planning potential is not intended to be a predictor of vehicle sales. Instead, FCA uses the dealer's planning potential solely to determine working capital

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[38] Tr. 298-99.

[39] Tr. 35; FCA Ex. 50 at 2.

[40] Tr. 36-37, 184, 218, 333-34, 374-76. Mr. Cholagh testified that MSR is calculated monthly, and there is typically about a three-month delay in obtaining vehicle registration data. Tr. 381, 426.

[41] Tr. 184.

[42] Tr. 36-37.

[43] Tr. 72-74, 136, 367-57, 433-34.

[44] Tr. 136, 184.

[45] Tr. 44, 268, 393.

guidelines and facility requirements for the dealers.[46] If a dealership's planning potential decreases, then the minimum facility requirements (generally, size requirements for the dealership) are also decreased.[47]

B. Market Study of the McAllen Sales Locality

FCA has four main sales localities in the Rio Grande Valley—McAllen, Rio Grande City, Weslaco, and Harlingen.[48] Within the McAllen sales locality, Ms. McDaniel said there are three main auto shopping regions—McAllen, Mission, and Edinburg.[49] Currently, Burns Motors owns the only full-line CJDR dealership in the McAllen sales locality, and it is situated in the city of McAllen.[50] Burns Motors also owns a truck center in Mission; the truck center sells only Ram trucks and does not offer any vehicle servicing.[51]

In August 2015, FCA began a market study of the McAllen sales locality to evaluate whether and how CJDR brands could perform better in that rapidly expanding market.[52] Census data showed that Hidalgo County (where McAllen and Edinburg sit) had a population of about 550,000 in 2000; by 2017, that had grown to about 860,000, a population growth of about 49 percent in less than 20 years.[53] According to Mr. Cholagh, household growth in the McAllen market is projected at 7.7 percent through 2020, a faster rate than the statewide projected growth rate of 6.7 percent.[54]

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[46] Tr. 44-46, 273, 395.

[47] Tr. 271.

[48] Tr. 194; Burns Ex. 1140 at 4813.

[49] Tr. 74; FCA Ex. 82 at 6.

[50] Tr. 68.

[51] Tr. 397-98.

[52] Tr. 155, 158.

[53] Tr. 368.

[54] Tr. 388.

The metropolitan area of McAllen-Mission-Edinburg was identified by the U.S. Census Bureau as the fifth-largest metropolitan statistical area (MSA) in Texas, surpassing the El Paso MSA (now sixth-largest).[55] In the McAllen-Mission-Edinburg MSA, the population grew 4.1 percent between 2010 and 2012; population grew 7.3 percent between 2010 and 2014; and population grew 8.7 percent between 2010 to 2015.[56] Mr. Cholagh explained that this shows a steady increase of year-over-year population growth in the McAllen-Mission-Edinburg MSA, a region that generally corresponds to the McAllen sales locality.[57]

In addition to these population trends, Mr. Cholagh said that his research showed significant retail expansion and other development in the region. The University of Texas was building a medical school and hospital that brought more jobs to the region; a new sports arena was being built to host an NBA development team; and major retail was expanding, including new locations of WalMart and Home Depot.[58] In October 2015, Mr. Cholagh visited McAllen to meet with Ms. McDaniel and drive through the region. He testified that their personal observations corroborated the data he had been reviewing, as they observed new construction of both housing and retail facilities.[59] In her testimony, Ms. McDaniel confirmed that she has seen the construction of new hospitals, medical centers, residential developments, and retail complexes in the decade or so she has worked with Burns Motors in the McAllen region.[60]

FCA's witnesses pointed to several factors that led them to believe that Burns Motors was not able to adequately represent CJDR brands in this large and expanding market. One concern was that the McAllen sales locality had a planning potential of around 3,300 or 3,400 units at the time of the market study, the highest of any secondary market in Texas, and

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55 Tr. 369, 425; Burns Ex. 1144 at 3, Burns Ex. 1143.

56 Burns Exs. 1141-43.

57 Tr. 371.

58 Tr. 361, 367; FCA Exs. 84-91.

59 Tr. 365.

60 Tr. 67.

almost twice the planning potential of any comparable market in Texas.[61] Mr. Cholagh and Mr. Chandler both expressed concern that no single dealer could adequately represent a region with such a large planning potential.[62]

Also, the market study indicated that CJDR brands were not capturing as much of the market in McAllen as expected. The market study, which was completed in August 2015, was based on year-end data from 2014.[63] At that time, CJDR had a 12.7 percent market share in Texas, but only a 9.8 percent market share in McAllen. Mr. Cholagh said that the approximately 3 percent difference showed that CJDR brands were underperforming in the McAllen sales locality.[64] In terms of registration effectiveness, the market study also showed that CJDR brands were underperforming. Registration effectiveness in McAllen at that time was only 80 percent, another indicator of "lost opportunity," according to Mr. Cholagh.[65] In fact, the CJDR brands failed to achieve 100 percent registration effectiveness in the McAllen region each year from 2010 through June 2015.[66] In the market study, when registration effectiveness was examined within different market segments (trucks vs. compact cars vs. SUVs, etc.), CJDR had only 15 percent of the market share of pickup trucks—one of its most popular segments—compared to 20 percent statewide, meaning that performance in McAllen in this popular segment was 5 percent below statewide average.[67] The below-average registration effectiveness was an ongoing concern for FCA, according to Mr. Tunic, leading him to believe that the region could support a second dealership.[68]

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[61] Tr. 396, 549-50. A "secondary market" is a metropolitan area represented by only one dealer. Tr. 416.

[62] Tr. 396, 549.

[63] Tr. 377.

[64] Tr. 385; FCA Ex. 82 at 2.

[65] Tr. 385; FCA Ex. 82 at 2.

[66] Tr. 215, 399; FCA Ex. 82 at 7.

[67] Tr. 398; FCA Ex. 82 at 3.

[68] Tr. 215.

This is a "very, very large market full of opportunity," according to Mr. Cholagh, and he did not think one dealer could adequately represent FCA in the entire McAllen sales locality.[69] Mr. Chandler agreed, saying that the market study convinced him that there was "significant untapped opportunity" in the McAllen area, and that the existing dealer network—with just one dealer for the whole sales locality—was inadequate to capture the market share CJDR should have there.[70] According to Mr. Cholagh, McAllen is one of the 10 largest markets in the nation where FCA has only one dealer.[71]

At the same time, FCA's major competitors all have more than one dealership in the McAllen sales locality. Chevrolet and Ford—CJDR's main competitors in the market—both have three full-service, full-line dealerships in the region, one each in McAllen, Edinburg, and Mission.[72] Nissan and Buick/GMC have dealerships in both McAllen and Edinburg.[73] The market study showed that those brands with more dealerships captured more market share and had better registration effectiveness than CJDR in the McAllen sales locality. In 2014—the last full year that FCA looked at for the market study—Ford, with three dealerships, registered 5,471 vehicles, representing an 18.3 percent market share.[74] Chevrolet, also with three dealerships, registered 4,905 vehicles, representing a 16.4 percent market share. Nissan, with two dealerships in the sales locality, registered 3,844 vehicles and had 12.8 percent market share. CJDR, with only one full-range dealership in the sales locality, registered 2,935 vehicles and had only 9.8 percent market share.[75] Mr. Cholagh testified that the data showed CJDR was "outdealered" in the area versus its competitors.[76]

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[69] Tr. 386-87.

[70] Tr. 546.

[71] Tr. 361.

[72] Tr. 69-70, 210-12, 941; FCA Ex. 83.

[73] Tr. 70-71, 210-12, 386-87, 941; FCA Ex. 82 at 2.

[74] Tr. 388

[75] Tr. 388; FCA Ex. 82 at 3.

[76] Tr. 361.

By contrast, Mr. Cholagh pointed out that there are currently three CJDR dealerships in El Paso, a smaller MSA than McAllen.[77] With those three outlets, according to Mr. Cholagh, CJDR is exceeding 100 percent registration effectiveness in El Paso, and is the market leader, outperforming Ford, Chevrolet, and other competitors.[78]

According to Mr. Tunic, Kyle Burns (Protestant's owner) has previously acknowledged that Burns Motors is not able to keep up with competing brands that have multiple dealerships in the McAllen area. Four or five years ago, Mr. Tunic said, he met with Mr. Burns to discuss his dealership's sales performance. During their conversation, Mr. Burns drew a rough map of the dealerships in the McAllen sales territory and told Mr. Tunic, "I'm trying to fight with three Ford dealers and three Chevy dealers, and I can't do it," because the other brands had three times as much advertising, inventory, and staff to cover the same territory.[79]

Ms. McDaniel and Mr. Tunic both testified that, in their view, a principal reason CJDR is underperforming in McAllen is that its closest competitors have two or three dealerships in the region, while Protestant is the only CJDR dealer.[80] They believe that the proposed new Edinburg dealership will alleviate this imbalance and allow the CJDR brands to be more competitive in the region. Mr. Cholagh testified that the three Ford dealerships in the McAllen sales locality (located in McAllen, Mission, and Edinburg) have been in the market since the 1940s, and Chevrolet has had three stores open in the market since at least 2007.[81] He contends this shows that the region can readily support more than one dealership selling CJDR vehicles.

After the market study was completed, Mr. Cholagh concluded that the McAllen area was simply too big for one dealer to adequately cover.[82] At the hearing, he testified that his

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[77] Tr. 369.

[78] Tr. 370.

[79] Tr. 213-14.

[80] Tr. 40, 205.

[81] Tr. 398-99.

[82] Tr. 410.

subsequent analysis of more recent market data has only confirmed that conclusion. When the market study was completed in October 2015, CJDR had about 9.8 percent market share in the McAllen sales locality, but as of May 2017, its market share had fallen to 8.7 percent, still lagging behind its competitors who have two or three dealerships.[83] At the same time, the number of CJDR vehicles in operation had climbed from roughly 16,000 units at the time of the market study, to almost 20,000 in May 2017. Mr. Cholagh explained this means that there are increasing numbers of vehicles that have only one CJDR service center available to service them.[84] Registration effectiveness has also declined from 80 percent to 79.6 percent in May 2017.[85] And the population in McAllen continues to grow, with the household growth rate climbing from 7.70 percent in the market study to 7.75 percent in mid-2017.[86] Mr. Chandler had also reviewed data showing CJDR's current performance in the marketplace, and he agreed that the brands were continuing to underperform in the same ways highlighted in the October 2015 market study.[87]

Mr. Tunic and Ms. McDaniel also testified to market conditions since the market study was completed. According to Ms. McDaniel, in the first six months of 2017, the brands with more than one dealership in the McAllen area all registered more vehicles than their brands' statewide averages.[88] Ford, with its three dealerships, registered 20.79 percent of the new vehicles in the McAllen region, but only 16 percent of vehicles statewide, and only 12.36 percent nationwide. General Motors, which includes the three Chevrolet three dealerships, registered 23.36 percent of the new vehicles in McAllen, compared to 18.37 percent statewide, and 16.73 percent nationwide.[89] Nissan (with two dealerships) registered 11.19 percent of the

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[83] Tr. 414, 416; FCA Ex. 101 at 3.

[84] Tr. 415.

[85] Tr. 414.

[86] Tr. 417.

[87] Tr. 556.

[88] *See* FCA Ex. 83 at 1.

[89] FCA Ex. 83 at 1.

new vehicles in McAllen, versus 8.31 percent statewide and 7.21 percent nationwide.[90] Ms. McDaniel said that Nissan is not typically considered one of CJDR's major competitors, so it was particularly concerning that they were registering more vehicles than CJDR in McAllen.[91] By comparison, CJDR represented 8.84 percent of the vehicle registrations in the McAllen sales locality in the first six months of 2017, while statewide the brand captured 11.86 percent of vehicle registrations. This difference of almost 3 percent represents a significant portion of the market that has been ceded to other dealers in the McAllen area, according to Ms. McDaniel and Mr. Tunic.[92] Mr. Tunic said this means that "there's plenty of sales opportunity [in the sales locality] to support another dealership."[93] Toyota and Honda, two other brands with only one dealership in McAllen, also registered below their state and national averages in the region.[94]

C. Burns Motors's Performance in McAllen Sales Locality

1. Dealer Background

Burns Motors has been owned and operated by the Burns family since 1948, when Felix Burns opened the family's McAllen dealership. Felix passed the dealership business on to his son, Don Burns, who has since ceded control to his son, Kyle Burns (Mr. Burns).[95] Mr. Burns has worked in the dealership since he finished college in the 1980s. He testified that, today, his three sons all work for Burns Motors in some capacity, and he expects them to run the business when he retires, just as he took over management when his own father retired.[96]

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90 Tr. 72.

91 Tr. 73.

92 Tr. 71, 205.

93 Tr. 208.

94 Tr. 73-74.

95 Tr. 866, 923.

96 Tr. 864, 866.

According to Mr. Burns, his father has not been active in the business for the last 15 years.[97] Today Don Burns owns only 0.5 percent of the dealership, and Mr. Burns owns the other 99.5 percent.[98] However, Don Burns remains a co-owner with Mr. Burns of Burns Income Properties, the entity that owns the land and buildings where the dealership is situated.[99] That entity's real estate holdings alone are appraised at over $8 million, according to Mr. Burns.[100] Though Don Burns no longer has an active role in the business, Burns Motors pays him a salary of about $1 million per year, booked as rental payments to Burns Income Properties.[101]

Richard DeLeon has worked for Burns Motors since 1991, and has been the general manager since 2011.[102] Xavier Contreras, who has been friends with Mr. Burns and Mr. DeLeon since they were in junior high school, has worked for Burns Motors since 1985, and has been the dealership's operations manager since 2009.[103] Nancy Linville has been Burns Motors's office manager since 1991, and is in charge of bookkeeping for the dealership.[104] Mr. Burns, Mr. DeLeon, Mr. Contreras, and Ms. Linville are all paid a percentage of the dealership's net earnings each month, with Mr. Burns collecting an additional bonus at the end of each year.[105]

2. Burns Motors's Sales Performance

There is little dispute that Burns Motors has been a large, stable, successful, and profitable dealership for FCA. Mr. Tunic testified that Burns Motors is a well-capitalized, financially strong dealership. Financial statements that Burns Motors prepared in 2016 and 2017

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97 Tr. 872.

98 Tr. 923.

99 Tr. 912-13; FCA Ex. 107 at 15.

100 Tr. 914.

101 Tr. 924-25.

102 Tr. 867-68, 926-27, 1010-11.

103 FCA Ex. 106 at 8-10.

104 FCA Ex. 106 at 12; FCA Ex. 107 at 7-8.

105 FCA Ex. 107 at 12, 15, 52-53.

show that the business earns several million dollars per year, maintains roughly double the amount of working capital that is required by FCA, and has a substantial amount of cash on hand.[106] According to Mr. Tunic, in terms of net earnings, Burns Motors has been one of the top 15 out of approximately 325 dealerships in the Southwest Business Center for the last six or seven years.[107] Mr. Burns testified that Burns Motors has ranked as high was third or fourth in gross sales among the more than 300 dealerships in the Southwest Business Center.[108]

Though Burns Motors is situated in McAllen (with the truck center in Mission), the dealership markets and sells vehicles throughout the Rio Grande Valley, including in markets where there are other CJDR dealers.[109] For example, on its website, Burns Motors currently advertises itself as the "premier" CJDR dealer in the Harlingen area (as well as McAllen, Edinburg, and Mission), despite the fact that there is another CJDR dealer in Harlingen.[110] Mr. Contreras explained that while most of the dealership's customers are from Hidalgo County (where McAllen sits), an increasing number of shoppers will drive to McAllen from other areas to purchase a vehicle they have researched and selected on the internet.[111] According to Mr. Contreras, some customers will drive past their closest CJDR dealer to purchase a vehicle from Burns Motors, and it is the dealership's goal to attract such customers.[112] According to FCA, this shows that Burns Motors can continue to market and sell vehicles to customers in Edinburg, just as it does now, even if another CJDR dealership is established there.

Mr. Burns testified that Burns Motors is the highest volume CJDR dealer in the Rio Grande Valley, and it has historically sold far more vehicles than the CDJR dealers in the

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106 Tr. 249-51, 919, 958, 1122-23; FCA Ex. 75 at 1.

107 Tr. 251.

108 Tr. 907.

109 FCA Ex. 106 at 15-18.

110 Tr. 931-32; FCA Ex. 81 at 1.

111 FCA Ex. 106 at 16-18, 58-59.

112 FCA Ex. 106 at 18.

surrounding areas' sales localities.[113] Mr. DeLeon said they sell double, even triple the volume of their closest competitors in the region.[114] In 2014, for example, Burns Motors sold 2,635 new vehicles, while the CDJR dealer in Rio Grande City (owned by Ed Payne, also the owner of Applicant) sold 292 vehicles, the dealer in Weslaco sold 1,445 vehicles, and the dealer in Harlingen sold 1,226 vehicles.[115] According to Mr. Burns, none of the dealerships in the Rio Grande Valley are able to achieve 100 percent registration effectiveness, and FCA acknowledged that all of those dealerships, like Burns Motors, are below MSR in their sales areas.[116]

FCA witnesses explained that the sales volume in McAllen has been much higher than the other regional sales localities simply because there are substantially more people buying and registering vehicles in the McAllen area.[117] As Mr. Cholagh explained, Protestant is expected to have more sales than other dealers in the region because "[t]here's just more people to capture" in the McAllen sales locality.[118] That is, because of the size and strength of the market in its sales locality, the performance goals required by Burns Motors's dealer agreements are higher than those for dealers in smaller markets.

FCA's evidence shows that, despite its comparatively high sales volume, Burns Motors has consistently been unable to meet its MSR as required by its dealer agreements. Ms. McDaniel said that, in the decade that McAllen and Edinburg have been in her territory, Burns Motors has met or exceeded its MSR only once, in 2012.[119] In other years, Burns Motors has been "significantly below" MSR, according to Ms. McDaniel.[120] In conducting the market

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[113] Tr. 900, 985-86.

[114] Tr. 1086.

[115] Tr. 161; Burns Ex. 1140 at 4813.

[116] Tr. 161-62, 870-71.

[117] Tr. 194-95, 390.

[118] Tr. 392.

[119] Tr. 31, 38.

[120] Tr. 38.

study, Mr. Cholagh confirmed this; he testified that other than 2012, Protestant has shown "below average performance" on MSR for the last decade.[121] In 2006, Protestant sold only 58.03 percent of MSR, and over the next five years its MSR never rose higher than 79.76 percent. After a strong year in 2012 (when Protestant sold 102.99 percent of its MSR), Protestant's MSR performance tumbled again, falling from 86.52 percent in 2013, to 67.10 percent in 2016, and 67.77 percent in the first five months of 2017.[122] Mr. Tunic characterized a dealer's performance in this range as "very poor."[123] Mr. Cholagh said the low MSR figures show that "there's opportunity in the [McAllen] market that they're not capitalizing on."[124] Mr. Chandler said the MSR figures show that Burns Motors was "not getting the job done."[125]

3. Expansion of the Dealership and Addition of the Jeep Line

The parties believed that Burns Motors's declining facilities could be one factor contributing to its underwhelming sales performance. Protestant's current dealership was first constructed in approximately 1973, and by the early 2000s had become "old and outdated," according to Ms. McDaniel and Mr. Tunic.[126] The facility was undersized, the sales and service departments were housed in separate buildings, the dealership did not have a showroom, and it was difficult for customers to park and maneuver on the dealership's crowded lot.[127] Especially when compared to more modern dealerships in the area, Protestant's dealership had become uncompetitive in FCA's view.[128] The dealership also failed to meet the minimum size requirements its Dealer Agreements required, and did not comply with FCA's current image and

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[121] Tr. 382; FCA Ex. 67.

[122] Tr. 224-25, 383; FCA Ex. 68 at 2.

[123] Tr. 225.

[124] Tr. 383.

[125] Tr. 551.

[126] Tr. 51, 264, 867.

[127] Tr. 51.

[128] Tr. 51-52.

appearance requirements.[129] Mr. DeLeon, Protestant's general manager, agreed that the dealership was in need of an upgrade.[130]

By about 2010, Burns Motors carried only the Chrysler, Dodge, and Ram lines at its dealership, and it wanted to add the Jeep line, as well. At the same time, FCA was anxious to add a Jeep dealer in McAllen, having terminated its only Jeep dealer there in 2009, leaving the brand unrepresented in that market.[131] In 2011, FCA decided to award the Jeep line to Burns Motors, provided that Burns Motors would renovate or rebuild its dealership to meet current FCA standards.[132] The parties signed a 14-month letter of intent (LOI) in November 2011.[133] The LOI set forth the minimum building requirements, which were based on the then-current planning potential figures, but contained certain caveats cautioning Burns Motors that its planning potential could change for any of a number of reasons, including the potential addition of another CJDR dealer in the region, and that the planning potential was not predictive of the number of vehicles that Burns Motors would sell.[134]

In conjunction with the LOI, FCA tried to negotiate a Market Agreement with Burns Motors, which Ms. McDaniel characterized as a tool that would give Burns Motors more time to meet its MSR.[135] FCA's proposed Market Agreement provided that if Burns Motors's MSR fell below 100 percent for 120 consecutive days, then Burns Motors could not protest or challenge the establishment of another CJDR dealer in the McAllen sales locality.[136] Burns Motors rejected this offer and countered with a revised Market Agreement that would have removed the deadline for Burns to meet its MSR, had FCA agree not to establish another

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[129] Tr. 260-64; FCA Ex. 64.

[130] Tr. 1016.

[131] Tr. 160, 191, 1018.

[132] Tr. 874.

[133] FCA Ex. 15; Tr. 50.

[134] FCA Ex. 15 at 3-4; Tr. 55.

[135] Tr. 84-85.

[136] FCA Ex. 10 at 2.

CJDR in the McAllen sales locality until at least five years after Burns Motors completed the expansion and renovation contemplated by the Jeep LOI, and promised that no new CJDR dealership would be established within 15 miles of Burns Motors's McAllen dealership.[137] FCA did not agree to the revised Market Agreement, and the parties proceeded to execute only the Jeep LOI.[138]

Although construction had not yet started when the LOI expired, FCA elected to proceed with entering into a dealer agreement that awarded the Jeep line to Protestant.[139] In June 2013, the parties entered into a Term Agreement (rather than the standard, open-ended dealer agreement), with the term expected to coincide with the construction or renovation of the dealership.[140] The Term Agreement made adjustments to the minimum size requirements necessary for the renovated dealership, based on new planning potential figures and other recent changes to FCA's facility guides.[141] In October 2013, Burns Motors's plans for the expanded facility were formally approved, clearing the way for construction to begin.[142]

When Protestant expanded its dealership, it elected to build a facility that was considerably larger than the minimum requirements set by FCA.[143] For example, Protestant was required to build 31 service stalls, but elected to build at least 68. The facility (including land and building) was required to be at least 316,130 square feet, but was actually built at 682,661 square feet.[144] FCA's witnesses testified that this was entirely Protestant's decision.[145] Mr. Burns explained that Protestant's building plans were made in line with the

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[137] FCA Ex. 11 at 2; Tr. 87-88, 1020.

[138] FCA Ex. 12; Tr. 89-90.

[139] Tr. 57.

[140] FCA Ex. 52, Burns Ex. 1042; Tr. 57, 121.

[141] Tr. 60.

[142] FCA Ex. 26.

[143] Tr. 47, 61, 95-96, 935-36.

[144] Tr. 47.

[145] Tr. 48, 264, 267.

goals of Project Genesis—which he understood to be a push for fewer but larger dealerships, selling all of the CJDR brands under one roof.[146] Mr. DeLeon, Protestant's general manager, elaborated that Protestant planned the size of the expanded dealership to accommodate anticipated growth in its planning potential.[147] When the parties began discussing an expanded facility, Protestant's planning potential, as set by FCA, was between 1,800 and 2,099 vehicles per year.[148] However, Protestant was "planning for growth," and it developed building plans for a facility large enough to support an anticipated planning potential of 3,300 to 3,599 vehicles per year.[149] Thus, while FCA's minimum building requirements for the new facility were based on Protestant's then-current planning potential, Protestant elected to build a dealership large enough to accommodate the planning potential that Mr. Burns and Mr. DeLeon had forecast. These witnesses pointed out that Burns Motors's planning potential did, in fact, increase and is now very close to what they had forecast when construction was in the planning phase.[150]

The preliminary and final building plans had to be reviewed and approved by FCA, and Ms. McDaniel was in regular contact with Burns Motors regarding the status of planning and then throughout construction.[151] FCA's witnesses emphasized that FCA reviewed the building plans only to ensure that the minimum size and facility requirements were met; it did not weigh in on whether Burns Motors should exceed them.[152] Burns Motors has suggested in this proceeding that FCA should not have approved its building plans for an expanded dealership without warning that a competing CJDR dealership was likely to be added to the sales locality. From FCA's perspective, Burns Motors was well aware from the parties' negotiations over the

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[146] Tr. 875-76, 997.

[147] Tr. 1070.

[148] Tr. 1028-30.

[149] Tr. 1028-30; Burns Exs. 1018, 1157.

[150] Tr. 879, 1058-59.

[151] Tr. 124, 150, 1040; FCA Exs. 20-28, 53, 55.

[152] Tr. 48, 181.

Market Agreement that FCA was already contemplating adding a new dealership to the area, and elected to proceed with building a larger-than-required dealership anyway.[153]

Demolition of the old structures and construction of the new facilities proceeded in phases over several years, allowing Burns Motors to remain open throughout the expansion. A new service facility was built first, then the old service facility was demolished to make way for the new showroom. When the new showroom was completed, the old sales facility was demolished.[154] In total, the new facility cost Burns Motors between $9 and $10 million and took over four years to design and complete, with the renovation finally completed in 2016.[155] At that time, the Term Agreement between Protestant and FCA was converted to a standard, open-ended dealer agreement for the Jeep line, executed in July 2017.[156]

4. Performance During and Since Expansion

In their testimony at the hearing, FCA's witnesses were critical of Burns Motors's sales performance since adding the Jeep line, noting that sales of Jeep vehicles have been slow, even several years after the line was awarded. Though the total number of Jeeps sold has increased each year, Burns Motors has yet to meet MSR for that brand.[157] In 2013, Protestant sold only 62 percent of its MSR in the Jeep line; in 2014, it sold 56 percent; in 2015, it sold 64 percent; in 2016, it sold 63 percent; and, in the first five months of 2017, it sold 66.21 percent of MSR.[158] In testimony at the hearing, Mr. Burns and Mr. DeLeon suggested that this was because there was a learning curve associated with selling the new brand, made more difficult by the chaos of construction, a lack of FCA-approved signage advertising the Jeep brand in his dealership, and

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153 Tr. 96.

154 Tr. 102.

155 Tr. 51, 879, 903-04. Mr. Burns clarified that there is still remaining work to complete on the dealership's body shop, but Burns Motors has been operating out of the new sales and service facilities since July 2016. Tr. 946.

156 Tr. 61; FCA Ex. 57.

157 Tr. 345.

158 Tr. 229; FCA Ex. 67 at 8-12.

regional and nation-wide sales trends.[159] FCA's witnesses discounted these reasons, with Ms. McDaniel testifying that the Jeep line typically outperforms other vehicles in the CDJR lines, so she found Burns Motors's underperformance to be particularly surprising.[160] Mr. Tunic likewise testified that he could see no reason that Burns has been unable to effectively sell the Jeep brand.[161]

According to Ms. McDaniel, Protestant's poor MSR performance across the CJDR brands has long been a topic of discussion and concern among managers in FCA.[162] In August 2014, FCA's then-area manager wrote to Burns Motors to address the dealership's MSR numbers.[163] According to the letter, as of May 2014, Protestant was only at 74.5 percent of its MSR for the year, and fell below MSR for all brands except Chrysler trucks during the first part of that year.[164] The lowest-performing brand for Burns Motors was Jeep, with the dealership only meeting 48.85 percent of its MSR.[165] This was approximately a year after Burns Motors had been awarded the Jeep line. In 2015, when the market study was performed, Burns Motors was at 70.1 percent of MSR as of July of that year.[166]

Burns Motors suggested that the renovation and construction of its dealership from 2013 through mid-2016 negatively affected its MSR during those years.[167] Mr. Tunic disputed this. First, he noted that Burns Motors had not met its MSR target for six of the seven years prior to commencing construction in 2013.[168] Further, he noted that, even though Burns Motors's MSR

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159 Tr. 901-02, 1043-45, 1109-10.

160 Tr. 189.

161 Tr. 229.

162 Tr. 40.

163 FCA Ex. 29.

164 FCA Ex. 29 at 2.

165 FCA Ex. 29 at 2.

166 Tr. 220; FCA Ex. 82 at 15.

167 Tr. 899, 1093.

168 Tr. 226.

performance was declining during these years, the number of vehicles it was selling actually increased. In 2012, the year before construction began, Burns Motors sold 1,965 new vehicles (achieving 102.99 percent of its MSR). That number increased to 2,369 vehicles in 2013, 2,635 vehicles in 2014, 2,587 vehicles in 2015, and 2,370 vehicles in 2016. That result carried across all of the brands Protestant carried. The Jeep brand was added in 2013, but the subsequent increase in total sales was not just attributable to the new Jeep line. Rather, according to Mr. Tunic, Burns Motors also sold more Chrysler, Dodge, and Ram vehicles during construction than it had in 2012, the year before construction began.[169]

Mr. Tunic testified that these figures show that it was not the disruption of construction that has made Burns unable to meet MSR in 2013 and after.[170] Instead, the problem for Burns Motors is that its MSR has been increasing at a faster rate than sales. Driven by rapid growth and increased auto sales in the region, and by the addition of the Jeep line in 2013, Burns Motors's MSR nearly doubled (from 1,908 to 3,657 vehicles) between 2012 and 2014.[171] The dealership simply cannot keep pace with the rapid population growth within the McAllen sales locality, according to FCA's witnesses.

When it became clear that Burns Motors's MSR performance was not rebounding after construction was completed, FCA moved to address it. On March 7, 2017, Mr. Tunic sent a "Dealership Performance Assistance" letter, letting Burns Motors know that FCA had "significant concerns" with Protestant's sales performance and offering to discuss ways to improve.[172] The letter reminded Burns Motors that failure to achieve 100 percent MSR was a breach of the dealer agreements with FCA.[173] Another letter was sent on June 21, 2017,

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169 Tr. 227-28; FCA Ex. 68 at 2.

170 Tr. 228.

171 Tr. 331-32, 336, 944.

172 Tr. 232; FCA Ex. 47.

173 Tr. 236; FCA Ex. 47 at 1.

addressing updated data that showed Burns Motors was still not meeting its sales performance obligations.[174]

The June 2017 letter also identified another area—customer advocacy—where FCA contended Burns Motors was in breach of dealer agreements. Mr. Tunic explained that when a dealer sells or services a vehicle, it provides the customer's email address to FCA, and FCA sends the customer a survey asking whether the customer would recommend that dealer to someone else. Customers who answer in the affirmative are considered "advocates."[175] FCA calculates the percentage of both sales and service customers who respond as advocates, and dealers are contractually required to meet the national average.[176] According to FCA's June 2017 letter, Burns Motors fell below the national average in the percentage of sales customers willing to advocate for the dealership in May 2017, and had also fallen below the national average each month from January to May 2017 for the number of service customers willing to advocate for the dealership.[177]

Mr. Tunic testified that a one-month dip would not be concerning, but a sustained failure to meet the national sales group average over several months is a problem that indicates a dealership's customers are less satisfied than the nationwide average.[178] Mr. Tunic also acknowledged that while below-average advocacy scores are technically considered a breach of the dealer agreements, FCA would not typically send a letter to a dealer to address advocacy issues unless there were other deficiencies (like low MSR) to address, as well.[179]

Burns Motors disputes the reliability of FCA's customer satisfaction figures. In his testimony, Mr. Burns explained that FCA receives responses from only 5 or 6 percent of the

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[174] FCA Ex. 48.

[175] Tr. 311.

[176] Tr. 42, 313; FCA Ex. 50 at 22.

[177] Tr. 236-37; FCA Ex. 48 at 2-3.

[178] Tr. 237.

[179] Tr. 316.

customers who receive its survey.[180] Those customers, he contends, do not comprise a representative sample of the more than 1,500 repair jobs his service center works on per month.[181] At FCA's suggestion, about 15 years ago, Burns Motors hired a third-party company to monitor its service advocacy ratings. That company, called CAR-Research, sends its own surveys to the dealership's customers, and Mr. Burns believes CAR-Research receives a response rate of over 30 percent. According to Mr. Burns and Mr. DeLeon, on CAR-Research's surveys, Burns Motors enjoys "around 88 percent satisfaction" when customers are asked about their service experience and the quality of the work performed.[182] Mr. DeLeon testified said this shows that Burns Motors's customers are "overwhelmingly satisfied," and that FCA's data to the contrary is flawed.[183]

D. Addition of a New Edinburg Point

1. Burns Motors's Desire to Open the New Point

FCA and Burns Motors have both long acknowledged the possibility of establishing another CJDR dealership in the McAllen sales locality, and Burns Motors repeatedly expressed its interest in being the dealer who is awarded any such new point. FCA's evidence included a letter from November 1982, in which founder Don Burns wrote that Burns Motors was "prepared to open a full-line Chrysler Dealership in Edinburg, Texas" within 60 days if given approval by the Chrysler Corporation.[184] In 1999, when Burns Motors opened its truck sales center in Mission, Mr. Burns wrote to his FCA zone manager that Burns Motors also aspired to open another truck sales center in Edinburg, with an eye toward someday expanding both the Mission and Edinburg truck centers into "full-line dealerships with complete service and parts

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180 Tr. 889.

181 Tr. 892-94. Mr. Burns testified that his service department is open six days a week and receives "between 60 and 70 repair orders a day." Tr. 889.

182 Tr. 889-90, 1085.

183 Tr. 1085.

184 FCA Ex. 1.

will directly impact a dealer, such as the decision to open, close, or relocate a dealer point.[191] However, once the decision was made to open a new Edinburg point, Ms. McDaniel notified Burns Motors by phone within days.[192]

During their conversation, according to Ms. McDaniel, she tried to convince Burns Motors that a new dealership could be a beneficial development. She explained that adding a new dealer to the area would reduce Burns Motors's area of responsibility and lower its overall sales requirements, which would help improve its MSR performance. This, in turn, could help Burns Motors earn certain sales incentives it had been struggling to achieve.[193] She also explained that Burns Motors's planning potential would be adjusted to account for the new dealership in the area, and that this could reduce the minimum requirements for the facility then under construction.[194] Ms. McDaniel said that she suggested FCA would be receptive if Burns Motors wanted to downsize its building plans.[195] Mr. Tunic followed up on this conversation by sending a letter to Burns Motors, dated November 13, 2015, reiterating that the dealer might want to reconsider building a new facility that was so much larger than the minimum requirements, particularly in view of the anticipated new dealership in Edinburg.[196]

At that point, Burns Motors had already completed construction of its new service facility, demolished the old service facility, and was preparing to pour the foundation for the new sales office.[197] Steel, which had to be custom-built, had been purchased for the new building, and orders had already been placed for the windows, concrete, door hinges, and lighting.[198] Mr. DeLeon testified that it would have been difficult, if not impossible, to halt construction at

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191 Tr. 99-100, 270-71, 358-59.

192 Tr. 98, 552.

193 Tr. 101.

194 Tr. 101.

195 Tr. 102-03.

196 FCA Ex. 34.

197 Tr. 101, 1063.

198 Tr. 1065.

that point to reduce the scale of the dealership's expansion.[199] Further, any change in plans would have caused delays of a year or more, by Mr. DeLeon's estimate, and Burns Motors could not abide any more delays to the expansion project, which had already been in progress for nearly three years.[200]

Next, Ms. McDaniel and Mr. Tunic traveled to McAllen to meet with Mr. Burns and Mr. DeLeon in person.[201] During that meeting, according to Ms. McDaniel and Mr. Tunic, Mr. Burns and Mr. DeLeon said that if there was going to be a new dealership in Edinburg, Burns Motors should be the one to open it.[202] However, unbeknownst to Mr. Burns and Mr. DeLeon, FCA was contractually prohibited from considering Burns Motors for the new dealership because, several years earlier, FCA had given Payne Motors, LLC and Mr. Payne an exclusive right of first refusal for the new dealership.[203]

2. Applicant's Right of First Refusal

In 2012, Payne Motors had protested both FCA's decision to award the Jeep line to Burns Motors and its decision to open a new dealership in the Harlingen market, where Mr. Payne also owned a dealership.[204] In exchange for Mr. Payne's agreement to drop those protests, FCA entered into a confidential Market Agreement with Mr. Payne that gave him and Payne Motors a right of first refusal, for a term of seven-and-a-half years, to open any new point

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199 Tr. 1062, 1066-67.

200 Tr. 1068.

201 Tr. 105.

202 Tr. 105, 282-83, 1071. Mr. Burns reiterated this position at the hearing, testifying, "I'm not saying that there should be a point there, but . . . I'd rather ourselves have it than the competition have it." Tr. 976.

203 Tr. 106.

204 Tr. 107, 791-92. At the hearing, Burns Motors elicited testimony from Mr. Payne acknowledging that Payne Motors's protests were based on concerns similar to those raised by Burns Motors in this proceeding—namely, that the existing dealership would be harmed by adding a same-brand competitor nearby. Tr. 793-94, 801-05. Ed Payne Motors also filed a protest in 1999, based on similar arguments, when Burns Motors applied to open the Mission truck sales center. Tr. 808-17. In his testimony, Mr. Payne said that however sincerely held his concerns were at the time, they ultimately were proved unfounded, as his businesses have not been harmed by the Burns Motors truck center, the new Harlingen CJDR dealership, or Burns Motors's addition of the Jeep line. Tr. 850-55. He also noted that he lost the protest against the Burns Motors truck center. Tr. 845; FCA Ex. 8.

that FCA elected to add in the McAllen sales territory.[205] During Burns Motors's construction, FCA did not disclose that Payne Motors had a right of first refusal to any new point that might be added in the sales locality. FCA also did not disclose the right of first refusal during its late-2015 discussions with Burns Motors regarding the new Edinburg point, nor did FCA tell Burns Motors that its own desire to be awarded the additional point was an impossibility.[206]

In January 2016, FCA notified Mr. Payne of the tentative award of the new Edinburg point to Payne Motors, and on March 4, 2016, Payne Motors entered into a letter of intent with FCA for the new Edinburg point.[207] The letter of intent was amended in September 2016.[208]

3. Anticipated Impact of the New Dealership

According to Mr. Cholagh, if the McAllen sales locality is split into two trade zones—a McAllen trade zone and an Edinburg trade zone—the proposed McAllen trade zone would be geographically smaller than the proposed Edinburg trade zone, but the population in the McAllen trade zone would be considerably larger and more dense. Mr. Cholagh estimated that there would be approximately 400,000 people in the McAllen trade zone assigned to Burns Motors, approximately double the population of the geographically larger Edinburg trade zone that would go to the new dealer.[209] Also, he pointed out that Burns Motors can continue to sell vehicles to customers in Edinburg, just as he does now.[210]

Assuming the Edinburg point is approved, the size of the resulting McAllen trade zone would be more in line with the Texas average, making it "more reasonable for [Burns Motors] to

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[205] Tr. 107, 116; Burns Ex. 1012.

[206] Tr. 319-20, 883-84, 1023.

[207] Tr. 106; FCA Ex. 40.

[208] FCA Ex. 45.

[209] Tr. 403.

[210] Tr. 403-04.

succeed," according to Mr. Cholagh.[211] According to the market study, splitting the McAllen sales locality into two trade zones, and thereby reducing the size of Burns Motors's trade zone, will reduce the number of vehicles Burns Motors needs to sell to achieve its MSR.[212] In 2015, when the market study was performed, Burns had met only 70.1 percent of its MSR through July of that year. If a new Edinburg point was opened and Burns Motors's MSR was measured in relation to the proposed McAllen sales zone (and not including the new Edinburg trade zone), then Burns Motors's sales would have represented 105 percent of its MSR, according to the market study.[213] FCA argues that this shows the new sales point will actually help Burns Motors, because while Burns Motors is expected to continue to enjoy high sales volume, its smaller trade zone will reduce the number of sales it needs to make in order to meet its contractual MSR targets.[214] At the same time, FCA expects to capture sales that are currently being lost in Edinburg. Based on his examination of the McAllen locality sales data, Mr. Cholagh concluded that approximately half of FCA's lost sales opportunities have been in the proposed trade zone for Edinburg.[215] The new dealership would be able to reach those potential customers, he argued.

Also, FCA believes that adding a new CJDR dealer in the region would mean more advertising and marketing, which would inure to Burns Motors's benefit as well as the new dealer's.[216] In his testimony, Mr. Burns acknowledged that a new dealer's advertising could increase brand awareness in the region.[217] As further evidence that a new dealership could improve Burns Motors's sales, Mr. Tunic cited the example of the Austin sales locality, where an

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211 Tr. 408.

212 Tr. 448.

213 FCA Ex. 82 at 15; Tr. 220, 286, 302.

214 Tr. 220-21.

215 Tr. 405.

216 Tr. 238.

217 Tr. 971.

existing CJDR dealership saw its sales increase after a second dealership was opened nearby in 2012.[218]

The addition of a new Edinburg point—and ensuing reduction in the size of the McAllen trade zone—would also reduce Burns Motors's planning potential. That, in turn, would drive down the minimum facility requirements Burns Motors has to meet.[219] Burns Motors seemed to argue that by reducing its planning potential (that is, reducing the number of vehicles that were expected to be available for sale by Burns Motors), FCA had reduced its expected sales volume, and Mr. DeLeon testified that this was potentially "devastating."[220] In response, FCA reiterated that planning potential is not a metric used to predict vehicle sales. Further, FCA pointed out that Protestant's planning potential has *always* exceeded its actual sales. For example, Protestant's current planning potential (without a new dealership) is about 3,500 vehicles, though Protestant has never sold more than 2,700 vehicles in a year.[221]

FCA's witnesses believe that there is so much available opportunity in the area that a new dealership in Edinburg will not harm Burns Motors. Mr. Chandler said his goal is to see all CJDR dealers be "healthy and profitable," and he would not have agreed with opening the new Edinburg dealership if he thought it would materially harm Burns Motors's existing business.[222] Mr. Cholagh testified that the new dealership will not "cannibalize" sales from Burns Motors. He explained that there is so much lost opportunity in the McAllen sales territory that even if the new dealership performs as well as projected, he projects that there will still be about 42 percent lost sales opportunity in the region for Burns Motors to capture.[223]

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[218] Tr. 239.

[219] Tr. 271.

[220] Tr. 1077-89.

[221] Tr. 46.

[222] Tr. 553.

[223] Tr. 417.

Burns Motors disputed the rosy outlook put forth by FCA's witnesses. Mr. Burns testified that he believes his newly-expanded store will be "way too big" for the smaller trade zone he would be assigned if a new dealership is added in Edinburgh.[224] He built the new dealership facility in anticipation of a growing market, not a smaller one, and incurred significant expense in hiring and training certified service technicians to operate the expanded service facility.[225] Mr. Burns expects the new dealership to siphon sales and service customers away, and he is concerned that with a nearby CJDR competitor, Burns Motors will not earn enough from sales to cover its fixed and variable expenses in the new facility.[226] He also believes that he will lose his investment in many of the certified service technicians, either because they will leave to work for the new dealership or because business will be too slow for Burns Motors to sustain their employment.[227]

These concerns were echoed by Mr. Contreras and Mr. DeLeon, who likewise testified that they expect Burns Motors to lose a substantial number of sales and service customers if a new dealership is established in Edinburg, and that the dealership could lose certified technicians.[228] Mr. DeLeon said the new dealership could devastate Burns Motors's business.[229] He acknowledged that the dealership's MSR performance might improve with a smaller sales zone in McAllen, but argued that such improvement was offset by the anticipated loss of sales volume, which directly impacts Burns Motors's profitability.[230]

Mr. DeLeon also testified that the proposed location of Applicant's dealership is problematic, because it is so close to Burns Motors. At present, he said, the closest CJDR dealer is in Weslaco, a 15-minute drive from Burns Motors. Applicant's dealership would be just five

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224 Tr. 882.

225 Tr. 882, 886.

226 Tr. 911.

227 Tr. 887.

228 Tr. 1078, 1156; FCA Ex. 106 at 49-50.

229 Tr. 1086.

230 Tr. 1111.

operations."[185] More recently, Ms. McDaniel testified that several times over the last decade she has discussed the possibility of adding a new CJDR dealership with Burns Motors's general manager. Each time, she said, he indicated that if a new dealer point was awarded, it should go to Burns Motors.[186] FCA points to this history as evidence that Burns Motors does not truly dispute that there is good cause for establishing a new dealership, only that the new point has been awarded to another dealer.

The possibility of a new dealership became more concrete when the FCA market study was completed in August 2015, and the market representation department recommended that a new dealership be established in Edinburg.[187] Mr. Cholagh said this recommendation was driven by the facts that (a) McAllen was selling about 3 percent below the Texas average in that market; (b) the number of CJDR vehicles in operation for service in McAllen was among the highest in the country; (c) the planning potential for that region was about double the Texas average; (d) competitors with more dealerships in the region were capturing more market share than CJDR could capture with just one, and the lone dealer in McAllen was consistently below MSR; and (e) the region was seeing rapid growth, from both a population and a household perspective.[188] The market study was presented to Mr. Chandler in a meeting he attended with Mr. Tunic, Mr. Cholagh, and others on October 28, 2015. At that meeting, Mr. Chandler approved the recommendation to establish a new Edinburg point.[189]

At this point, Burns Motors was in the midst of construction on its facility expansion, and was unaware that FCA was moving towards opening a competing dealership in the sales locality.[190] According to Ms. McDaniel, Mr. Tunic, and Mr. Cholagh, area dealers are not typically informed of market studies unless and until those market studies lead to a decision that

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185 FCA Ex. 7.

186 Tr. 78-79.

187 FCA Ex. 82, Burns Ex. 1140.

188 Tr. 409, 419.

189 Tr. 410-11, 544.

190 Tr. 885.

or six miles from Burns Motors, and situated "in the heart of the healthiest buying demographic in [its] sales locale," according to Mr. DeLeon, where customers with higher incomes and higher credit scores tend to reside.[231] Losing those customers to a new Edinburg dealer would harm Burns Motors, Mr. DeLeon contended.[232] FCA disputed that the high-income customers would be disproportionately allocated to the Edinburg dealer. FCA pointed to data showing that if the McAllen area is split into two trade zones, the McAllen trade zone would have about 40,000 more households overall than the Edinburg trade zone, and about 9,000 more high-income households than Edinburg.[233]

If the new dealership were placed farther north, deeper in Edinburg and a greater distance from Burns Motors, then Mr. DeLeon did not think Burns Motors would have protested; in fact, when Burns Motors proposed opening the Edinburg point itself, that is the general location it had in mind.[234] Applicant and FCA pointed out that other brands (Chevrolet, Ford, and Nissan) are able to maintain dealerships in both Edinburgh and McAllen, separated by distances comparable to that between Burns Motors and Applicant's proposed location.[235] Mr. DeLeon emphasized that Burns Motors's preference was to remain the only CJDR dealership in the region, but he said that if another dealership was needed, Burns Motors would be harmed less if it could open the dealership instead of having FCA award it to another dealer.[236]

4. Anticipated Benefit for Customers

FCA contends that a new Edinburg dealership would benefit consumers, as well as Burns Motors and FCA. The market study analyzed the average distance that customers had to drive to reach each dealership in the sales locality, a measure referred to as "customer

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[231] Tr. 1072-73, 1087.

[232] Tr. 1087.

[233] Tr. 1150-51; FCA Ex. 96 at 58.

[234] Tr. 1073, 1075.

[235] Tr. 1090-91, 1098-99.

[236] Tr. 1152-53.

convenience." Mr. Chandler explained that it is important for CJDR to be at least as convenient as its major competitors.[237] At present, to reach Burns Motors's dealership, the average customer has to travel 8.6 miles, while the average customer only has to drive 4.3 miles to a Ford dealership or 5.2 miles to Chevrolet dealership.[238] If the proposed Edinburg dealership is approved, then FCA's customer convenience would improve by nearly 50 percent, with a customer having to drive an average of 4.7 miles to reach a CJDR dealership.[239] Mr. Tunic and Mr. Cholagh both said this would represent a major improvement for customers, as it brings the average travel distance to get to a CJDR dealership in line with the average travel distance required to reach the competitors who already have dealerships in both McAllen and Edinburg.[240]

Mr. Cholagh and Mr. Tunic also asserted that adding another CJDR dealer to the region will benefit customers by giving them two locations to choose from for sales and service.[241] The region would also have more inventory and a larger sales force available to serve customers.[242]

Mr. Payne, the owner of Applicant, echoed the opinion that the new dealership will benefit customers in the region. In particular, he pointed to the convenience offered by having a new dealership—which is anticipated to have 24 service stalls—available to provide parts and service to customers. When there are not enough dealers in a market, he explained, customers have to drive farther to obtain service and the wait longer for their vehicles. Mr. Payne believes these problems can be avoided by the addition of his new dealership in Edinburg.[243] Mr. Payne

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237 Tr. 548.

238 Tr. 216; FCA Ex. 82 at 14.

239 Tr. 217; FCA Ex. 82 at 14.

240 Tr. 217-18, 338-41, 406.

241 Tr. 238-39, 549.

242 Tr. 239, 549.

243 Tr. 780-81.

also testified that his dealership will benefit the community at large by creating new jobs (thereby adding tax revenue) and supporting the community.[244]

Burns Motors's witnesses disagreed that the new dealership would meaningfully improve customer convenience.[245] Though an Edinburg resident might have a shorter drive to an Edinburg dealership than to McAllen, Mr. Burns testified that Burns Motors is nonetheless more convenient overall because of the size, speed, and reliability of its service center.[246] Mr. Burns also contended that a shorter driving distance is less meaningful to sales customers in the current marketplace. He explained that while customers used to visit dealerships to comparison shop, today many customers shop online and do not visit a dealership until they are ready to close a sale, and they are willing to drive farther for a lower price.[247]

E. Payne Family Dealerships

Applicant is an entity owned and operated by Edwin "Bud" Payne, a lifelong Weslaco resident and third-generation auto dealer.[248] Mr. Payne's grandfather owned a Ford dealership in Illinois in the 1930s, and his father (Ed Payne) opened a Dodge dealership in the Rio Grande Valley in 1948. Mr. Payne began working with his father when he was 24 years old, and his brother joined the family business as well. In or about 1988, the business expanded into Payne Auto Group, which is owned today by Mr. Payne and his brother, with his two nephews also working in the business, the fourth generation of the family to do so.[249] Payne Auto Group presently owns nine dealerships across the Rio Grande Valley, with franchises to sell 18 different vehicle brands.[250] The dealerships include Payne Volkswagen Mitsubishi in Brownsville; Payne

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244 Tr. 782, 1554.

245 Tr. 988-89, 1114; FCA Ex. 106 at 51.

246 Tr. 972, 988-89.

247 Tr. 909, 939-40, 988.

248 Tr. 756, 758.

249 Tr. 759-60, 767.

250 Tr. 761.

Rio Dodge, Payne Rio Ford, and a CJDR dealership in Rio Grande City; and Ed Payne Motors, the CJDR dealership in Weslaco.[251]

Mr. Payne said Payne Auto Group was "ecstatic" when they learned they would have the opportunity to open the new Edinburg point for FCA.[252] Payne Auto Group formed a new entity and filed an assumed name certificate to operate the new dealership as Payne Chrysler, Dodge, Jeep, Ram.[253] Mr. Payne then proceeded to purchase property for the new dealership, spending $2,759,520.00 on the tract in a transaction that closed on August 25, 2016.[254] He described the lot as an ideal location, situated in the center of a cluster of dealerships on the expressway in Edinburgh, about a quarter mile from a Chevrolet dealership, less than two miles from a Ford dealership, and near several other domestic and import dealerships in the cluster.[255]

Mr. Payne said he has observed firsthand the same dramatic growth that FCA's witnesses described, describing the region as "one of the fastest growing areas in the United States."[256] He described some of the academic, medical, residential, and commercial developments that have been built or are planned, and testified that he has every expectation that the region's growth will continue.[257] In particular, he noted that the area immediately to the north of the proposed Edinburg dealership is undergoing rapid commercial and residential development.[258] He believes the market and demand for new vehicles will continue to expand, and the there is more than ample opportunity there for both an Edinburg dealership and Burns Motors's McAllen dealership to thrive.[259]

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[251] Tr. 761-62, 767.

[252] Tr. 777.

[253] Applicant Ex. 1.

[254] Tr. Ex. 109, 763; FCA Ex. 41.

[255] Tr. 764, 778.

[256] Tr. 771.

[257] Tr. 765, 771-74.

[258] Tr. 765.

[259] Tr. 765.

In preparation for opening the new dealership, Mr. Payne met with local officials to make sure the location will comply with zoning and other regulations. Payne Auto Group has also retained an engineer to do preliminary site work, and begun speaking with contractors to evaluate the time and cost of construction.[260] Mr. Payne said they are also paying property taxes on the tract, beginning with some 2016 taxes.[261] Mr. Payne testified that, if the Application is denied, he would have to sell the tract purchased for the new dealership. Despite the strong commercial market in the region, he thinks he could lose money on a sale because he paid "toward the top of the market" for the property.[262] He would also lose the other expenses he has already incurred in pursuing the Edinburgh point—namely attorneys' fees, engineering and architectural costs, and taxes paid.[263]

IV. EXPERT OPINIONS

The parties retained three experts to opine on the performance of Burns Motors and the anticipated impact of the new Edinburg point. Herbert E. Walter and Sharif Farhat testified for FCA and Applicant, while Ilhan Geckil testified for Protestant. Their testimony is summarized below.

A. Opinions of Herbert E. Walter

Mr. Walter testified on FCA's behalf as an expert witness. He worked at a major accounting firm for roughly 32 years before spending the last eight years self-employed as a financial consultant for the auto industry. He has undergraduate and graduate degrees in accounting, finance, and quantitative analysis. He is a certified public accountant and a certificated fraud examiner. The bulk of his career has been spent studying, advising, and

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260 Tr. 779-80.

261 Tr. 842.

262 Tr. 763-64, 843-44.

263 Tr. 1554.

consulting on the retail aspects of the automobile industry. Almost all of his work has been on behalf of automobile manufacturers, and he has done work for most of the major automobile manufacturers in the world.[264]

Mr. Walter was tasked with evaluating the financial and operational performance of Protestant. The overall gist of Mr. Walter's testimony was that Burns Motors is "a very large, strong, profitable dealership" that will continue to thrive even if the new dealership point for Applicant is established.[265]

Mr. Walter's analysis revealed that Burns Motors's total sales (whether measured in total dollar value or in total number of vehicles sold) were routinely multiple times greater than the annual sales of the four other CJDR dealerships in the Rio Grande Valley.[266] The difference in profitability between Burns Motors and the other CJDR dealerships in the Rio Grande Valley is even greater and growing. For example, in 2013, Burns Motors enjoyed net profits of roughly [redacted] while the other four dealers averaged net profits of slightly less than [redacted]. Over the ensuing years Burns Motors's net profits generally increased as the other four dealers' net profits steadily decreased, such that, by 2016, Burns Motors's net profits were roughly [redacted], while the other four dealerships averaged net losses of roughly [redacted]. Moreover, the net profits enjoyed by Burns Motors were substantially greater than the net profits enjoyed by other dealerships of a comparable size located elsewhere in Texas.[267] To Mr. Walter, these facts demonstrate that the Burns Motors dealership is "huge," "quite profitable," enjoys consistent profitability and, therefore, "has a lot of financial capacity to compete against an additional dealership."[268]

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[264] Tr. 460-66.

[265] Tr. 534.

[266] Tr. 471-77; FCA Ex. 99 at Attachments 2-4. Those dealerships are: Ed Payne Motors in Weslaco, Payne Rio CDJR in Rio Grande City, Bert Ogden CDJR in Harlingen, and Don Johnson CDJR in Brownsville. FCA Ex. 99 at Appendix 18.

[267] FCA Ex. 99 at Attachments 5-6.

[268] Tr. 477-80.

In his rebuttal testimony, Mr. Walter explained that evidence produced at the hearing has revealed that Burns Motors is even more profitable than its balance sheet suggests and than he originally calculated. The testimonies of Burns Motors's employees revealed that the majority owner of the dealership, Mr. Burns, has a personal debt to his brother, Brian Burns, for roughly [redacted]. The dealership has been paying roughly [redacted] per year in interest on this debt, and listing those payments as an expense on the dealership's income statements. As explained by Mr. Walter, this means that the dealership's income is being artificially reduced by $225,000 per year for payments that have nothing to do with the operation of the business. Thus, for example, rather than having net profits of roughly [redacted] in 2016, it would be more accurate to say that the dealership had net profits of roughly [redacted] that year.[269]

Moreover, Burns Motors earns a substantially greater percentage of profits from its service and parts departments than do the other four CJDR dealers in the Rio Grande Valley. Indeed, out of the four years analyzed by Mr. Walter (2013-2016), in two of the years (2014 and 2016) the Burns Motors dealership would have covered all of its fixed expenses even if it had not sold a single new car.[270] To Mr. Walter, this demonstrates that Burns Motors is a well-diversified and more stable business. As he explained it, the more profitable a dealership's service and parts departments are, the less dependent it is on vehicle sales to achieve profitability. This is important because, unlike service and parts, vehicle sales tend to be cyclical, with large swings up and down. Thus, the high profits from the service and parts departments will enable Burns Motors to "weather any storms" on the sales side better than its competitors.[271]

Mr. Walter testified that, with its high profitability, Burns Motors has the luxury of being able to afford many different options in order to complete with any new dealership, such as increasing advertising, paying more for trade-in vehicles, becoming more aggressive on pricing,

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269 Tr. 1482-86; FCA Ex. 100 at 7-8.

270 Tr. 492-94, 529-30; FCA Ex. 99 at Attachment 12.

271 Tr. 483-85; FCA Ex. 99 at Attachments 10-11.

or changing its compensation structure. In sum, Mr. Walter opined that Burns Motors is extremely well-situated to complete with a new dealership in Edinburg.[272]

During his testimony, Burns Motors's expert witness, Ilhan Geckil conceded that Burns Motors is a "profitable" dealership, but he disputed Mr. Walter's description of the dealership as "very profitable." As will be discussed more in the summary of his testimony, Mr. Geckil produced a chart comparing the net profits at Burns Motors to the average net profits of new car dealers on a regional basis and new car dealers on a national basis. Although the chart shows that Burns Motors was consistently more profitable than the two benchmarks, Mr. Geckil contends that it establishes only that Burns Motors was profitable, not *very* profitable. In his rebuttal testimony, Mr. Walter responded by pointing out that Mr. Geckil's analysis failed to take into account that the dealership's net profits are artificially understated by the roughly $225,000 per year in interest payments made to Brian Burns. If the $225,000 were added back into Burns Motors's net profits, then the dealership's net profits would exceed the regional and national benchmarks cited by Mr. Geckil by an even greater margin.[273]

Mr. Walter continued to maintain that Burns Motors is "extremely profitable."[274] He pointed out that, over the last four years, the dealership has earned a net profit ranging from roughly [redacted] per vehicle sold, despite having consistently projected that it would make a net profit of only roughly $1,000 per vehicle sold.[275]

Mr. Walter also testified that Burns Motors maintains high amounts of working capital on hand. He explained that, like almost all vehicle manufacturers, FCA imposes on its dealers a requirement specifying the minimum amount of working capital that each dealer must maintain. The amounts required by FCA are developed based on a formula that takes into account the size of the dealership. The FCA formula specifies that Burns Motors must maintain roughly

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[272] Tr. 487-88.

[273] Tr. 1492-93.

[274] Tr. 1498.

[275] Tr. 1504-05; FCA Ex. 100 at 10-12.

$6 million in working capital but, as Mr. Walter pointed out, the dealership has consistently maintained levels that are substantially higher. For example, its working capital levels in 2016 were roughly [redacted]. In Mr. Walter's opinion, this constitutes additional evidence that Burns Motors has the financial wherewithal to respond to competition from a new dealership in Edinburg.[276]

Mr. Walter also analyzed the quality of inventory management at Burns Management. He did so by comparing the percentages of each line of vehicles (Chrysler, Dodge, Jeep, and Ram) sold at Burns Motors to the average percentages of the sales at the 300+ other CDJR dealers within FCA's Southwest Business Center. From his analysis, Mr. Walter concluded that Burns Motors largely sells vehicles and obtains new inventory from FCA slightly faster than the Southwest Business Center average, all while maintaining good amounts of inventory on-hand. From this, Mr. Walter concluded that Burns Motors is a "very good dealer" because, among other things, the company is "very effective at moving their inventory." He also opined that, to the extent Burns Motors is underperforming (such as by failing to meet its MSR), such a failure cannot be attributed to a shortage of inventory on hand. Rather, Mr. Walter testified that he believes the dealership maintains sufficient inventories of vehicles.[277]

During his testimony, Burns Motors's expert witness, Mr. Geckil, opined that the creation of a new sales point in Edinburg would result in a 24 percent decline in sales of new vehicles at Burns Motors. He then projected that all of Burns Motors's other departments (used car sales, service, parts, and body shop) would also see revenues drop by the same 24 percent. Mr. Walker disputes the notion that Burns will lose 24 percent of its new car sales. However, if it is assumed that Burns lost 24 percent in new car sales, Mr. Walter strongly disputed the notion that the dealership's other departments would experience the same 24 percent decline. He explained that, based on his general experience in the industry and his examination of Burns Motors specifically, there is no one-to-one correlation between the growth or decline of a dealership's new car sales and its other departments. On the contrary, according to Mr. Walter, it is quite

[276] Tr. 496-98; FCA Ex. 99 at Attachment 14.

[277] Tr. 498-509; FCA Ex. 99 at Attachments 15-29.

common for the profitability of some departments to increase while the profitability of others decline or remain the same.[278] Moreover, Mr. Walter demonstrated that, even if, as Mr. Geckil asserted, Burns Motors experienced an across-the-board 24 percent drop in revenues, the dealership would remain profitable and "dramatically strong as a financial operation."[279]

B. Opinions of Sharif Farhat

Mr. Farhat also testified on FCA's behalf as an expert witness. He is the Vice President of Expert Services at Urban Science Applications, a large consulting firm that serves, primarily, the automotive industry. He has been with the company for more than 31 years. His company has done consulting work for most of the major automobile manufacturers in the world.[280]

Mr. Farhat was tasked with evaluating three issues: (1) whether the CDJR lines are currently being adequately represented as to sales and service in the McAllen sales locality; (2) whether Burns Motors would be harmed by the addition of the new dealership; and (3) whether the addition of the new dealership would be in the public interest.[281] Each of these will be discussed in turn.

1. Adequacy of Representation

Mr. Farhat's opinion is that the CDJR brands have not been adequately represented in the McAllen sales locality since at least 2013.[282] McAllen and Edinburg are located in Hidalgo County. The primary population centers in the county are McAllen, Edinburg, Weslaco, and Mission. By far, most of the population is found in the southern third of the county, and the population thins as one travels north, with the northern half or so of the county being only

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278 Tr. 1507-10.

279 Tr. 1515-21; FCA Ex. 108.

280 Tr. 579-93; FCA Ex. 96 at 18-22.

281 Tr. 593; FCA Ex. 96 at 2.

282 Tr. 596; FCA Ex. 96 at 4-9.

sparsely populated. Currently, a section in the southeast corner of the county (comprising perhaps a fifth of the county's geographic area) is allocated as the sales locality for the Ed Payne dealership in Weslaco, Texas (the Ed Payne Sales Locality). A small portion of the southwest corner of the county is allocated to the relatively distant Payne CJDR dealership in Rio Grande City. The rest of the county (the remaining three-quarters or so) is the McAllen sales locality allocated to Burns Motors (the Current Burns Sales Locality). If the new dealership is created as contemplated in this proceeding, then the Current Burns Sales Locality would be split into two parts: the southern part (largely corresponding to the city limits of McAllen) would become the new sales locality for Burns Motors (the Proposed Burns Sales Locality) and the northern part (which would include the city limits of Edinburg and largely unpopulated areas to the north of Edinburg) would become the Applicant's sales locality (the Proposed Applicant's Sales Locality). The Proposed Applicant's Sales Locality is geographically larger but more sparsely populated than the Proposed Burns Sales Locality.[283]

There are three major concentrations of auto dealerships (or "auto rows") within the Current Burns Sales Locality: one each in Mission, McAllen, and Edinburg. The auto row in Mission includes dealerships for Ford, General Motors, Buick, and Chevrolet. CJDR, on the other hand, does not have a full dealership in Mission. Rather, only the Burns Motors truck center is located there, and it only sells trucks and provides no servicing of vehicles. The Edinburg auto row includes dealerships for Chevrolet, Buick, GMC, Nissan, Mazda, and Subaru, but no CJDR dealership. The McAllen auto row includes dealerships for Ford, Chevrolet, Toyota, Hyundai, Honda, Nissan, and CJDR (*i.e.* Burns Motors). Mr. Farhat generally described the auto rows in Mission, McAllen, and Edinburg as consisting of large, beautiful, state-of-the-art dealerships. However, he described the Burns Motors truck center in Mission as out-of-place looking, "far too small," and inadequate compared to the competition. Importantly, of the three major auto rows in the Current Burns Sales Locality, only the one in McAllen contains a full CJDR dealership.[284]

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[283] Tr. 597-99; FCA Ex. 96 at 25.

[284] Tr. 599-600, 607, 609-11; FCA Ex. 96 at 26.

The Burns Motors truck center in Mission is 5.4 miles, as the crow flies, west of Burns Motors in McAllen. If the Application issue in this case is granted, then a new CJDR dealership will be established in Edinburgh, and it will be 5.7 miles north/northeast of Burns Motors in McAllen. Mr. Farhat pointed out that these distances are comparable to those between the dealerships of the vehicle brands that compete with CJDR. For example, the Chevrolet dealership in McAllen is 5.1 miles from the one in Mission and 5.9 miles from the one in Edinburg; and the Ford dealership in McAllen is 7.0 miles from the one in Mission and 7.4 miles from the one in Edinburg.[285] According to Mr. Farhat, it is not unusual in Texas to have two CJDR dealerships located less than 6 miles apart, and he specifically identified a number of such dealerships.[286]

Mr. Farhat testified that CJDR sales in Hidalgo County are far below what they would be expected to be if compared to the percentage that CJDR sales comprise of total auto sales in Texas. Mr. Farhat calculated that if, within Hidalgo County, CJDR vehicles were registered in the same percentages as CJDR vehicles were registered within the State of Texas as a whole, then 4,383 new CJDR vehicle registrations would have been made in Hidalgo County in 2016. In reality, only 3,569 new CJDR vehicle registrations were made in the county. This means that the county has a "registration effectiveness" of 81.4 percent. According to Mr. Farhat, this means that over 800 fewer CJDR cars were sold in Hidalgo County than should have been if the Burns Motors had been performing at an average level, which is a "significant shortfall." Burns Motors sold roughly 2,300 vehicles in 2016, which means that many of the 3,569 vehicles registered in Hidalgo County in that year were "insells," *(i.e.*, vehicles sold by other CJDR dealers outside the county to buyers within the county).[287]

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[285] Tr. 606-07; FCA Ex. 98 at 13-15.

[286] Tr. 608; FCA Ex. 98 at 12.

[287] Tr. 612-28; FCA Ex. 96 at 37. Significantly, the registration effectiveness remains roughly the same even when the benchmark changes from CJDR sales in Texas to CJDR sales in the Southwest Business Center (82.2 percent), or CJDR sales in the nation (81.7 percent). FCA Ex. 96 at 38-39. According to Mr. Farhat, this fact confirms that Burns Motors's underperformance as shown by the registration effectiveness percentages was not artificially skewed as the result of using a faulty benchmark. Tr. 618-19.

According to Mr. Farhat, Burns Motors's registration effectiveness of 81.4 percent is quite low. In 2016, there were 122 CJDR dealerships in Texas. Of those, 104 were in markets where registration effectiveness equaled or exceeded 100 percent, and quite a few exceeded 150 percent. Meanwhile, only one dealership in Texas was in a market with a lower registration effectiveness than Burns Motors. Moreover, Mr. Farhat also calculated registration effectiveness separately for the Proposed Burns Sales Locality and the Proposed Applicant's Sales Locality and determined that the registration effectiveness was lower for the latter than it was for the former. Mr. Farhat's calculations indicate that Burns Motors is serving the Edinburg area even more poorly than it is serving the McAllen area. Moreover, as the population in Hidalgo County grows over time, Burns Motors's registration effectiveness has slowly declined, indicating that the dealership is increasingly unable to serve the market adequately.[288] Mr. Farhat conceded that Burns Motors consistently achieved a high level of sales, but explained that the market it serves "is too darn big" for a single dealership to handle adequately.[289]

As will be discussed more thoroughly in the summary of his testimony, Burns Motors's expert witness, Mr. Geckil, opined that Mr. Farhat's use of the Texas market as the benchmark for measuring Burns Motors's registration effectiveness is flawed because there are too many small markets within Texas and it is unfair to compare a relatively big market, like the one served by Burns, against small markets. Mr. Farhat disagrees with Mr. Geckil's premise that the small markets in Texas meaningfully skew the Texas benchmark. According to Mr. Farhat, although Texas may once have been a rural state with many small markets, it is no longer so. He provided data demonstrating that 70 percent of all vehicles sold in Texas are sold in markets that are the size of the Burns market or larger. Thus, Mr. Farhat maintains that the analysis he performed using Texas as the benchmark was fair and appropriate.[290]

Moreover, in response to Mr. Geckil's critique that Burns Motors's performance should only be compared to similarly-sized markets, Mr. Farhat pointed out that the market most similar

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[288] Tr. 620-21, 631-33; FCA Ex. 96 at 42-45, 96.

[289] Tr. 735.

[290] Tr. 622-24; FCA Ex. 102.

to the Current Burns Sales Locality is El Paso. Yet, in an apples-to-apples comparison of these demographically similar markets, Burns Motors compares even more unfavorably than it does with a Texas benchmark. That is, Mr. Farhat explained, if El Paso is used as the benchmark, then Burns Motors's registration effectiveness drops to roughly 70 percent.[291] Using the Texas benchmark, the El Paso registration effectiveness is 108 percent (compared to Burns Motors's 81.4 percent). Mr. Farhat attributes this good performance in El Paso to the fact that, unlike in the Current Burns Sales Locality, there are three each of CJDR, Ford, and Chevrolet dealerships in El Paso, meaning that CJDR is on an equal footing with its competitors.[292]

Mr. Farhat also compared Burns Motors's MSR performance with that of the Ed Payne dealership in Weslaco. From 2013 through 2016, Burns Motors had sub-par MSR performance, ranging from a high of 85.5 percent to a low of 67.1 percent, while Ed Payne Weslaco had excellent MSR performance ranging from 142.1 percent to 172.6 percent.[293]

Burns Motors's expert witness, Mr. Geckil, suggests that Burns Motors's sub-par MSR performance can be attributed to the fact that the dealership only recently began selling the Jeep line and it has experienced initial slow sales of Jeep that skewed its MSR numbers. Mr. Farhat disagrees. His analysis shows that, in the years since 2013 (when Burns Motors first began selling Jeep), its sales of the Chrysler, Dodge, and Ram lines have actually declined while sales of those lines by other dealerships in Texas and the nation increased. In other words, according to Mr. Farhat, Burns Motors's poor performance is attributable to all the product lines, not just Jeep.[294]

MSR is developed using the state average of CJDR sales as its benchmark. Burns Motors's expert, Mr. Geckil, thinks this is unreasonable. He contends that the sales expectations for a given market should be determined by comparing it to a bundle of 20 or so other markets

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[291] Tr. 624-26.

[292] Tr. 626-27.

[293] Tr. 633; FCA Ex. 96 at 46.

[294] Tr. 634-35; FCA Ex. 98 at 11.

that are similar demographically. Mr. Farhat responded to this criticism by pointing out that the demographics of Hidalgo County are rather unique in the country. According to Mr. Farhat, there is only one other community in the country, El Paso, that is similar in total population and percentage of Hispanic population to the Current Burns Sales Locality. In other words, it would not be possible to develop a benchmark of Mr. Geckil's desired bundle of 20 or so similar communities to use as a benchmark to measure Burns Motors's performance.[295]

Mr. Farhat personally toured the Current Burns Sales Locality. He observed a "quite amazing" amount of retail growth, including "very high-end retail" growth, throughout the area. He stated that the amount of growth is more than any other market area he has studied.[296]

There were roughly 860,000 people living in Hidalgo County in 2016, which is roughly 300,000 more than lived there in 2000. The county has seen dramatic population growth over recent decades, and that rapid growth is projected to continue. Because the southern portion of the county (where Burns Motors is located) is already heavily populated, the growth in the county is trending northward, largely in the Edinburg area. From 2000 to 2016, the population of Edinburg grew by an impressive 73 percent, while McAllen grew at a slower, but still impressive, 46 percent. During same time period, the State of Texas as a whole grew by 35 percent. As would be expected, as the population of the county has steadily grown, so has the number of new car sales. The Applicant's proposed dealership would be located roughly in the center of much of that recent population growth.[297]

To Mr. Farhat, all of this growth indicates that the Current Burns Sales Locality is an economically strong and growing area that has become too big for one dealership to service adequately. He illustrated this point by pointing out that Burns Motors has the largest sales locality (in terms of vehicles needed to be sold in order to achieve 100 percent MSR) of any dealership in Texas. By way of comparison, Burns Motors is expected to sell more than 3,500

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[295] Tr. 1426-27.

[296] Tr. 605-06.

[297] Tr. 637-49 ; FCA Ex. 96 at 48-63; FCA Ex. 103.

vehicles per year, while the second-largest dealership is expected to sell roughly 2,000. To put this in perspective, Mr. Farhat explained that the Current Burns Sales Locality is so unusually large that, if it were divided into two sales localities by the creation of the Applicant's dealership, then the Proposed Burns Sales Locality would still be the largest in Texas (albeit by a smaller margin) and the Proposed Applicant's Sales Locality would be the thirteenth-largest.[298]

Mr. Farhat's analysis, and common sense, indicates that a dealer's ability to penetrate a market declines with distance. Stated differently, the farther a customer has to travel to reach a dealership, the less likely he is going to do so. Mr. Farhat calculated that, currently, customers in what would be the Proposed Applicant's Sales Locality have to travel much farther to reach a CJDR dealer than to reach most of CJDR's competitors. For example, on average, a resident of the Proposed Applicant's Sales Locality has to travel 9.2 miles to reach the Burns Motors dealership in McAllen, while he need only travel between five and six miles to reach dealerships for Ford, Mazda, Subaru, Volvo, Chevrolet, Buick, GMC Truck, or Nissan.[299]

Burns Motors's expert witness, Mr. Geckil, has suggested that Burns Motors's sub-par performance is due to the fact that the high Hispanic population in Hidalgo County simply has a preference for Ford and Chevrolet products. Mr. Geckil posited that this preference stems from the fact that Ford has a manufacturing presence in Mexico. Mr. Farhat disagrees. He pointed out that Weslaco has a higher Hispanic population percentage than McAllen or Edinburg, yet the Ed Payne Weslaco dealership consistently has registration effectiveness of more than 100 percent. Additionally, according to Mr. Farhat, FCA and Ford each have three manufacturing plants in Mexico, and one of FCA's is the closest to Hidalgo County. Moreover, CJDR sales in El Paso, which has a high Hispanic population similar to Hidalgo County, also consistently has registration effectiveness above 100 percent.[300]

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[298] Tr. 649-50; FCA Ex. 96 at 68-69.

[299] Tr. 652-55; FCA Ex. 96 at 74-76.

[300] Tr. 655-57.

2. Harm to Burns Motors and the Public Interest

Mr. Farhat also expressed opinions on two other major issues that are relevant to this matter: whether Burns Motors would be harmed by the addition of the new dealership; and whether the addition of the new dealership would be in the public interest. Because much of the same analysis relates to both issues, they will be discussed together. Mr. Farhat opined that the addition of Applicant's dealership in Edinburg would increase exposure and access to CJRD products and services, thereby enhancing sales and services for customers in Hidalgo County, while avoiding harm to Burns Motors. By his calculations, Applicant's proposed dealership is optimally located to best serve customers in the Edinburg area. Moreover, overall demand in the county is so great, and the market is so large, that there is enough sales opportunity for the Applicant to take advantage of without meaningfully harming Burns Motors.[301]

The addition of the Applicant's dealership would greatly enhance customer convenience in the Proposed Applicant's Sales Locality, by reducing the average travel distance from 9.2 miles to 5.8 miles (a level that is comparable to CJDR's competitors). Moreover, as discussed above, Burns Motors's below-average performance as to registration effectiveness suggests that there are many hundreds of sales opportunities being lost in the county, the majority of which are being lost from potential customers living in the Edinburg area or further north. The addition of a sales point in Edinburg would increase the likelihood of making sales to these customers. Further, as noted above, there are an unusually high number of "insells" in Hidalgo County, meaning that Hidalgo County residents are buying CJDR products from dealers outside the county. Mr. Farhat opined that the addition of another point in Edinburg would likely reduce the level of insells. By Mr. Farhat's calculations, the total amount of vehicles the Applicant would be expected to sell to achieve 100 percent registration effectiveness is roughly 300 vehicles less than: (1) the total number of sales that are currently lost by Burns Motors's failure to achieve 100 percent registration effectiveness, plus (2) the total number of current insells in the county. In other words, Mr. Farhat believes that there are currently so many missed sales opportunities in the county that the Applicant could seize on those missed opportunities

[301] Tr. 660- 62; FCA Ex. 96 at 78.

without negatively affecting Burns Motors's sales figures. Stated differently, Mr. Farhat argues that Applicant's dealership would, to a great extent, increase the size of the pie available to both dealerships rather than steal customers from Burns Motors.[302]

In support of this argument, Mr. Farhat analyzed every market where a CJDR dealer was added between 2012 and 2015. According to Mr. Farhat, in every instance CJDR sales increased significantly. He testified this means that, rather than just cannibalizing sales from Burns Motors, the addition of the Applicant's sale point will result in more CJDR sales overall, and more CJDR market penetration, by taking sales from other brands. Mr. Farhat also mentioned that three new dealerships were added in the Dallas area over the course of 2011 to 2013, yet the sales numbers and registration effectiveness of all Dallas dealerships generally increased over the same time period. A similar thing occurred in the Austin market when an additional point was added. In sum, according to Mr. Farhat, in an area such as Hidalgo County where the CJDR brand is being inadequately represented, the addition of a new sales point will expand overall sales in the county (both for the new dealer and the existing dealer) rather than simply taking existing sales and redistributing them. Moreover, the new point will improve customer convenience and choice, and increase competition, which are all in the public interest.[303]

C. Opinions of Ilhan Geckil

Mr. Geckil testified as an expert witness for Burns Motors. He is an economist and the Director of Strategy and Business Valuation at Anderson Economic Group, an economic consulting firm. He has been with the company and its predecessor since 2001. He has frequently consulted for both automobile manufacturers and dealers.[304]

Mr. Geckil was tasked with evaluating four issues: (1) whether the CDJR lines are currently being adequately represented as to sales and service in the relevant market area;

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[302] Tr. 662-65; FCA Ex. 96 at 80-89; FCA Ex. 105.

[303] Tr. 671-79; FCA Ex. 96 at 91-100.

[304] Tr. 1166-79; Burns Ex. 1155 at Tab A.

(2) what effect the addition of a new sales point would have on CJDR registrations in the Current Burns Sales Locality; (3) whether Burns Motors would be harmed by the addition of the new sales point; and (4) whether the addition of the new sales point would be in the public interest.[305]

1. Adequacy of Representation

Mr. Geckil's opinion is that Burns Motors is adequately representing the CDJR lines within the Current Burns Sales Locality. Mr. Geckil pointed out that, in the period 2012 through 2016, nationwide sales of the CJDR brands grew at an annual rate of 8.3 percent, which is much higher than the industry average of 5.4 percent. This rate of growth was, however, widely divergent within the CJDR brands, with Jeep sales growing at 18.2 percent per year, Ram at 16.1 percent, Dodge at -0.9 percent, and Chrysler at -6.8 percent. This is relevant to Mr. Geckil because Burns Motors did not begin selling Jeep, the fastest-growing segment of the CJDR lines, until 2013. Conversely, in the first eight months of 2017, sales of the CJDR brands declined at an annual rate of -8.0 percent, which was worse than the industry average of -2.3 percent. Mr. Geckil believes the performance of any dealership is largely tied to the popularity (or lack thereof) of the brands it sells.[306] Thus, to the extent that Burns Motors is underperforming, Mr. Geckil attributes such underperformance to FCA, for providing inventory that customers do not demand. He also opined it was possible that Chevrolet and Ford products are preferred by Hispanic populations, which would explain why those two brands have sold better than CJDR products in heavily Hispanic Hidalgo County, and that this preference is possibly due to Ford's manufacturing presence in Mexico.[307]

Mr. Geckil opined that the Burns Motors dealership is very well located to serve the population centers within the Current Burns Sales Locality.[308] However, his data on projected

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[305] Burns Ex. 1155 at 9.

[306] Tr. 1189-94; Burns Ex. 1155 at B-1; Burns Ex. 1159.

[307] Tr. 1337-40.

[308] Tr. 1200-01; Burns Ex. 1155 at C-5.

2016-2021 population growth within the locality reveals that most growth will occur just north of the Applicant's proposed new dealership. In other words, the consumers in that fast-growing area would find the new sales point more convenient than the Burns dealership.[309]

On the one hand, Mr. Geckil conceded that "distance is very important for retail sales."[310] Later in his testimony, however, he disputed the contention that improving proximity to customers by adding a new sales point in Edinburg would increase CJDR sales. He produced maps showing, by census tract, the areas within the Current Burns Sales Locality where CJDR vehicles are most heavily purchased (as a percentage of market share). A number of those areas are north of what would be the new sales point (and, therefore, fairly distant from Burns Motors). He also produced maps showing that, over multiple years, Burns Motors has had strong sales to customers living in areas that would be north of the proposed new sales point in Edinburg. According to Mr. Geckil, this demonstrates that customers are already willing to drive longer distances to reach Burns Motors and there is not a need to improve proximity. Mr. Geckil testified that this data also demonstrates that Burns Motors does not have difficulty selling to customers that are fairly far from its dealership.[311]

As was mentioned above, the addition of the Applicant's dealership would reduce the average travel distance for CJDR customers from 9.2 miles to 5.8 miles. Mr. Geckil does not believe this is a meaningful improvement to customer convenience, nor does he think it is necessary. He opined that what drives demand is not the number of dealerships, but the popularity and desirability of the product.[312]

Mr. Geckil opined that the customers living within the Current Burns Sales Locality are already well-served by a highly competitive CJDR market. He pointed out that

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[309] Burns Ex. 1155 at C-6.

[310] Tr. 1210.

[311] Tr. 1228-31; Burns Ex. 1155 at D-3 to D-10.

[312] Tr. 1236-40. He pointed out that Toyota sells roughly as many vehicles nationally as CJDR with roughly half the number of dealerships.

roughly 37 percent of CJDR sales in the market are in-sells by other dealers. To Mr. Geckil, this demonstrates that it is a competitive market in which the existing CJDR dealers are competing with each other very aggressively.[313]

Mr. Geckil does not believe Burns Motors should be faulted for failing to meet MSR because he thinks MSR is developed using a "flawed metric." MSR is calculated using the state average of CJDR sales, which he thinks is unreasonable. He contends that the many smaller markets in Texas (in which the dealers are generally performing above 100 percent of MSR) skew the results for the larger markets (in which the dealers are generally underperforming). Instead, he contends that the sales expectations for a given market should be determined by comparing it to a bundle of 20 or so other markets that are similar demographically, economically, and in other ways, such as whether they are urban or rural.[314] He did not identify a specific bundle of other markets that would constitute an appropriate comparison. He agreed that the El Paso market is comparable to the Current Burns Sales Locality. Mr. Geckil pointed out that Burns Motors annually sells about 2,500 vehicles, which demonstrates to him that the dealership serves its market area effectively.[315]

Mr. Geckil was critical of the market area Mr. Farhat chose to analyze, alleging that Mr. Farhat chose the market randomly. His arguments on this point were not, however, terribly clear.[316] Mr. Geckil also disputed Mr. Farhat's contention that Burns Motors has missed opportunities for additional sales in the Current Burns Sales Locality. He also disagrees that the addition of a new sales point in Edinburg will meaningfully increase CJDR sales.[317]

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313 Tr. 1240-42; Burns Ex. 1155 at D-13 to D-14.

314 Tr. 1243; 1384.

315 Tr. 1245-46, 1383-84.

316 Tr. 1262-63; Burns Ex. 1156 at 4-5. Like the ALJs, Mr. Farhat did not understand Mr. Geckil's criticism. Tr. 1415.

317 Tr. 1265-66.

2. Effect on CJDR Registrations in the Current Burns Sales Locality

Mr. Geckil's opinion is that there would be only an insignificant increase in CJDR registrations in the Current Burns Sales Locality if the Edinburg dealership was opened. He estimated that if the new dealership were opened, "you may gain 50, 100 [additional] sales, some sales, but nothing significant."[318] Later, he stated, "[y]our sales might increase 200, 300 units. I don't know. We didn't attempt to quantify that. . . . [W]e don't think it will be any significant impact."[319] He did not attempt to quantify how many sales CJDR's competitors, such as Ford, Chevrolet, and Nissan, would lose to the new sales point in Edinburg, although he conceded that such losses would occur.[320]

3. Harm to Burns Motors

Mr. Geckil prepared a map with the Current Burns Sales Locality overlaid with what he calculated would be the area from which Applicant's dealership would draw its customers (the Applicant's Projected Sales Area). The Applicant's Projected Sales Area was developed based solely on proximity (taking into account existing roadways) to the dealership. The Applicant's Projected Sale Area extends to a distance that equates to a maximum drive time of 40 minutes to access Applicant's dealership. Mr. Geckil conceded that he arbitrarily chose a 40-minute drive time, based on his experience and opinion as to how far customers will travel to reach a dealership. However, he admitted that he often uses a 30-minute drive time when conducting such analyses. The areas closer to the proposed dealership are allocated to the Applicant's Projected Sales Area and the remaining areas are allocated to Burns Motors. Thus, in drawing the map, Mr. Geckil assumed that all customers would choose which dealership they buy from based solely on proximity: those closer to Burns Motors would buy from Burns Motors, and those closer to Applicant would buy from Applicant. Mr. Geckil conceded that, in the real world, some customers closer to Applicant might end up buying from Burns Motors or another

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[318] Tr. 1238; Burns Ex. 1155 at 20.

[319] Tr. 1257.

[320] Tr. 1346-47.

dealership, and vice versa. He argued, however, that his total reliance on proximity was reasonable for developing the Applicant's Projected Sales Area, because he believes it is reasonable to assume that any sales made by Burns Motors to customers in the Applicant's Projected Sales Area would be offset by sales made by Applicant to customers in areas closer to Burns Motors.[321]

Mr. Geckil then took Burns Motors's historical sales data and determined that roughly 24 percent of those sales were to customers living in what would be the Applicant's Projected Sales Area. Thus, Mr. Geckil estimated that, if the new sales point in Edinburgh is created, Burns Motors will lose 24 percent of its new car sales to the new dealership. He also concluded that Burns Motors would, as well, lose 24 percent of its revenue from its other departments (used vehicles, parts, service, and body shop). He described this as a conservative assumption about the harm that Burns Motors will suffer as the result of the new dealership.[322] He was unaware that the Applicant does not plan on having a body shop at its dealership, and conceded, during cross examination, that Burns Motors would not lose much body shop business in that event.[323] Mr. Geckil also conceded that Burns Motors has been in business for a long time and built up goodwill in the community and a loyal customer base. However, his analysis that Burns Motors will lose 24 percent of its sales does not take those facts into account. Mr. Geckil conceded that, if he had used his more normal 30-minute drive time when drawing the boundaries of the Applicant's Projected Sales Area, then his projection of Burns Motors's lost sales might have been lower than 24 percent.[324]

Mr. Geckil was also critical of Mr. Walter's testimony regarding the profitability of Burns Motors. On one hand, Mr. Geckil testified that Burns Motors is a "quite average dealership." Immediately thereafter, however, he testified that "it is more profitable than [the]

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321 Tr. 1209-1220, 1231-34, 1400-01; Burns Ex. 1155 at C-11.

322 Tr. 1232-34, 1253-54, 1257-58; Burns Ex. 1155 at D-11.

323 Tr. 1354-55.

324 Tr. 1356, 1400-01.

average CJDR [dealership]."[325] He agrees that Burns Motors is a "profitable" dealership, but is critical of Mr. Walter calling it a "very profitable" dealership. However, his analysis revealed that "Burns Motors had a slightly higher net profit margin than an average dealership in the region and in the nation."[326] He produced a chart comparing the net profits at Burns Motors to the average net profit of: (1) new car dealers in the South Central Region, as defined by the Risk Management Association; and (2) the average net profit of new light vehicle dealer in the nation, and provided by the National Automotive Dealers Association. In every instance but one, Burns Motors was substantially more profitable than either benchmark.[327]

4. The Public Interest

Finally, Mr. Geckil testified that the public interest will not meaningfully be served by the addition of the new sales point, although he conceded that there will be some minor benefit by virtue of the public's improved proximity to a CJDR dealer.[328] On one hand, Mr. Geckil was critical of Mr. Farhat's conclusion that the new dealership in Edinburg would increase customer exposure and access to the CJDR brands, and increase competition.[329] On the other hand, Mr. Geckil testified that it was "obvious" that "having a dealership in Edinburg . . . would increase exposure, access, and competition."[330] Later, he testified that the Edinburg dealership would: be in the public interest for Edinburg consumers, improve convenience for Edinburg consumers, "definitely" increase competition, and encourage more aggressive advertising and pricing.[331]

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[325] Tr. 1272.

[326] Burns Ex. 1156 at 13.

[327] Burns Ex. 1156 at SubEx. 6.

[328] Tr. 1260; Burns Ex. 1155 at 21.

[329] Burns Ex. 1156 at 9-10.

[330] Tr. 1269.

[331] Tr. 1361-63.

V. ANALYSIS OF STATUTORY FACTORS

A. Adequacy of Representation

To show good cause to add a new dealer point in Edinburg, Applicant and FCA must address whether CJDR vehicles are being adequately represented as to sales and service.[332] The preponderance of the evidence establishes that CJDR has not, for several years, been adequately represented in the Current Burns Sales Locality. Therefore, this criterion weighs in favor of granting the application.

Protestant contends that its dealership is adequately representing FCA and is well-situated to adequately represent FCA in the future. Protestant expanded its dealership in line with FCA's Project Genesis goals (of larger dealerships in fewer locations) and today, Protestant contends, it has the facilities and employees to accommodate the growing Current Burns Sales Locality.

There is no dispute that Burns Motors is a large, stable, successful, and profitable CJDR dealership. It is also true that, in absolute terms, Burns Motors sells a lot of vehicles; roughly 2,500 per year. Mr. Geckil asserted that this fact alone proves adequacy. But the number of sales, standing alone, cannot be the basis for determining whether a market is adequately served. The size of the market must also be taken into account. For example, a dealership selling 2,500 vehicles in a market with a population of 100,000 might be performing quite well, while a dealership that sells 2,500 vehicles in a market with a population of one million might not.

In this case, the market Burns Motors serves is unusually large and growing at a remarkably fast clip. Throughout the hearing, the Current Burns Sales Locality was described in superlative terms—"a very, very large market," that is "too darn big" for one dealership, and experiencing "quite amazing" growth. It is one of the 10 largest markets in the nation that has only one CJDR dealer.

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[332] Tex. Occ. Code § 2301.652(a)(1).

When the size of the underlying market is taken into account (by using metrics like MSR, registration effectiveness, and planning potential) it becomes clear that Burns Motors is not adequately representing the CJDR brands. The Current Burns Sales Locality has a planning potential of roughly 3,400 vehicles per year, the highest of any secondary market in Texas, but Burns Motors is selling only roughly 2,500 vehicles per year. The planning potential of the Current Burns Sales Locality is almost twice the planning potential of any comparable market in Texas. Similarly, in order to achieve registrations at a rate comparable to within the state as a whole, there should have been 4,383 new CJDR registrations in the Current Burns Sales Locality in 2016, but there were only 3,569. This results in a registration effectiveness in the sales locality that is the second-worst out of the 122 CJDR dealers in Texas. Further, Mr. Farhat's analysis revealed that the farther north one travels in the locality, the worse the registration effectiveness becomes, indicating that customers living in Edinburg and areas further north are even more poorly-served than customers living in McAllen.

When measured in terms of the number of vehicles needed to be sold in order to achieve 100 percent of MSR, Burns Motors has, by far, the largest sales locality in Texas. Burns Motors must sell roughly 3,500 vehicles per year to achieve 100 percent of MSR. The second largest dealer must sell roughly 2,000. For years, Burns Motors's MSR performance has consistently been substantially below 100 percent of MSR. Even if the Current Burns Sales Locality was divided and a new sales point was created as envisioned in this proceeding, Burns Motors would still be left with the largest sales locality in Texas in terms of MSR (albeit by a smaller margin). The Current Burns Sales Locality also has a very large and growing number of CJDR vehicles in operation. This means that it is increasingly impossible for one service department to service them all.[333]

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[333] At the hearing, FCA presented evidence which, it asserted, showed that Burns Motors was providing inadequate service to its customers. Specifically, testimony was provided that customers of the Burns Motors service department who completed customer satisfaction surveys provided survey answers indicating that they were slightly less satisfied with the services provided than the FCA national average. The ALJs did not find this evidence persuasive. For one thing, the variance between the national average and Burns Motors's responses was insignificant. For another, Burn Motors's own survey data was more favorable to the dealership. Thus, the ALJs are not finding that service of CJDR vehicles in the locality is inadequate on the grounds of survey results. Rather,

Mr. Geckil's criticisms of the evidence suggesting inadequate representation were unpersuasive. He opined that it was unfair to compare sales in the Current Burns Sales Locality to sales in the State of Texas because the state includes a number of markets that are smaller than the Current Burns Sales Locality. He offered a theoretical alternative benchmark—a bundle of 20 or so similar markets—but did not identify an actual bundle of such markets. Moreover, the only evidence in the record establishes that there exists no such bundle of 20 or so similar markets in the United States. Rather, in terms of demographics, there is only one other market in the nation that is similar to the Current Burns Sales Locality—El Paso. Tellingly, the sales performance of the Current Burns Sales Locality compares even more unfavorably to El Paso than it does to the state as a whole. This is perhaps because there are three CJDR dealerships in El Paso to compete with the three each of Ford and Chevrolet while, in the Current Burns Sales Locality, there is only one CJDR dealership to compete against three each of Ford and Chevrolet.

Mr. Geckil also suggested, without providing any supporting data, that the poor MSR performance of CJDR in the Current Burns Sales Locality might simply mean that Hispanic customers do not care for CJDR products. On this point, the evidence does not support Mr. Geckil's theory. In recent years, Burns Motors's MSR performance has ranged from 67 percent to 86 percent. Meanwhile, immediately next door in Weslaco (another community with a high Hispanic population), Ed Payne Weslaco had MSR performance ranging from 142 percent to 173 percent. Similarly, the three dealerships in El Paso have consistently high MSR performance.

Mr. Geckil also suggested that the poor performance of Burns Motors as shown by the various metrics is the fault of FCA, not Burns Motors. That is, he argued that the dealership's poor performance is simply caused by the unpopularity of the CJDR brands. But this argument is also unpersuasive. Mr. Geckil did not prove that the CJDR brands are less popular in the Current Burns Sales Locality than they are elsewhere in the state. Thus, it is fair to compare

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the ALJs conclude that service is inadequate for the same reasons they conclude sales are inadequate: the market is simply too large to be adequately handled by a single dealership.

sales in the locality to sales in the state. Further, when using a metric like MSR, it does not matter whether the CJDR brands are popular or unpopular. If the brands are popular, then the amount of cars a dealership would be expected to sell will be larger; if the brands are unpopular, then the dealership will be expected to sell less. In either case, however, the dealership is merely being compared to the average of what is occurring statewide. If, for example, Burns Motors was selling an unpopular brand, but selling at a rate that was on par with the average but also unpopular rate in the rest of Texas, then its MSR would have been at 100 percent. Finally, even though Mr. Geckil may consider MSR to be a flawed metric, it is clear that his client does not, because Burns Motors agreed in its contractual obligations to FCA to achieve 100 percent of MSR. Moreover, prior to this hearing, Burns Motors had never sought exemption from the MSR requirement or requested of FCA that its MSR be adjusted to account for extenuating local circumstances.

Mr. Geckil argued that Burns Motors is well-situated to serve the Current Burns Sales Locality. Even his own data, however, suggests otherwise. The population growth data in the locality reveal that the growth has been trending northward, and will continue to do so, meaning that population centers are springing up farther and farther from Burns Motors and closer to Applicant's proposed sales point. On average, customers in the Current Burns Sales Locality must travel much further to reach a CJDR dealership than they must travel to reach CJDR's competitors. This is a part of why CJDR is underperforming in the locality. Indeed, even Mr. Geckil conceded that "distance is very important for retail sales."

Mr. Geckil touted the fact that 37 percent of CJDR sales in the Current Burns Sales Locality are insells by Burns Motors's competitors as proof that CJDR is being adequately represented. But, as explained by Mr. Farhat, the rate of insells in the Current Burns Sales Locality is unusually high. Thus, the high level of insells merely proves that Burns Motors is not adequately reaching customers in the locality.

CJDR's competitors have clearly recognized that the enormity of the area represented by the Current Burns Sales Locality warrants more than one dealer. It is significant that, while there is only one CJDR in the market, Ford and Chevrolet have three each, and Nissan has two. As a

result, Ford, Chevrolet, and Nissan significantly outsell CJDR in the locality. As Mr. Cholagh put it, CJDR is being "outdealered" in the locality. By contrast, El Paso, the one market in the nation that Mr. Farhat and Mr. Geckil both agree is most similar to the McAllen sales locality in terms of total population and Hispanic population, has three CJDR dealers and the CJDR brands are competing quite well against Ford and Chevrolet.

It is clear that even Burns Motors knows that a second sales point is needed within the locality. For years, Burns Motors has repeatedly petitioned FCA for the right to open its own new sales point in Edinburg. Logic dictates that it would not have done so unless it thought both its current location and the new location would be profitable.

Simply put, Burns Motors has, for years, had a gold mine (i.e. a very large market) all to itself. It is understandable that the company would like to keep the whole gold mine for itself. However, it is equally clear that the gold mine is too large for Burns Motors to adequately serve. The evidence proves that CJDR vehicles are currently not being adequately represented as to sales and service within the Current Burns Sales Locality. Thus, this factor supports approving the Application for a new dealer point in Edinburg.

B. Burns Motors's Substantial Compliance with the Dealer's Franchise

The second statutory factor examines whether Burns Motors is in substantial compliance with its franchise agreement with FCA.[334] "Substantial compliance" is a doctrine of contract law that "excuses contractual deviations or deficiencies which do not severely impair the purpose underlying the contractual provision."[335]

FCA has identified two ways it contends Burns Motors has breached its dealer agreements: (1) by failing to achieve MSR for all but one year in over a decade, and (2) by

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[334] Tex. Occ. Code § 2301.652(a)(2).

[335] *Burtch v. Burtch*, 972 S.W.2d 882, 889 (Tex. App.—Austin 1998, no pet.); *RCJD Motors, Inc. v. Chrysler Group, LLC,* SOAH Docket No. 608-10-5694.LIC, Proposal for Decision at 31 (April 2, 2012).

falling short of customer satisfaction goals set in the dealer agreements. Burns Motors disputes that these constitute substantial breaches.

1. Failure to Meet MSR Requirements

It is undisputed that the dealer agreements require Burns Motors to meet 100 percent MSR, a figure that represents the number of vehicles a dealer must sell in order to capture the same market share in its sales locality that the CJDR brands average statewide.[336] It is further undisputed that, with the exception of 2012, Burns Motors has failed to meet MSR for any year since at least 2006. Specifically, FCA presented evidence that Burns Motors achieved only the following MSR percentages:

2006: 58.03 percent	2012: 102.99 percent
2007: 70.04 percent	2013: 86.52 percent
2008: 62.81 percent	2014: 72.05 percent
2009: 57.05 percent	2015: 70.24 percent
2010: 74.71 percent	2016: 67.10 percent; and
2011: 79.76 percent	2017 (Jan-May): 67.77 percent.[337]

FCA's witnesses testified that these below-average MSR percentages represent lost sales opportunities in the McAllen sales locality, and that Burns Motors's performance in this regard is "very poor" and shows the dealership is "underperforming."[338]

Burns Motors does not dispute that it has failed to meet this contractual requirement for a number of years. Instead, Burns Motors contends that MSR is an unfair way to evaluate a dealer's performance because it overlooks other factors that may drive down sales. Specifically, Burns Motors urges that differences between urban and rural markets, and differences between

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[336] FCA Ex. 50 at 21, FCA Ex. 57 at 9; Tr. 36-37, 218-19, 374-77.

[337] FCA Exs. 67, 68.

[338] Tr. 37, 225.

the Rio Grande Valley and other Texas regions, make it unfair to measure Burns Motors's performance against a statewide average, as MSR does. Burns Motors also asserts that extraneous factors (like economic trends, disruption caused by construction, and the addition of the Jeep line during construction) contributed to its poor performance for a number of years. In essence, Burns Motors contends that, notwithstanding its below-average MSR performance, the dealership is nonetheless doing a good job of representing CJDR brands in the McAllen sales locality.

These arguments relate more to the statutory factor addressing adequacy of representation (section V.A, above).[339] Even if the ALJs agreed that MSR is an inapt measurement (which they do not), the fact remains that Burns Motors is contractually required to achieve 100 percent MSR, and it has failed to do so in every year but one since 2006. Moreover, the dealer agreements contain terms that expressly authorize a dealer to request MSR adjustments if the dealer believes current circumstances are limiting its ability to achieve MSR.[340] In this case, Burns Motors has pointed to a number of factors that it suggests make its MSR targets unrealistic and unattainable yet, in the many years Burns Motors has failed to achieve MSR, it has never availed itself of this provision to ask FCA to reduce the MSR requirements.[341]

Burns Motors also argues that, even if a failure to achieve MSR is technically a breach of the dealer agreements, it should not be regarded as a *substantial* breach because, according to Burns Motors, FCA overlooked its poor performance for years until Burns Motors filed its protest in this proceeding. FCA disputes this, pointing to testimony and exhibits showing that FCA has long been concerned by Burns Motors's poor MSR performance, and has repeatedly raised these concerns in conversations and correspondence with Burns Motors, both before and

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339 Indeed, in its post-hearing briefs, Burns Motors addressed the first and second statutory factors together, conflating them into a single argument against giving much weight to MSR figures in this case.

340 FCA Ex. 50 at 21, FCA Ex. 57 at 9; Tr. 37.

341 Tr. 37-38, 225-26, 1106-07.

after this protest proceeding was initiated.[342] The evidentiary record does not support Burns Motors's suggestion that FCA's breach claim is merely a pretext for opposing this protest.

Finally, Burns Motors argues that its noncompliance with a single contract term (the MSR requirement) is insufficient to show that it is not in substantial compliance with the dealer agreements as a whole. Burns Motors points to a number of other contract provisions that it is *not* alleged to have breached and claims this shows that, on balance, it is in substantial compliance with the dealer agreements. FCA disagrees, arguing that Burns Motors's breach of the MSR requirements undermines the very purpose of the dealer agreements, which is to sell CJDR vehicles. In the last several years, between 2014 and 2016, Burns Motors has been between approximately 28 and 33 percent below its MSR requirements, figures that represent over 1,000 vehicle sales per year that Burns Motors is not making.[343] The ALJs agree that this is not a minor deviation from the contract term.

FCA has shown that, for eleven of the last twelve years—that is, from 2006 to 2011, and from 2013 to 2017—Burns Motors breached the provisions of the dealer agreements that required it to meet 100 percent MSR. FCA has further shown that this breach represents a consistent failure by Burns Motors to sell as many vehicles as it contractually agreed to sell, and a consistent failure to capture the market share that dealers statewide average. This is a material breach that significantly impairs the purpose of the dealer agreements. That Burns Motors may have complied with most other contract terms does not mitigate this breach. Burns Motors is not in substantial compliance with the MSR requirements of its dealer agreements, a fact that supports approving the Application for a new dealer point in Edinburg.

2. Failure to Meet Customer Satisfaction Requirements

FCA also argues that Burns Motors is not in substantial compliance with the customer satisfaction obligations in the dealer agreements. The dealer agreements require Burns Motors to

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[342] Tr. 40, 82-84, 212-14; FCA Exs. 10, 29, 47, 48.

[343] FCA Ex. 67.

achieve certain "Customer Promotor Scores," which purport to measure the percentage of sales and service customers who would recommend, or advocate for, a dealer to someone else.[344] According to FCA, Burns Motors fell 0.8 percent below the required percentage of *sales* customers willing to advocate for the dealership for one month (May 2017), and fell between 0.8 percent and 10.7 percent below the required percentage of *service* customers willing to advocate for the dealership over a period of five months (January to May 2017).[345]

In response, Burns Motors disputes the reliability of FCA's methods of measuring customer advocacy. Its witnesses claim that FCA's surveys are returned by only a small, non-representative sample of customers.[346] In contrast, Burns Motors claims that its own customer satisfaction surveys—performed by a third-party firm originally recommended by FCA—are answered by a much larger percentage of its customers, and that these surveys show customers are overwhelmingly satisfied with Burns Motors's sales and service departments.[347]

The ALJs need not determine which party has the more reliable customer-service survey method, because the record shows that even if Burns Motors has breached this contract term, the breach is not material. Mr. Tunic, FCA's Dealer Network Development Manager, squarely testified that a one-month dip in customer satisfaction ratings is not concerning to FCA.[348] Therefore, the evidence that Burns Motors had below-average sales advocacy scores for a single month in May 2017 is no evidence of a material breach. And though the evidence shows that Burns Motors's service advocacy scores were below-average for several months, Mr. Tunic also acknowledged that this deficiency is not something FCA would typically raise unless there was another, more substantial, breach to address with the dealer as well.[349] Particularly considering that Burns Motors fell, at most, 10.1 percent below that national average (and in some instances

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344 FCA Ex. 50 at 22, FCA Ex. 57 at10.

345 Tr. 236-37; FCA Ex. 48 at 2-3.

346 Tr. 289-94.

347 Tr. 889-90, 1085.

348 Tr. 237.

349 Tr. 316.

missed the required target by less than 1 percent), the evidence failed to establish that Burns Motors's short-term failure to achieve required scores on customer satisfaction surveys constituted a material or substantial breach of the dealer agreements. Therefore, this alleged breach is not a factor that the Division should consider in evaluating whether to approve the Application.

C. Desirability of a Competitive Marketplace

The third statutory factor requires consideration of "the desirability of a competitive marketplace."[350] Both parties acknowledge that a competitive marketplace is desirable, and the ALJs generally agree with Protestant's statement that this statutory element is little more than "a statement of statutory policy that neither the agency nor the parties in a contested case are in a position to challenge."[351]

Here, Burns Motors contends that a competitive marketplace already exists for CJDR vehicles, while FCA disagrees that the current market is sufficiently competitive. FCA argues that approval of the Application will promote both intra-brand and inter-brand competition for sales and services in the region. Currently, Burns Motors is the sole CJDR dealership in the McAllen sales locality, affording it the largest sales territory and highest planning potential in the entire state of Texas.[352] Clearly, the addition of a second CJDR dealership in Edinburg will promote intra-brand competition. FCA contends it will promote inter-brand competition, as well. The evidence showed that while Burns Motors is the only CJDR dealer in this expansive sales locality, FCA's closest competitors have two or more dealerships. Specifically, Chevrolet and Ford both have full-service, full-line dealerships in McAllen, Edinburg, and Mission, while Nissan and Buick/GMC have dealerships in both McAllen and Edinburg.[353] And in the four main shopping areas across the relevant region (McAllen, Mission, Edinburg, and Weslaco),

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350 Tex. Occ. Code § 2301.652(a)(3).

351 Protestant's Rebuttal Brief at 12.

352 Tr. 549-50, 649-50.

353 Tr. 69-71, 210-12, 386-87, 941; FCA Ex. 82-002, FCA Ex. 83.

there are full-line CJDR dealerships only in McAllen and Weslaco, while FCA's main domestic competitors, Ford and Chevrolet, have full-line dealerships in all four shopping areas. The ALJs agree that CJDR dealerships are currently out-numbered in the marketplace, and the addition of a CJDR dealer in Edinburg will improve inter-brand competition.

FCA's other arguments on this element address why it believes adding a new Edinburg dealership will improve CJDR brands' representation in the market and benefit customers, without harming Protestant. These arguments are more directly addressed in the sections addressing those specific statutory factors (sections V.A, D, and E).

D. Harm to Protesting Franchised Dealer

Next, the parties must address whether a new point in Edinburg will cause harm to Burns Motors.[354] The ALJs conclude that Burns Motors will suffer little or no harm from the addition of the new sales point in Edinburg and is likely to enjoy some benefits from the addition. Accordingly, this criterion weighs in favor of granting Applicant's application.

Burns Motors asserts that it will be substantially hurt by the addition of the new dealership. Mr. Geckil's opinion was that Burns would suffer an across-the-board loss of 24 percent of revenues from all of its departments. For reasons discussed further below, the ALJs did not find Mr. Geckil's opinion on this point to be persuasive. However, Mr. Walter's testimony established that, even if Burns Motors experienced a 24 percent across-the-board loss of revenues as predicted by Mr. Geckil, the dealership would remain profitable and "dramatically strong as a financial operation." To the ALJs, this demonstrates merely that Burns Motors has long benefitted from the status quo of enjoying a market that is too big for it to represent adequately, not that the Application should be denied. Stated differently, the ALJs do not believe that changing a dealership from very profitable to profitable is the kind of "harm" that the statutory factor in Texas Occupations Code § 2301.652(a)(4) was intended to prevent.

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[354] Tex. Occ. Code § 2301.652(a)(4).

Moreover, the ALJs conclude that Mr. Geckil's 24 percent opinion was not credible and was derived from faulty premises. Mr. Geckil created Applicant's Projected Sales Area by drawing a map extending up to a distance of a 40-minute drive time from the Applicant's proposed location. (He admitted that he usually used a 30-minute drive time, but chose a longer time in this case, which led to a worsening of his projected harm to Burns Motors.) Mr. Geckil then assumed that all sales and other revenues within the Applicant's Projected Sales Area would go to the Applicant, while all sales outside of it would go to Burns Motors. In other words, Mr. Geckil's projection of harm to Burns Motors is based entirely on the premise that the only factor considered by customers when deciding where to buy or service a vehicle is nearness to the dealership. This is not reflective of the real world, where a myriad of other considerations—such as price, experience, customer loyalty, goodwill in the community, advertising, and so on—influence a customer's decision-making. Even Mr. Geckil admitted that, in the real world, Burns Motors will continue making sales to customers living closer to the Applicant's dealership and vice versa.

Moreover, Mr. Geckil's opinions regarding the significance of proximity seemed to vary depending upon which position benefitted his client as to a given statutory factor. When evaluating the harm to Burns Motors factor, he assumed that proximity is of the utmost importance (really, the *only* importance). On the other hand, when evaluating the adequate representation factor, Mr. Geckil was less impressed with the importance of proximity. He asserted that there was no need to improve customer convenience in the sales locality and downplayed the importance of the reduction in drive time that customers would enjoy by the addition of the sales point in Edinburg.

Mr. Geckil's assumption that all of Burns Motors's departments would suffer the same 24 percent drop in revenues was also unconvincing. For one thing, Burns Motors will not have to compete with a new body shop because the Applicant does not plan to have one. Moreover, even if one assumes as true the assertion that Burns Motors will lose 24 percent of its retail sales, it does not follow that the dealership's other departments would move in lock-step. Mr. Walter testified, convincingly, that it is likely that the profitability of the other departments would be quite different than that of retail sales.

Mr. Geckil's opinions are most undermined by his inaccurate assumption that any sales or service provided by the Applicant will necessarily be "stolen" from Burns Motors. The evidence establishes that, contrary to Mr. Geckil's assumptions, the amount of revenue to be generated in the Current Burns Sales Locality is not a "fixed pie." Testimony from a number of witnesses established that there is such a large untapped market that there is enough sales opportunity for the Applicant to take advantage of without meaningfully harming Burns Motors. The low MSR and registration effectiveness numbers in the locality represent many hundreds of CJDR sales that are currently not being made, but could be made, in the locality with the addition of a sales point in Edinburg. There are two primary factors that represent additional opportunities that could expand the market for both the Applicant and Burns Motors. First, as already discussed above, the CJDR brands are being substantially undersold in comparison to competitors such as Ford and Chevy. The addition of a new dealer could take customers away from the competing brands, not from Burns Motors.[355] Second, there is an unusually high rate of inselling in the Current Burns Sales Locality. With the addition of a second dealer in Edinburg, the rate of inselling could be lowered, thereby taking sales from more distant dealers, not Burns Motors. By Mr. Farhat's calculations, the total amount of vehicles the Applicant would be expected to sell to achieve 100 percent registration effectiveness is roughly 300 vehicles less than: (1) the total number of sales that are currently lost by Burns Motors's failure to achieve 100 percent registration effectiveness, plus (2) the total number of current insells in the county. Further, testimony from Mr. Farhat and others established that the addition of Applicant's dealership would, to a great extent, increase the size of the pie available to both dealerships, rather than merely stealing customers from Burns Motors. This phenomenon has been experienced elsewhere in Texas. For example, as explained by Mr. Tunic, an existing CJDR dealer in the Austin area saw its sales increase after a second dealership was opened nearby in 2012. Mr. Farhat testified about similar recent occurrences in Dallas.

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[355] Even Mr. Geckil conceded that Ford and Chevrolet would lose sales due to the addition of Applicant's dealership in Edinburg, but he did not attempt to quantify how many.

In its Rebuttal Brief, Burns Motors suggests that Mr. Geckil's 24 percent loss estimate is somewhat corroborated by the change in planning potential that would follow from the addition of the new sales point in Edinburg. For example, the planning potential for Burns Motors in 2015 was 3,377 vehicles. With the addition of the new sales point in Edinburg, Burns Motors's planning potential would drop to 2,235 vehicles per year.[356] Burns Motors suggests that Mr. Geckil's 24 percent loss estimate compares favorably to this roughly 33 percent drop in planning potential. But this is an apples-to-oranges comparison. Planning potential is not used to estimate sales, but to gauge working capital and minimum facility size requirements.[357] Moreover, Burns Motors has never sold nearly as many vehicles as its planning potential suggests it might. Thus, a drop in the dealership's planning potential does not suggest the dealership will suffer a loss of sales. It merely brings the planning potential roughly into line with its actual, current sales. For example, with the addition of the new dealership, Burns Motors's planning potential would be 2,235, which is roughly the amount of vehicles it sold in 2016.

Burns Motors also complains that the new dealership would be unusually close to it, and this unique closeness would cause Burns Motors undue competitive harm. But the evidence established that the distance between Burns Motors and the new dealership would not be unusually short, whether measured by the standards of other dealerships in the Rio Grande Valley or other dealerships throughout Texas. Notably, there are three each Ford and Chevrolet dealerships in the Current Burns Sales Locality and they appear to be performing well despite their proximity to one another.

Burns also complains that it recently completed a $9 million renovation and expansion in anticipation that it would continue to serve a large market, and the shrinking of that market would harm it by leaving the dealership with a facility that is bigger than it needs to be. The dealership is continuing to pay off the loan for the expansion and renovation. Burns Motors explained that it knowingly built more service bays, a larger waiting area, and a larger sales

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[356] FCA Ex. 82 at 15.

[357] Tr. 44, 46, 393-04; FCA Ex. 15.

facility than FCA required because it anticipated serving a large area. Now, Burns Motors is concerned that the addition of a dealer in Edinburg will cause it to have unutilized capacity. As pointed out by FCA, however, the renovations have left Burns Motors in a highly competitive posture. That is, the dealership now has greatly improved appearance and functionality in a state-of-the-art facility. Most importantly, Burns Motors never made any attempt to explain in any detail why or by how much its facilities will be outsized, nor did it perform any analysis to quantify the potential harm of an allegedly outsized facility. Therefore, any such alleged harm is too speculative to assess.[358]

The evidence also established that Burns Motors is uniquely well-positioned to compete with the new dealership. Protestant's dealership has averaged net profits of approximately [redacted] per year for the last couple of years. The company also maintains unusually high amounts of working capital on hand and is very effective at moving its inventory. As explained by Mr. Walter, Burns Motors is unusually profitable, stable, and well-diversified, in that it earns a substantially greater percentage of profits from its parts and services departments. All of these factors mean the dealership has substantial financial capacity, which gives it the luxury of many options to use in competing against the new dealership.

There are some additional benefits that would likely accrue to Burns Motors from the addition of the sales point in Edinburg. Ms. McDaniel testified that the addition would reduce Burns Motors's area of responsibility, thereby lowering its MSR requirement and helping the company improve its MSR performance. This, in turn, could help the dealership earn certain FCA sales incentives that it has been struggling to achieve. It would also help the dealership comply with its contractual obligations to achieve 100 percent of MSR. The new dealer would engage in more advertising and marketing of CJDR products in the area, thereby increasing brand awareness to the benefit of Burns Motors as well as the Applicant.

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[358] In a similar manner, several Burns Motors witnesses expressed concern that the dealership might lose certified service technicians if the Edinburg location was opened. However, because no analysis or further detail was provided, such an alleged harm is too speculative to assess.

For the foregoing reasons, the ALJs conclude that Burns Motors will suffer little or no harm from the addition of the new sales point in Edinburg and will enjoy some benefits from the addition. Thus, this is another factor that favors granting the Application.

E. The Public Interest

In demonstrating good cause for approval of an application, an applicant must show that approval of the application is in the public interest.[359]

Here, FCA and Applicant contend that the new dealership would benefit both CJDR customers and the public at large. They argue that the Paynes are experienced and successful auto dealers, and it is reasonable to anticipate that their Edinburg dealership will be well-run and involved in the community, just as the family's other dealerships in the region are.[360] Further, they argue, the new dealership will benefit the public by creating new jobs in Edinburg—positions created both in constructing the new facility, and working at the new dealership once it is opened—and by increasing local sales tax revenue.[361] FCA also argues that the new dealership will stimulate additional competition in the marketplace, which is expected to benefit the public by raising brand awareness, promoting price competition, and enhancing customer service.[362]

Burns Motors does not dispute that, in general terms, Edinburg would benefit from a new CJDR dealership because it would create jobs, raise local tax revenues, and be positively engaged in the community. Burns Motors also concedes that adding a new dealer into the market tends to stimulate competition, which ultimately benefits consumers.[363] However, Burns Motors urges that these public-interest benefits should not be given conclusive weight.

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359 Tex. Occ. Code § 2301.652(a)(5).

360 Intervenor FCA LLC's Opening Brief at 44.

361 Tr. 782, 1554.

362 Intervenor FCA LLC's Opening Brief at 44-45.

363 Protestant's Opening Post-Hearing Brief at 35-36.

Instead, Burns Motors argues that the general benefit to the public must be balanced against the harm that its dealership would experience, claiming that "a drastic loss of potential future sales by a currently successful dealer is not in the public interest."[364] The ALJs agree that no single factor is determinative of whether the Application should be granted. Still, the evidence does prove that establishing the new Edinburg dealership would provide general benefits to the public by creating jobs, increasing economic activity, and stimulating competition. This factor weighs in favor of granting the Application.

More specifically, FCA and Applicant argue that the public would benefit because the new dealership would be measurably more convenient to customers. FCA points to its expert's testimony showing that the proposed Edinburg dealership would reduce the average distance that consumers have to drive to reach a CJDR dealership by about 3.4 miles (from about 9.2 miles to 5.8 miles), or 6.8 miles round trip.[365] Burns Motors quibbles with the extent to which this represents a meaningful benefit to customers, citing to a prior case where the Division held that a reduction of "only a few miles" in average driving distance did not represent a significant improvement in customer convenience. Burns Motors also argues that this benefit inures only to the benefit of "the limited number of potential CJDR customers" who reside in the Proposed Applicant's Sales Locality, and does not represent a benefit to the public at large. In response, FCA counters with data showing that there are over 78,046 households currently located in the Proposed Applicant's Sales Locality, a not-insignificant number.[366] Further, FCA contends that the reduced driving distance represents a significant improvement, because the resulting distance is more in line with the average travel distance required to reach CJDR's closest competitors, which already have dealerships in both McAllen and Edinburg.[367] FCA also argues that customer convenience would be enhanced by the added convenience of having a CJDR service

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[364] Protestant's Opening Post-Hearing Brief at 36.

[365] Tr. 653-55, 662-63; FCA Ex. 96 at 76, 80.

[366] FCA Ex. 96 at 58.

[367] Tr. 218, 338-41, 406; FCA Ex. 82 at 14.

center in Edinburg, as Applicant plans to have at least 24 service stalls in the Edinburg dealership.[368]

The ALJs agree that the evidence shows customers would benefit by the convenience of a shorter drive and a second service location in Edinburg. This factor supports approving the Application.

F. Harm to Applicant

The next statutory factor to be considered in determining good cause for establishing a dealership is whether denial would result in "harm to the applicant."[369]

Here, Applicant asserts that it could lose "part of its investment in real estate for the proposed dealership" if the Application is not granted.[370] The evidence shows that, in 2016, Applicant paid $2,759,520.00 for the property where it plans to establish the Edinburg dealership.[371] If the Application is denied, Mr. Payne said he would likely sell the property, but he is not confident that he would be able to recoup the entire purchase price. Burns Motors disputes that Applicant is likely to sell the Edinburg property at a loss, pointing to the extensive testimony at the hearing about the rapid growth and commercial development in Edinburg. At the hearing, Mr. Payne acknowledged that the Edinburg tract he purchased for the dealership is an "excellent" property situated in a strong market for commercial real estate.[372] When pressed on cross-examination on whether he expected to lose money if he sold the property, Mr. Payne responded, "I cannot testify either way, yes or no."[373]

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368 Tr. 780-81.

369 Tex. Occ. Code § 2301.652(a)(6).

370 Applicant's Closing Brief at 5.

371 Tr. Ex. 109, 763; FCA Ex. 41.

372 Tr. 842-43.

373 Tr. 844.

Mr. Payne also testified that he has expended time and resources towards developing the Edinburg property to establish the new dealership, including funds paid for taxes, attorneys' fees, and engineering and architectural costs.[374] None of these expenses were quantified at the hearing, but FCA and Applicant argue that they represent actual expenses and opportunity costs that cannot be recouped if Applicant is ultimately unable to open the Edinburg CJDR dealership. Protestant counters that these anticipated damages are simply the kind of incidental risk that a dealer assumes when trying to establish a new point and do not represent actual or material harm.

As the parties with the ultimate burden of establishing good cause for granting the Application, FCA and Applicant bear the burden of showing that Applicant will be harmed if the Application is denied.[375] Here, they have shown that Mr. Payne might lose some unspecified portion of the total purchase price of his Edinburg property if he elects to re-sell it, but then again, he might not. FCA and Applicant have also shown that Mr. Payne has incurred some costs and expenses in pursuit of the Application, though they are largely unspecified and entirely unquantified. This evidence is simply too speculative to establish meaningful harm to Applicant.[376] The ALJs conclude that this factor neither weighs in favor of or against granting the Application.

G. Projections of Economic Conditions, Financial Expectations, and the Market

The final statutory factor requires the parties to address "reasonably foreseeable projections of economic conditions, financial expectations, and the market for new motor vehicles in the relevant market area."[377]

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374 Tr. 1554.

375 Tex. Occ. Code § 2301.652(a).

376 *See Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012) (property owner's testimony on damages must be based on more than intrinsic or speculative value of the property); *McCoy v. Waller Group, LLC*, 05-10-01479-CV, 2012 WL 1470147, at *1 (Tex. App.—Dallas Apr. 26, 2012, no pet.) (party's conclusory and speculative testimony was legally and factually insufficient to show any damages).

377 Tex. Occ. Code § 2301.652(a)(7).

Both parties agree that the areas in and around McAllen and Edinburg have seen significant population growth, economic growth, and growth in new vehicle sales over the last decade or more. Fact witnesses for all of the parties testified to the population growth and commercial, residential, and retail development they have witnessed firsthand.[378] FCA's evidence showed that the McAllen area gained 85,690 households between 2000 and 2016.[379] In Edinburg, the population grew by 73 percent between 2000 and 2016, while McAllen grew at a rate of 46 percent. Both areas far exceeded the statewide growth rate (35 percent) and the nationwide population growth (15.5 percent) during the same period.[380] According to Mr. Farhat, this sustained growth over 16 years shows that these new residents are staying long-term, and not just moving to Edinburg on a temporary basis.[381] He projected that, by 2021, the area will gain an additional 18,589 households, with the population increasing from 862,316 to 926,488, evidence that the region's growth will continue apace.[382]

At the same time, the region is seeing an upward trend in retail registrations for cars and trucks.[383] In particular, new vehicle registrations in the proposed Edinburg sales locality more than doubled from 2010 to 2016, which FCA says reflects strong growth in vehicle purchases.[384] The number of CJDR vehicles in operation has also climbed, and the McAllen sales locality now has more CJDR vehicles in operation than any secondary market in the nation.[385] Given the increased number of new vehicle registrations, the number of CJDR vehicles in operation is also expected to climb further, likely increasing future demand for vehicle service in the area.[386]

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[378] Tr. 67, 365-66; 765, 771-72, 855, 961-62.

[379] Tr. 639, FCA Ex. 96 at 50.

[380] Tr. 641-43.

[381] Tr. 643.

[382] Tr. 639; FCA Ex. 96 at 51, 54.

[383] Tr. 644-46; FCA Ex. 96 at 60-63.

[384] Tr. 645; FCA Ex. 96 at 61-63.

[385] Tr. 386-87.

[386] Tr. 648-49.

For the most part, Burns Motors does not dispute this evidence. However, it contends that the fast growth in recent years is not a reliable predictor of future economic conditions, and that recent data suggests the market for new vehicles in McAllen and Edinburg is softening. FCA's witnesses acknowledged that, since 2016, there has been a nationwide decline in new vehicle sales, including what Burns Motors calls a particularly steep decline in the sales of CJDR vehicles.[387] (FCA characterizes the decline as "slight," and notes that Ram truck sales have actually increased.)[388] Witnesses for both Applicant and Burns Motors testified to a general mood of cautiousness among consumers, mostly attributed to current political uncertainties in the border region where McAllen is situated.[389] And, while populations in McAllen and Edinburg have been growing, Burns Motors contends that, over the next five years, they are projected to grow at a slightly slower rate than the statewide average. Burns Motors also claims that, though the population is growing, median incomes in Hidalgo County are well below statewide and national levels.[390] To Burns Motors, these facts suggest that economic conditions are not favorable to adding a new CJDR dealership in Edinburg.

In response, FCA and Applicant argue that the current motor vehicle market is very strong and stable, and to the extent the growth has dipped in the last year or two, that is because it is unreasonable to expect the market to continue hitting new records each year.[391] They also point to data showing that over half of new vehicle sales are made to buyers with household incomes in the range of $20,000 to $75,000, and that most households in the Edinburg, McAllen, and Weslaco area have median household incomes in or above that range.[392] Further, employment levels are on the rise, which FCA believes shows that increasing numbers of residents will have the means to purchase vehicles.[393]

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387 Tr. 317, 421; FCA Ex. 96 at 63; Burns Ex. 1159.

388 Intervenor FCA USA's Response to Protestant's Opening Post-Hearing Brief at 38.

389 Tr. 833-34, 1088-89.

390 Burns Ex. 1155 at 13-14; Protestant's Opening Post-Hearing Brief at 39-41.

391 Intervenor FCA USA's Response to Protestant's Opening Post-Hearing Brief at 39-40.

392 Tr. 643-44; FCA Ex. 96 at 56-57.

393 Tr. 644; FCA Ex. 96 at 59.

At best, the ALJs find that growth in the McAllen-Edinburgh area will continue, though perhaps at a slower rate than the rapid levels experienced since 2000. There is certainly no evidence that the population or automobile market is shrinking. As discussed above, the Current Burns Sales Locality is currently the largest in the state, and Burns Motors—as the locality's lone CJDR dealer—has not been able to adequately represent CJDR brands there. Whether the market continues to expand at the rate that FCA and Applicant expect, or whether growth begins to slow as Burns Motors anticipates, the evidence shows that the economic conditions are plenty strong enough to support an additional CJDR dealership in the McAllen sales locality. This statutory factor weighs in favor of granting the Application.

VI. CONCLUSION

Applicant has met the burden of demonstrating good cause for the establishment of the proposed CJDR dealership in Edinburg. Accordingly, the ALJs recommend that the Division approve the Application for Payne Edinburg, LLC.

VII. FINDINGS OF FACT

Procedural Background

1. On May 23, 2016, Payne Edinburg, LLC, d/b/a Payne Chrysler, Dodge, Jeep, Ram (Applicant) filed its license application (Application) with the Texas Department of Transportation, Motor Vehicle Division (Division) for a license to operate a new Chrysler, Dodge, Jeep, Ram (CJDR) dealership in Edinburg, Texas.

2. The new dealership would be located at 3460 South I-69C, Edinburg, Texas 78542.

3. Burns Motors, Ltd. (Protestant or Burns Motors), which owns an existing CJDR dealership in McAllen, Texas, filed a protest with the Division on July 13, 2016.

4. On November 22, 2016, the Division referred the case to the State Office of Administrative Hearings (SOAH) for a contested case hearing, and issued a Notice of Hearing to the parties.

5. On February 16, 2017, the Administrative Law Judges (ALJs) issued Order No. 1, setting the prehearing schedule and hearing date.

6. The Notice of Hearing and Order No. 1 contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted.

7. FCA US, LLC (Intervenor or FCA), the exclusive dealer of CJDR vehicles in the United States, joined the case as an intervenor aligned with Applicant.

8. The hearing on the merits was held September 11-14 and 18-19, 2017, before ALJs Hunter Burkhalter and Sarah Starnes. At the hearing, Protestant was represented by its counsel, James E. Cousar; Applicant was represented by its counsel, William R. Crocker; and Intervenor was represented by its counsel, Mark T. Clouatre, Steven B. McFarland, and Adrienne L. Toon.

9. The record closed on December 19, 2017, after the parties' post-hearing briefs were submitted.

FCA and Industry Background

10. Chrysler, Jeep, Dodge, and Ram brands had historically been sold in separate dealerships but, in the early 2000s, FCA initiated a project known as "Project Genesis" to consolidate the separate-brand dealerships into full-line CJDR dealerships and ensure those dealerships were situated in optimal locations and facilities.

11. Project Genesis is substantially complete today, and resulted in the sale, closing, or termination of a number of dealerships nationwide. FCA now has about 2,600 dealers in the United States, including FIAT, Alfa, and CJDR dealers.

12. In 2009, while Project Genesis was underway, the nation experienced an economic downturn that affected the automotive industry. Annual retail sales of all makes and lines of vehicles dropped from around 17 million units to around 10 million units during this anomalous economic period.

13. During the economic downturn, CJDR vehicles sold relatively poorly from approximately 2008 to 2011.

14. The automotive industry has since rebounded, and 2016 saw the highest number of vehicle sales ever in the United States. Automakers are again selling around 17 million vehicles per year in the United States.

15. Despite the rebound in the industry as a whole, CJDR sales have been trending downwards for a year or two. As of the date of the hearing in September 2017, CJDR sales were about 7 percent lower in 2017 than they had been in 2016.

16. Burns Motors has been owned and operated by the Burns family since 1948. Its most recent Sales and Service Agreements with FCA—or "dealer agreements"—for the Chrysler, Dodge, and Ram brands were executed on February 20, 2013. The current dealer agreement for the Jeep line was executed in July 2017.

17. "Sales locality" is a term used by FCA to describe a dealership's assigned geographical area of responsibility. FCA generally measures a dealer's performance by the sales and vehicle registrations made within its own sales locality.

18. FCA has four sales localities in the Rio Grande Valley—McAllen, Rio Grande City, Weslaco, and Harlingen.

19. Within the McAllen sales locality, there are three main auto shopping regions—McAllen, Mission, and Edinburg.

20. Some sales localities are broken down further into trade zones. Burns Motors and the proposed Edinburg point are both in the McAllen sales locality, a single territory that would be broken down into two trade zones (one for McAllen, one for Edinburg) if the Application is approved.

21. The dealer agreements expressly reserve to FCA the right to add dealers to a sales locality.

22. "Minimum sales responsibility (MSR)" is the contractual sales performance standard that FCA sets for each of its dealers. A dealer's MSR is the number of vehicles a dealer must sell in order to capture the same market share in its sales locality that the CJDR brands average statewide, with the market share calculated based on recent new vehicle registrations. Dealers who fall below 100 percent MSR are considered underperforming and in breach of their dealer agreements.

23. "Registration effectiveness" is another metric FCA uses to measure brand performance, evaluating the percentage of all new vehicle registrations that are CJDR brands on a regional, statewide, and nationwide basis. FCA hopes that registrations in each sales locality in Texas will meet or exceed the averages in Texas and nationwide.

24. Because vehicles can be registered in a sales locality even if the owner purchased them elsewhere, vehicle registrations cannot be directly correlated to the dealer in a sales locality. Thus, registration effectiveness is used to evaluate how the CJDR brands are performing in a market.

25. "Planning potential" is a number FCA provides annually to each dealer that projects how many vehicles will be available to the dealer over the next several years, based on the anticipated production volume for each vehicle line, among other factors. Planning potential is not intended to be a predictor of vehicle sales, but is instead used solely to determine working capital guidelines and facility requirements for the dealers.

McAllen Market Study

26. Currently, Burns Motors owns the only full-line CJDR dealership in the McAllen sales locality, and it is situated in the city of McAllen. Burns Motors also owns a truck center in Mission; the truck center sells only Ram trucks, and does not offer any vehicle servicing.

27. McAllen is one of the 10 largest sales localities in the nation where FCA has only one dealer.

28. In August 2015, FCA conducted a market study of the McAllen sales locality to evaluate whether and how CJDR brands could perform better in that market. It relied on data through year-end 2014.

29. According to census data, Hidalgo County (where McAllen and Edinburg sit) had a population of about 550,000 in 2000; by 2017, that had grown to about 860,000, a population growth of about 49 percent in less than 20 years.

30. The metropolitan area of McAllen-Mission-Edinburg was identified by the U.S. Census Bureau as the fifth-largest metropolitan statistical area (MSA) in Texas, surpassing the El Paso MSA (now sixth-largest).

31. In the McAllen-Mission-Edinburg MSA, there has been a steady increase of year-over-year population growth since 2010.

32. The McAllen sales locality has experienced significant retail expansion and other development in the last decade or so. The University of Texas is building a medical school and hospital that is bringing more jobs to the region; a new sports arena is being built to host an NBA development team; and major retail is expanding, including new locations of WalMart and Home Depot.

33. At the time of the market study, the McAllen sales locality had a planning potential of around 3,300 or 3,400 units, the highest of any secondary market in Texas, and almost twice the planning potential of any comparable market in Texas.

34. The market study indicated that CJDR brands were not capturing as much of the market in McAllen as expected. In year-end data from 2014, CJDR had a 12.7 percent market share in Texas, but only a 9.8 percent market share in McAllen.

35. In terms of registration effectiveness, the market study also showed that CJDR brands were underperforming. In year-end data from 204, registration effectiveness in McAllen at that time was only 80 percent, and the CJDR brands failed to achieve 100 percent registration effectiveness in the McAllen region each year from 2010 through June 2015.

36. In the market study, when registration effectiveness was examined within different market segments (trucks vs. compact cars vs. SUVs, etc.), CJDR had only 15 percent of the market share of pickup trucks—one of its most popular segments—compared to 20 percent statewide, meaning that performance in McAllen in this popular segment was 5 percent below statewide average.

37. FCA's major competitors all have more than one dealership in the McAllen sales locality. Chevrolet and Ford—CJDR's main competitors in the market—both have three full-service, full-line dealerships in the region, one each in McAllen, Edinburg, and Mission. Nissan and Buick/GMC have dealerships in both McAllen and Edinburg.

38. The market study showed that those brands with more dealerships captured more market share and had better registration effectiveness than CJDR in the McAllen sales locality.

39. In 2014—the last full year that FCA looked at for the market study—Ford, with three dealerships, registered 5,471 vehicles, representing an 18.3 percent market share. Chevrolet, also with three dealerships, registered 4,905 vehicles, representing a 16.4 percent market share. Nissan, with two dealerships in the sales locality, registered 3,844 vehicles and had 12.8 percent market share. CJDR, with only one full-range dealership in the sales locality, registered 2,935 vehicles and had only 9.8 percent market share.

40. By contrast, there are currently three each of Ford, Chevrolet, and CJDR dealerships in El Paso, a smaller MSA than McAllen. With its three outlets, CJDR is exceeding 100 percent registration effectiveness in El Paso, and is the market leader, outperforming Ford, Chevrolet, and other competitors.

41. When the FCA market study was completed in August 2015, FCA's market representation department recommended that a new dealership should be established in Edinburg.

42. Subsequent analysis of more recent market data has only confirmed the trends shown in the market study. CJDR's market share has fallen from about 9.8 percent to 8.7 percent in the McAllen sales locality as of May 2017, still lagging behind its competitors with two or three dealerships.

43. After the market study was completed, the number of CJDR vehicles in operation climbed from roughly 16,000 units to almost 20,000 in May 2017.

44. The increased number of CJDR vehicles in operation shows that there are increasing numbers of vehicles that have only one CJDR service center available to service them in the McAllen sales locality.

45. Since the market study, CJDR's registration effectiveness declined from 80 percent to 79.6 percent in May 2017.

46. In the first six months of 2017, the brands with more than one dealership in the McAllen area all registered more vehicles than their brands' statewide averages, while brands with only one dealership in McAllen registered below their state and national averages.

47. In the first six months of 2017, CJDR represented 8.84 percent of the vehicle registrations in the McAllen sales locality in the first six months of 2017, while statewide the brand captured 11.86 percent of vehicle registrations.

Burns Motors's Performance

48. Burns Motors has been a large, stable, successful, and profitable dealership for FCA. The dealership is well-capitalized and financially strong.

49. Burns Motors earns several million dollars per year in net profit, maintains roughly double the amount of working capital than is required by FCA, and has a substantial amount of cash on hand.

50. Burns Motors is the highest volume CJDR dealer in the Rio Grande Valley, and it has historically sold far more vehicles than the CDJR dealers in the surrounding areas' sales localities. In 2014, for example, Burns Motors sold 2,635 new vehicles, while the CDJR dealer in Rio Grande City sold 292 vehicles, the dealer in Weslaco sold 1,445 vehicles, and the dealer in Harlingen sold 1,226 vehicles.

51. All of the dealerships in the Rio Grande Valley are below 100 percent MSR in their sales areas.

52. Because the population is larger, there are substantially more people buying and registering vehicles in the McAllen sales locality. Accordingly, the sales volume in the McAllen sales locality has been much higher than the other regional sales localities, and the performance goals required by Burns Motors's dealer agreements are higher than those for dealers in smaller markets.

53. Despite its comparatively high sales volume, Burns Motors has consistently been unable to meet its MSR as required by its dealer agreements. Other than in 2012, Burns Motors has fallen significantly below 100 percent MSR each year for over a decade.

54. Burns Motors's inability to achieve 100 percent MSR shows that there is substantial unmet opportunity for vehicle sales in the McAllen sales locality.

55. Burns Motors's current dealership was first constructed in approximately 1973, and by the early 2000s it had become outdated and in need of upgrades.

56. By about 2010, Burns Motors carried only the Chrysler, Dodge, and Ram lines at its dealership, and it wanted to add the Jeep line, as well. In 2011, FCA decided to award the Jeep line to Burns Motors, provided that Burns Motors would renovate or rebuild its dealership to meet current FCA facility standards.

57. The parties signed a 14-month letter of intent (LOI) in November 2011, with the minimum building requirements based on the then-current planning potential figures. The LOI expressly cautioned Burns Motors that its planning potential could change for any of a number of reasons, including the potential addition of another CJDR dealer in the region, and that the planning potential was not predictive of the number of vehicles that Burns Motors would sell.

58. In conjunction with the Jeep LOI, FCA tried to negotiate a Market Agreement with Burns Motors. Though the parties ultimately did not execute the Market Agreement, in their negotiations FCA expressly raised the possibility that another CJDR dealer could be established in the McAllen sales locality if Burns Motors's MSR performance did not improve.

59. In June 2013, the parties entered into a Term Agreement (rather than the standard, open-ended dealer agreement) for the Jeep line, and in October 2013, Burns Motors's plans for the expanded facility were formally approved, clearing the way for construction to begin.

60. When Burns Motors expanded its dealership, it elected to build a facility that was considerably larger than the minimum requirements set by FCA. This was neither required nor encouraged by FCA.

61. Burns Motors's preliminary and final building plans had to be reviewed and approved by FCA, but FCA reviewed the building plans only to ensure that the minimum size and facility requirements were met; it did not weigh in on whether Burns Motors should exceed them.

62. Mr. Burns, the dealership's owner, stated his belief that Burns Motors's building plans were made in line with the goals of Project Genesis—which he understood to be a push for fewer but larger dealerships, and to accommodate growth that Burns Motors anticipated in its planning potential.

63. Demolition of the old structures and construction of the new facilities proceeded in phases over several years, allowing Burns Motors to remain open throughout the expansion. In total, the new facility cost Burns Motors between $9 and $10 million and took over four years to design and complete, with the renovation finally completed in 2016.

64. The Term Agreement between Burns Motors and FCA was converted to a standard, open-ended dealer agreement for the Jeep line in July 2017.

65. Burns Motors's sales of Jeep vehicles have been slow, even several years after the line was awarded. Though the total number of Jeeps sold has increased each year, Burns Motors has yet to meet MSR for that brand.

66. In 2013, Burns Motors sold only 62 percent of its MSR in the Jeep line; in 2014, it sold 56 percent; in 2015, it sold 64 percent; in 2016, it sold 63 percent; and, in the first five months of 2017, it sold 66 percent of MSR.

67. Though Burns Motors believes the renovation and construction of its dealership from 2013 through mid-2016 negatively affected its MSR during those years, the evidence shows that Burns Motors also failed to meet its MSR target for six of the seven years prior to commencing construction in 2013.

68. Even though Burns Motors's MSR performance was declining during construction, the number of vehicles it was selling actually increased. While the Jeep brand was added in 2013, the subsequent increase in total sales was not just attributable to the new Jeep line. Burns Motors also sold more Chrysler, Dodge, and Ram vehicles during construction than it had in 2012, the year before construction began.

69. Driven by rapid growth and increased auto sales in the region, and by the addition of the Jeep line in 2013, Burns Motors's MSR nearly doubled (from 1,908 to 3,657 vehicles) between 2012 and 2014. Burns Motors's MSR has been increasing at a faster rate than sales.

Addition of a New Edinburg Point

70. FCA and Burns Motors have both long acknowledged the possibility of establishing another CJDR dealership in the McAllen sales locality, and since the early 1980s, Burns Motors has repeatedly expressed its interest in being the dealer who is awarded any such new point.

71. In late October 2015, FCA decided to accept the recommendation of the market study to establish a new Edinburg point.

72. Because area dealers are not typically informed of market studies unless and until those market studies lead to a decision that will directly impact a dealer, Burns Motors—which was in the midst of construction on its facility expansion—was unaware that FCA was moving towards opening a competing dealership in the sales locality.

73. Once FCA made the decision to open a new Edinburg point, its Dealer Placement Manager, Teresa McDaniel, notified Burns Motors by phone within days.

74. During their conversation, Ms. McDaniel tried to convince Burns Motors that a new dealership could be a beneficial development because it would reduce Burns Motors's area of responsibility and lower its overall sales requirements, which would help improve its MSR performance. She also explained that Burns Motors's planning potential would be adjusted to account for the new dealership in the area, and that this could reduce the minimum requirements for the facility then under construction.

75. Ms. McDaniel and, later, other FCA executives, suggested FCA would be receptive if Burns Motors wanted to downsize its building plans in view of the anticipated new dealership in Edinburg.

76. Burns Motors had already completed construction of its new service facility, demolished the old service facility, and was preparing to pour the foundation for the new sales office. It had also purchased custom materials for the facilities to be constructed. It would have been difficult, if not impossible, to halt construction at that point to reduce the scale of the dealership's expansion.

77. In discussions with FCA, Burns Motors's representatives have repeatedly stated that if there is going to be a new dealership in Edinburg, Burns Motors should be the one to open it.

78. FCA was contractually prohibited from considering Burns Motors for the new dealership because, several years earlier, FCA had given Payne Motors, LLC, and its owner, Edwin "Bud" Payne, an exclusive right of first refusal for the new dealership.

79. The right of first refusal was given in exchange for Mr. Payne's agreement to drop his protests of both FCA's decision to award the Jeep line to Burns Motors, and its decision to open a new dealership in Harlingen.

80. In January 2016, FCA notified Mr. Payne of the tentative award of the new Edinburg point to Payne Motors, and on March 4, 2016, Payne Motors entered into a letter of intent with FCA for the new Edinburg point. The letter of intent was amended in September 2016.

81. If FCA splits the McAllen sales locality into two trade zones—a McAllen trade zone and an Edinburg trade zone—the proposed McAllen trade zone would be geographically smaller than the proposed Edinburg trade zone, but the population in the McAllen trade zone would be considerably larger and more dense.

82. There would be approximately 400,000 people in the McAllen trade zone assigned to Burns Motors, approximately double the population of the geographically larger Edinburg trade zone that would go to the new dealer.

83. Even if a new Edinburg point is opened, Burns Motors can continue to sell vehicles to customers in Edinburg, just as it does now.

84. Assuming the Edinburg point is approved, the size of the resulting McAllen trade zone would be more in line with the Texas average.

85. Reducing the size of Burns Motors's trade zone will reduce the number of vehicles it needs to sell to achieve its MSR. In 2015, when the market study was performed, Burns Motors had met only 70.1 percent of its MSR through July of that year. If a new Edinburg point was opened and Burns Motors's MSR was measured in relation to the proposed McAllen sales zone (and not including the new Edinburg trade zone), then Burns Motors's sales that year would have represented 105 percent of its MSR, according to the market study.

86. The addition of a new Edinburg point—and ensuing reduction in the size of the McAllen trade zone—would also reduce Burns Motors's planning potential. That, in turn, would drive down the minimum facility requirements Burns Motors has to meet.

Payne Family Dealerships

87. Applicant is an entity owned and operated by Mr. Payne, a lifelong Weslaco resident and third-generation auto dealer.

88. Mr. Payne and his brother own Payne Auto Group, which presently owns nine dealerships across the Rio Grande Valley, with franchises to sell 18 different vehicle brands. The dealerships include Payne Volkswagen Mitsubishi in Brownsville; Payne Rio Dodge, Payne Rio Ford, and a CJDR dealership in Rio Grande City; and Ed Payne Motors, the CJDR dealership in Weslaco.

89. Payne Auto Group formed a new entity and filed an assumed name certificate to operate the anticipated Edinburg dealership as Payne Chrysler, Dodge, Jeep, Ram.

Adequacy of Representation

90. In absolute terms, Burns Motors sells a high number of vehicles, roughly 2,500 per year. In relation to the size of the market Burns Motors serves (the McAllen sales locality), however, Burns Motors is selling substantially fewer vehicles than it should.

91. The McAllen sales locality is unusually large, has grown over recent years at a remarkably fast pace, and is one of the 10 largest markets in the nation with only one CJDR dealer.

92. Metrics such as MSR and registration effectiveness, which take the size of the underlying market into account, demonstrate that the CJDR brands are not being adequately represented in the McAllen sales locality.

93. The McAllen sales locality has:

- by far the largest planning potential of any secondary CJDR market in Texas;
- the second worst registration effectiveness out of the 122 CJDR dealers in Texas;
- by far the largest MSR in Texas (Burns Motors must sell roughly 3,500 vehicles to achieve 100 percent MSR, while the second largest dealer must sell only roughly 2,000).

94. If, as envisioned in the Application, the McAllen sales locality is divided into two parts, such that Burns Motors is responsible for the McAllen Trade Zone, and Applicant is responsible for the Edinburg Trade Zone, Burns Motors will still have the largest sales locality in Texas in terms of MSR (albeit by a smaller margin).

95. The McAllen sales locality has such a large and growing number of CJDR vehicles in operation that it is increasingly impossible for one CJDR service department to adequately service them all.

96. It is reasonable and fair to use metrics such as MSR and registration effectiveness (which use sales in the State of Texas as the benchmark) to measure the performance of Burns Motors.

97. The evidence does not establish that MSR is a flawed metric.

98. In terms of demographics, there is only one other market in the nation that is similar to the McAllen sales locality: El Paso, Texas. If, instead of using sales in the State of Texas, sales in El Paso were used as the benchmark, Burns Motors's MSR performance would be even lower than it is with the State of Texas benchmark.

99. There is no credible evidence to suggest that Hispanic customers disfavor CJDR products at a higher rate than the general population, or that Burn Motors's poor MSR performance can be attributed to the high Hispanic population in the McAllen sales locality.

100. There is no credible evidence to suggest that Burns Motors's poor MSR performance can be attributed to a generalized unpopularity of CJDR products.

101. Population growth in the McAllen sales locality has been trending north and will continue to do so, meaning that the population centers are springing up further and further from Burns Motors and closer to Applicant's proposed sales point.

102. Burns Motors is underperforming in the sales locality in part because, on average, customers must travel farther to reach a CJDR dealer than they must to reach CJDR's competitors.

103. An unusually high rate of "insells" (meaning sales made by CJDR dealers located outside the McAllen sales locality to customers living inside the locality) are occurring, which indicates that Burns Motors is not adequately reaching customers within its locality.

Substantial Compliance with Dealer Agreement

104. The dealer agreements require Burns Motors to meet 100 percent MSR, a figure that represents the number of vehicles a dealer must sell in order to capture the same market share in its sales locality that the CJDR brands average statewide.

105. With the exception of 2012, Burns Motors has failed to meet 100 percent MSR for any year since at least 2006. Specifically, Burns Motors has achieved only the following MSR percentages:

2006: 58.03 percent,	2012: 102.99 percent,
2007: 70.04 percent,	2013: 86.52 percent,
2008: 62.81 percent,	2014: 72.05 percent,
2009: 57.05 percent,	2015: 70.24 percent,
2010: 74.71 percent,	2016: 67.10 percent, and
2011: 79.76 percent,	2017 (Jan-May): 67.77 percent.

106. An MSR percentage below 100 percent represents lost sales opportunities in the dealer's sales locality.

107. Between 2014 and 2016, Burns Motors was between approximately 28 and 33 percent below its MSR requirements, figures that represent over 1,000 vehicle sales per year that Burns Motors is not, but should be, making.

108. The dealer agreements authorize a dealer to request MSR adjustments from FCA if the dealer believes local circumstances are limiting its ability to achieve MSR.

109. In the many years Burns Motors has failed to achieve MSR, it has never availed itself of this provision to ask FCA to reduce the MSR requirements.

110. FCA has long been concerned by Burns Motors's poor MSR performance, and has repeatedly raised these concerns in conversations and correspondence with Burns Motors, both before and after this protest proceeding was initiated.

111. Burns Motors's breach of the MSR requirements represents a consistent failure by Burns Motors to sell as many vehicles as it contractually agreed to sell, and a consistent failure to capture the market share that dealers statewide average.

112. Burns Motors's breach of the MSR requirements undermines the very purpose of the dealer agreements, which is to sell CJDR vehicles.

113. Burns Motors is not in substantial compliance with the MSR requirements of its dealer agreements by virtue of its chronic failure to achieve 100 percent MSR.

114. The dealer agreements also require Burns Motors to achieve certain "Customer Promotor Scores," which purport to measure the percentage of sales and service customers who would recommend, or advocate for, a dealer to someone else.

115. Burns Motors fell 0.8 percent below the required percentage of sales customers willing to advocate for the dealership in one month, May 2017.

116. From January to May 2017, Burns Motors fell between 0.8 percent and 10.7 percent below the required percentage of service customers willing to advocate for the dealership.

117. The evidence failed to establish that Burns Motors's short-term failures to achieve required scores on customer satisfaction surveys constituted a material or substantial breach of the dealer agreements.

Desirability of Competitive Marketplace

118. The legislature has expressed a statutory policy that a competitive marketplace is desirable.

119. Burns Motors is currently the sole CJDR dealership in the McAllen sales locality, affording it the largest sales territory and highest planning potential in the entire state of Texas.

120. Adding a second full-line CJDR dealership in Edinburg will promote intra-brand competition in the region.

121. While Burns Motors is the only CJDR dealer in the McAllen sales locality, FCA's closest competitors have more than one dealership. Chevrolet and Ford both have three full-service, full-line dealerships in the region, one each in McAllen, Edinburg, and Mission. Nissan and Buick/GMC have dealerships in both McAllen and Edinburg.

122. In the four main shopping areas in the Rio Grande Valley (McAllen, Mission, Edinburg, and Weslaco), there are full-line CJDR dealerships only in McAllen and Weslaco, while FCA's main domestic competitors, Ford and Chevrolet, have full-line dealerships in all four shopping areas

123. CJDR dealerships are currently out-numbered in the marketplace, and the addition of a CJDR dealer in Edinburg will improve inter-brand competition.

Harm to Protesting Dealer

124. Burns Motors's assertion that the addition of the news sales point in Edinburg will cause it to suffer a 24 percent loss of revenues across all of its departments was based on faulty premises and assumptions, and was not proven.

125. The amount of CJDR revenues to be generated in the McAllen sales locality is not a "fixed pie," such that any sales or service provided by Applicant would necessarily be "stolen" from Burns Motors.

126. There is such a large, currently untapped market in the McAllen sales locality that there is enough opportunity for the Applicant to take advantage of without meaningfully harming Burns Motors.

127. The current low MSR and registration effectiveness numbers in the locality represent many hundreds of CJDR sales that are currently not being made, but could be made, with the addition of a new sales point in Edinburg.

128. The addition of the new sales point in Edinburg could:

- take customers away from the competing brands, not Burns Motors; and
- reduce the unusually high rate of inselling, thereby taking customers away from more distant CJDR dealers, not Burns Motors.

129. The total amount of vehicles the Applicant would be expected to sell to achieve 100 percent registration effectiveness in the Edinburg Trade Zone is roughly 300 vehicles less than: (1) the total number of sales that are currently lost by the failure to achieve 100 percent registration effectiveness in the McAllen sales locality, plus (2) the total number of insells in the locality.

130. The evidence does not establish that Applicant's dealership would be unusually close to Burns Motors, whether measured by the standards of other dealerships in the Rio Grande Valley or other dealerships throughout Texas.

131. Burns Motors did not attempt to quantity or explain in detail its assertion that it would be harmed by the addition of a new sales point in Edinburg because Burns Motors's recently renovated and expanded facilities would then be larger than they needed to be. As such, this alleged harm was too speculative to assess.

132. Burns Motors has greatly improved appearance and functionality in a state-of-the-art facility, placing it in a highly competitive posture.

133. Burns Motors is unusually profitable, stable, well-diversified, and earns a substantially greater than normal percentage of profits from its parts and services departments. All of these factors mean the dealership has substantial financial capacity which gives it the luxury of many options to use in competing against a new dealership in Edinburg.

134. The addition of the dealership in Edinburg will reduce Burns Motors's area of responsibility, thereby lowering its MSR requirement and helping the company improve its MSR performance. This, in turn, could help the dealership earn certain FCA sales incentives that it has been struggling to achieve, and help the dealership comply with its contractual obligations to achieve 100 percent of MSR.

135. The new dealer in Edinburg will engage in more advertising and marketing of CJDR products in the area, thereby increasing brand awareness to the benefit of Burns Motors as well as the Applicant.

Public Interest

136. The Paynes are experienced and successful auto dealers, and it is reasonable to anticipate that the proposed Edinburg dealership would be well-run and involved in the community.

137. The proposed Edinburg dealership will benefit the public by creating new jobs in Edinburg, both positions created in constructing the new facility and positions working at the new dealership once it is opened.

138. The proposed Edinburg dealership will benefit the public by increasing local sales tax revenue.

139. The proposed Edinburg dealership will stimulate additional competition in the marketplace, which is expected to benefit consumers by raising brand awareness, promoting price competition, and enhancing customer service.

140. The proposed Edinburg dealership will reduce the average distance that consumers have to drive to reach a CJDR dealership by about 3.4 miles (from about 9.2 miles to 5.8 miles), or 6.8 miles round trip.

141. The resulting distance is more in line with the average travel distance required to reach CJDR's closest competitors, which already have dealerships in both McAllen and Edinburg.

142. Customers would benefit by the convenience of a shorter drive to reach a CJDR dealer.

143. Burns Motors is currently the only CJDR service center in the entire McAllen sales locality, and customers would benefit by the convenience of having a second CJDR service center in Edinburg.

Harm to Applicant

144. In 2016, Applicant paid $2,759,520.00 for the real property where it plans to establish the Edinburg dealership.

145. The property is situated in the center of a cluster of dealerships on the expressway in Edinburgh, about a quarter mile from a Chevrolet dealership, less than two miles from a Ford dealership, and near several other domestic and import dealerships in the cluster.

146. If the Application is denied, Mr. Payne might sell the property, but cannot say whether or not he would lose money if the property is sold.

147. Mr. Payne has expended time and resources towards developing the Edinburg property to establish the new dealership, including funds paid for taxes, attorneys' fees, and engineering and architectural costs. None of these expenses were specified or quantified in the evidence adduced in this case.

148. The evidence is too speculative to establish any likely harm to Applicant if the Application is denied.

149. This factor of "harm to the applicant" neither weighs in favor of or against granting the Application.

Economic Projections

150. The areas in and around McAllen and Edinburg have seen significant population growth, economic growth, and growth in new vehicle sales since 2000, including new commercial, residential, and retail development.

151. The McAllen-Edinburg area gained 85,690 households between 2000 and 2016. By 2021, the area is expected to gain an additional 18,589 households, with the population increasing from 862,316 to 926,488.

152. In Edinburg, the population grew by 73 percent between 2000 and 2016, while McAllen grew at a rate of 46 percent. Both areas far exceeded the statewide growth rate (35 percent) and the nationwide population growth (15.5 percent) during the same period.

153. The sustained growth over 16 years shows that these new residents are staying long-term, and not just moving to Edinburg on a temporary basis.

154. The region is seeing an upward trend in retail registrations for cars and trucks, and new vehicle registrations in the proposed Edinburg sales locality more than doubled from 2010 to 2016.

155. The McAllen sales locality currently has more CJDR vehicles in operation than any secondary market in the nation.

156. Given the increased number of new vehicle registrations, the number of CJDR vehicles in operation is also expected to climb further, likely increasing future demand for vehicle service in the area.

157. Since 2016, there has been a nationwide decline in new vehicle sales, including a decline in the sales of CJDR vehicles, other than Ram vehicles.

158. There is some evidence that the rate of population growth in McAllen and Edinburg is beginning to slow.

159. Median incomes in Hidalgo County are below statewide and national median levels.

160. Over half of new vehicle sales are made to buyers with household incomes in the range of $20,000 to $75,000, and most households in the Edinburg, McAllen, and Weslaco area have median household incomes in or above that range.

161. Further, employment levels in the area are on the rise, indicating that increasing numbers of residents in the McAllen and Edinburg sales areas will have the means to purchase vehicles.

162. While growth may be slowing from the rapid levels experienced since 2000, there is no evidence that the population or automobile market in the McAllen-Edinburg area is shrinking.

163. Economic conditions are strong enough to support an additional CJDR dealership in the current McAllen sales locality.

VIII. CONCLUSIONS OF LAW

1. The Division has jurisdiction and authority over the subject matter of this case. Tex. Occ. Code ch. 2301, subchs. N, O.

2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this matter, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 2301.704; Tex. Gov't Code ch. 2003.

3. Notice of the Application was properly provided. 43 Tex. Admin. Code § 215.105.

4. Protestant timely filed its notice of protest. 43 Tex. Admin. Code § 215.106.

5. Notice of Hearing was properly provided. Tex. Occ. Code §§ 2301.705, .707; Tex. Gov't Code §§ 2001.051-.052; 43 Tex. Admin. Code § 215.34.

6. Protestant has standing to protest Applicant's application. Tex. Occ. Code § 2301.652(b)(2).

7. Applicant has the burden of showing by a preponderance of the evidence that good cause exists for the establishment of a dealership. Tex. Occ. Code § 2301.652(a); 1 Tex. Admin. Code § 155.427.

8. The CJDR product lines are not being adequately represented as to sales and service in the McAllen sales locality. Tex. Occ. Code § 2301.652(a)(1).

9. Protestant is not in substantial compliance with its dealer franchise agreements. Tex. Occ. Code § 2301.652(a)(2).

10. A new CJDR dealership in Edinburg will promote healthy interbrand and intrabrand competition in the relevant markets. Tex. Occ. Code § 2301.652(a)(3).

11. Establishing a new CJDR dealership in Edinburg will not cause Protestant to suffer any significant harm. Tex. Occ. Code § 2301.652(a)(4).

12. Establishing a new CJDR dealership in Edinburg is in the public interest. Tex. Occ. Code § 2301.652(a)(5).

13. The evidence failed to establish that Applicant will be financially harmed if the Application for a new CJDR dealership in Edinburg is denied. Tex. Occ. Code § 2301.652(a)(6).

14. Current and reasonably foreseeable projections of economic conditions, financial expectations, and the market for new motor vehicles in the relevant market area favor the establishment of a new CJDR dealership in Edinburg. Tex. Occ. Code § 2301.652(a)(7).

15. Applicant met its burden of demonstrating good cause for the establishment of the proposed CJDR dealership in Edinburg. Tex. Occ. Code § 2301.652(a).

16. Applicant's application for a new dealership in Edinburg should be granted.

SIGNED February 15, 2018.

HUNTER BURKHALTER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SARAH STARNES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

Upload Date: 20180302155740 Account Number: 3101 Upload Description: Protestant'sExceptionstoProposalforDecision3.02.18

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

BURNS MOTORS, LTD., Protestant, v. PAYNE EDINBURG, LLC d/b/a PAYNE CHRYSLER, DODGE, JEEP, RAM, Applicant, & FCA US LLC, Intervenor.	§ § § § § § § § § § § § § § §	SOAH DOCKET NO. 608-17-1285.LIC MVD DOCKET DOCKET NO. 16-0028 LIC

PROTESTANT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

March 2, 2018

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TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

BURNS MOTORS, LTD., Protestant, v. PAYNE EDINBURG, LLC d/b/a PAYNE CHRYSLER, DODGE, JEEP, RAM, Applicant, & FCA US LLC, Intervenor.	§ § § § § § § § § § § § § § §	SOAH DOCKET NO. 608-17-1285.LIC MVD DOCKET DOCKET NO. 16-0028 LIC

PROTESTANT'S EXCEPTIONS TO THE
PROPOSAL FOR DECISION

Protestant Burns Motors, Ltd. ("Burns"), hereby files its Exceptions to the Proposal for Decision ("PFD"), which was filed on February 15, 2018. These exceptions are timely filed pursuant to SOAH Procedural Rule § 155.507. These exceptions will track the Section and Subsection numbers in the PFD, and will restate, in italics, only those proposed Findings of Fact and Conclusions of Law to which Burns excepts. The basis for Burns' exceptions will be set out in part after the Section or Subsection of the PFD excepted to, and in part following the proposed Findings of Fact and Conclusions of Law excepted to.

I. PROCEDURAL HISTORY

Burns has no exceptions to this Section of the PFD.

II. APPLICABLE LAW

Burns has no exceptions to this Section of the PFD.

III. FACTUAL BACKGROUND

A. Overview of CJDR Brands and Dealership Management

Burns excepts to the PFD's discussion of "registration effectiveness" on p. 8 up to and including footnote 43 because the cited testimony does not support the statement that *"FCA*

<< AGENDA

hopes that registrations in each sales locality in Texas will meet or exceed the averages in Texas and nationwide." Whatever FCA may "hope," it would be a mathematical impossibility for registration effectiveness in each Texas sales locality to exceed the statewide average because all of the entities in a sample group, in this case all of the CJDR sales localities in Texas, cannot exceed the average for the sample group. In fact, FCA's own data shows that half of the CJDR vehicles in Texas were registered in sales localities that fell below 100% registration effectiveness, and half were registered in sales localities that were above 100% registration effectiveness. FCA's listing of the Texas sales localities that are above and below 100% registration effectiveness, **Ex. 97-027** (Farhat Expert Report) shows that most rural and small city CJDR sales localities achieve 100% or more registration effectiveness, but that none of the five largest sales localities (Houston, Dallas, San Antonio, Ft. Worth, Austin) achieve 100% registration effectiveness. If anything, FCA's data on registration effectiveness confirms the stronger performance of CJDR brands in non-metropolitan markets and their weaker performance in large Texas cities and high population metropolitan statistical areas. If FCA does have the expectation (or hope) that it will achieve 100% or better registration effectiveness in all sales localities, that position clearly illustrates the inherent unreasonableness of FCA holdings its dealers to an impossible standard.

B. Market Study of the McAllen Sales Locality

Burns excepts to the statement on p. 9 of the PFD that *"FCA has four main sales localities in the Rio Grande Valley."* FCA has five sales localities in the Rio Grande Valley. Parts of the Market Study, **Ex. 82a-** did fail to discuss and analyze the Don Johnson CJDR dealership in Brownsville, Texas, a sales locality that Burns consistently outperforms. Elsewhere in the Market Study, **Ex. 82a-039** and following pages and maps, the Don Johnson dealership in Brownsville was included and compared. FCA's expert witness, Mr. Walter, also included the Don Johnson dealership in Brownsville in his expert report relating to the comparative position of Burns vis a vis other CJDR dealerships. **Ex. 99.** A more accurate finding of fact would state that "*FCA has five main sales localities in the Rio Grande Valley*."

Burns excepts to the discussion of Mr. Cholagh's testimony on p. 9 of the PFD (footnote 54) to the effect that McAllen was projected to grow faster than the state as a whole, in that it is not the best and most relevant evidence on that question in the record. FCA's Supplement to the

Market Study released just before the hearing, in August 2017, **Ex. 101-3** states, that "HH (households) in McAllen are growing at *about the same rate* as the State."

Burns excepts to the discussion of registration effectiveness in the McAllen Sales Locality on p. 11 of the PFD in that it inaccurately portrays that sales locality's registration effectiveness as being unusually low, when actually it is representative of the 2016 registration effectiveness of the five CJDR dealers in the Rio Grande Valley shown on **Ex. 102-101**: Brownsville-65.4%; Harlingen-92.7%; Weslaco-94.2%; Rio Grande City-84.2%. The Farhat Expert Report, **Ex. 97-029,** reflects a similar pattern of registration effectiveness in the Rio Grande Valley for 2016, with the five Rio Grande Valley sales localities registering 5464 vehicles as opposed to a total of 6797 vehicles that FCA determined to be the number of "registrations necessary" to achieve 100%. FCA's **Ex.97-029** shows a registration effectiveness of 78.5% for the McAllen sales locality, which is only a point or two below the 80% cumulative registration effectiveness of the five Valley sales localities (5464 actual sales v. 6797 "registrations necessary"). By relying on a statewide standard of registration effectiveness, rather than a number targeted to new vehicle registrations in the Rio Grande Valley the PFD embraces the FCA position that low vehicle registrations in the McAllen Sales Locality are attributable to Burns, when FCA's own numbers confirm CJDR's underwhelming level of registrations throughout the region.

Burns excepts to the PFD's reliance, in this section and elsewhere, on the concept of "opportunity" as if that were a recognized metric or concept within the field of economics. The PFD approvingly cites the testimony of FCA witnesses Mr. Cholagh (p. 11), Mr. Chandler (p.12) and Mr. Tunic (p. 15) that a registration effectiveness of below 100% is evidence of "*lost opportunity*." The testimony of Burns' expert Mr. Geckil, the only economist to testify in this proceeding, made it clear that the term "opportunity" has no recognized meaning within the discipline of economics, which instead quantifies "supply and demand" to evaluate markets. (**Tr. 1264:6 to 1265:8)** "Opportunity," as used by FCA, is based on the flawed concept that every CJDR sales locality can and should meet or exceed the statewide average for CJDR registrations, at the risk of the noncomplying dealers' performance being deemed unsatisfactory. The concept of "opportunity" tied to a statewide average fails to take into account differences in consumer preference, such as the low demand for CJDR vehicles across the Rio Grand Valley, the stronger demand for CJDR vehicle in rural and non-metropolitan markets, and other vehicle sales

variations attributable to local market conditions. In its Rebuttal Brief, Burns cited the TDMV case *Don Davis Nissan Grapevine, Inc. v. Grubbs Nissan Mid-Cities, Ltd.*, Docket No. 03-0028-LIC (PFD Dated Nov. 20, 20015, Final Order Dated May 15, 2006. The *Don Davis* PFD and Order effectively analyzed why a generic market metric that fails to address individualized market conditions is improperly based on the "theory of embedded inadequacy." *Don Davis* PFD at 15. This analysis of remains valid and is applicable to the FCA evaluation of Burns' new vehicle sales and the McAllen Sales Locality registration effectiveness

C. Burns Motors's Performance in McAllen Sales Locality

1. Dealer Background

Burns has no exceptions to this subsection of the PFD.

2. Burns Motors's Sales Performance

Burns excepts to the discussion of Burns' performance in terms of Minimum Sales Responsibility ("MSR") in this section of the PFD to the extent that the PFD accepts FCA's position that a dealer MSR below 100% evidences unsatisfactory sales performance and a breach of the terms of the FCA franchise agreement. This exception is more fully discussed in Section III. A and III. B, above and Section IV. B, below.

3. Expansion of the Dealership and Addition of the Jeep Line

Burns has no exceptions to this subsection of the PFD.

4. Performance During and Since Expansion

Burns excepts to the discussion of Burns' performance in terms of MSR in this subsection of the PFD to the extent that the PFD accepts FCA's position that an MSR below 100% *per se* establishes a dealer's unsatisfactory sales performance and breach of its franchise agreements. This exception was more fully discussed in Section III. A and III. B, above and Section IV. B, below.

D. Addition of a New Edinburg Point

Burns excepts to this portion of the PFD to the extent that the PFD implicitly accepts the testimony of FCA witnesses McDaniel and Tunic that Burns, when FCA notified Burns of plans to award a new Edinburg point, could have scaled back its ongoing facilities expansion in a significant way (p. 29). The PFD does note the unrebutted testimony of the Burns witnesses: that

it was functionally impossible at that late date, after the new service facility was completed, plans and permits were complete, concrete was ready to pour, and the custom built steel had been purchased, to totally redesign and reduce the size of the new Burns dealership facilities. Burns recommends the addition of a finding of fact to reflect this testimony as follows: FF#__: *In late 2015, when Burns first learned of plans to award a new FCA point in Edinburg, it was economically unfeasible and functionally impossible for Burns to scale back the size of its new dealership facilities.*

1. Burns Motors's Desire to Open the New Point

Burns has no exceptions to this subsection of the PFD.

2. Applicant's Right of First Refusal

Burns has no exceptions to this subsection of the PFD.

3. Anticipated Impact of the New Dealership

Burns excepts to the discussion on p. 36 of the PFD to the extent that it implies that there currently is, or in the future would be, a "longer wait" for service at Burns Motors. No evidence supports that speculative assertion. To the contrary, the record shows that Burns has an unusually large, efficient and capable service department with substantially more service bays than FCA required at the time Burns sought and obtained FCA approval for its facilities plans. The record shows that Burns in 2013 planned its service capacity based on a planning potential number of about 3600 vehicle sales, which turned out to be close to the planning potential of 3377 vehicles that FCA actually assigned to the dealership in 2015 and the MSR of 3683 that FCA assigned to Burns in December 2015. **Ex. 82-015; Ex. 68**. In terms of the number of service bays, number of highly trained and certified technicians, speed of service, and overall customer satisfaction, the evidence shows that Burns is currently capable of meeting the service needs of both McAllen Sales Locality customers and numerous CJDR owners from outside of the McAllen Sales Locality, and that Burns will continue to be able to do so in the foreseeable future.

4. Anticipated Benefit for Customers

Burns excepts to the discussion in this subsection of "customer convenience" in that the numbers and data discussed by Mr. Cholagh (p. 36 of the PFD) are based on a <u>hypothetical</u> location for an Edinburg dealership rather than the actual location of the proposed Payne

Edinburg dealership. Mr. Cholagh relied on **Ex.82a-14,** the FCA Market Study, which was commissioned in August 2015 and completed before a location had been selected for a Payne Edinburg dealership. **Ex. 82a** was effectively mooted as a "convenience" analysis when Mr. Payne acquired the proposed location. The reduced driving distance for a potential customer in the proposed Edinburg Trade Zone was calculated by Mr. Farhat in his expert report, **Ex. 96-76, -80**, as being 3.4 miles driving distance rather than the 3.9 miles predicted in the Market Study relied on by Mr. Cholagh. In Section V.E. of the PFD, discussion of the Statutory Factor "Public Interest," the PFD cites the 3.4 miles distance testified to by Mr. Farhat rather than the higher number cited by Mr. Cholagh.

E. Payne Family Dealerships

Burns has no exceptions to this Section of the PFD.

IV. EXPERT OPINIONS

A. Opinions of Herbert E. Walter

Burns excepts to portions of this discussion on pp. 40-41 of the PFD to the extent that the PFD appears to accept the position of this witness that a protesting dealer is not harmed within the meaning of the Occupations Code if that dealer has working capital sufficient to partially mitigate the effects of reduced revenue and reduced profitability attributable to a new competing dealership. While the ability to "weather any storms" (in Mr. Walter's words) may result in the protesting dealer suffering less harm that it would suffer if it lacked adequate capitalization and was not profitable, that ability does not establish that a protesting dealer who loses sales and profitability to a new competitor is not "harmed," within the meaning of the statute, which uses the term "any harm to the protesting dealer."

Burns further excepts to the PFD's apparent acceptance of testimony that the protesting dealer will not be "harmed" within the meaning of the statute because it has the "luxury" of competing with a new dealer by 1) increasing advertising; 2) paying more for trade-in vehicles; 3) becoming more aggressive on pricing; and 4) changing its compensation structure. In the real world, each of these options would likely increase the operating costs of Burns and/or reduce its profitability. If these strategies would increase the revenues and profitability of Burns, sound economic principles dictates that a successful and sophisticated dealer like Burns would have already taken them, with or without the addition of a nearby competitor. In effect, the witness is

merely saying that Burns will need to raise its expenditures and reduce its revenues to address the effects of the new point- another way of saying that Burns will be harmed.

B. Opinions of Sharif Farhat

1. Adequacy of Representation

Burns excepts to the discussion, on p. 46, of the witness's conclusion that it is "not unusual" in Texas for two CJDR dealerships to be located within six aerial miles of each other. As pointed out in Burns exceptions to Section V.D of the PFD, below, more than 90% of CJDR dealers in Texas do not have a competitor located as close as the Payne Edinburg point would be to the Burns dealership in McAllen.

Burns excepts to the PFD's discussion of the use of the normative term "should" and "should have sold" by the witness as set out on p. 46. As discussed above in Section III. B of these exceptions, that terminology is based on the "theory of embedded inadequacy" discussed in the *Don Davis* PFD and Order, which holds a dealer liable for meeting statewide or other large scale performance metrics without any evaluation of individual market factors and circumstances affecting that dealership or its sales area.

Burns excepts to the discussion on p. 47 of the CJDR sales localities that do and do not meet CJDR's "registration effectiveness" goals in that the discussion fails to distinguish between CJDR's small number of metropolitan (big city, multi-trade zone) sales localities and the much larger number of rural and non-metropolitan, mostly single trade zone sales localities. This CJDR statewide sales performance gap should be noted in the PFD, as confirmed by FCA Exhibits 97-027-29; 96-069; and 96-094-094. As discussed in Section III.A of these exceptions, above, none of the CJDR sales localities in the state's five largest urban areas (or in McAllen) achieve 100% registration effectiveness, while the great majority of small and non-metropolitan sales localities do. While Mr. Farhat notes that 70% of the CJDR vehicles sold in Texas are sold in markets comparable in size to the McAllen sales locality, The PFD should note that based on the way CJDR calculates "registration effectiveness" half of the CJDR vehicles sold in any given time frame are and necessarily will continue to be sold in sales localities that fall below 100% registration effectiveness.

Burns excepts to the discussion on p. 50 of the PFD of the effect of distance on a dealer's ability to penetrate a market in that it unduly focuses on the difference between current mileage

for a resident of the proposed Edinburg Trade Zone when driving to a CJDR dealership and the distance when driving to a non-CJDR competitor's dealership. While the testimony and exhibits of Mr. Farhat do indicate that this driving distance for residents of that proposed new trade zone would be reduced, because the proposed Payne Edinburg point and the existing Burns dealership are very close together the reduction would not be significant. Nor would it be a significant customer convenience factor in an area with an excellent road network and a population with a proven tendency to shop for CJDR vehicles at dealerships up to three counties away from their place of residence.

Finally, with respect to the discussion on p. 50 of the PFD of the preference or lack of preference of Hidalgo County residents for vehicles other than CJDR line/makes, Burns excepts because the relevant factor is not why that preference exists, **but the fact that it exists not just in McAllen and the McAllen Sales Locality but up and down the Rio Grande Valley.** None of the five CJDR sales localities in the Rio Grande Valley achieves 100% registration effectiveness, and the 78.5 % registration effectiveness in the McAllen Sales Locality that FCA complains of- as discussed in Section III.B of these exceptions (p. 3) is only a point or two below the registration effectiveness for the entire Rio Grande Valley. The relevant evidence for assessing CJDR's poor sales performance in the Rio Grande Valley is not just an issue of "representation" and the causation for CJDR's performance cannot simply be focused on Burns. For whatever reason, CJDR registrations across the Valley region lag well below statewide levels even though there are five CJDR dealers in the Valley.

2. Harm to Burns Motors and the Public Interest

Burns excepts to this subsection's discussion of customer convenience distance changes for residents of the proposed Edinburg Trade Zone for the reasons discussed in Section IV.B.1 above. The reduced drive distance for residents of the new trade zone should not bee considered meaningful under TDMV precedent, and a the importance of a 3.4 mile reduction is further undercut by this area's excellent road network and the vehicle shopping habits and shopping flexibility of the residents of the Rio Grande Valley.

Burns excepts to the PFD's continuing reliance on the concept of "opportunity" as discussed on pp. 51 and 52 for the reasons set out in Section III.B (pp. 3-4) of these exceptions. Further, there is no evidentiary or logical basis supporting the opinion of the witness, cited by the PFD at p. 52, that the new dealership would "*increase the size of the pie*" but not "*steal*

customers from Burns Motors." Burns does not take exception to the concept of "increasing the size of the pie" to the extent that it means two CJDR dealers operating in a given sales territory will likely sell more vehicles than the original dealer would sell if it remained the sole dealer there. However, given the PFD's approving discussion of the testimony of Mr. Farhat (cited on p. 50) that "*a dealer's ability to penetrate a market declines with distance*" and the undisputed fact that a new Payne Edinburg dealership will be closer to a great many current and potential Burns customer, it makes no sense to accept the rosy prediction that Burns will not lose customers to a competing dealer who will 1) be in Burns former sales locality; and 2) be closer to many customers there.

Burns notes, in the context of this exception, that Mr. Farhat cited statistic from the CJDR Dallas Sales Locality in the period 2011 to 2014 as one example of a multi-trade zone (11 dealer) sales locality in which addition of a new dealer to the sales locality did not have the effect of reducing overall sales in the sales locality. Nor should it be expected to do so. An examination of the sales locality map (**Exs. 96-092**) and the sales data for the 11 dealers in the old and new trade zone (**Exs. 96-71-72**) shows that the sales for CJDR vehicles in the sample period (2012-2014) following the addition of a new dealership in Richardson grew by 35% nationwide and 39% in Texas. During that same period, a time of very rapid population and economic growth in greater Dallas, CJDR new vehicle sales in the Dallas Sales Locality as a whole exceeded the Texas and national growth rates. However, in the dealerships in three trade zones close to the new Richardson dealership, the two year 2012-2014 results were a **drop** of 17% (Plano), a drop of 7% (Garland) and a comparatively weak increase in sales of 19% (McKinney). Burns agrees that adding a dealership to a very large multi-dealer, multi-trade zone sales locality like Dallas (FCA's second largest sales locality in Texas) will not necessarily result in a decrease in sales in all or most of the dealerships in the sales localities, but in the case of the new Richardson dealership it certainly coincided with a substantial drop in sales or substandard growth in sales for several of the closest CJDR dealers. It is significant that this decline in sales of these nearby dealers in the Dallas sales locality occurred during a period of expansive sales growth in Texas, in Dallas and nationwide as the country recovered from a steep recession and Chrysler emerged from Bankruptcy.

In the case of Payne Edinburg and Burns, there would be one dealership added to a single dealer sales locality. Going from one to two dealers in a sales locality is not comparable

to adding one or two dealers to a huge sales locality with ten dealers, as was the case in Dallas. If current trends hold in the coming year or two, the new Payne Edinburg dealership would go into business at a time when the CJDR line/makes collectively will have had two years or more of declining sales nationwide, in Texas, and in the Rio Grande Valley. To summarize, Burns excepts to the PFD's apparent acceptance of the premise that the cited evidence of sales from Dallas establishes that a new dealership in Edinburg will not take sales away from Burns and cause harm to Burns.

C. Opinions of Ilhan Geckil

1. Adequacy of Representation

Burns excepts to the PFD's discussion of this portion of Mr. Geckil's testimony and expert report in that the PFD implicitly criticizes Mr. Geckil for 1) asserting that a metric other than statewide MSR would be more appropriate for evaluating Burns vehicle sales performance, including a "bundle of 20 or so other markets" more similar to the McAllen Sales Locality; but 2) not preparing and offering such an analysis into evidence. Burns reasserts that the burden of proof in a new point case like this one rests with the applicant to establish good cause, including proving that a current dealer is not adequately representing the brand. The point of Mr. Geckil's testimony was the flawed nature of MSR as a metric. His testimony as to **why a CJDR's current statewide MSR is invalid as a performance metric** is more significant than his suggestions as to what might replace it. Mr. Geckil has testified that Burns is being held to an inappropriate performance standard, but it is not the burden of Burns or its expert to design and analyze some other, more accurate standard.

2. Effect on CJDR Registrations in the Current Burns Sales Locality

Burns excepts to the discussion in this Section of the PFD to the extent that it suggests that it was the burden of Burns and its expert to quantify the number of new CJDR vehicle sales that would likely result from adding a new point in a newly created Edinburg Trade Zone. The Occupations Code places the burden on the applicant to establish good cause for approving a new point. Mr. Geckil's testimony was directed towards the lack of reliable evidence on the part of FCA that a new CJDR point less than six miles away from Burns would increase overall CJDR sales, and it was not the Protestant's obligation to calculate and quantify the number of reduced vehicle sales to Burns that would result from that new point.

<< AGENDA

3. Harm to Burns Motors

Burns excepts to this discussion of Mr. Geckil's testimony to the extent that it does not adequately address his opinion and testimony (discussed on p. 57 of the PFD) that a new competing dealership will take new vehicle sales from other nearby sales localities or trade zones on an offsetting basis. Mr. Geckil's testimony actually is consistent with the opinions of Mr. Farhat and FCA fact witnesses emphasizing the CJDR "insell" sales by competing dealers in the McAllen Sales Locality and the high level of sales captured by Burns in other Rio Grande Valley sales localities. The PFD is incorrect when it characterizes Mr. Geckil's testimony as being based on the contention that Burns will lose *all* of its current sales and customers residing in the proposed new Edinburg Trade Zone, resulting in a 24% loss of new vehicle sales. Mr. Geckil made it clear that the projected 24% lost sales and revenues figure was based on the premise that Burns would continue to make a *reduced* number of sales in the new Edinburg Trade Zone, zone just as a new Payne Edinburg dealership would make offsetting sales to customers residing in the remaining portion of the McAllen trade zone. The 24% figure was a projected net loss based on these offsetting sales between the existing dealer and the new dealer.

Burns excepts to the PFD's discussion of the 40 mile vs. 30 mile "projected sales area" utilized by Mr. Geckil as being unreliable or questionable merely because he has elsewhere used a 30 miles drive to evaluate a projected sales area. The result of the 40 mile distance is primarily to extend the "projected sales area" for a new Edinburg Trade Zone into a sparsely populated area well to the north of the proposed Payne Edinburg dealership. The 40 mile range has minimal effect in other directions, where its reach is necessarily cut off by the sales areas of competing CJDR dealers, including Burns and Payne Weslaco. Further, the much cited evidence of high level of "insell" sales across the Rio Grande Valley sales localities confirms that customers in the region are willing to drive an extended distance, even from Harlingen or Brownsville, to trade with CJDR dealers outside their own sales locality.

4. The Public Interest

Burns has no exceptions to this subsection of the PFD. Burns reiterates that Mr. Geckil's testimony supports the assertion that any additional customer convenience from a reduced driving distance for customers in the proposed Edinburg Trade Zone will be minimal.

V. ANALYSIS OF STATUTORY FACTORS

A. Adequacy of Representation

Burns excepts to this Section of the PFD for reasons set out in Sections III. A, III. B, and Section IV. B, above.

B. Burns Motors Substantial Compliance with the Dealer's Franchise

1. Failure to Meet MSR Requirements

Burns excepts to this Section of the PFD for reasons set out in Sections III. A, III. B and Section IV. B, above.

2. Failure to Meet Customer Satisfaction Requirements

Burns has no exceptions to this subsection of the PFD.

C. Desirability of a Competitive Marketplace

Burns has no exceptions to this Section of the PFD.

D. Harm to Protesting Franchised Dealer

Burns excepts to this discussion of the statutory factor of "Harm to the Protesting Franchised Dealer" because the evidence does not support a conclusion that Burns will suffer "little or no harm" from the addition of a new competing sales point in Edinburg. The PFD compares "very profitable" (the current status of Burns) to "profitable" and states that the difference is not the type of "harm" that the Occupations Code was meant to prevent. While neither parties' experts projected that a competing dealership would "put Burns out of business", it defies economic logic and reality to assert that adding a competing dealer a few miles away will likely increase Burns' own vehicle sales. Between a) the FCA position that Burns will suffer no harm or benefit financially from the presence of a competing dealership a few miles away; and b) the Burns expert testimony that the likely loss of sales to Burns will be 24%, the more credible testimony is the latter. All projections of lost sales in a hypothetical future market are somewhat speculative, but the laws of supply and demand are not repealed by a manufacturer's glib assertion that the remedy for a competing dealer is merely a matter of "responding positively to any enhanced competition." Burns further excepts to the suggestion that Mr. Geckil's testimony on "proximity" was somehow inconsistent when he found a 3.4 mile reduced driving distance within the proposed new trade zone to be insignificant (as a factor of customer convenience and public interest) as opposed to the certainty that a new Edinburg dealer

will pull in a substantial number of the potential customers in that trade zone who otherwise would have likely purchased vehicles from Burns.

With respect to the distance between Burns and the proposed new Payne Edinburg dealership, Mr. Farhat's rebuttal report showed that there are only eight instances in Texas in which the **air distance** between two CJDR dealerships is closer than the driving distance between Burns and the proposed new point. Air distance is generally disfavored in TDMV in comparison to road distance, in that it tends to understate the effective distance for purposes of travel and competitive impact. Even so, Mr. Farhat's charts **(Exs. 96-040 and 97-032)** showed that there are 124 CJDR sales localities in Texas and 178 dealerships, which means that 162 CJDR dealerships, or more than 90% of the total, do not have a competing CJDR dealership within the proposed Burns-Payne road distance. So, while it is not unprecedented for FCA to have two dealerships less than six air miles apart, it is comparatively uncommon. The issue should not be whether such unusual proximity currently exists (and we have no evidence on how or when those dealerships so close together came into existence). The more relevant question under the Occupations Code is whether placing a new competitor so close today to a protesting dealer today will likely result in harm and loss of sales to that existing CJDR dealer.

Finally, FCA expert Mr. Walter testified that there is no straight line correlation between a dealership's reduced sales and its reduced income from service, parts and other income. Burns agrees that his data did not show a straight line correlation, but in more instances than not reduced new vehicle sales did correlate with some reduction in service revenues and other back end income. Burns excepts to the PFD to the extent that it appears to accept that there would be **no** loss of back end income tied to reduced sales from the presence of a nearby competing dealer. In the absence of credible evidence from FCA addressing such loss (as opposed to simply ignoring or denying it), Burns urges that the PFD accept Mr. Geckil's testimony that there will be some back end reduced income to Burns as a result of the proposed new point, excluding body shop income (based on testimony that Payne Edinburg will not provide that service).

E. The Public Interest

Burns excepts to the discussion of the "Public Interest" factor to the extent that the PFD places undue reliance on the minimal savings of drive distance (3.4 miles) for customers located in the proposed new Edinburg trade zone. This issue has already been discussed in Section III.D.4, above.

F. Harm to Applicant

Burns has no exceptions to this Section of the PFD.

G. Projections of Economic Conditions, Financial Expectations, and the Market

Burns excepts to this Section of the PFD for the reason that it includes the assertion that "Burns has not been able to adequately represent CJDR brands" in the McAllen Sales Locality. Burns disputes that proposed finding and conclusion for the reasons set out in Section IV. B.1, above. Burns further excepts to this Section of the PFD in that it does not attach sufficient weight to the evidence of uncertainty in the larger Rio Grande Valley economy tied to the potential end of the NAFTA trade agreements and the potentially negative effect on the region of volatility in the Mexican economy.

VI. CONCLUSION

Burns excepts to this Conclusion for all of the reasons stated in these Exceptions.

VII. FINDINGS OF FACT

Burns excepts to the following proposed Findings of Fact:

18. *FCA has four sales localities in the Rio Grande Valley-McAllen, Rio Grande City, Weslaco, and Harlingen.*

Burns excepts to this proposed Finding of Fact for the reasons set out in Section III.B, above. There are five FCA sales localities in the Rio Grande Valley, including Brownsville.

23. *"Registration effectiveness" is another metric FCA uses to measure brand performance, evaluating the percentage of all new vehicle registrations that are CJDR brands on a regional, statewide, and nationwide basis. FCA hopes that registrations in each sales locality in Texas will meet or exceed the averages in Texas and nationwide.*

Burns excepts to this proposed Finding of Fact for the reasons set out in Section III.B, above.

54. *Burns Motors's inability to achieve 100 percent MSR shows that there is substantial unmet opportunity for vehicle sales in the McAllen sales locality.*

Burns excepts to this proposed Finding of Fact for the reasons set out in Section III.B, above.

60. *When Burns Motors expanded its dealership, it elected to build a facility that was considerably larger than the minimum requirements set by FCA. This was neither required nor encouraged by FCA.*

Burns excepts to this proposed Finding of Fact because it is incomplete in that it fails to note, as the PFD does on p. 22, that the Burns Motors planning potential assigned by FCA in 2015, during the construction phase of the new Burns facilities, increased to a level of 3377 vehicle sales. **Ex. 82a-015**. The planning potential FCA assigned to Burns in 2015 before it decided to award a new point in Edinburg would have been generally consistent with the size of the Burns facilities planned in 2013, which shows that Burns was acting prudently in planning for growth even if FCA did not then require it. If Burns had built out a new facility at the minimum levels recommended by FCA at the time the expansion project began- in 2013- it would have been severely undersized based on the FCA assigned planning potential and MSR just two years later. By December 2015, with the facilities project still in process, FCA was assigning Burns an MSR of 3683, almost equal to the 3600 number that Burns looked to in the FCA Design Guidelines. **Ex. 68; Ex. 1157, Chart F-3; Tr. 1029:5 to 1030:20; Tr. 1057:12 to 1059:15.** While FCA did not **require** Burns to build the dealership to the dimensions and capacities Burns submitted to FCA in 2013, FCA did approve the plans- which were prepared by an FCA sanctioned architectural firm. Burns submits that the PFD should include findings of fact recognizing that the size and the capacities of the facility that Burns chose to build in 2013 were approved by FCA and were consistent with the planning potential and MSR that FCA had assigned to Burns by the end of 2015.

85. *Reducing the size of Burns Motors's trade zone will reduce the number of vehicles it needs to sell to achieve its MSR. In 2015, when the market study was performed, Burns Motors had met only 70.1 percent of its MSR through July of that year. If a new Edinburg point was opened and Burns Motors's MSR was measured in relation to the proposed McAllen sales zone (and not including the new Edinburg trade zone), then*

Burns Motors's sales that year would have represented 105 percent of its MSR, according to the market study.

Burns excepts to this proposed finding of fact in that the comparison of what Burns "would have sold" in another year, in terms of MSR, is not a meaningful or valid "finding of fact." It is retrospective and too speculative. It fails as a finding of fact because it does not and cannot control, retrospectively, for new vehicle sales that Burns inevitably would have lost to a competitor if a new Payne dealership in Edinburg had been in existence. It is one thing to assert that Burns in the future will likely have a reduced MSR tied to the reduced sales locality or trade zone FCA plans to assign to it. That is simple arithmetic tied to the way FCA calculates MSR. It is quite another matter to look back and assume the same volume of new vehicle sales would have occurred in 2015 in the face of a different set of market circumstances attributable to the hypothetical presence of a nearby competing CJDR dealer. Burns further excepts to this proposed finding of fact because it apparently accepts the FCA rationale that there would be a net benefit to Burns in achieving its FCA assigned MSR even if Burns meets that goal by selling fewer vehicles and having a reduced profitability. That result might be of benefit to FCA, which will sell more vehicles overall as a result of the new dealership, but it confirms the likelihood of future harm to the protesting dealer.

86. *The addition of a new Edinburg point—and ensuing reduction in the size of the McAllen trade zone—would also reduce Burns Motors's planning potential. That, in turn, would drive down the minimum facility requirements Burns Motors has to meet.*

Burns excepts to this proposed finding of fact because its conclusions about the "minimum facility requirements" Burns has to meet are moot. The undisputed evidence in the record shows that Burns has already completed its facilities expansion, including a large new service facility and a large new sales facility, both consistent with the planning potential that FCA assigned to Burns during the later stages of the build out and the MSR FCA was assigning to Burns before it elected to provision a new point. There is no evidence that Burns could benefit at this point by somehow removing or eliminating part of its new, state of the art, FCA approved facility, which it has expended $10 million dollars to complete. Burns recommends that this proposed finding of fact be deleted..

92. *Metrics such as MSR and registration effectiveness, which take the size of the underlying market into account, demonstrate that the CJDR brands are not being adequately represented in the McAllen sales locality.*

Burns excepts to this proposed finding of fact for the reasons set out in Sections III. A, III. B, and IV.B.1, above.

95. *The McAllen sales locality has such a large and growing number of CJDR vehicles in operation that it is increasingly impossible for one CJDR service department to adequately service them all.*

Burns excepts to this proposed finding of fact because there was no evidence presented that Burns has been unable—in the past or currently—**to service all CJDR vehicle owners in the McAllen Sales Locality** who need or seek service. To the contrary, FCA has criticized Burns for overbuilding its service department. The unrebutted testimony of all Burns witnesses is that Burns handles the current service demand efficiently and satisfactorily, including difficult warranty work that other nearby dealers cannot handle and service work for CJDR owners from outside the McAllen Sales Locality.

96. *It is reasonable and fair to use metrics such as MSR and registration effectiveness (which use sales in the State of Texas as the benchmark) to measure the performance of Burns Motors.*

Burns excepts to this proposed finding of fact for the reasons set out in Sections III. A, III. B, IV. B and V. A, above.

97. *The evidence does not establish that MSR is a flawed metric.*

Burns excepts to this proposed Finding of Fact for the reasons set out in Sections III. A, III. B, IV. B and V. A above.

98. *In terms of demographics, there is only one other market in the nation that is similar to the McAllen sales locality: El Paso, Texas. If, instead of using sales in the State of Texas, sales in El Paso were used as the benchmark, Burns Motors's MSR performance would be even lower than it is with the State of Texas benchmark.*

Burns excepts to this proposed finding of fact because it ignores the most obvious markets that are comparable to the McAllen Sales Locality- the four other CJDR sales localities in the Rio Grande Valley. While the McAllen MSA is now the largest MSA in the Rio Grande Valley and the McAllen Sales Locality if FCA's largest sales locality in the region, demographics up and down the Valley are generally similar to those of McAllen. All of the sales localities are predominantly Hispanic in ethnicity and all have a per capita and household income substantially lower than state and national averages. As discussed in Section V.D of these Exceptions, the CJDR registration effectiveness in the McAllen Sales Locality is very close to the overall registration effectiveness for the five Rio Grande Valley sales localities combined. Burns also excepts to this proposed finding of fact because it does not address the Burns expert testimony that a performance comparison based on approximately twenty urban sales localities or trade zones in Texas would be a more accurate than comparing Burns as a dealer and the McAllen Sales Locality to indexes based on Texas as a whole, since FCA data in the record confirms a marked consumer preference for CJDR vehicles in non-metropolitan areas and a weaker performance for CJDR vehicles in most metropolitan sales localities such as McAllen. **Ex. 97-027-29; Ex. 96-069; 96-093-094.**

103. *An unusually high rate of "insells" (meaning sales made by CJDR dealers located outside the McAllen sales locality to customers living inside the locality) are occurring, which indicates that Burns Motors is not adequately reaching customers within its locality.*

Burns excepts to this proposed finding of fact for the reasons set out in Sections III. A, III. B, and IV. B, above.

106. *An MSR percentage below 100 percent represents lost sales opportunities in the dealer's sales locality.*

Burns excepts to this proposed finding of fact for the reasons set out in Sections III. A, III. B, and IV. B, above.

107. *Between 2014 and 2016, Burns Motors was between approximately 28 and 33 percent below its MSR requirements, figures that represent over 1,000 vehicle sales per year that Burns Motors is not, but should be, making.*

Burns excepts to this proposed finding of fact for the reasons set out in Sections III.A, III.B, and IV. B.1, above. MSR is a sales standard set by FCA over which dealers have no input. While FCA may take the position that Burns "should" be making a certain number of sales per year, the number assigned by FCA is based on a flawed metric. Burns would not except to a finding that Burns, in fact, sold a certain percentage below the MSR requirements, but it does object to the term "should…be making."

112. *Burns Motors's breach of the MSR requirements undermines the very purpose of the dealer agreements, which is to sell CJDR vehicles.*

Burns excepts to this proposed finding of fact for the reasons set out in Section IV. B.1, above. Burns notes that the dealer agreements are complicated contracts governing all aspects of the relationship between FCA and its dealers. While the sale of new CJDR vehicles is a key component of those agreements, so are provisions governing service to customers, warranty work, CJDR parts, dealer financing, working capital requirements, dealership staffing, physical facilities, brand promotion and monthly dealer reports. Clearly "selling CJDR vehicles" is one main component of the dealer agreements, but the record does not support the premise that it is the "very purpose" of those multi-faceted agreements.

122. *In the four main shopping areas in the Rio Grande Valley (McAllen, Mission, Edinburg, and Weslaco), there are full-line CJDR dealerships only in McAllen and Weslaco, while FCA's main domestic competitors, Ford and Chevrolet, have full-line dealerships in all four shopping areas.*

Burns excepts to this proposed finding of fact for the reasons set out in Section III.B., above—specifically because it fails to account for the fifth existing CJDR dealership in the Rio Grande Valley, the Don Johnson CJDR dealership in Brownsville. Burns points out that data on that dealership was cited by FCA's own expert, Mr. Walter, in his report and calculations.

124. *Burns Motors's assertion that the addition of the news sales point in Edinburg will cause it to suffer a 24 percent loss of revenues across all of its departments was based on faulty premises and assumptions, and was not proven.*

Burns excepts to this proposed finding of fact for the reasons set out in Section IV.A. above, its exceptions to the PFD discussion of the testimony of FCA expert Mr. Walter. Burns agrees that there is no evidence that it would suffer a loss of revenue in its body shop, given that the Applicant and FCA witnesses testified that a new Payne Edinburg dealership will not have a bodyshop. With respect to loss of income from new car sales, Burns contends that its evidence of a 24% loss of vehicle sales and revenues is more credible than the FCA position that Burns will incur no loss of vehicle sales and revenues. As to loss of revenues in other departments, the burden of proof is on the Applicant to establish good cause for approval of a new point application, and Burns contends that the FCA expert at most raised an issue as to whether there would be consistent loss of revenue in other departments (excluding body shop), not whether lost new vehicle sales in the long run would have the effect of reducing revenue in other back end departments.

126. *There is such a large, currently untapped market in the McAllen sales locality that there is enough opportunity for the Applicant to take advantage of without meaningfully harming Burns Motors.*

Burns objects to this proposed finding of fact for the reasons stated in Section II. B above, in part because the term "opportunity" is not a concept recognized in the field of economics. "Opportunity" is not an element of the economic factors of supply and demand that drive economic analysis, including analysis of the market for new vehicles. Burns further excepts to this proposed Finding of Fact in that the term "meaningfully harm" is not based on any reliable evidence or metric. Whether the loss of sales to a new, nearby competitor is 24%, as Burns expert projected, or some smaller percentage, the lost sales will reflect an absolute loss of revenue to Burns due to fewer vehicles being sold and a likely reduced margin of profit due to the presence of a competing dealer.

128. *The addition of the new sales point in Edinburg could:*

• *take customers away from the competing brands, not Burns Motors; and*

• *reduce the unusually high rate of inselling, thereby taking customers away from more distant CJDR dealers, not Burns Motors.*

Burns excepts to this proposed finding of fact because it is speculative. While it is likely that a new sales point in Edinburg would take some customers away from competing line/makes, there is no reliable evidence that a well situated and well managed competing CJDR dealership less than six miles away would not cut into the existing customer base of Burns, especially among current or prospective Burns customers who live in Edinburg and other areas of the current McAllen Sales Locality who will be located closer to the proposed Payne Edinburg dealership. For the same reason, it is likely that a new CJDR dealership in Edinburg will reduce the current rate of inselling in the McAllen Sales Locality, but no evidence supports the premise that a reduced rate of insell attributable to a new Payne Edinburg dealership will affect the near certainty that a competing dealership less than six miles away will also take customers away from Burns.

131. *Burns Motors did not attempt to quantity or explain in detail its assertion that it would be harmed by the addition of a new sales point in Edinburg because Burns Motors recently renovated and expanded facilities would then be larger than they needed to be. As such, this alleged harm was too speculative to assess.*

Burns excepts to this proposed finding of fact because the fact that Burns will be harmed as a result of overbuilding is readily apparent from the record, while quantifying the exact dollar amount of the harm will depend on factors not readily susceptible to proof. Further, the Occupations Code does not require a Protestant, who does not bear the burden of proof, to quantify the exact amount of harm incurred if a competing dealership is awarded. The best evidence of harm likely to be incurred by Burns if the Payne Edinburg dealership is awarded comes from FCA's own "planning potential" numbers. FCA itself takes the position that planning potential is its primary metric for determining a dealership's facilities size. During the construction phase of Burns new facility, the FCA assigned planning potential reached 3377 vehicle sales, a number generally consistent with the facility Burns designed and built between 2013 and 2016. In the 2015 Market Study, **Ex. 82a-051**, FCA stated that adding a new point in Edinburg would

reduce the Burns planning potential to 2235, a reduction of over 33%. FCA witnesses McDaniel and Tunic also testified that, in late 2015, they encouraged Burns to reduce the size of the new facility, although the unrebutted evidence from Burns showed that it was unfeasible to do so at that late stage of the expansion project. Accordingly, FCA's own evidence that Burns planning potential will be reduced by one-third is the best evidence of the extent to which the Burns facilities will be overbuilt as a result of the new point. While this is not a precise calculation of dollar damages as might be appropriate in a damages lawsuit, it is sufficiently clear and convincing evidence to establish significant "harm to the protesting dealer" within the terms of the Occupations Code.

142. Customers would benefit by the convenience of a shorter drive to reach a CJDR dealer.

Burns excepts to the proposed Finding of Fact for the reasons set out in Section V.E., above. The actual reduction in driving distance of 3.4 miles would be applicable only to a limited set of potential Payne Edinburg customers who reside in the new Edinburg Trade Zone to be carved out of the current McAllen Sales Locality. The record does not show that the new location would afford additional convenience to potential customers residing within the remaining portion of the McAllen Sales Locality or those residing in the other Rio Grande Valley sales localities. This projected minimal reduction in driving distance results from the fact that the proposed Payne Edinburg dealership would be less than six miles from the current Burns location, a distance well below the usual distance separating more than 90% of Texas CJDR dealerships from their closest competitor. There is TDMV precedent, as discussed in Part V. E. 2 of Burns Opening Post-Hearing Brief, that a "reduction of driving distance of only a few miles is not significant." *RCJD Motors, Inc. v. Chrysler Group, LLC,* SOAH Docket No. 608-10-5694.LIC, MVD Docket No. 10-0048.LIC at p.15. The "customer convenience" argument is further undercut by the data recited in the PFD about the high volume of CJDR "insell" sales in the current McAllen Sales Locality, which confirms that many customers are willing to drive from one Rio Grande Valley dealership to another- at distances substantially greater than 3.4 miles- to do business with a CJDR dealer of their own choosing. Finally, the evidence does not support the contention advanced by FCA and adopted in part in the PFD that the new expanded Burns service facility in McAllen lacks the capacity to meet the service needs of the existing McAllen sales locality. To the contrary, the evidence

shows that Burns designed the service facility to have sufficient service bays to handle a planning potential of more than 3500 vehicles, consistent with the 2015 planning potential assigned to Burns before the proposed division of the McAllen Sales Locality into two Trade Zones. The evidence is also unrebutted that Burns has a large and well trained staff of service technicians who are often called on to handle difficult warranty claims that are beyond the capabilities of service departments of other Rio Grande Valley CJDR dealers.

VIII. CONCLUSIONS OF LAW

Burns excepts to the following proposed Conclusions of Law:

8. *The CJDR product lines are not being adequately represented as to sales and service in the McAllen sales locality. Tex. Occ. Code § 2301.652(a)(l).*

Burns excepts to this proposed Conclusion of Law for the reasons set out in Sections III. A, III. B, IV. B, and IV. C, above.

9. *Protestant is not in substantial compliance with its dealer franchise agreements. Tex. Occ. Code § 2301.652(a)(2).*

Burns excepts to this proposed Conclusion of Law for the reasons set out in Sections III. A, III. B, IV. B, and IV. C, above.

11. *Establishing a new CJDR dealership in Edinburg will not cause Protestant to suffer any significant harm. Tex. Occ. Code § 2301.652(a)(4).*

Burns excepts to this proposed Conclusion of Law for the reasons set out in Sections III. A, III. B, IV. B, and IV. C, above.

14. *Current and reasonably foreseeable projections of economic conditions, financial expectations, and the market for new motor vehicles in the relevant market area favor the establishment of a new CJDR dealership in Edinburg. Tex. Occ. Code § 2301.652(a)(7).*

Burns excepts to this proposed Conclusion of Law for the reasons set out in Sections III. A, III. B, IV. B, IV. C and V. G, above..

15. *Applicant met its burden of demonstrating good cause for the establishment of the proposed CJDR dealership in Edinburg. Tex. Occ. Code § 2301.652(a).*

Burns excepts to this proposed ultimate Conclusion of Law for all of the reasons set forth above.

16. *Applicant's application for a new dealership in Edinburg should be granted.*

Burns excepts to this proposed ultimate Conclusion of Law for all of the reasons set forth above.

IX. CONCLUSIONS AND PRAYER

Wherefore, premises considered, Burns respectfully requests that the PFD be revised in accordance to these exceptions.

Dated this 2nd day of March, 2018.

Respectfully submitted,

/s/ James E. Cousar

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2018, a true and correct copy of the foregoing document was served, via e-service and/or fax, in accordance with the Administrative rules of the State Office of Administrative Hearings:

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TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

BURNS MOTORS, LTD., Protestant, v. PAYNE EDINBURG, LLC d/b/a PAYNE CHRYSLER, DODGE, JEEP, RAM, Applicant, & FCA US LLC, Intervenor.	§ § § § § § § § § § § § § § §	SOAH DOCKET NO. 608-17-1285.LIC MVD DOCKET DOCKET NO. 16-0028 LIC

INTERVENOR FCA US LLC'S REPLY TO PROTESTANT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

Intervenor FCA US LLC ("Intervenor" or "FCA") submits this Reply to Protestant Burns Motors, Ltd.'s ("Protestant" or "Burns Motors") Exceptions to the Proposal for Decision.

I. INTRODUCTION

This case involves the proposed establishment of a new Chrysler, Jeep, Dodge, and RAM ("CJDR") dealership in Edinburg, Texas by Payne Edinburg, LLC ("Applicant" or "Payne").

On or about July 12, 2016, Burns Motors filed a protest pursuant to Tex. Occ. Code § 2301.652 challenging the establishment of the proposed new Edinburg dealership ("New Dealership"). FCA intervened in this case as an interested party aligned with Applicant.

On September 11–14 and 18–19, 2017, a six-day merits hearing was held, and Administrative Law Judges Hunter Burkhalter and Sarah Starnes (collectively the "ALJs") presided over the proceedings.

The ALJs received extensive post-hearing briefing from the parties, and after considering these filings and the evidence presented at the hearing, on February 15, 2018, the ALJs issued a detailed and well-reasoned Proposal for Decision ("PFD") finding that Payne and FCA met their burden of proving that good cause exists for the establishment of the New Dealership. PFD at p. 97. Accordingly, the ALJs recommended that Payne's dealer license application be granted and that the New Dealership be established. *Id.*

On March 2, 2018, Burns Motors filed its Exceptions to the PFD, arguing that certain findings and conclusions in the PFD should be amended. None of Protestant's Exceptions, however, raise any challenge to the legal standard applied in the PFD, or allege that any of the findings in the PFD are unsupported by substantial evidence. Protestant instead argues that the evidence ***it*** presented at the hearing—which was expressly considered and rejected by the ALJs—should have been given more weight and credibility. As explained in detail below, however, the findings and conclusions contained in the PFD are supported by the great weight of the evidence, and are based on the proper interpretation and application of relevant law. Moreover, many of Protestant's Exceptions, even if accepted, would not warrant any change in the PFD's final determination that there is good cause for the establishment of the New Dealership. Protestant's Exceptions therefore should be rejected.

II. STANDARD OF REVIEW

After issuing a proposal for decision, an administrative law judge may correct or amend that decision in one of two ways. First, the ALJ may amend the proposal for decision in response to exceptions and replies to exceptions. *See* Tex. Admin. Code § 155.507(d)(1). Second, the ALJ may correct any clerical errors in the proposal for decision, which permits the correction

of errors that do not result from judicial reasoning or determination. *Id.* at § 155.507(d)(2); *Texas Dep't of Transp. v. A.P.I. Pipe and Supply, LLC*, 397 S.W.3d 162, 167 (Tex. 2013).

Under Tex. Occ. Code § 2301.704, Administrative Law Judges have the authority to, among other things, issue orders, make findings of fact and conclusions of law, issue proposals for decision, and recommend final orders.

After the administrative law judge makes a determination regarding any exceptions, the proposal for decision is then submitted to the Texas New Motor Vehicle Board ("Board") for approval.[1] Under Tex. Gov't Code § 2001.058(e), the Board may modify the proposal for decision only in limited circumstances and for limited reasons: "if [it] 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." *Id.* § 2001.058(e). If the Board changes a finding of fact or conclusion of law made by an administrative law judge, the Board "shall state in writing the specific reason and legal basis for the change." *Id.*

III. ARGUMENT

As set forth in the PFD, after consideration of all the evidence and the filings of each party, the ALJs concluded that there is good cause for the establishment of the New Dealership. (PFD at pp. 96-97). The ALJs' conclusions comport with applicable legal principles and are fully supported by the evidence in this case. As discussed in detail below, Protestant's Exceptions have not demonstrated that the PFD or any of its determinations should be altered in any way.

A. Protestant's Exceptions to the PFD's Findings Regarding the Adequacy of Representation in the McAllen Sales Locality Lack Merit.

Throughout its Exceptions, Protestant raises several challenges to the findings and conclusions in the PFD that the CJDR product lines are not adequately represented in the McAllen Sales Locality. Its Exceptions, however, do not object to many key findings and conclusions that go to the heart of the inadequate representation in this market, including:

- The McAllen Sales Locality is the largest sales locality served by any one single dealership in the entire state of Texas, and is one of the ten largest, single dealer markets in the entire nation. (PFD at pp. 12; 49; 68).

- In addition to being one of the largest sales locality in the state, the McAllen Sales Locality also has experienced tremendous growth in the past few years, and is projected to continue growing in the future. For example, from 2000 to 2016, the population increased by an extraordinary 73% in Edinburg and by 46% in McAllen. (*Id.* at pp. 9; 78).

- Although FCA currently has only one CJDR dealership to serve this large market, FCA's major competitors all have multiple dealerships serving this area. This includes Chevrolet and Ford, which both have three dealerships in this same area, and Nissan and Buick/GMC, which both have two dealerships in this same area. Accordingly, the CJDR brands "are currently out-numbered in the marketplace." (*Id.*).

- Because the CJDR brands are out-numbered in the marketplace, customers currently must travel 8.6 miles round trip to reach a CJDR dealership, almost twice the distance to reach a competitive dealership for Ford or Chevrolet. These other brands also have more locations for customers to choose from for sales and service, and larger inventories and sales forces to serve customers. (*Id.* at p. 36).

- The McAllen Sales Locality currently is the second worst performing area for the CJDR brands out of 122 markets in the entire state of Texas, and that performance declines even further in Edinburg where CJDR currently lacks representation. (*Id.* at pp. 60; 89).

- Although Protestant is the only CJDR dealership in the McAllen Sales Locality, approximately 37% of the sales in that area are being made by other CJDR dealerships located further away, which shows that Protestant is not adequately serving customers in the area. (*Id.* at p. 62).

- Although Protestant claims the market is being adequately served, Protestant itself has repeatedly expressed its interest in establishing a new sales and/or service location in the Edinburg area. (*Id.* at pp. 27-28; 88).

These factors are wholly undisputed, and they alone show that the CJDR brands are not being adequately represented and that an additional dealership would significantly improve the level of representation for CJDR consumers in this market. Instead of challenging these essential findings, however, Protestant's Exceptions raise several technical objections to FCA's process for measuring brand performance. Each of these objections fail for the reasons stated below, and none of the objections provide a valid basis for amending the PFD.

1. State Average is a Reasonable and Appropriate Standard for Evaluating Brand Performance and Adequacy of Representation in a Market.

Protestant's first objection is that registration effectiveness allegedly is an inherently unreasonable measurement because it is calculated based on state average. Specifically, Protestant claims that because registration effectiveness is based on state average, it must be an impossible standard that ensures that half of the markets in Texas will meet the standard while the other half necessarily must fall below the standard. This assertion, however, is not supported by any citation to the record, and in fact is provably false. Contrary to the Protestant's claim, out of the 122 CJDR sales localities in the State of Texas, 104 of those sales localities meet or exceed 100% of state average. (PFD at p. 47) (Exh. 96-040). This undisputed fact not only disproves Protestant's claim that half of the markets in Texas necessarily must be underperforming, but makes clear that state average is a conservative, reasonable, and achievable standard, (Hrg. Tr. 612:2-613:12), as the ALJs correctly held in the PFD. (PFD at pp. 90 ¶ 96).

2. Protestant's Suggested Alternative Benchmarks are Arbitrary, Inconsistent, and do not Alter the Conclusion that FCA is Inadequately Represented in the Market.

Protestant next argues that instead of accepting the use of state average to evaluate dealership performance, the PFD should have evaluated the CJDR brands' performance in the McAllen Sales Locality based on various other benchmarks.

Urban v. Rural Markets

Protestant first contends that the PFD should adopt a distinction between urban and rural markets, and claims that the CJDR brands generally perform at lower levels in urban areas versus more rural localities. Protestant then suggests that because McAllen has grown so significantly and surpassed El Paso in population, it should be compared to the five largest sales localities in the state (Houston, Dallas, San Antonio, Ft. Worth, and Austin), which in turn would show that McAllen is being adequately served. (Exceptions at 1-2; 7-8). These arguments fail for several reasons.

As an initial matter, Protestant's contention ignores the fact that while registration effectiveness is based on the average performance of all markets in Texas, approximately 70% of the CJDR sales comprising that average were made into highly-populated metropolitan markets like Dallas, Houston, San Antonio and others. (PFD at p. 47) (Hrg. Tr. 622-64) (Exh. 102). State average therefore is weighted heavily by the very metropolitan markets that Protestant claims the McAllen Sales Locality should be measured against. (*Id.*).

Moreover, although Protestant implies that the McAllen Sales Locality should be compared to the largest cities in Texas, McAllen simply is not a Houston or a Dallas. (Hrg. Tr. 624:7-625:3) (Houston is "938 percent the size of McAllen"). Indeed, both of the experts who testified—including Protestant's own expert witness—agreed that El Paso is a comparable market—if not the most comparable market—to the McAllen Sales Locality in terms of population and demographics. (PFD at pp. 47-48; 55) (Hrg. Tr. 625:4-8; 1329:19-1330:3).

Contrary to Protestant's claims regarding CJDR's performance in urban markets, the registration effectiveness of the CJDR brands in El Paso is 108.3%—well above state average.

(PFD at p. 48) (Exh. 102).[2] Because the CJDR brands outperform the state average in El Paso, if the McAllen Sales Locality were compared against this similar market, the McAllen Sales Locality's sales effectiveness would actually decline. This means that the CJDR brands would be even more inadequately served under an El Paso standard. (PFD at p. 48) (Hrg. Tr. 626:1-10).

Finally, although Protestant alleges that the CJDR brands generally perform at lower levels in these five largest metropolitan areas, it is undisputed that the CJDR brands actually perform better in all of those metropolitan areas than they do in the McAllen Sales Locality. (Exh. 102). In fact, McAllen is the second worst performing sales locality for the CJDR brands out of the 122 sales localities in the entire State of Texas, below Dallas, Houston, and others. (PFD at pp. 60; 89). Accordingly, even if this market were measured against a standard comprised of the largest major cities in Texas—or virtually any other standard—the McAllen Sales Locality still would be underperforming. (Hrg. Tr. 751:15-752:13). This undisputed fact makes clear that the CJDR brands are not being adequately represented with only one dealership location in McAllen.

The Rio Grande Valley

Although Protestant first alleges that the McAllen Sales Locality is such a large market that it should be compared against large cities such as Houston and Dallas, its Exceptions next take the wholly inconsistent position that McAllen also should be compared to other rural markets in the Rio Grande Valley, including Brownsville, Harlingen, Weslaco, and Rio Grande City. (Exceptions at pp. 2-3). Specifically, Protestant claims that the brands' performance in McAllen

[2] Although El Paso is similar to McAllen in size, FCA currently has ***three*** CJDR dealerships in El Paso compared to only ***one*** in McAllen. (PFD at p. 48). The fact that El Paso performs well above state average demonstrates that the establishment of additional dealerships in a particular area can and should improve brand representation in that market.

is "representative" of its effectiveness in these other markets, and thus presumably that if the McAllen Sales Locality were compared against these markets, it would be performing at a higher level and be adequately represented. (Exceptions at pp. 2-4; 7-10).

Simply put, it is illogical for Protestant to claim that McAllen's performance should be compared against the likes of Houston and Dallas on the one hand, and then claim it should be compared against markets that are between a third and a tenth of its size on the other. (Exh. 102). More importantly, although Protestant appears to suggest otherwise, three of the four other markets in the Rio Grande Valley consistently perform better than the McAllen Sales Locality. (Exh. 96-045; 102). Weslaco—the market directly to the east of McAllen—has exceeded state average performance in each of the past four years except 2016, when it performed at nearly 93% of state average. (Exh. 96-045). In stark contrast, in 2016, the McAllen Sales Locality was performing at 78.5% of state average and the proposed Edinburg sales locality was performing at 76.8% of state average. (Exhs. 96-045; 97-029). This again makes clear that even if the McAllen Sales Locality were measured against these other markets in the Rio Grande valley, the CJDR brands still would not be adequately represented with only one dealership location in the Sales Locality.[3]

[3] According to Protestant, its expert should not be criticized for testifying that the McAllen Sales Locality should be evaluated against some unknown "bundle" of dealers, even though Protestant's expert failed to develop an alternative standard for evaluating performance and failed to conduct any analysis of performance. Protestant claims that it is not Protestant's burden to come up with an alternative standard. (Exceptions at p. 10). It strains credibility, however, to allege that an expert's testimony regarding adequacy of representation should be accepted when the expert admittedly conducted no analysis evaluating the level of representation in the market.

3. There is no Credible Evidence that Consumers in the Market Have a Stronger Preference for other Domestic Brands over the CJDR Brands.

Protestant alleged that the PFD fails to consider that consumers in the McAllen Sales Locality purportedly have a preference for domestic vehicles other than the CJDR brands—namely Ford and Chevrolet. Protestant claims this alleged preference is evidenced by the lower registration effectiveness achieved in the other Rio Grande Valley markets, and stems from the fact that McAllen has a high Hispanic population that allegedly is more loyal to Ford and Chevrolet because of their more significant manufacturing presence in Mexico. (Exceptions at pp. 3-4; 7-10).[4]

Contrary to Protestant's argument, the PFD gave significant consideration to these unsupported allegations and, based on the great weight of the evidence, ultimately rejected this claim and found that there was no credible evidence to support it. (PFD at pp. 50; 90 ¶ 99). Although Protestant alleges that the Hispanic community prefers other competitive brands like Ford and Chevrolet, Weslaco—which has a higher Hispanic population than McAllen—has consistently exceeded 100% registration effectiveness for the CJDR brands. (PFD at p. 50) (Exh. 96-045). El Paso's registration effectiveness also has consistently exceeded state average, even though both market representation experts in this case agreed it is most similar to McAllen in size and demographic composition. (PFD at pp. 47-48; 55) (Hrg. Tr. 625:4-8; 1329:19-1330:3) (Exh. 102). Given the success CJDR has experienced in these heavily Hispanic markets, there

[4] Despite Protestant's contentions, the testimony at the hearing revealed that FCA has the same number of plants in Mexico as Ford, with each manufacturer having 3 plants in Mexico. In addition, one of FCA's Mexico plants is closer to Hidalgo County than any of Ford's Mexico locations. (Hrg. Tr. 656:7-25).

is no evidence supporting Protestant's claim that the CJDR brands' underperformance in the McAllen Sales Locality is the result of some supposed bias against the CJDR brands.

B. The PFD Correctly Found that Protestant has not been in Substantial Compliance with its Primary Obligation under the Dealer Agreements.

Protestant's Exceptions object to the PFD's findings that Protestant has not complied with its sales performance obligations under the Dealer Agreements. (PFD at pp. 90-91).

As set forth in the PFD, one of the primary obligations of any CJDR dealer—including Protestant—is to effectively sell new vehicles. (PFD at p. 91 ¶ 112). Pursuant to the express provisions of the Dealer Agreements, FCA evaluates a dealer's sales performance under a metric known as minimum sales responsibility or "MSR." (PFD at p. 8). At the hearing, FCA presented undisputed evidence that in every year since at least 2006 (with the one exception of 2012), Protestant has materially and consistently failed to achieve 100% MSR as required under the Dealer Agreements. (Exh. 67). Indeed, despite being the sole CJDR dealer in the largest sales locality in the state, Protestant consistently has made only about 60-70% of the new vehicle sales it is expected to make in the market. (PFD at p. 91 ¶ 105) (Exh. 67).

In its Exceptions, Protestant does not challenge these figures or the fact that it has not achieved 100% MSR for many years. Protestant instead challenges the calculation of its MSR on the same grounds under which it challenged registration effectiveness—that state average is not a reasonable standard for evaluating sales performance and that consumers in McAllen are biased against CJDR vehicles. (Exceptions at p. 4). FCA therefore incorporates its responses to these Exceptions set forth in Section I above, and will not restate them here.

Moreover, it is important to note that the ALJs also expressly considered each of these arguments and, for the reasons discussed above, correctly held that (1) MSR is a reasonable and

fair metric for evaluating dealer performance and (2) there is no credible evidence to suggest that Protestant's poor MSR performance can be attributed to a generalized allegation of unpopularity of CJDR products. (PFD at p. 90 ¶¶ 96; 97; 99).[5] Accordingly, Protestant's Exceptions to the ALJs' findings that its sales performance has been materially deficient and in breach of its obligations under the Dealer Agreement are unsupported.

C. Protestant has not raised any Objections to the PFD's Findings Regarding the Desirability of a Competitive Marketplace.

In the PFD, the ALJs recognized that the Legislature has expressed a statutory policy that a competitive marketplace is desirable, a policy both parties acknowledged at the hearing. (PFD at p. 68; 92, ¶ 118). Moreover, based on the evidence presented in this case, the PFD found that the establishment of the proposed dealership "will promote healthy inter-brand and intra-brand competition in the relevant markets." (PFD at p. 96, ¶ 10). The PFD found that while Protestant currently is the sole CJDR dealership in the McAllen Sales Locality, the CJDR brands are currently out-numbered in the marketplace compared to their closest competitors, all of which have two or even three dealerships in the same market. (PFD at p. 68). The PFD therefore held that the proposed new dealership "clearly" will promote intra-brand competition for the CJDR lines, and that the addition of a new CJDR dealership in Edinburg "will improve inter-brand competition" as well. (PFD at pp. 68-69). In its Exceptions, Protestant does not

[5] In addition to breaching its sales performance obligations under the Dealer Agreement, Protestant also has consistently failed to meet its own sales expectations. Protestant created a forecast that projected its expected CJDR vehicle sales for the years 2013 to 2016. (Exh. 51). Although these figures were based on Protestant's own considerations and not MSR, Protestant failed to achieve the sales goals it established for itself in each of these years, selling only 65-80% of its own projections. (Exhs. 51; 67). This makes clear that Protestant has materially failed to achieve an acceptable level of sales, both under its Dealer Agreements and by its own standards.

raise any objections or challenges to these findings. (Exceptions at p. 12). This factor thus is undisputed and continues to weigh strongly in favor of granting the application for the New Dealership

D. The PFD Correctly Held that Protestant would not Suffer Material Harm if the New Dealership is Established.

In its Exceptions, Protestant readily concedes there is no evidence that the establishment of the New Dealership would put it out of business or cause it to become unprofitable. (Exceptions at p. 12) ("[N]either parties' experts projected that a competing dealership would 'put Burns out of business'"). Nevertheless, one of Protestant's primary challenges to the PFD relates to the PFD's finding that "establishing a new CJDR dealership in Edinburg will not cause Protestant to suffer any significant harm." (PFD at p. 96 ¶ 11). Although Protestant has objected to this finding, on various grounds, as set forth below, the weight of the evidence makes clear that Protestant should not suffer any material impact from the establishment of a new dealership in Edinburg.

1. Protestant's Challenge to the Concept of "Opportunity" Lacks Merit.

As set forth in detail above, although the McAllen Sales Locality is one of the largest sales localities in the state in terms of potential business for the CJDR brands, it currently ranks as the second worst performing sales localities for CJDR out of 122 sales localities in the entire State of Texas. (PFD at pp. 60; 89-90). Based on this and the other evidence presented at the hearing, the ALJs concluded that "there is such a large, currently untapped market in the McAllen Sales Locality that there is enough opportunity for the Applicant to take advantage of without meaningfully harming Burns Motors." (PFD at p. 92 ¶ 126). Despite the overwhelming evidence in support of this conclusion presented at the hearing, Protestant claims that all of this

evidence should be disregarded because its own expert testified that the term "opportunity" allegedly is "not a recognized metric or concept within the field of economics." (Exceptions at pp. 3-4).

Regardless of whether it is known in the field of economics, the term "opportunity" is a recognized and time-tested concept within the field of market representation analysis. Mr. Sharif Farhat, FCA's market representation expert in this case, has conducted hundreds of dealer network analyses and testified in over 100 cases involving dealer network actions, including the establishment of proposed dealerships. (Hrg. Tr. 585:18-587:22). Not only did Mr. Farhat testify extensively regarding the concept of opportunity during the hearing, this Board has previously adopted Mr. Farhat's analyses and recognized the concept of untapped "opportunity" as a reliable method of calculating the amount of sales available to dealers in a given area. *See e.g. RCJD Motors, Inc. v. Huffines Dodge Plano, L.P.*, SOAH Docket No. 608-10-5694.LIC (July 12, 2012 Order) and (April 2, 2012 Proposal for Decision) at pp. 64 and 68 (adopting Mr. Farhat's methodology for assessing sales opportunity and recommending the establishment of a new dealership). Accordingly, there is no support for Protestant's claim that "opportunity" is not a reasonable or appropriate metric in a market representation case such as this one.

Moreover, FCA and its experts provided extensive evidence demonstrating the amount of opportunity and untapped business available in the McAllen Sales Locality. Using the same analysis employed in *RCJD Motors*, Mr. Farhat concluded that in 2016 alone, the total lost opportunity available to CJDR dealers in the market was 1,650 units. (Exh. 96 at ¶ 45; and 96-081 to 082) (Hrg. Tr. 663:3-665:10). Mr. Farhat also found that the New Dealership would be estimated to sell approximately 1,329 CJDR vehicles. (Exh. 96 at ¶ 45; 96-083) (Hrg. Tr. 665:20-666:25). Because the lost opportunity in the market far exceeds the projected sales for

the New Dealership, there was ample lost opportunity for the New Dealership to operate without taking any sales from other existing CJDR dealers. (*Id.*) The PFD's findings regarding the amount of opportunity in the market therefore are supported by the evidence and consistent with applicable law, and Protestant's objections to those findings should be rejected.

2. The PFD Correctly Held that Protestant Would Not Be Materially Harmed Because it is Unusually Profitable and Able to Compete.

In its Exceptions, Protestant does not contest the findings that it recently completed a new dealership facility that places it in a highly competitive posture in the market. (PFD at p. 93 ¶ 132). Protestant also does not challenge the finding that "Burns Motors is unusually profitable, stable, well-diversified, and earns a substantially greater than normal percentage of profits from its parts and services departments. All of these factors mean the dealership has substantial financial capacity which gives it the luxury of many options to use in competing against a new dealership in Edinburg." (PFD at p. 93, ¶133). Nevertheless, Protestant takes issue with the PFD's acceptance of FCA's expert testimony that Protestant has the financial wherewithal to compete with the New Dealership. (PFD at pp. 40-41: 69). Contrary to these exceptions, however, the ALJs' findings on these issues are wholly consistent with applicable law and are supported by the evidence.

Protestant claims that the testimony of Mr. Herbert Walter (one of FCA's expert witnesses) regarding Protestant's ability to compete should be disregarded because he did not conclusively prove that the New Dealership would not cause ***any*** harm to Protestant. However, Section 2301.6552(a) does not require such a showing. While the statute requires the Board to consider "any harm to the protesting franchised dealer," it is well-established that this provision statute does ***not*** require the applicant to demonstrate a complete lack of harm to the protesting

dealer. *Grubbs Nissan Mid-Cities, Ltd. v. Nissan North America, Inc.*, 2007 WL 1518115, at 7 (Tex. App. Austin, 2007). Indeed, prior Board decisions have made clear that "much more is required to prove harm than that an existing dealer would be less profitable once a new dealer has entered its market." *Landmark Chevrolet Corp. v. General Motors Corp.*, No. 02-0002 LIC (Tex. MVB Dec. 9, 2004) ("[A]n existing dealer in a flourishing market where opportunity looks large is not necessarily 'harmed' simply because it must now share the market with a new dealer, even if it means that the existing dealer will profit less after the dealer network expands."). This is entirely consistent with the ALJs' rulings in the PFD.

Moreover, Mr. Walter's testimony and analyses regarding Protestant's financial wherewithal and ability to compete in the market was appropriate and substantiated by the evidence. As the PFD held, it is undisputed that Protestant is an unusually profitable dealership that enjoys net profits of nearly four times that of the other dealers in the Rio Grande Valley. (PFD at p. 40). Given this high level of profitability, Mr. Walter credibly demonstrated that Protestant has the flexibility to make adjustments to its business practices to make whatever changes Protestant might deem necessary to best position itself to compete with the New Dealership. (Hrg. Tr. 486:4-488:9; 497:23-498:9). Indeed, Protestant's own General Manager admitted that Protestant has the ability to compete with the New Dealership. (*See e.g.* Hrg. Tr. 1126:15-1127:3 ("I don't think we'll have much of a problem competing with a new dealership."). This evidence, coupled with Protestant's admission that the New Dealership would not cause it to go out of business, makes clear that the PFD correctly found that Protestant will continue to be profitable and has the ability to compete. Protestant's Exceptions on this issue thus should be dismissed.

3. Protestant's Expert Analysis that Protestant would lose 24% of its Entire Business is not Credible and was Properly Rejected.

Protestant next objects to the finding that its expert's opinion (*i.e.*, that the addition of a new dealership in Edinburg would cause Protestant to suffer a 24 percent loss of revenues across all of its departments) was based on faulty premises and assumptions, and was not proven. (PFD at p. 92 ¶ 124). Specifically, Protestant argues that "its evidence of a 24% loss of vehicle sales and revenues is more credible than FCA's position that Burns will incur no material loss of vehicle sales and revenues." (Exceptions at pp. 12-13). This unfounded assertion is not only untrue but it does not address the fact that Protestant's analysis of its potential harm is fundamentally flawed.

Protestant's claim that it may lose 24% of its sales was based on its expert's calculation that from 2013 through 2016, Protestant made 24% of its sales into areas that would be closer in proximity to the New Dealership if it were established. (Protestant's Brief at p. 33) (Exh. 1155 at p. 18). Although Protestant objects to the holding in the PFD that Mr. Geckil's analysis assumes Protestant would lose all of its current sales into that area, (Exceptions at p. 11), that is exactly how Protestant's expert calculated his defective estimate of loss. (Exh. 98 at ¶11). Indeed, Protestant and its expert readily admitted that Protestant will continue to make sales into the area closest to the proposed New Dealership. (Hrg. Tr. 1346:2-8; 1091:23-1092:3; 1434:9-1435:23). Given that Protestant acknowledges it will still make sales in this area, the amount of sales it allegedly may lose to the New Dealership—even if its expert analyses were accepted—necessarily would be less than 24%. (Hrg. Tr. 604:19-605:5).

More importantly, Protestant and its expert expressly acknowledge that the addition of a new dealership in Edinburg would allow the CJDR brands to capture additional sales from other

competing brands. (Exceptions at pp. 9; 21) (conceding that the addition of a dealer would take some customers away from competing brands) (Hrg. Tr. 1346:18-21). That said, Protestant's expert admitted that he made no effort to analyze the sales that may be captured from other brands as part of his potential loss analysis. (Hrg. Tr. 1347:3-11; 1436:13-1437:2). Mr. Geckil's failure to evaluate this key market effect undermines the credibility of his analysis and, as the PFD held, results in his analysis being based on the inaccurate assumption that the number of sales available in the market is a "fixed pie." (PFD at p. 71).

In addition, Mr. Geckil's assumption that because Protestant would lose an estimated 24% of its new vehicle sales, Protestant would also lose 24% of its service, parts, and other business across the board is equally flawed. In its Exceptions, Protestant expressly agrees that "the data did not show a straight line correlation" that all departments would be affected the same way. As such, Protestant has essentially admitted that its expert's assumption was flawed. (Exceptions at p. 13). Moreover, Mr. Walter—FCA's financial expert—presented significant evidence that different departments in a dealership experience changes in profits at different paces, and that some departments can even increase in profits while others decrease. (Hrg. Tr. 1507:11-1510:20) (Exh. 100-017). For all of the reasons discussed above, Protestant's claim that it's expert provided the "more credible testimony" on alleged harm is unsupported and should be rejected.

4. Protestant would not Suffer any Ascertainable Impact because it Chose to Build New Dealership Facilities Much Larger than FCA's Guides.

In its Exceptions, Protestant acknowledged that it overbuilt its new dealership facility and that FCA "did not require Burns to build the dealership to the dimensions and capacities Burns submitted to FCA." (Exceptions at p. 15). Nevertheless, Protestant objects to the findings that it "elected to build a facility that was considerably larger than the minimum requirements set by FCA," and that Protestant failed to explain how it would be harmed by the New Dealership because those facilities would be larger than needed. (PFD at p. 93, ¶ 131).

Indeed, Protestant made no attempt to explain how or why its dealership facilities will be outsized if the New Dealership is established.[6] Moreover, Protestant's own witnesses agreed that its facility renovations were necessary and overdue, and that those renovations have been beneficial to its business. (Hrg. Tr. 1016:20-1017:15; 1128:5-1132:12; 1126:1-8). Protestant also has not challenged any of the findings in the PFD reflecting the fact that before Protestant began construction, FCA expressly informed Protestant that (1) there was the possibility another CJDR dealership could be added to the market and (2) its planning potential could change for any number of reasons, including the potential addition of another CJDR dealership. (PFD at p. 86 ¶¶ 57-58). The ALJs thus correctly concluded that this alleged harm was unsupported and "too speculative to assess" (PFD at p. 93, ¶131). Accordingly, Protestant's Exceptions to these findings should be disregarded.

[6] Protestant claims that the best evidence of this alleged harm is FCA's own planning potential numbers. (Exceptions at p. 21). Although Protestant appears to suggest otherwise, planning potential is not a predictor of potential sales. (PFD at p. 8). Indeed, although the planning potential in this market reached 3,377, Protestant's new vehicle sales have never exceeded 2,600 units—which is more than 700 units below that peak planning potential number. (Exh. 67).

E. The PFD Correctly Found that the Establishment of the New Dealership Would Benefit the Public Interest.

Protestant's Exceptions also raise several objections to the PFD's holding that the establishment of the New Dealership would benefit the public interest. (*See e.g.* PFD at p. 94, ¶¶136-143 and p. 97, ¶12). Its Exceptions, however, do not object to many findings and conclusions that were central to this holding, including:

- The New Dealership will benefit the public by creating new jobs and by increasing local tax revenue. (PFD at p. 94, ¶¶ 137-38).
- The Applicant and its team are "experienced and successful auto dealers," and thus the proposed New Dealership almost certainly will be "well-run and involved in the community." (PFD at p. 94, ¶136).
- "Burns Motors is currently the only CJDR service center in the entire McAllen sales locality, and customers would benefit by the convenience of having a second CJDR service center in Edinburg." (PFD at p. 94, ¶143).
- The New Dealership "will stimulate additional competition in the marketplace, which is expected to benefit consumers by raising brand awareness, promoting price competition, and enhancing customer service." (PFD at p. 94, ¶139).
- The New Dealership "will reduce the average distance that consumers have to drive to reach a CJDR dealership," and will make it "more in line with the average travel distance required to reach CJDR's closest competitors, which already have dealerships in both McAllen and Edinburg." (PFD at p. 94, ¶¶ 140-41).

These undisputed findings and conclusions alone demonstrate that the establishment of the New Dealership will benefit the public interest.

Instead of challenging these essential findings, Protestant's Exceptions take issue with a number of other holdings in the PFD. First, although it is undisputed that the New Dealership would reduce the average distance customers must travel to reach a CJDR dealership, Protestant claims that this increase in customer convenience would not be beneficial to the public. Specifically, Protestant claims that a reduction of 3.4 miles in the average distance consumers

must drive each way to reach a CJDR dealership purportedly is not "significant" or "meaningful." (Exceptions at pp. 8 and 22) (PFD at p. 94, ¶ 142).

Contrary to this argument, however, this reduction in drive distance between consumers and their auto dealership absolutely is beneficial to the public. As discussed in detail above, the McAllen Sales Locality is the largest sales locality served by any one single dealership in the entire state of Texas, and is one of the ten largest single-dealer markets in the entire nation. (PFD at pp. 12; 49; 68). In addition, while FCA currently has only one CJDR dealership to serve this large market, all of its major competitors all have multiple dealerships serving this area. (PFD at p. 68). Given these undisputed facts, customers in the sales locality on average currently must travel 8.6 miles to reach a CJDR dealership, almost twice the distance to reach a competitive dealership for Ford or Chevrolet. (PFD at p. 36) (Exh. 82-014).

The situation is even worse for the public in Edinburg, where customers currently must drive 9 miles to reach a CJDR dealership. (Exh. 96-080). Reducing the average distance customers must travel to reach a CJDR dealership by approximately 3.4 miles each way—or 6.8 miles round trip—will materially improve customer convenience and benefit the public. (Exh. 96-080) (Hrg. Tr. 340:18-341:1; 653:23-655:2; 662:10-663:2). This is particularly true given that, as the PFD held, "Burns Motors is underperforming in the sales locality in part because, on average, customers must travel farther to reach a CJDR dealer than they must to reach CJDR's competitors." (PFD at p. 90, ¶ 102).

Protestant also objects to the PFD's discussion that implies there currently is, or in the future would be, a 'longer wait' for service at Burns Motors." (PFD at p. 36) (Exceptions at p. 5). In support of this exception, Protestant claims that it is "capable of meeting the service needs of both McAllen Sales Locality customers and numerous CJDR owners from outside of the

McAllen Sales Locality, and that Burns will continue to be able to do so in the foreseeable future." (Exceptions at pp. 5; 22-23). Protestant's assertion that its dealership, alone, has been and will continue to be capable of providing adequate levels of service for all CJDR consumers in the McAllen Sales Locality and surrounding area is not supported by the evidence.

As discussed above, Protestant's current sales locality "is one of the ten largest sales localities in the nation where FCA has only one dealer." (PFD at p. 83, ¶27). A number of FCA witnesses testified that the McAllen Sales Locality currently is already is too large for one dealer to handle, and the ALJs adopted this as a finding of fact in the PFD. (*See e.g.* Tr. 549:15-550:10) (PFD at pp. 63; 90, ¶95). The population and the demand for CJDR sales and service also have been growing and are projected to continue growing at significant levels. Protestant's own expert projected that the population in the McAllen Sales Locality will increase by 8.5% from 2016 to 2021, and that the number of households will increase by 8.4% during that same time period. (Exh. 1155). In addition, this market also is experiencing upward trends in retail registrations and the number of CJDR vehicles in operation ("VIO") that will require service. (Exh. 96-060 to 063; 067) (Hrg. Tr. 644:16-646:10; 648:4-649:9). In fact, the VIO count in the McAllen Sales Locality is the highest of any secondary market in the nation, meaning there is and will continue to be a significant amount of service opportunity in the area. (Hrg. Tr. 386:8-16; 387:5-11; 648:4-649:9). This evidence demonstrates that Protestant alone has not been able to provide adequate service for all CJDR customers in the Sales Locality and surrounding areas, and certainly will not be able to do so going forward.

Moreover, there is no credible dispute that the public interest would be benefitted by the presence of an additional CJDR sales and service location in Edinburg. *See Rockwall Imports, LP, et al. v. The Allee Corporation*, SOAH Docket No. 601-09-1276.LIC (April 20, 2011)

(Proposal for Decision) at p. 110 (finding that the proposed new establishment would serve the public interest by providing more convenient access to products and service). If the New Dealership is established, Payne plans to have at least 24 service stalls at the New Dealership, which will have a positive impact on customer convenience as customers will have an additional service location option. (Hrg. Tr. 780:11-781:4). As noted in the PFD, Protestant's own expert witness even acknowledged that the New Dealership would increase consumer exposure and access to CJDR sales and service. (PFD at p. 58). Accordingly, the weight of the evidence in this case demonstrates that the establishment of the New Dealership would benefit the public interest, and Protestant's Exceptions challenging these findings do not demonstrate otherwise.

F. Protestant has not raised any Objections to the PFD's Findings regarding the Expected Harm to the Applicant.

Tex. Occ. Code § 2301.652(a) also requires consideration of any harm to the applicant that would result from denial of its efforts to establish the proposed new dealership. Although the PFD ultimately found that it is unclear if Payne would have to sell the proposed site for a loss in the event its application were denied, the PFD contains several findings that recognize the significant time and resources Payne has expended towards developing the New Dealership, including its multi-million dollar investment in the proposed site. (PFD at p. 76; 94; ¶¶ 144; 147). Protestant has not raised any Exceptions or otherwise objected to these findings; thus, they are undisputed and support affirmation of the PFD.

G. The PFD Correctly Found that the Current and Projected Economic Conditions, Financial Expectations, and the Market for New Vehicles in the Relevant Market Area Support the Establishment of a New Dealership in Edinburg.

The final statutory factor for consideration is the current and reasonably foreseeable projections of economic conditions, financial expectations, and the market for new motor vehicles in the relevant market area. Tex. Occ. Code § 2301.652(a)(7).

In its Exceptions, Protestant does not object to any of the findings in the PFD detailing the exceptional growth McAllen and Edinburg have experienced over the past years. Although Protestant has been the sole CJDR dealership here for some time, as the PFD held, this market has been "rapidly expanding." (PFD at p. 9). The population in Hidalgo County (where this market is located) has grown by about 49% since 2000, an increase of about 310,000 people. (*Id.*). In Edinburg, where the proposed new dealership would be located, the population has grown by an astounding 73% during this same time period, and the population in McAllen has grown by 46%. (*Id.* at p. 78). These growth figures have far exceeded both the state and the nation in terms of average annual population growth. (*Id.*). Indeed, Burns Motors' Dealer Principal and General Manager both confirmed that the McAllen and Edinburg areas have grown significantly, and that the motor vehicle business—both in sales and service—has grown significantly as well. (Hrg. Tr. 961:13-20; 1095:4-1096:23). Protestant even introduced evidence that the McAllen-Edinburg area has grown so much it has surpassed El Paso as the fifth largest metropolitan statistical area in Texas. (Exh. 1144).

Instead of challenging the tremendous growth this area has experienced, Protestant takes exception to the PFD's discussion of FCA's testimony that this area is projected to grow *faster* that the state as a whole going forward. (Exceptions at pp. 2-3). Specifically, Protestant claims

that there is better evidence on this issue which shows McAllen is growing at about the same rate as the state. (*Id.*). This argument, however, misses the mark.

As an initial matter, Protestant does not challenge the PFD's findings that the McAllen-Edinburg area is projected to continue growing, and thus concedes that the relevant market is expected to continue expanding in the future. This alone is sufficient to affirm the PFD's holding that the current and reasonably foreseeable market conditions support the addition of the New Dealership.

Protestant's argument also is factually inaccurate. Although Protestant claims that FCA's supplement to the market study is the best evidence of growth rates that happen to be in line with state growth rates, the supplement expressly states that from 2016 to 2021, McAllen is expected to grow at a rate of 7.75% and Edinburg is expected to grow at a rate of 8.7%--both of which are *greater than* the expected growth rate for Texas (7.61%). (Exh. 101-003; 101-012). Indeed, Protestant's own expert projects that the population in the McAllen Sales Locality as a whole will increase by 8.5% during that same time period, and that the number of households in the Sales Locality will increase by 8.4%—also greater than the expected growth rates for Texas. (Exh. 1155).

The Exceptions further allege that the PFD did not "attach sufficient weight" to the evidence of uncertainty in the larger Rio Grande Valley area due to the "potential" end of the NAFTA trade agreements and the "potentially" negative effect of the volatility in Mexico's economy. (Exceptions at p. 14). Contrary to this claim, the PFD expressly considered these issues and found that the weight of the evidence demonstrated that projections favor the establishment of the New Dealership. (PFD at pp. 79-80).

In addition, Protestant's Exceptions also are based on highly speculative claims about what "potentially" could happen in the region depending on certain political events that may or may not happen in the future. Yet, every reasonably foreseeable projection introduced into evidence in this case showed that the McAllen-Edinburg area is expected to continue growing. This includes Protestant's own expert projections of population and household growth discussed above. (Exh. 1155) (projecting 8.5% population and 8.4% household growth from 2016 to 2021). Protestant's expert witness also testified that he "expect[s] the economy to be steady" and for the auto industry to experience "steady growth" going forward. (Hrg. Tr. 1288:24-1289:10).[7]

Accordingly, Protestant's Exceptions to the PFD's findings and conclusions as to this factor lack merit. Instead, the great weight of the evidence at the hearing supports the PFD's finding that the current and reasonably foreseeable projections of economic conditions, financial expectations, and the market for new vehicles favors the establishment of a new CJDR dealership in Edinburg. Protestant's Exceptions therefore should be rejected.

IV. CONCLUSION

For the reasons set forth above, the findings and conclusions contained in the PFD are supported by the evidence in the record and by applicable law, and Protestant has not put forth any valid justification for amending the PFD. Accordingly, FCA respectfully requests that the

[7] Protestant's Exceptions also appear to incorporate its arguments related to the adequacy of the existing CJDR representation in the McAllen Sales Locality. (Exceptions at p. 14). To the extent that is the case, FCA incorporates its responses to these arguments set forth in Section I of this filing above.

relief requested in Protestant's Exceptions be denied, that Payne's dealer license application be approved, and that Protestant's protest be dismissed in its entirety.

Dated this 16th day of March, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this instrument was electronically filed with the State Office Administrative Hearings and served upon the following this 16th day of March, 2018 in accordance with TEX. R. CIV. P. 21a:

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/s/ John W. Chambless II, Esq.
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State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

March 22, 2018

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731

VIA FACSIMILE: (512)465-3666

RE: SOAH Docket No. 608-17-1285.LIC; MVD Docket No. 16-0028.LIC; *Burns Motors, Ltd. v. Payne Edinburg, LLC d/b/a Payne Chrysler, Dodge, Jeep, Ram and FCA US, LLC*

Dear Mr. Avitia:

On January 31, 2018, Judge Hunter Burkhalter[1] and I issued the Proposal for Decision (PFD) in this case. Timely exceptions were filed on March 2, 2018, by Burns Motors, Ltd. (Protestant), and FCA US LLC (Intervenor) filed a timely response to the exceptions on March 16, 2018. Payne Edinburgh, LLC d/b/a Payne Chrysler, Dodge, Jeep, Ram (Applicant) did not file exceptions or respond to Protestant's exceptions.

The first ten pages or so of Protestant's exceptions take issue with various statements in Sections III and IV of the PFD, which summarized the factual background and expert opinions that were presented via exhibits and testimony during the hearing on the merits. The exceptions go on to object to much of Section V of the PFD, which set forth the ALJs' analysis of the applicable statutory factors in Texas Occupations Code § 2301.651(a). Specifically, Protestant objected to the discussion of each statutory factor that the ALJs found weighed in favor of granting the application at issue. Finally, the exceptions object to the corresponding Findings of Fact and Conclusions of Law that set forth the basis for the ALJs' ultimate recommendation that

[1] Subsequent to the issuance of the PFD, Judge Burkhalter left the State Office of Administrative Hearings.

the Motor Vehicle Division grant Applicant's application for a new Chrysler, Dodge, Jeep, Ram dealership in Edinburg, Texas.

In its response, Intervenor addressed each of Protestant's exceptions and arguments in detail and argued that the exceptions should all be denied. Intervenor also argued that even if the Division relied only those fact-findings that went unchallenged in the exceptions, the record would still support establishment of the new dealership.

Protestant's exceptions largely re-urge arguments that were already raised during the hearing and discussed at length in the parties' post-hearing briefs. These issues were already considered and addressed in the PFD. Generally speaking, Protestant's exceptions do not argue that the PFD is factually inaccurate or has mis-cited the record. Protestant also does not argue that the ALJs misapplied the law. Rather, the exceptions argue that the PFD should have emphasized different facts or disregarded testimony that Protestant regards as unfavorable, and that adopting Protestant's view of the evidence would have led to a different outcome.

It is well-settled that it is the role of the ALJs to determine the weight and credibility to be given to the record evidence.[2] Judge Burkhalter and I addressed the evidence at length, and the PFD is supported by hundreds of pinpoint citations to the evidence that supports our discussion. The PFD also explains how that evidence led to our conclusions on each statutory factor. I do not agree with Petitioner that the PFD contains substantive errors that require correction. Accordingly, I recommend no changes to the PFD, and it is ready for your consideration.

Sincerely,

Sarah Starnes

Sarah Starnes
Administrative Law Judge

SS/ls
cc: Mark T. Clouatre and Adrienne L. Toon, Nelson Mullins Riley & Scarborough, LLP, 1400 Wewatta Street, Suite 500, Denver, CO 80202 - **VIA FACSIMILE: (303)583-9999**

Steven B. McFarland, Nelson Mullins Riley & Scarborough, LLP, Meridian/17th Floor, 1320 Main Street, Columbia, South Carolina, 29201- **VIA FACSIMILE: (803)256-7500**

William R. Crocker, 807 Brazos, Suite 1014, Austin, TX 78701 - **VIA FACSIMILE: (512)474-2540**

James E. Cousar, Thompson & Knight, LLP, 98 San Jacinto Blvd, Suite 1900, Austin, TX 78701 – **VIA FACSIMILE: (512)469-6180**

Frederick J. Biel, Atlas & Hall, LLP, 818 Pecan Boulevard, McAllen, TX 78501-2148 – **VIA FACSIMILE: (956)686-6109**

MVD Docket Clerk, Motor Vehicle Division, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 - **VIA FACSIMILE: (512)465-4135**

[2] *Buddy Gregg Motor Homes, Inc. v. Marathon Coach, Inc.*, 320 S.W.3d 912, 925 (Tex. App.—Austin 2010, no pet.); *Granek v. Tex. State Bd. of Med. Exam.*, 172 S.W.3d 761, 778 (Tex. App.—Austin 2005, pet. denied).

Liz Slick

To: XMediusFAX@soah.state.tx.us
Subject: RE: Broadcast Completed: ALJ EXCEPTIONS REPLY - DKT. #608-17-1285.LIC

Resent Mr. Avitia's copy to DMV Docket Clerk per his office.
E-mailed Mr. McFarland's to him since fax machine out of order

-----Original Message-----
From: XMediusFAX@soah.state.tx.us [mailto:XMediusFAX@soah.state.tx.us]
Sent: Thursday, March 22, 2018 1:40 PM
To: Liz Slick
Subject: Broadcast Completed: ALJ EXCEPTIONS REPLY - DKT. #608-17-1285.LIC

Time Submitted : Thursday, March 22, 2018 1:21:11 PM Central Daylight Time
Time Completed : Thursday, March 22, 2018 1:39:53 PM Central Daylight Time
Nb of Success Items : 5
Nb of Failed Items : 2

Status	Time Sent	Pages Sent	Duration	Remote CSID	Destination	Error Code
Failure	Thursday, March 22, 2018 1:36:29 PM Central Da	0	10		5124653666	100
	Error message: Busy.					
Failure	Thursday, March 22, 2018 1:39:42 PM Central Da	0	201		18032567500	200
	Error message: No answer.					
Success	Thursday, March 22, 2018 1:22:34 PM Central Da	2	73	836180	5124696180	0
Success	Thursday, March 22, 2018 1:22:48 PM Central Da	2	93	5126101324	5124742540	0
Success	Thursday, March 22, 2018 1:23:05 PM Central Da	2	110	Nelson Mullins	13035839999	0
Success	Thursday, March 22, 2018 1:23:58 PM Central Da	2	107	5124654135	5124654135	0
Success	Thursday, March 22, 2018 1:28:07 PM Central Da	2	108	9566866109	19566866109	0

Liz Slick

From: XMediusFAX@soah.state.tx.us
Sent: Thursday, March 22, 2018 2:00 PM
To: Liz Slick
Subject: Broadcast Completed: ALJ EXCEPTIONS REPLY - DKT. #608-17-1285.LIC
Attachments: 0DD50F35-C1F4-4F34-90E6-8B8ED27F5C09-44527-BR.pdf

Time Submitted : Thursday, March 22, 2018 1:58:12 PM Central Daylight Time
Time Completed : Thursday, March 22, 2018 2:00:09 PM Central Daylight Time
Nb of Success Items : 1
Nb of Failed Items : 0

Status	Time Sent	Pages Sent	Duration	Remote CSID	Destination	Error Code
Success	Thursday, March 22, 2018 1:59:59 PM Central Da	2	104	5124654135	5124654135	0

Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Date: June 14, 2018
Action Requested: APPROVAL

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Jeremiah Kuntz, Director, Vehicle Titles and Registration Division
Agenda Item: 7
Subject: Adoption of Rules under Title 43, Texas Administrative Code, Chapter 217, Vehicle Titles and Registration
Amendments, §217.122 and §217.123
New, §§217.125 - 217.130
(Relating to motor vehicle record information and DPPA)

RECOMMENDATION

Approve adoption of amendments for publication in the *Texas Register*

PURPOSE AND EXECUTIVE SUMMARY

The purpose of the amendments is to:

- Differentiate those who request and receive motor vehicle records directly from the Department with those who receive records by resale or redisclosure; and
- Allow the Department to accept identification not otherwise enumerated.

The purpose of the new sections is to:

- Require additional documentation when requesting personal information from the Department;
- Limit the unlawful resale or redisclosure of motor vehicle records;
- Define what records must be maintained by those who resale or redisclose personal information and define the Department's procedures for requesting and reviewing those records; and
- Provide a process for reestablishing access to motor vehicle records.

FINANCIAL IMPACT

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

BACKGROUND AND DISCUSSION

The amendments and new sections include:

- **§217.122** – definitions for "authorized recipient" and "requestor" to reflect who may lawfully receive personal information associated with motor vehicle records.
- **§217.123** – allow the Department to accept any approved identification.
- **§217.125** – defines what documentation the Department will require from a requestor of motor vehicle records.
- **§217.126** – limits the forms in which personal information may be resold or redisclosed and requires a recipient to inform those whom they resale or redisclose records of their duties under the Transportation Code.
- **§217.127** – requires those who resale or redisclose personal information to keep certain records of those transactions.
- **§217.128** – creates a process for Departmental review of the records required in §217.127.
- **§217.129** – defines how a requestor may become ineligible to receive motor vehicle records.
- **§217.130** – defines the process for reestablishing access to motor vehicle records.

The proposal was published in the *Texas Register* on March 16, 2018. The comment period closed on April 16, 2018. The department received comments from the following regarding the proposed rules: Steve Hayden, HDR; HS Hardy, QuickView Technologies; Sean Wheatley, Experian Information Solutions, Inc.; Alice Miles, R.L. Polk & Co.; and Eric Ellman, Consumer Data Industry Association. Changes in the adopted amendments respond to public comments asking the department to clarify from three to two definitions of those who qualify to receive personal information; to

allow out-of-state licensees to receive personal information; to limit recordkeeping provisions to personal information only, consistent with the Transportation Code; and to make our termination provisions discretionary rather than mandatory.

If the board adopts the amendments and new sections during its June 14, 2018, open meeting, staff anticipates:

- publication in the July 6, 2018, issue of the *Texas Register*; and
- an effective date of July 15, 2018.

Lawson, Jon

Subject: FW: 180309 HDR/Steve Hayden FW: Proposal of Rules under Title 43, Texas Administrative Code

From: Steve Hayden [mailto:shayden@hdr.com]
Sent: Friday, March 9, 2018 11:02 AM
To: Duncan, David <David.Duncan@txdmv.gov>
Subject: Proposal of Rules under Title 43, Texas Administrative Code

David,

I have looked at the recommendations using the attached document. I have a few questions and comments.

On the first page it says that "publication of the proposed amendments and new sections in the Texas Register on or about March 23,2018". It then says comments "will be accepted until 5:00 pm on April 23, 2018". Does this mean that this all has not been put in to the Texas Register yet? Sorry, I'm new to this particular process.

On #377 it states that "The Board of the Texas Department of Motor Vehicles (board) finds it necessary to amend Chapter 217, etc." Why is "it necessary"? I can conjure up some reasons, the main one being that the information is being used for solicitation or marketing and that is not allowed by the DPPA or the Texas Transportation Code. As you and I have discussed previously even I receive such solicitations which appear to be generated from the records that are being addressed in these amendments. Usually this is from entities attempting to sell automobile aftermarket warranties. One problem with this is that from my own experiences I cannot say for sure if these solicitations are generated from the Texas title data. Why? Because there are companies like Infutor who have been collecting (for years) and aggregating vehicle data that is not obtained from any state repository that would fall under the DPPA. They obtain their data from a variety of sources external of any state databases and I can assure you that in states like Texas they have at least 75% of the same basic data (excluding license plates) that the state has on vehicles. Because of this I am wondering if the state has considered these types of external non-DPPA databases when addressing whatever makes it "necessary" for these changes? I am not asking this because of questions or issues I may or may not have with these proposed changes, I am asking because if these very large secondary data sources are contributing to complaints by the public to your agency is this something that you have taken in to consideration? Has the state been able to delineate between the possible misuse of DPPA/Tx Tran Code data which is the obvious reason for these changes and instances where someone has complained to your agency about some type of solicitation or marketing driven by non-DPPA data? The non-DPPA data aggregators get their data from secondary sources quickly and it could look like the information has come from the state when it has not.

Here are some comments and questions I have:

#385 - #7-#23 – COMMENT: I agree with the identification requirements.

#386 - #13(ii) – QUESTION: Will the records cost the same but the money paid be drawn down from a "prepaid account"? COMMENT: If yes on both I agree with this provision.

#388 - #10 – QUESTION: Please define "reasonable assurance".

#388 - #19b to #390 1-5: QUESTION: What does "additional documentation submitted prior to disclosure mean"? Does this mean that you want us to send you documentation on every entity we supply data to? You want our list of clients? COMMENT: If yes why is this necessary if we have agreements with all of them where they agree to use the information

under the DPPA/Texas Trans Code? Where they have agreed in writing already that they will use the data for permitted uses and have signed the same basic "permitted use" forms that direct users to the state has signed? How does this work with entities such as Crime Stoppers? Or other law enforcement entities that we provide the data to where they may have open cases or closed cases? In 28 years my company has never had a consumer complaint or any complaints to any state agency. Since 1989 our company policy has been to address any inquiries regarding our clients use of the data (excepting law enforcement) within 60 minutes. This is what I named "The Sixty Minute Rule". If anyone ever has a question about any record we have supplied for a permitted purpose to one of our clients we will have all their questions responded to within one hour. FYI, regarding vehicle information we have not had a consumer inquiry for several years. Under #390 18-22 it appears that we are "responsible for misuse" by anyone we provide the information to anyway. I consider our client list a trade secret also.

#390 7-13: COMMENT: We have only resold some data in bulk once and that was **when the state asked us** to provide copies of some older data (a tiny amount) to another entity. Our policy has been to not resell data in bulk to anyone, ever.

#390 – 14 to 17: COMMENT: We have been doing this for years, we were advising entities we supply information to of the DPPA restrictions many years ago then of the Texas Transportation Code restrictions. The only exception to this is when we provide TxDMV itself data, usually this is for cold law enforcement cases or circumstances where a law enforcement agency is looking for data that TxDMV may no longer hold. We have provided various state and law enforcement agencies data for over a quarter of a century. Usually this involves "needle in a haystack" circumstances where we try to use the case file information to find whatever the detective or analysis is looking for. We have done 100's of these over the decades we have bene in business and as a company policy have never charged money for such work.

Further, there have been numerous situations where we have been approached by entities that do not fall under "permitted uses" and have had to advise them we cannot supply information to them. Several times in past years the state may supply someone a list of "vendors" that acquired the data from the state. At times I have received calls from the public where the person has the vendor list but we cannot provide them with the information they are looking for. An example of this is when someone may be trying to find a vehicle that their parent owned years back and wishes to track it down and buy it back for the parent. In such a scenario we cannot provide the data. Over the years in some circumstances where we have been unsure if we could provide data we would ask the state about the circumstance we were looking at. In situations where TxDMV has provided the list of vendors and we are contacted by a member of the public and they can certify to us that they have a permitted purpose then we provide the data. I don't think we have ever charged anyone for that either. In situations where the person who contacts us wants to obtain information regarding a criminal event we will usually assist them but never directly. An example of this would be a hit and run event or a homicide where a family member is trying to look in to the situation on their own. We will work with whoever in law enforcement is working on the case or bring someone in law enforcement in to assist. This is something else we have never charged money for. I could write a book about these kinds of things. Why do we do this? How could we say no?

#391 – 14: QUESTION: Please define what is meant by "statement".

#391 – 19 to 23; #392 1 to 12: QUESTION: What format would the data have to be provided in?

David, overall a lot of the things proposed I am already doing. My biggest concern is providing our client data without reason, I get the feeling that this could result in possible litigation where some attorney decides that we have been involved in something we have not been. Again, I'm at almost 30 years handling this data and I have done so without one consumer complaint, complaint to any government agency including your agency and without any litigation regarding our handling of information. I worked on the DPPA, I wrote the list that is contained in the permitted use section. I worked with Barbara Boxer way back when the issue was "stalking". I have spoken to numerous representatives in the Texas legislature and also to committees, besides working with people like then Senator Armbrister when the state was formulating what is currently in the Texas Transportation Code. I worked with Senator Richard Shelby when the DPPA was amended to outlaw using the data to market or solicit. When that passed and there

were new restrictions on marketing and/or solicitation my company did not have to change a thing as far as our business practices because we would not provide data for such uses. Honestly, I could have made a lot of money in doing so oin the 1990's but I knew that the public did not like being pestered.

If you are going to require that we hand over our records and/or client agreements in the case of my company I just don't see why. I'd prefer that TxDMV maybe look at issues related to any complaints about the possible misuse of information then simply ask us if we provided the record in question to anyone. This is akin to what Texas DPS does with the criminal conviction data some of us handle. They had an issue with companies obtaining the data and then pushing it out to the public to anyone with a credit card (DPS does this themselves with their own web site) but those companies were letting the data get "stale". Some people would have their records expunged but the record was sitting out there in some old database some idiot was selling as if it was current. We worked very hard to get things changed such that if you have the data Texas DPS can send you an audit checking that records that should have been removed have been. So far my company has been through several audits and has passed every single one. Using the same kind of logic I'd prefer that if TxDMV has a complaint regarding a record that might be state related that they simply send us the license plate or VIN and we tell you if we have provided that record to anyone and who we provided it to. I wonder, how many complaints about misuse have you received to propose these amendments? I'm back to my why is "it necessary" to do this question. I presume you already have someone who is tracking any complaints or you would not be working on these amendments. You are already tracking this and would not have to hire someone to send us a record or list of records that have possibly been possibly misused so we can check to see if the data came out of our systems. The state might find that the aforementioned external non-DPPA vehicle data aggregators are the reason you are receiving a lot of complaints.

Repeating myself, I have handled Texas vehicle registration data for many years. I'm pretty sure HDR® was the first company to acquire the vehicle registration data from the state in the early 1990's. Over the years we have done a lot of good with the information and we have followed the laws, laws we helped construct. I appreciate the opportunity to comment on these proposed amendments and I hope that you can answer some of my questions and consider my comments regarding how these amendments could affect my company.

If you have any questions or comments please let me know.

Kindest regards,

Steven C. Hayden
CEO
HDR
shayden@hdr.com
office - 281-996-5509
office - 1-800-899-4HDR (4437)
mobile - 713-824-5069
office direct VOIP - 281-816-3129
fax - 281-996-1947

Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Date: February 8, 2018
Action Requested: APPROVAL

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Jeremiah Kuntz, Director, Vehicle Titles and Registration Division
Agenda Item: 18
Subject: Proposal of Rules under Title 43, Texas Administrative Code, Chapter 217, Vehicle Titles and Registration
Amendments, §217.122 and §217.123
New, §§217.125 - 217.130
(Relating to motor vehicle record information and DPPA)

RECOMMENDATION

Approval to publish the proposed amendments and proposed new rules in the *Texas Register* for public comment.

PURPOSE AND EXECUTIVE SUMMARY

The purpose of the proposed amendments is to:

- Differentiate those who request and receive motor vehicle records directly from the Department with those who receive records by resale or redisclosure; and
- Allow the Department to accept identification not otherwise enumerated.

The purpose of the proposed rules is to:

- Require additional documentation when requesting motor vehicle records from the Department;
- Limit the unlawful resale or redisclosure of motor vehicle records;
- Define what records must be maintained by those who resale or redisclose motor vehicle records and define the Department's procedures for requesting and reviewing those records; and
- Provide a process for reestablishing access to motor vehicle records.

FINANCIAL IMPACT

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

BACKGROUND AND DISCUSSION

The proposed amendments and new sections include:

- **§217.122** – definitions for "authorized recipient," "original recipient," and "requestor" to reflect who may lawfully receive motor vehicle records.
- **§217.123** – allow the Department to accept any approved identification.
- **§217.125** – defines what documentation the Department will require from a requestor of motor vehicle records.
- **§217.126** – limits the forms in which motor vehicle records may be resold or redisclosed and requires an original recipient to inform those whom they resale or redisclose records of their duties under the Transportation Code.
- **§217.127** – requires those who resale or redisclose motor vehicle records to keep certain records of those transactions.
- **§218.128** – creates a process for Departmental review of the records required in section 217.127.
- **§219.129** – defines how a requestor may become ineligible to receive motor vehicle records.
- **§219.130** – defines the process for reestablishing access to motor vehicle records.

If the proposed amendments are approved by the board, staff anticipates publication of the proposed amendments and new sections in the Texas Register on or about March 23, 2018. Comments on the proposed amendments will be accepted until 5:00 pm on April 23, 2018.

BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES

RESOLUTION APPROVING PUBLICATION OF PROPOSED AMENDMENTS TO 43 TAC SECTIONS 217.122-217.123, AND NEW SECTIONS 217.125-217.130, RELATING TO MOTOR VEHICLE RECORD INFORMATION

The Board of the Texas Department of Motor Vehicles (board) finds it necessary to amend Chapter 217, Vehicle Titles and Registration, Subchapter F, Motor Vehicle Record Information, §217.122, Definitions, and §217.123, Access to Motor Vehicle Records; and add new §217,125, Additional Documentation Related to Certain Permitted Uses, §217.126 Limitations on Resale and Redisclosure, §217.127 Records Maintained by Recipients Who Resell or Redisclose Motor Vehicle Records, §217.128 Department Review of Recipient's Records of Resale or Redisclosure, §217.129 Ineligibility to Receive Motor Vehicle Records, and §217.130 Approval For Persons Whose Access to Motor Vehicle Records Has Previously Been Terminated.

The preamble, proposed amendments, and new sections are attached to this resolution as Exhibits A-B, and are incorporated by reference as though set forth verbatim in this resolution, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the board that the attached rules are authorized for publication in the *Texas Register* for the purpose of receiving public comment.

The department is directed to take the necessary steps to implement the actions authorized in this order pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

_____
Raymond Palacios, Jr., Chairman
Board of the Texas Department of Motor Vehicles

Recommended by:

_____
Jeremiah Kuntz, Director
Vehicle Titles and Registration

Order Number: _____ Date Passed: February 8, 2018

Texas Department of Motor Vehicles
Chapter 217, Vehicle Titles and Registration

Proposed Preamble

The Texas Department of Motor Vehicles (department) proposes amendments to Chapter 217, Vehicle Titles and Registration, Subchapter F, Motor Vehicle Record Information, §217.122 Definitions, and §217.123, Access to Motor Vehicle Records. The department also proposes new sections §217.125 Additional Documentation Related to Certain Permitted Uses, §217.126 Limitations on Resale and Redisclosure, §217.127 Records Maintained by Recipients Who Resell or Redisclose Motor Vehicle Records, §217.128 Department Review of Recipient's Records of Resale or Redisclosure, §217.129 Ineligibility to Receive Motor Vehicle Records, and §217.130 Approval For Persons Whose Access to Motor Vehicle Records Has Previously Been Terminated.

EXPLANATION OF PROPOSED AMENDMENTS

The amendments to §217.122 differentiate those who request and receive motor vehicle records directly from the Department with those who receive records by resale or redisclosure.

The amendments to §217.123 allow the department to accept identification not enumerated but deemed acceptable when processing a request for motor vehicle records.

EXPLANATION OF PROPOSED NEW SECTIONS

Transportation Code, §730.014 allows any agency that compiles or maintains motor vehicle records to adopt rules to implement and

Texas Department of Motor Vehicles
Chapter 217, Vehicle Titles and Registration

administer the Motor Vehicle Records Disclosure Act.

Proposed new §217.125 states what additional documentation is needed when submitting a request for motor vehicle records.

Proposed new §217.126 limits the forms motor vehicle records may be resold or redislosed and requires anyone reselling or redisclosing motor vehicle records to inform the recipient of their obligations under the Transportation Code.

Proposed new §217.127 states what records must be maintained by those who resell or redisclose motor vehicle records.

Proposed new §217.128 states the department's process in reviewing records kept by those who resell or redisclose motor vehicle records.

Proposed new §217.129 states when a requestor of motor vehicle records is ineligible to receive those records.

Proposed new §217.130 states how a requestor of motor vehicle records, whose access was previously revoked, may regain access to records.

FISCAL NOTE

Linda M. Flores, Chief Financial Officer, has determined that

for each of the first five years the proposed amendments and new sections are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposals.

Jeremiah Kuntz, Director of the Vehicle Titles and Registration Division, has determined that there will be no impact on local economies or overall employment as a result of enforcing or administering the proposed new sections and amendments.

PUBLIC BENEFIT AND COST

Mr. Kuntz has also determined that for each year of the first five years the proposed amendments and new sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments and new sections will be to ensure only recipients permitted by law obtain motor vehicle records. There are no anticipated economic costs for persons required to comply with the proposed amendments and new sections. There will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

TAKINGS IMPACT ASSESSMENT

The department has determined that this proposal affects no private real property interests and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does

not constitute a taking or require a takings impact assessment under Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT

The department has determined that during the first five years the proposed amendments and new sections are in effect, no government program would be created or eliminated. Implementation of the proposed amendments and new sections would not require the creation of new employee positions or elimination of existing employee positions. Implementation would not require an increase or decrease in future legislative appropriations to the department or an increase or decrease of fees paid to the department. Additionally, the proposed amendments and new sections do not create a new regulation, or expand, limit, or repeal an existing regulation. Implementation does not affect the number of individuals subject to the rule's applicability and will not affect this state's economy.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments and new sections may be submitted to David D. Duncan, General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 or by email to *rules@txdmv.gov*. The deadline for receipt of comments is 5:00 p.m. on April 23, 2018.

STATUTORY AUTHORITY

Texas Department of Motor Vehicles
Chapter 217, Vehicle Titles and Registration

The proposed amendments and new sections are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §730.014, which provides that the department may adopt rules to implement and administer Transportation Code Chapter 730, Motor Vehicle Records Disclosure Act.

CROSS REFERENCE TO STATUTE

Government Code, §552.130; Transportation Code, Chapter 730; and 18 U.S.C. §2721 et seq.

SUBCHAPTER F MOTOR VEHICLE RECORD INFORMATION

§217.122 Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Authorized recipient – a person receiving motor vehicle records as defined by this subchapter, in a manner authorized by Transportation Code, Chapter 730.

(2) Department--Texas Department of Motor Vehicles.

(3) Motor vehicle records --Information regarding the titling or registration of motor vehicles, which may include the make, vehicle identification number, year, model, body style, license number of a motor vehicle, and the name, address, and social security number of an owner or lienholder. As used in this Subchapter, the term includes any personal information contained in such records.

(4) Original recipient – an authorized recipient receiving motor vehicle information directly from the department.

(5) Personal information--Information that identifies an individual, including an individual's photograph or computerized image, social security number, driver identification number, personal identification certificate number, name, telephone number, medical or disability information, license plate number,

or address other than the postal routing code.

(6) Requestor – a person seeking motor vehicle records from the department.

(7) Service agreement--A contractual agreement that allows individuals, businesses or governmental entities or institutions to access the department's motor vehicle records.

(8) Written request--A request made in writing, including electronic mail, electronic media, and facsimile transmission.

§217.123 Access to Motor Vehicle Records.

(a) Request for records. A requestor shall submit a written request on the form required by the department. Information will be released only in accordance with Title 18 U.S.C. §2721 et seq., Transportation Code, Chapter 730, Government Code, §552.130, and this Subchapter. A completed and properly executed form must include, at a minimum:

(1) the name and address of the requestor;

(2) the Texas license number, title or document number, or vehicle identification number of the motor vehicle about which information is requested;

(3) a photocopy of the requestor's identification;

(4) a statement that the requested information may only be released if the requestor is the subject of the record,

if the requestor has written authorization for release from the subject of the record, or if the intended use is for a permitted use as indicated on the form;

(5) a certification that the statements made on the form are true and correct; and

(6) the signature of the requestor.

(b) Identification required. A requestor may not apply for receipt of personal information unless the person presents current photo identification containing a unique identification number. The identification document must be a:

(1) driver's license or state identification certificate issued by a state or territory of the United States;

(2) United States or foreign passport;

(3) United States military identification card;

(4) United States Department of Homeland Security, United States Citizenship and Immigration Services, or United States Department of State identification document;

(5) concealed handgun license or license to carry a handgun issued by the Texas Department of Public Safety under Government Code, Chapter 411, Subchapter H;

(6) copy of current law enforcement credentials if the requestor is a law enforcement officer, or

(7) other form of identification acceptable to the

department.

(c) Electronic access. The department may make motor vehicle record information available under the terms of a written service agreement.

(1) Agreement with business or individuals. The written service agreement with a business or individual must contain:

(A) the specified purpose of the agreement;

(B) an adjustable account, if applicable, in which an initial deposit and minimum balance is maintained in the amount of:

(i) $200 for an on-line access account; or

(ii) $1,000 for a prepaid account for batch purchase of motor vehicle record information;

(C) termination and default provisions;

(D) service hours for access to motor vehicle records for on-line access;

(E) the contractor's signature;

(F) a statement that the use of motor vehicle record information obtained by virtue of a service agreement is conditional upon its being used:

(i) in accordance with 18 U.S.C. §2721 et seq. and Transportation Code, Chapter 730; and

(ii) only for the purposes defined in the agreement; and

(G) the statements required by subsection (a) of this section.

(2) Agreements with governmental agencies.

(A) The written service agreement with an agency must contain:

(i) the specified purpose of the agreement;

(ii) method of payment;

(iii) notification regarding the charges;

(iv) a statement that the use of motor vehicle record information obtained by virtue of a service agreement is conditional upon its being used in accordance with 18 U.S.C. §2721 et seq. and Transportation Code, Chapter 730, and only for the purposes defined in the agreement;

(v) the statements required by subsection (a) of this section;

(vi) the signature of an authorized official; and

(vii) an attached statement citing the agency's authority to obtain social security number information, if applicable.

(B) Texas Law Enforcement Telecommunication

System access is exempt from the payment of fees.

(d) Ineligibility to receive personal information. The department may prohibit a person, business, or agency from receiving personal information if the department finds a violation of a term or condition of the agreement entered into in accordance with subsection (c) of this section.

§217.125 Additional Documentation Related to Certain Permitted Uses.

(a) The department may require a requestor to provide reasonable assurance as to the identity of the requestor and that the use of motor vehicle records is only as authorized under Transportation Code §730.012(a). Where applicable, each requestor submitting a request for motor vehicle records shall provide documentation satisfactory to the department that they are authorized to request the information on behalf of the business or government entity authorized to receive the information.

(b) The following permitted uses of motor vehicle records require additional documentation submitted to the department prior to disclosure:

(1) Transportation Code §730.007(2)(C) requires submitting the information the business is attempting to verify

against the department's motor vehicle records.

(2) Transportation Code §730.007(2)(D) requires submitting proof of legal proceeding, or if no proceeding has been initiated, proof in anticipation of proceeding.

(3) Transportation Code §730.007(2)(E) requires submitting documentation sufficient to prove the requestor is employed in a researching occupation.

(4) Transportation Code §730.007(2)(F) requires submitting a license number provided by the Texas Department of Insurance, a license number the insurance support organization is working under, or proof of self-insurance.

(5) Transportation Code §730.007(2)(G) requires submitting a license number provided by the Texas Department of Licensing and Regulation.

(6) Transportation Code §730.007(2)(H) requires submitting a license number provided by the Texas Department of Public Safety.

(7) Transportation Code §730.007(2)(I) requires submitting a copy of the commercial driver's license.

(8) Transportation Code §730.007(2)(J) requires submitting documentation to relate the requested personal information with operation of a private toll transportation facility.

(9) Transportation Code §730.007(2)(K) requires a consumer reporting agency, as defined by the Fair Credit Reporting Act (15 U.S.C. §1681 et. seq.) to submit documentation on official letterhead indicating a permitted use for personal information, as defined by that Act.

§217.126 Limitations on Resale and Redisclosure.

(a) Authorized recipients may only resell or redisclose motor vehicle records to other authorized recipients and not in the identical or similar format as provided by the department.

(b) Authorized recipients may not resell or redisclose the entire motor vehicle records database in its complete bulk format.

(c) Any authorized recipient reselling or redisclosing motor vehicle records must inform the person to whom they are reselling or redisclosing of their obligations under Transportation Code, Chapter 730 and this Subchapter.

(d) Any original recipient is responsible for misuse of motor vehicle records by any person receiving their version of the information, regardless of whether the original authorized recipient approved or was aware of subsequent transfers of the information.

§217.127 Records Maintained by Recipients Who Resell or Redisclose Motor Vehicle Records.

(a) Authorized recipients who resell or redisclose motor vehicle records are required to maintain records of that transaction.

(b) Records must be maintained for not less than five years and must include:

(1) the name and contact information of any recipient of resold or redisclosed motor vehicle records;

(2) the permitted use for which the motor vehicle records were released;

(3) the quantity of motor vehicle records sold or disclosed to each subsequent person;

(4) a statement by the authorized recipient specifying what data was resold or redisclosed and in what format; and

(5) any other documentation of the agreement to resell or redisclose motor vehicle records.

§217.128 Department Review of Recipient's Records of Resale or Redisclosure.

(a) The department has the authority to request and review records kept by all authorized recipients who resell or redisclose motor vehicle records.

(b) This request will be made in writing to the recipient.

(c) The recipient must provide the requested records within 30 days of the date of the department's request.

(d) Failure to fully respond to the department's request will result in termination of access to motor vehicle records under Transportation Code §730.007.

(e) Upon receipt of the requested records, the department will evaluate the records for compliance with the service agreement, applicable statutes, and rules.

(f) If it is determined that an original recipient is not in compliance with the service agreement, applicable statutes, and rules, the service agreement will be terminated immediately.

§217.129 Ineligibility to Receive Motor Vehicle Records.

(a) The department may deny a requestor's access to motor vehicle records if it determines withholding the information benefits the public's interest more than releasing the information.

(b) If the department determines an authorized recipient of motor vehicle records has violated a clause or term of the service agreement, and that service agreement has been terminated, that authorized recipient cannot enter into a subsequent service agreement unless approved to do so under

§217.130 of this Subchapter.

(c) Termination of the service agreement caused by any member of a business, partnership, or entity shall be effective on the whole organization. Subsequent businesses formed by any member, officer, partner or affiliate of an entity whose service agreement has been terminated will also be ineligible to receive records.

§217.130 Approval For Persons Whose Access to Motor Vehicle Records Has Previously Been Terminated.

(a) A requestor whose service agreement was previously terminated, but who is not subject to Transportation Code §730.016, shall submit a written request for reapproval on the form required by the department.

(b) In addition to the requirements of §217.123 of this Subchapter, the request must contain:

(1) any documents indicating remedial efforts the requestor has undertaken to prevent the unlawful disclosure of motor vehicle records,

(2) any documents indicating agreements between the requestor and third parties receiving resold or redisclosed motor vehicle records, and

(3) A statement that the requestor will notify the department before reselling or redisclosing any motor vehicle

<< AGENDA

records for the time period prescribed by the department, including all of the information required under §217.127(b) of this Subchapter. The notification must include the name, address, and contact information of the third party requesting resold or redisclosed motor vehicle records, and must include the form(s) used to verify the third party's lawful purpose in obtaining motor vehicle records.

(c) Failure to comply with any of the terms of this section or a re-offense of the service agreement will result in the termination of the service agreement and the permanent inability to receive motor vehicle records.

April 15, 2018

Hello, I'm HS Hardy with QuickView Technologies, Inc.

Quickview is an Original recipient of Motor vehicle records containing Personal information from TxDMV by virtue of a Service agreement for Electronic access which is commonly known as MVInet.

Quickview, through secure WEB Site access, re-discloses these records that include Personal information to entities and individuals that have a Permitted purpose to view Personal information as their assigned Agent.

I would like to comment on the proposed amendments and proposed new rules that were published in the Texas Register for public comment on March 16th 2018.

Concerning 217.122(3), definition of Motor Vehicle Records.

The last sentence "*As used in this subchapter, the term includes any personal information contained in such records*." has the unintended consequence of restricting non-protected information such as vehicle class, weight, color, odometer, lien date, remarks section, etc.

The FDPPA and Chapter 730 refer to Personal Information restrictions, but not other information in Motor Vehicle Records.

Concerning 217.125(b), "*additional documentation submitted to the department prior to disclosure*."

For **re-disclosure companies like Quickview**, we wish to see additional language added in section 217.125(b). *The following permitted uses of motor vehicle records require addition documentation submitted to the department, if not addressed in 217.127(b)(2), prior to disclosure:*

And in 217.127(b)(2). *The permitted use for which motor vehicle records were released and additional documentation in accordance with 217.125(b);*

The intent is to delay delivery of additional documentation until 217.128 Audit.

Concerning 217.125(b)(4)(5)(6). Out of State entities that do not have Texas licenses would be locked out. Texas stakeholders would be in trouble if other States did not allow access to their records without their State licenses. I think the department should accept other States licenses.

Concerning 217.128(f). It would sure be nice to have the opportunity to quickly become compliant before being, *terminated immediately*, with a notice of non-compliance. Especially if believed you were in compliance and the termination came as a surprise.

Sincerely, Harmon "HS" Hardy III
972-490-5566 x202

Consumer Data Industry Association
1090 Vermont Ave., NW, Suite 200
Washington, D.C. 20005-4905

P 202 371 0910

Writer's direct dial: +1 (202) 408-7407

CDIAONLINE.ORG

April 16, 2018

David D. Duncan
General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731

Re: Proposed Amendments to 43 TAC §§217.122, 217.123, 217.125 -217.130

Via Email: rules@txdmv.gov

Dear Mr. Duncan:

This comment is on behalf of the Consumer Data Industry Association ("CDIA") expressing our concerns that the proposed amendment to Subchapter F on Motor Vehicle Record Information, while under the guise of helping Texas drivers and car owners, could ultimately jeopardize public safety. Since the 30-days provided by the Department of Motor Vehicles ("DMV) is not enough time to provide a compete vetting of the changes posed, we also request additional time to provide a more detailed and thorough comment.

CDIA is an international trade association, founded in 1906, of more than 130 corporate members. Our mission is to enable consumers, media, legislators and regulators to understand the benefits of the responsible use of consumer data which creates opportunities for consumers and the economy. CDIA members provide businesses with the data and analytical tools necessary to manage risk. Our members help ensure fair and safe transactions for consumers, facilitate competition and expand consumers' access to a market which is innovative and focused on their needs. CDIA member products are used in more than nine billion transactions each year.

CDIA members use motor vehicle records to prevent fraud, to assist in insurance underwriting and claims investigations, to locate owners to inform them of automobile recalls, and more. CDIA members operate under a number of privacy and security laws, including the Federal Fair Credit Reporting Act ("FCRA") and its Texas equivalent, the Drivers' Privacy Protection Act ("DPPA"), the Safeguards Rule of the Gramm-Leach-Bliley Act ("GLBA") and more. Our members' customers include federal, state, and local governments, insurers, non-profits, and more.

The data provided by our members, which include motor vehicle data, is critical to many public and private functions. This was best said by the Texas Office of the Attorney General: "[w]e [the Texas Attorney General's Office] need the private sector to help protect consumers and help combat identity fraud. Moreover, we also need the private sector to assist law enforcement."[1] The attorney general's office added that the "[Texas] Attorney General's Office routinely uses national databases provided by private resellers to track down individuals who are delinquent in their child-support payments, as well as to help locate suspects in the course of conducting consumer protection and criminal investigations."[2] The value of data from CDIA members is not just valuable to Texas, it is proven at the federal level. As stated by the Department of Homeland Security: "[W]e often get more accurate data from the commercial sector. In addition, the processes by which government agencies manage data often makes it difficult to acquire and needs [a] great deal of labor intensity into making it usable and accessible to other entities."[3]

The substantial documentation that would now be required by 43 TAC Sec. 217.125 would greatly interfere, with no logical purpose, with our members' ability to provide motor vehicle records for the socially beneficial purposes, like preventing fraud, locating people on behalf of law enforcement, authenticating volunteer drivers for nonprofits, and more.

The considerable new and proposed limits on resale and redisclosure would greatly interfere, with no logical purpose, with our members' ability to provide motor vehicle records for the socially beneficial purposes provided in this comment. Under the laws that govern our members, like the FCRA, the GLBA, and the DPPA, motor vehicle records use is closely monitored and are often provided only for a purpose permitted by law, like a job application, a law enforcement purpose, or a request to serve as a volunteer driver for a nonprofit. Limiting redisclosure of motor vehicle records would interfere with a host of socially beneficial uses for the records.

---

[1] *Amicus Argument of James Ho for State of Texas*, *Taylor v. Acxiom Corp.*, U.S. Court of Appeals (5th Cir.) Case Nos. 08-41083, 41180, 41232, (Nov. 4, 2009).

[2] May 8, 2009 *Brief of the State of Texas as Amicus Curiae in Support of Defendants*, *Taylor v. Acxiom Corp.*, U.S. Court of Appeals (5th Cir.) Case No. 08-41083, 41180, 41232, pp. 2-3.

[3] Source: The Privacy Office, Department of Homeland Security, Privacy and Technology Workshop, Official Transcript at 6 (Sept. 8-9, 2005) (comments of Grace Mastalli Principal Deputy Director for the Information Sharing and Collaboration Program at DHS), http://www.au.af.mil/au/awc/awcgate/dhs/privacy_wkshop_panel1_sep05.pdf.

The proposed rule changes provide for significant investigatory powers by the DMV to review the records of the recipients of motor vehicle records. These obligations are in addition to the obligations already on CDIA members under laws and contracts with others. This additional layer of regulation is unnecessary considering all of the recordkeeping obligations our members already have, and this additional burden could inject additional costs that might be most keenly felt by those entities with the least resources, like governments, law enforcement, and non-profits.

The proposal comes with the ability of the Department to deny access to records to lawful companies providing records under law and for a social good. CDIA particularly object to Proposed Sec. 217.129(a) which allows for a broad and unchecked denial of access if the Department feels, without any stated parameters, that denial of access benefits the public more than granting access. This provision is vague and invites arbitrary and subjective decisions. Denial of access will also be mostly harshly felt by governments, law enforcement, and non-profits, which may have limited means and methods to look for comparable motor vehicle records elsewhere.

In sum, while under the guise of helping Texas drivers and car owners, the proposed changes to Subchapter F on Motor Vehicle Record Information could ultimately jeopardize public safety. We also respectfully request that since the 30-days provided by the DMV is not enough time to provide a compete vetting of the changes posed, we also request additional time to provide a more detailed and thorough comment.

Thank you for the opportunity to provide this comment. We look forward to answering any questions you may have and hope for additional time for a complete airing of the issues presented in the proposed rule changes.

Sincerely,

Eric J. Ellman
Senior Vice President, Public Policy & Legal Affairs

Lawson, Jon

From: Alice Miles <Alice.Miles@ihsmarkit.com>
Sent: Monday, April 16, 2018 1:09 PM
To: Zz - Resource - GCO_Rules; Duncan, David
Cc: 'jack.erskine@klgates.com'
Subject: Administrative Rule Revision - Comments
Attachments: SKM-USS7-1218041614020.pdf

Please see attached for preliminary comments on 43 TAC 10.217.122-.130. Please let me know if there are any questions. Thank you, Alice Miles

Alice Miles
Associate Director | Government Relations
26533 Evergreen Road | Suite 1100 | Southfield MI 48076
P: 1 248 728 7404
alice.miles@ihsmarkit.com

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Please visit www.ihsmarkit.com/about/contact-us.html for contact information on our offices worldwide.

April 16, 2018

David D. Duncan
General Counsel
Texas Department of Motor Vehicles

Dear Mr. Duncan:

For the record, R.L. Polk & Co. has reviewed the Texas Department of Motor Vehicles March 5, 2018 Proposed Rule notification regarding 43.TAC 10.217.F.217.122,.123,.125-.130 and is opposed to certain sections as they are currently constituted. At a high level our concerns center around the need for:

- Clarification that the rule applies only to personal information
- Differentiation between the processes required for bulk data purchasers versus individual look-up customers
- Provision of a Cure Period prior to termination
- Assurance that the language included in the Rule does not expand on the Texas Transportation Code.

We will provide additional detailed comment regarding the proposed revision before April 20, 2018. R.L. Polk & Co. values its long-standing relationship with the Texas Department of Motor Vehicles and we appreciate the opportunity to provide our comments.

Sincerely,

Alice Miles

Alice Miles
Associate Director, Government Relations
R. L. Polk & Co.
26533 Evergreen Rd., Suite 1100
Southfield, MI 48076
(O) 248-728-7404
Alice.miles@ihsmarkit.com

955 American Lane
4th Floor Schaumburg,
IL 60173

April 16, 2018

Mr. David D. Duncan
General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, Texas 78731

Dear Mr. Duncan,

On behalf of Experian Information Solution's Inc., we would like to respectfully share some concerns regarding proposed rule 43 TAC § 217.122, § 217.123, § 217.125 - § 217.130.

As you will recall, Experian Automotive is a business unit of Experian, a global information solutions company. For almost twenty years, Experian Automotive ("Experian") has been receiving bulk motor vehicle title and registration data from all fifty-one US jurisdictions. We have built and maintain our National Vehicle Database (NVDB) which stores all motor vehicle data (current and historical) and powers all of our products and services that benefit consumers, law enforcement, and the automotive industry. These services include safety recall notifications, AutoCheck vehicle history reports, and statistical reports for the automotive industry services. All of these services comply with the federal Driver's Privacy Protection Act (DPPA) as well as all state privacy laws and contractual restrictions.

As discussed, we will provide detailed comments to the Department of Motor Vehicles by April 20, 2018. The concerns are related to the definitions of parties that receive data, the definition of motor vehicle records and that we feel there should be a differentiation between how individual record requestors/users and bulk record purchasers such as Experian are regulated.

Thank you for the opportunity to provide input on the proposed rule and we look forward to working with you and your team on this important issue.

Respectfully,

Sean Wheatley
State Government Relations

Beckley, Krystal

From: Wheatley, Sean <sean.wheatley@experian.com>
Sent: Friday, April 20, 2018 1:03 PM
To: Duncan, David
Cc: Lawson, Jon
Subject: Experian comments to proposed rule
Attachments: TX Administrative Rule Revision redline 042018 Experian comments.pdf

Hello David,

As promised, attached please find the Texas DMV's proposed rule with the edits we reviewed earlier this week. This version includes bullet points in each section that provide rational or reasoning behind the edits.

Thank you for your continued willingness to allow us to provide input into the rulemaking. Please let me know if you there is any further information I can provide you with.

Respectfully,

Sean Wheatley
State Government Affairs

Polk and Experian Proposed Revisions in RED – April 16, 2018

Experian Comments

43. TRANSPORTATION

10. TEXAS DEPARTMENT OF MOTOR VEHICLES

217. VEHICLE TITLES AND REGISTRATION

F. MOTOR VEHICLE RECORD INFORMATION

43 TAC §§217.122, 217.123, 217.125 - 217.130

The Texas Department of Motor Vehicles (department) proposes amendments to Chapter 217, Vehicle Titles and Registration, Subchapter F, Motor Vehicle Record Information, §217.122, Definitions, and §217.123, Access to Motor Vehicle Records. The department also proposes new §217.125, Additional Documentation Related to Certain Permitted Uses, §217.126, Limitations on Resale and Redisclosure, §217.127, Records Maintained by Recipients Who Resell or Redisclose Motor Vehicle Records, §217.128, Department Review of Recipient's Records of Resale or Redisclosure, §217.129, Ineligibility to Receive Motor Vehicle Records, and §217.130, Approval for Persons Whose Access to Motor Vehicle Records Has Previously Been Terminated.

EXPLANATION OF PROPOSED AMENDMENTS

The amendments to §217.122 differentiate those who request and receive motor vehicle records directly from the department with those who receive records by resale or redisclosure.

The amendments to §217.123 allow the department to accept identification not enumerated, but deemed acceptable when processing a request for motor vehicle records.

EXPLANATION OF PROPOSED NEW SECTIONS

Transportation Code, §730.014 allows any agency that compiles or maintains motor vehicle records to adopt rules to implement and administer the Motor Vehicle Records Disclosure Act.

Proposed new §217.125 states what additional documentation is needed when submitting a request for motor vehicle records.

Proposed new §217.126 limits the forms motor vehicle records may be resold or redisclosed and requires anyone reselling or redisclosing motor vehicle records to inform the recipient of their obligations under the Transportation Code.

Proposed new §217.127 states what records must be maintained by those who resell or redisclose motor vehicle records.

Proposed new §217.128 states the department's process in reviewing records kept by those who resell or redisclose motor vehicle records.

Proposed new §217.129 states when a requestor of motor vehicle records is ineligible to receive those records.

Proposed new §217.130 states how a requestor of motor vehicle records, whose access was previously revoked, may regain access to records.

FISCAL NOTE

Linda M. Flores, Chief Financial Officer, has determined that for each of the first five years the proposed amendments and new sections are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposals.

Jeremiah Kuntz, Director of the Vehicle Titles and Registration Division, has determined that there will be no impact on local economies or overall employment as a result of enforcing or administering the proposed amendments and new sections.

PUBLIC BENEFIT AND COST

Mr. Kuntz has also determined that for each year of the first five years the proposed amendments and new sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments and new sections will be to ensure only recipients permitted by law obtain motor vehicle records. There are no anticipated economic costs for persons required to comply with the proposed amendments and new sections. There will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

TAKINGS IMPACT ASSESSMENT

The department has determined that this proposal affects no private real property interests and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT

The department has determined that during the first five years the proposed amendments and new sections are in effect, no government program would be created or eliminated. Implementation of the proposed amendments and new sections would not require the creation of new employee positions or elimination of existing employee positions. Implementation would not require an increase or decrease in future legislative appropriations to the department or an increase or decrease of fees paid to the department. Additionally, the proposed amendments and new sections do not create a new regulation, or expand, limit, or repeal an existing regulation. Implementation does not affect the number of individuals subject to the rules applicability and will not affect this state's economy.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments and new sections may be submitted to David D. Duncan, General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 or by email to rules@txdmv.gov. The deadline for receipt of comments is 5:00 p.m. on April 16, 2018.

STATUTORY AUTHORITY

The proposed amendments and new sections are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §730.014, which provides that the department may adopt rules to implement and administer Transportation Code, Chapter 730, Motor Vehicle Records Disclosure Act.

CROSS REFERENCE TO STATUTE

Government Code, §552.130; Transportation Code, Chapter 730; and 18 U.S.C. §2721 et seq.

§217.122. Definitions.

- Deleting "Original Recipient" definition as it is confusing to have definitions for three parties that receive data from the Department. The result would be leaving two parties, "Authorized Recipient" is party who is receiving data from a party that is not the Department and "Requestor" is a party receiving the data from the Department.
- Adding definition for "Request for Individual Records" as it is a term used later in the rule to address individual record requester regulations.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Authorized R~~r~~ecipient--A person receiving motor vehicle records as defined by this subchapter from a person that is not the Department, in a manner authorized by Transportation Code, Chapter 730.

(2) ~~(1)~~ Department--Texas Department of Motor Vehicles.

(3) ~~(2)~~ Motor vehicle records ~~record information~~--Information regarding the titling or registration of motor vehicles, which may include the make, vehicle identification number, year, model, body style, license number of a motor vehicle, and the name, address, and social security number of an owner or lienholder. As used in this subchapter, the term includes any personal information contained in such records.

~~(4) Original recipient--An authorized recipient receiving motor vehicle information directly from the department.~~

(4~~5~~) ~~(3)~~ Personal I~~i~~nformation--Information that identifies an individual, including an individual's photograph or computerized image, social security number, driver identification number, personal identification certificate number, name, telephone number, medical or disability information, license plate number, or address other than the postal routing code.

(5) Request for Individual Records – A request made directly to the Department for an individual record containing personal information.

(6) Requestor--A person seeking motor vehicle records directly from the department.

(7) ~~(4)~~ Service agreement--A contractual agreement that allows individuals, businesses or governmental entities ~~agencies~~ or institutions to access the department's motor vehicle records.

(8) ~~(5)~~ Written request--A request made in writing, including electronic mail, electronic media, and facsimile transmission.

§217.123. Access to Motor Vehicle Records.

- Edits in this section relate to differentiating between what requirements relate to Requests for Individual Records (sections (a) and (b)) and those that relate to parties receiving the data electronically (section c).

(a) Request for Individual R~~r~~ecords. A requestor not covered by (c) ~~person seeking motor vehicle record information~~ shall submit a written request on the form required by the department.

Information will be released only in accordance with Title 18 U.S.C. §2721 et seq., Transportation Code, Chapter 730, ~~and~~ Government Code, §552.130 and this subchapter. A completed and properly executed form must include, at a minimum:

(1) the name and address of the requestor;

(2) the Texas license number, title or document number, or vehicle identification number of the motor vehicle about which information is requested;

(3) a photocopy of the requestor's identification;

(4) a statement that the requested information may only be released if the requestor is the subject of the record, if the requestor has written authorization for release from the subject of the record, or if the intended use is for a permitted use as indicated on the form;

(5) a certification that the statements made on the form are true and correct; and

(6) the signature of the requestor.

(b) Identification required. A requestor ~~person~~ not covered by (c) may not apply for receipt of individual records containing personal information unless the requestor ~~person~~ presents current photo identification containing a unique identification number. The identification document must be a:

(1) driver's license or state identification certificate issued by a state or territory of the United States;

(2) United States or foreign passport;

(3) United States military identification card;

(4) United States Department of Homeland Security, United States Citizenship and Immigration Services, or United States Department of State identification document;

(5) concealed handgun license or license to carry a handgun issued by the Texas Department of Public Safety under Government Code, Chapter 411, Subchapter H; or

(6) copy of current law enforcement credentials if the requestor is a law enforcement officer.

(c) Electronic access. The department may make motor vehicle records ~~record information~~ available under the terms of a written service agreement.

(1) Agreement with business or individuals. The written service agreement with a business or individual must contain:

(A) the specified purpose of the agreement;

(B) an adjustable account, if applicable, in which an initial deposit and minimum balance is maintained in accordance with §217.124 of this title (relating to Cost of Motor Vehicle Records);

(C) termination and default provisions;

(D) the contractor's signature;

(E) a statement that the use of motor vehicle record information obtained by virtue of a service agreement is conditional upon its being used:

(i) in accordance with 18 U.S.C. §2721 et seq. and Transportation Code, Chapter 730; and

(ii) only for the purposes defined in the agreement~~; and~~

~~(F) the statements required by subsection (a) of this section.~~

(2) Agreements with Texas governmental entities.

(A) The written service agreement with a Texas governmental entity must contain:

(i) the specified purpose of the agreement;

(ii) a statement that the use of motor vehicle records ~~record information~~ obtained by virtue of a service agreement is conditional upon its being used in accordance with 18 U.S.C. §2721 et seq. and Transportation Code, Chapter 730, and only for the purposes defined in the agreement;

(iii) the statements required by subsection (a) of this section;

(iv) the signature of an authorized official; and

(v) an attached statement citing the entity's authority to obtain social security number information, if applicable.

(B) Texas governmental entities, as defined in Government Code, §2252.001, and including the Texas Law Enforcement Telecommunication System and toll project entities, as defined by Transportation Code, §372.001, are exempt from the payment of fees, except as provided by §217.124(e) of this title.

(d) Ineligibility to receive personal information. The department may prohibit a person, business, or Texas governmental entity from receiving personal information if the department finds a violation of a term or condition of the agreement entered into in accordance with subsection (c) of this section.

(e) Initial deposits and minimum balances. Notwithstanding §217.124 of this title, the department may modify initial deposit and minimum balance requirements on a case by case basis depending on customer usage.

§217.125. Additional Documentation Related to a Request for Individual Records ~~Certain Permitted Uses~~.

- Edits to this section relate to having the new requirements apply to only Requests for Individual Records.

(a) The department may require a requestor to provide reasonable assurance as to the identity of the requestor and that the use of motor vehicle records is only as authorized under Transportation Code, §730.012(a). Where applicable, each requestor submitting a R~~r~~equest for Individual ~~motor vehicle~~ R~~r~~ecords shall provide documentation satisfactory to the department that

they are authorized to request the information on behalf of the business or government entity authorized to receive the information.

(b) The following permitted uses of motor vehicle records require additional documentation submitted to the department prior to disclosure:

(1) Transportation Code, §730.007(2)(C) requires submitting the information the business is attempting to verify against the department's motor vehicle records.

(2) Transportation Code, §730.007(2)(D) requires submitting proof of legal proceeding, or if no proceeding has been initiated, proof in anticipation of proceeding.

(3) Transportation Code, §730.007(2)(E) requires submitting documentation sufficient to prove the requestor is employed in a researching occupation.

(4) Transportation Code, §730.007(2)(F) requires submitting a license number provided by the Texas Department of Insurance, a license number the insurance support organization is working under, or proof of self-insurance.

(5) Transportation Code, §730.007(2)(G) requires submitting a license number provided by the Texas Department of Licensing and Regulation.

(6) Transportation Code, §730.007(2)(H) requires submitting a license number provided by the Texas Department of Public Safety.

(7) Transportation Code, §730.007(2)(I) requires submitting a copy of the commercial driver's license.

(8) Transportation Code, §730.007(2)(J) requires submitting documentation to relate the requested personal information with operation of a private toll transportation facility.

(9) Transportation Code, §730.007(2)(K) requires a consumer reporting agency, as defined by the Fair Credit Reporting Act (15 U.S.C. §1681 et. seq.), to submit documentation on official letterhead indicating a permitted use for personal information, as defined by that Act.

§217.126. Limitations on Resale and Redisclosure of motor vehicle records containing personal information.

- Editing title of section in order to have the language in this section apply to resale and re-disclosure of motor vehicle data containing personal information. Experian assumes that the Department would not be interested putting these limitations on parties who receive motor vehicle data not containing personal information.
- Edits to section (a) reflect using language consisting with TX's Motor Vehicle Record Disclosure Act, section 730.013 (a). This is important to Experian as it could be argued we do redisclose data in a "similar format" when we normalize the data to a 50 state format. However, we do not redisclose the data in an "identical" or "substantially identical format".
- Edits to section (b) are tying uses allowed for redisclosure to TX's Motor Vehicle Record Disclosure Act.
- Edits to section (c) and (d) reflect responsibilities Requestors will have who are re-disclosing data to Authorized Recipients.

(a) An Authorized recipient~~s~~ of personal information may not resell or redisclose the personal information in the identical or substantially identical format the personal information was disclosed to the recipient by the applicable agency. ~~may only resell or redisclose motor vehicle~~

~~records to other authorized recipients and not in the identical or similar format as provided by the department.~~

(b) An Authorized recipient~~s~~ of personal information may resell or redisclose the information only for a use permitted under Section 730.007. ~~may not resell or redisclose the entire motor vehicle records database in its complete bulk format.~~

(c) Any Requestor or Authorized Recipient ~~authorized recipient~~ reselling or redisclosing motor vehicle records that contain personal information must inform the person to whom they are reselling or redisclosing of their obligations under Transportation Code, Chapter 730 and this subchapter.

(d) Any Requestor or Authorized Recipient directly reselling or redisclosing motor vehicle records that contain personal information must have agreements with the Authorized Recipients that directly acquire such records. Such agreements must include limitations on the permissible use of Personal Informaiton and termination language in the event of misuse. ~~Any original recipient is responsible for misuse of motor vehicle records by any person receiving their version of the information, regardless of whether the original authorized recipient approved or was aware of subsequent transfers of the information.~~

§217.127. Records Maintained by Recipients Who Resell or Redisclose Motor Vehicle Records that Contain Personal Information.

- The intent behind the changes in this section are to tie the record keeping requirements to Texas state and Federal law requirements that already exist.

(a) Any Requestor or Authorized recipient~~s~~ of motor vehicle records that contain personal information shall maintain records as required in 18 U.S.C. 2721 and Transportation Code 730.013. ~~who resell or redisclose motor vehicle records are required to maintain records of that transaction.~~

~~(b) Records must be maintained for not less than five years and must include:~~

~~(1) the name and contact information of any recipient of resold or redisclosed motor vehicle records;~~

~~(2) the permitted use for which the motor vehicle records were released;~~

~~(3) the quantity of motor vehicle records sold or disclosed to each subsequent person;~~

~~(4) a statement by the authorized recipient specifying what data was resold or redisclosed and in what format; and~~

~~(5) any other documentation of the agreement to resell or redisclose motor vehicle records.~~

§217.128. Department Review of Requestor's ~~Recipient's~~ Records of Resale or Redisclosure.

- Edits in this section relate to allowing for a mutually agreeable time period for response to Department's request to review records as well as allowing a Requestor an opportunity to cure any alleged deficiencies.

(a) The department has the authority to request and review records kept by all Requestors ~~authorized recipients~~ who resell or redisclose motor vehicle records.

(b) This request will be made in writing to the Requestor ~~recipient~~.

(c) The Requestor ~~recipient~~ must provide the requested records within a mutually agreed time period. ~~30 days of the date of the department's request~~.

(d) Failure to fully respond to the department's request may ~~will~~ result in termination of access to motor vehicle records under Transportation Code, §730.007.

(e) Upon receipt of the requested records, the department will evaluate the records for compliance with the service agreement, applicable statutes, and rules.

(f) If it is determined that a~~n original recipient~~ Requestor ~~-~~is not in compliance with the service agreement, applicable statutes, and rules, the Department will develop an action plan in consultation with the Requestor to cure any deficiencies. The Requestor shall communicate any remediation plans to the Department within 30 days. If the Requestor fails to provide the Department with an acceptable remediation plan the service agreement may ~~will~~ be terminated immediately.

§217.129. Ineligibility to Receive Motor Vehicle Records.

- Edits in this section generally relate to making the language consistent with edits made prior in this draft.

(a) The department may deny a requestor's access to motor vehicle records if it determines withholding the information benefits the public's interest more than releasing the information.

(b) If the department determines that a~~n authorized recipient~~ Requestor of motor vehicle records has violated a clause or term of the service agreement, and that service agreement has been terminated, that Requestor ~~authorized recipient~~ cannot enter into a subsequent service agreement unless approved to do so under §217.130 of this title (relating to Approval for Persons Whose Access to Motor Vehicle Records Has Previously Been Terminated).

(c) Termination of the service agreement caused by any member of a business, partnership, or entity shall be effective on the whole organization. Subsequent businesses formed by any member, officer, partner or affiliate of an entity whose service agreement has been terminated will also be ineligible to receive motor vehicle records.

§217.130. Approval for Persons Whose Access to Motor Vehicle Records Has Previously Been Terminated.

(a) A R~~r~~equestor whose service agreement was previously terminated, but who is not subject to Transportation Code, §730.016, shall submit a written request for reapproval on the form required by the department.

(b) In addition to the requirements of §217.123 of this title (relating to Access to Motor Vehicle Records), the request must contain:

(1) any documents indicating remedial efforts the R~~r~~equestor has undertaken to prevent the unlawful disclosure of motor vehicle records,

(2) any documents indicating agreements between the R~~r~~equestor and third parties receiving resold or redisclosed motor vehicle records, and

(3) a statement that the R~~r~~equestor will notify the department before reselling or redisclosing any motor vehicle records for the time period prescribed by the department, including all of the information required under §217.127(b) of this title (relating to Records Maintained by Recipients Who Resell or Redisclose Motor Vehicle Records). The notification must include the name, address, and contact information of the third party requesting resold or redisclosed motor vehicle records, and must include the form(s) used to verify the third party's lawful purpose in obtaining motor vehicle records.

(c) Failure to comply with any of the terms of this section or a re-offense of the service agreement will result in the termination of the service agreement and the permanent inability to receive motor vehicle records.

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

Filed with the Office of the Secretary of State on March 5, 2018.

TRD-201800952

David D. Duncan

General Counsel

Texas Department of Motor Vehicles

Earliest possible date of adoption: April 15, 2018

For further information, please call: (512) 465-5665

Texas Department of Motor Vehicles
Chapter 217, Vehicle Titles and Registration

Adoption Preamble

The Texas Department of Motor Vehicles (department) adopts new sections to Chapter 217, Vehicle Titles and Registration, Subchapter F, Motor Vehicle Record Information, §217.129, Ineligibility to Receive Motor Vehicle Records, and §217.130, Approval for Persons Whose Access to Motor Vehicle Records Has Previously Been Terminated without changes to the proposed text as published in the March 16, 2018, issue of the *Texas Register* (43 TexReg 1621). These rules will not be republished. The department also adopts amendments to §217.122, Definitions, and §217.123, Access to Motor Vehicle Records, and new sections §217.125, Additional Documentation Related to Certain Permitted Uses, §217.126, Limitations on Resale and Redisclosure, §217.127, Records Maintained by Recipients Who Resell or Redisclose Personal Information, §217.128, department Review of Recipient's Records of Resale or Redisclosure with changes. These rules will be republished.

Changes in the adopted amendments respond to public comments or otherwise reflect nonsubstantive variations from the proposed amendments to improve clarity and consistency, including renaming the subchapter title. The changes do not affect new persons, entities, or subjects other than those given notice under the original proposal. Compliance with the adopted sections will be less burdensome than under the proposed sections.

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Texas Department of Motor Vehicles
Chapter 217, Vehicle Titles and Registration

EXPLANATION OF AMENDMENTS

Transportation Code, §730.014 allows any agency that compiles or maintains motor vehicle records to adopt rules to implement and administer the Motor Vehicle Records Disclosure Act.

The amendments to §217.122 differentiate those who request and receive personal information contained in motor vehicle records directly from the department with those who receive records by resale or redisclosure.

The amendments to §217.123 allow the department to accept identification not enumerated but deemed acceptable when processing a request for motor vehicle records.

EXPLANATION OF NEW SECTIONS

New §217.125 states what additional documentation is needed when submitting a request for motor vehicle records to the department. Where applicable, professionals licensed out-of-state may be allowed to obtain motor vehicle records on a record-by-record basis.

New §217.126 limits the forms personal information contained in motor vehicle records may be resold or redislosed and requires anyone reselling or redisclosing personal information to inform the recipient of their obligations under the Transportation

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Code.

New §217.127 states what records must be maintained by those who resell or redisclose personal information contained in motor vehicle records.

New §217.128 states the department's process in reviewing records kept by those who resell or redisclose personal information contained in motor vehicle records.

New §217.129 states when a requestor of motor vehicle records is ineligible to receive those records.

New §217.130 states how a requestor of motor vehicle records, whose access was previously revoked, may regain access to records.

COMMENTS AND RESPONSES

The department received comments from the following regarding the proposed rules: Steve Hayden, HDR; HS Hardy, QuickView Technologies (Quickview); Sean Wheatley, Experian Information Solutions, Inc. (Experian); Alice Miles, R.L. Polk & Co. (POLK); and Eric Ellman, Consumer Data Industry Association.

COMMENT

Polk and Experian requested the department clarify §217.122 to

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reduce the proposed definitions from three proposed to two – one for those who request and receive motor vehicle records from the department, and one for every other person or entity who qualifies for motor vehicle records under Transportation Code, Chapter 730.

RESPONSE

The department agrees with the comments and has adjusted the definitions to differentiate between those who approach the department for motor vehicle records and those who may receive motor vehicle records under Transportation Code, Chapter 730.

COMMENT

QuickView commented adding “personal information” to the definition of motor vehicle record in §217.122 has the result of limiting non-personal information from disclosure.

RESPONSE

The department agrees with this comment and believes removing this provision better aligns with the statute, which differentiates how motor vehicles records with and without personal information may be resold or redisclosed.

COMMENT

Polk and Experian asked the department to clarify that the provisions of §217.123(a) do not apply to those seeking

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electronic access to records.

RESPONSE

The department does not believe this language needs to be modified. Currently, customers under a service agreement with the department for electronic access to motor vehicle records are vetted in accordance with that agreement. Additionally, the provisions of §217.123(a) and Transportation Code, Chapter 730 are covered in the agreement.

COMMENT

HDR, Experian, and Polk asked the department to clarify how the additional documentation provisions of §217.125 apply to those who resell or redisclose department data.

RESPONSE

No change is necessary here, as §217.125 applies only to the department. This rule indicates the documentation the department will require in order to disclose personal information associated with a motor vehicle record.

COMMENT

QuickView asked the department to consider accepting out-of-state licenses for the additional documentation in §217.125, related to those who request personal information as insurance agents, tow truck operators, or private investigators.

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RESPONSE

The department agrees with this comment and will accept out-of-state licenses as documentation required to prove a permitted use. The statute itself does not expressly limit disclosure to licensed professionals in Texas. However, under the department's authority to limit unlawful disclosure, these requests may only be submitted on a record-by-record basis.

COMMENT

Experian and Polk asked the department to modify §217.126 to reflect the recordkeeping provisions of §217.127 only apply to the resale and redisclosure of personal information.

RESPONSE

The department agrees that this modification is consistent with the Transportation Code and will require recordkeeping only on resold or redisclosed personal information.

COMMENT

Experian and Polk asked the department to require language in resellers' contracts alerting their customers of the obligations of the Transportation Code. Additionally, the two asked the department to delete language holding resellers responsible for the misuse of data by downstream users.

RESPONSE

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While the department greatly appreciates the inclusion of these provisions in the contracts of data resellers, we have always held those who receive our data responsible for the misuse of that particular data, regardless of misuse by the department's customers, or customers of our resellers. The department does not have the authority to create a cause of action against any of our data customers. On the other hand, since the enactment of DPPA, there has always been a federal cause of action for the person whose data was illegally disclosed.

Notably though, we do have the authority to exercise discretion in who receives our data. Part of that discretion is to ensure those who resell or redisclose our data adequately vet the purported permitted uses of their customers.

No change is necessary.

COMMENT

Experian, Polk, and Quickview asked the department to change the mandatory termination provisions of §217.128 to discretionary provisions.

RESPONSE

The department agrees with this comment and will make termination of a service agreement discretionary. It has always been the department's goal to protect personal information while

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providing a service to our customers, that includes developing safeguards and remediation plans.

STATUTORY AUTHORITY

The amendments and new sections are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §730.014, which provides that the department may adopt rules to implement and administer Transportation Code, Chapter 730, Motor Vehicle Records Disclosure Act.

CROSS REFERENCE TO STATUTE

Government Code, §552.130; Transportation Code, Chapter 730; and 18 U.S.C. §2721 et seq.

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Texas Department of Motor Vehicles
Chapter 217, Vehicle Titles and Registration

SUBCHAPTER F. MOTOR VEHICLE RECORDS [~~RECORD INFORMATION~~]

§217.122. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Authorized recipient--A person receiving motor vehicle records as defined by this subchapter, in a manner authorized by Transportation Code, Chapter 730.

(2)[~~(1)~~] Department--Texas Department of Motor Vehicles.

(3)[~~(2)~~] Motor vehicle records [~~record information~~]--Information regarding the titling or registration of motor vehicles, which may include the make, vehicle identification number, year, model, body style, license number of a motor vehicle, and the name, address, and social security number of an owner or lienholder.

(4)[~~(3)~~] Personal information--Information that identifies an individual, including an individual's photograph or computerized image, social security number, driver identification number, personal identification certificate number, name, telephone number, medical or disability information, license plate number, or address other than the postal routing code.

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(5) Requestor--A person seeking personal information contained in motor vehicle records from the department.

(6)[~~(4)~~] Service agreement--A contractual agreement that allows individuals, businesses or governmental entities [~~agencies~~] or institutions to access the department's motor vehicle records.

(7)[~~(5)~~] Written request--A request made in writing, including electronic mail, electronic media, and facsimile transmission.

§217.123. Access to Motor Vehicle Records.

(a) Request for records. A requestor [~~person seeking motor vehicle record information~~] shall submit a written request on the form required by the department. Information will be released only in accordance with Title 18 U.S.C. §2721 et seq., Transportation Code, Chapter 730, [~~and~~] Government Code, §552.130, and this subchapter. A completed and properly executed form must include, at a minimum:

(1) the name and address of the requestor;

(2) the Texas license number, title or document number, or vehicle identification number of the motor vehicle about which information is requested;

(3) a photocopy of the requestor's identification;

(4) a statement that the requested information may only be released if the requestor is the subject of the record, if the requestor has written authorization for release from the subject of the record, or if the intended use is for a permitted use as indicated on the form;

(5) a certification that the statements made on the form are true and correct; and

(6) the signature of the requestor.

(b) Identification required. A requestor [~~person~~] may not apply for receipt of personal information unless the requestor [~~person~~] presents current photo identification containing a unique identification number. The identification document must be a:

(1) driver's license or state identification certificate issued by a state or territory of the United States;

(2) United States or foreign passport;

(3) United States military identification card;

(4) United States Department of Homeland Security, United States Citizenship and Immigration Services, or United States Department of State identification document;

(5) concealed handgun license or license to carry a handgun issued by the Texas Department of Public Safety under Government Code, Chapter 411, Subchapter H; or

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(6) copy of current law enforcement credentials if the requestor is a law enforcement officer.

(c) Electronic access. The department may make motor vehicle records [~~record information~~] available under the terms of a written service agreement.

(1) Agreement with business or individuals. The written service agreement with a business or individual must contain:

(A) the specified purpose of the agreement;

(B) an adjustable account, if applicable, in which an initial deposit and minimum balance is maintained in accordance with §217.124 of this title (relating to Cost of Motor Vehicle Records);

(C) termination and default provisions;

(D) the contractor's signature;

(E) a statement that the use of motor vehicle records [~~record information~~] obtained by virtue of a service agreement is conditional upon its being used:

(i) in accordance with 18 U.S.C. §2721 et seq. and Transportation Code, Chapter 730; and

(ii) only for the purposes defined in the agreement; and

(F) the statements required by subsection (a) of

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this section.

(2) Agreements with Texas governmental entities.

(A) The written service agreement with a Texas governmental entity must contain:

(i) the specified purpose of the agreement;

(ii)a statement that the use of motor vehicle records [~~record information~~] obtained by virtue of a service agreement is conditional upon its being used in accordance with 18 U.S.C. §2721 et seq. and Transportation Code, Chapter 730, and only for the purposes defined in the agreement;

(iii) the statements required by subsection (a) of this section;

(iv) the signature of an authorized official; and

(v) an attached statement citing the entity's authority to obtain social security number information, if applicable.

(B) Texas governmental entities, as defined in Government Code, §2252.001, and including the Texas Law Enforcement Telecommunication System and toll project entities, as defined by Transportation Code, §372.001, are exempt from the payment of fees, except as provided by §217.124(e) of this title.

(d) Ineligibility to receive personal information. The department may prohibit a person, business, or Texas governmental entity from receiving personal information if the department finds a violation of a term or condition of the agreement entered into in accordance with subsection (c) of this section.

(e) Initial deposits and minimum balances. Notwithstanding §217.124 of this title, the department may modify initial deposit and minimum balance requirements on a case by case basis depending on customer usage.

§217.125. Additional Documentation Related to Certain Permitted Uses.

(a) The department may require a requestor to provide reasonable assurance as to the identity of the requestor and that the use of motor vehicle records is only as authorized under Transportation Code, §730.012(a). Where applicable, each requestor submitting a request for motor vehicle records shall provide documentation satisfactory to the department that they are authorized to request the information on behalf of the business or government entity authorized to receive the information.

(b) Disclosure under the following permitted uses requires

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additional documentation submitted to the department:

(1) Transportation Code, §730.007(2)(C) requires submitting the information the business is attempting to verify against the department's motor vehicle records.

(2) Transportation Code, §730.007(2)(D) requires submitting proof of legal proceeding, or if no proceeding has been initiated, proof in anticipation of proceeding.

(3) Transportation Code, §730.007(2)(E) requires submitting documentation sufficient to prove the requestor is employed in a researching occupation.

(4) Transportation Code, §730.007(2)(F) requires submitting a license number provided by the Texas Department of Insurance, a license number the insurance support organization is working under, or proof of self-insurance.

(5) Transportation Code, §730.007(2)(G) requires submitting a license number provided by the Texas Department of Licensing and Regulation.

(6) Transportation Code, §730.007(2)(H) requires submitting a license number provided by the Texas Department of Public Safety.

(7) Transportation Code, §730.007(2)(I) requires submitting a copy of the commercial driver's license.

(8) Transportation Code, §730.007(2)(J) requires

submitting documentation to relate the requested personal information with operation of a private toll transportation facility.

(9) Transportation Code, §730.007(2)(K) requires a consumer reporting agency, as defined by the Fair Credit Reporting Act (15 U.S.C. §1681 et. seq.), to submit documentation on official letterhead indicating a permitted use for personal information, as defined by that Act.

(c) Regarding §217.125(b)(4-6), the department may accept out-of-state licenses as documentation of a permitted use. Under this subsection, the department will limit access to a record-by-record basis.

§217.126. Limitations on Resale and Redisclosure.

(a) Authorized recipients may only resell or redisclose personal information to other authorized recipients and not in the identical or substantially identical format as provided by the department.

(b) Authorized recipients may not resell or redisclose the entire motor vehicle records database in its complete bulk format.

(c) Any authorized recipient reselling or redisclosing personal information must inform the person to whom they are

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reselling or redisclosing of their obligations under Transportation Code, Chapter 730 and this subchapter.

(d) Any authorized recipient is responsible for misuse of personal information by any person receiving their version of the information, regardless of whether the authorized recipient approved or was aware of subsequent transfers of the information.

§217.127. Records Maintained by Recipients Who Resell or Redisclose Personal Information.

(a) Authorized recipients who resell or redisclose personal information are required to maintain records of that transaction.

(b) Records must be maintained for not less than five years and must include:

(1) the name and contact information of any recipient of resold or redisclosed personal information contained in motor vehicle records;

(2) the permitted use for which the records were released, or documentation in accordance with 217.125(b);

(3) the quantity of records sold or disclosed to each subsequent person;

(4) a statement by the authorized recipient specifying

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what data was resold or redisclosed and in what format; and

(5) any other documentation of the agreement to resell or redisclose personal information contained in motor vehicle records.

§217.128. Department Review of Recipient's Records of Resale or Redisclosure.

(a) The department has the authority to request and review records kept by all authorized recipients who resell or redisclose personal information.

(b) This request will be made in writing.

(c) The requested records must be provided to the department within 30 days of the request.

(d) Failure to fully respond to the department's request may result in termination of access to motor vehicle records under Transportation Code, §730.007.

(e) Upon receipt of the requested records, the department will evaluate the records for compliance with the service agreement, applicable statutes, and rules.

(f) If it is determined that an authorized recipient is not in compliance with the service agreement, applicable statutes, and rules, the service agreement may be terminated.

Texas Department of Motor Vehicles
Chapter 217, Vehicle Titles and Registration

§217.129. Ineligibility to Receive Motor Vehicle Records.

(a) The department may deny a requestor's access to motor vehicle records if it determines withholding the information benefits the public's interest more than releasing the information.

(b) If the department determines an authorized recipient of motor vehicle records has violated a clause or term of the service agreement, and that service agreement has been terminated, that authorized recipient cannot enter into a subsequent service agreement unless approved to do so under §217.130 of this title (relating to Approval for Persons Whose Access to Motor Vehicle Records Has Previously Been Terminated).

(c) Termination of the service agreement caused by any member of a business, partnership, or entity shall be effective on the whole organization. Subsequent businesses formed by any member, officer, partner or affiliate of an entity whose service agreement has been terminated will also be ineligible to receive records.

§217.130. Approval for Persons Whose Access to Motor Vehicle Records Has Previously Been Terminated.

(a) A requestor whose service agreement was previously terminated, but who is not subject to Transportation Code,

§730.016, shall submit a written request for reapproval on the form required by the department.

(b) In addition to the requirements of §217.123 of this title (relating to Access to Motor Vehicle Records), the request must contain:

(1) any documents indicating remedial efforts the requestor has undertaken to prevent the unlawful disclosure of motor vehicle records,

(2) any documents indicating agreements between the requestor and third parties receiving resold or redisclosed motor vehicle records, and

(3) a statement that the requestor will notify the department before reselling or redisclosing any motor vehicle records for the time period prescribed by the department, including all of the information required under §217.127(b) of this title (relating to Records Maintained by Recipients Who Resell or Redisclose Personal Information). The notification must include the name, address, and contact information of the third party requesting resold or redisclosed motor vehicle records, and must include the form(s) used to verify the third party's lawful purpose in obtaining motor vehicle records.

(c) Failure to comply with any of the terms of this section or a re-offense of the service agreement will result in the

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Texas Department of Motor Vehicles
Chapter 217, Vehicle Titles and Registration

termination of the service agreement and the permanent inability to receive motor vehicle records.

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Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Date: June 14, 2018
Action Requested: APPROVAL

To: **Texas Department of Motor Vehicles (TxDMV)** Board
From: **Jimmy Archer, Director, Motor Carrier Division**
Agenda Item: **8**
Subject: **Adoption of Rule under Title 43, Texas Administrative Code, Chapter 218, Motor Carriers Amendments, §218.13**
(Relating to the requirement for sole proprietor applicants to scan a copy of their identification document into the eLINC system, as well as rule language cleanup regarding HB 3254)

RECOMMENDATION

Approval to publish the adoption of the amendments for publication in the *Texas Register*.

PURPOSE AND EXECUTIVE SUMMARY

One amendment requires a sole proprietor who applies for motor carrier operating authority to provide a copy of their driver's license or other identification document. This additional documentation will help the department verify the identity of the individuals who apply for operating authority.

Other amendments clean up the language in §218.13 to be consistent with House Bill 3254 from the 85th Legislature, Regular Session.

FINANCIAL IMPACT

There will be no fiscal implications related to the amendments.

BACKGROUND AND DISCUSSION

The amendment to require a copy of the sole proprietor's identification document helps the department determine whether the applicant is a potential chameleon carrier or reincarnated carrier, which is a motor carrier that reinvents itself or operates affiliated companies to avoid the consequences of prior violations of the laws, rules, and/or regulations. Chameleon carriers create a new business or operate affiliated companies because otherwise, they would not qualify for operating authority under Transportation Code, Chapter 643.

Section 218.13 already requires applicants that are entities to provide their Texas Comptroller's Taxpayer Number or their Federal Employer Identification Number, which helps the department identify the applicant and verify whether the entity is a valid legal entity.

The proposal was published in the *Texas Register* on March 2, 2018. The comment period closed on April 2, 2018. No comments were received.

If the board adopts the amendments during its June 14, 2018, open meeting, staff anticipates:

- publication in the July 6, 2018, issue of the *Texas Register*; and
- an effective date of July 15, 2018.

Texas Department of Motor Vehicles
Chapter 218, Motor Carriers

Adoption Preamble

The Texas Department of Motor Vehicles (department) adopts amendments to Chapter 218, Motor Carriers, Subchapter B, Motor Carrier Registration, §218.13, Application for Motor Carrier Registration, without changes to the proposed text as published in the March 2, 2018, issue of the *Texas Register* (43 TexReg 1245). The rule will not be republished.

EXPLANATION OF AMENDMENTS

An amendment to §218.13(a)(12)(F) requires a sole proprietor who applies for motor carrier operating authority to provide a copy of their driver's license or other identification document. Applicants must scan in a copy of their identification document via the department's online system, which is currently called eLINC.

This additional documentation will help the department verify the identity of the individuals who apply for operating authority. The amendment will help the department determine whether the applicant is a potential chameleon carrier or reincarnated carrier, which is a motor carrier that reinvents itself or operates affiliated companies to avoid the consequences of prior violations of the laws, rules, and/or

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regulations. Chameleon carriers create a new business or operate affiliated companies because otherwise, they would not qualify for operating authority under Transportation Code, Chapter 643.

Other amendments to §218.13 modify the language to be consistent with the amendments in House Bill 3254 from the 85th Legislature, Regular Session, 2017.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §643.003, which authorizes the department to adopt rules to administer Transportation Code, Chapter 643; and Transportation Code, §643.052(8), which authorizes the department by rule to require an application to include any information the department determines is necessary for the safe operation of a motor carrier under Chapter 643.

Texas Department of Motor Vehicles
Chapter 218, Motor Carriers

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 643.

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Texas Department of Motor Vehicles
Chapter 218, Motor Carriers

SUBCHAPTER B. MOTOR CARRIER REGISTRATION

§218.13. Application for Motor Carrier Registration.

(a) Form of application. An application for motor carrier registration must be filed with the department's Motor Carrier Division and must be in the form prescribed by the director and must contain, at a minimum, the following information.

(1) USDOT number. A valid USDOT number.

(2) Business or trade name. The applicant must designate the business or trade name of the motor carrier.

(3) Owner name. If the motor carrier is a sole proprietorship, the owner must indicate the name and social security number of the owner. A partnership must indicate the partners' names, and a corporation or other entity must indicate principal officers and titles.

(4) Physical address of principal place of business. A motor carrier must disclose the motor carrier's principal business address. If the mailing address is different from the principal business address, the mailing address must also be disclosed.

(5) Legal agent.

(A) A Texas-domiciled motor carrier must provide the name, telephone number, and address of a legal agent for service of process if the agent is different from the motor carrier.

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(B) A motor carrier domiciled outside Texas must provide the name, telephone number, and Texas address of the legal agent for service of process.

(C) A legal agent for service of process shall be a Texas resident, a domestic corporation, or a foreign corporation authorized to transact business in Texas with a Texas physical address, rather than a post office box, for service of process.

(6) Description of vehicles. An application must include a motor carrier equipment report identifying each commercial motor vehicle that requires registration and that the carrier proposes to operate. Each commercial motor vehicle must be identified by its motor vehicle identification number, make, model year, and type of cargo and by the unit number assigned to the commercial motor vehicle by the motor carrier. Any subsequent registration of vehicles must be made under subsection (e) of this section.

(7) Type of motor carrier operations. An applicant must state if the applicant:

(A) proposes to transport passengers, household goods, or hazardous materials; or

(B) is domiciled in a foreign country.

(8) Insurance coverage. An applicant must indicate insurance coverage as required by §218.16 of this title

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(relating to Insurance Requirements).

(9) Safety certification. Each motor carrier must complete, as part of the application, a certification stating that the motor carrier knows and will conduct operations in accordance with all federal and state safety regulations.

(10) Drug-testing certification. Each motor carrier must certify, as part of the application, that the motor carrier is in compliance with the drug-testing requirements of 49 C.F.R. Part 382. If the motor carrier belongs to a consortium, as defined by 49 C.F.R. Part 382, the applicant must provide the names of the persons operating the consortium.

(11) Duration of registration.

(A) An applicant must indicate the duration of the desired registration. Except as provided otherwise in this section, registration may be for seven calendar days, 90 calendar days, one year, or two years. The duration of registration chosen by the applicant will be applied to all vehicles.

(i) Household goods carriers may not obtain seven-day or 90-day certificates of registration.

(ii) Motor carriers that transport passengers in a commercial motor vehicle as defined by §218.2(8)(A)(ii) of this title (relating to Definitions) may not obtain seven-day or 90-

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day certificates of registration, unless approved by the director.

(B) Interstate motor carriers that operate in intrastate commerce and meet the requirements under §218.14(c) of this title (relating to Expiration and Renewal of Commercial Motor Vehicles Registration) are not required to renew a certificate of registration issued under this section.

(12) Additional requirements. The following fees, documents, and information must be submitted with all applications.

(A) An application must be accompanied by an application fee of:

(i) $100 for annual and biennial registrations;

(ii) $25 for 90-day registrations; or

(iii) $5 for seven-day registrations.

(B) An application must be accompanied by a vehicle registration fee of:

(i) $10 for each vehicle that the motor carrier proposes to operate under a seven-day, 90-day, or annual registration; or

(ii) $20 for each vehicle that the motor carrier proposes to operate under a biennial registration.

(C) An application must be accompanied by proof of

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insurance or financial responsibility and insurance filing fee as required by §218.16.

(D) An application must include the applicant's business telephone number, email address, and any cell phone number.

(E) An application must include the completed New Applicant Questionnaire.

(F) An application submitted by an individual must include the number from one of the following forms of identification, as well as a copy of the identification document:

(i) an unexpired driver's license issued by a state or territory of the United States. If the driver's license was issued by the Department of Public Safety, the application must also include the audit number listed on the driver's license;

(ii) an unexpired identification certificate issued by a state or territory of the United States; or

(iii) an unexpired concealed handgun license or license to carry a handgun issued by the Department of Public Safety under Government Code, Chapter 411, Subchapter H.

(G) An application submitted by an individual or entity with an assumed name must be accompanied by supporting documents regarding the assumed name, such as an assumed name filing in

the county of proposed operation.

(H) An application submitted by an entity, such as a corporation, general partnership, limited liability company, limited liability corporation, limited partnership, or partnership, must include the entity's Texas Comptroller's Taxpayer Number or the entity's Federal Employer Identification Number.

(I) An application must be accompanied by any other information required by law.

(13) Additional requirements for household goods carriers. The following information, documents, and certification must be submitted with all applications by household goods carriers:

(A) A copy of the tariff that sets out the maximum charges for transportation of household goods [~~between two or more municipalities~~], or a copy of the tariff governing interstate transportation services [~~on a highway between two or more municipalities~~]. If an applicant is governed by a tariff that its association has already filed with the department under §218.65 of this title (relating to Tariff Registration), the applicant complies with the requirement in this subparagraph by checking the applicable box on the application to identify the association's tariff.

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(B) If the motor vehicle is not titled in the name of the household goods carrier, the following lease information and documentation, notwithstanding §218.18(a) of this title (relating to Short-term Lease and Substitute Vehicles):

(i) a copy of a valid lease agreement for each motor vehicle that the household goods carrier will operate; and

(ii) the name of the lessor and their USDOT number for each motor vehicle leased to the household goods carrier under a short-term lease.

(C) A certification that the household goods carrier has procedures that comply with Code of Criminal Procedure, Article 62.063(b)(3), which prohibits certain people who are required to register as a sex offender from providing moving services in the residence of another person without supervision.

(14) Additional requirements for passenger carriers. The following information and documents must be submitted with all applications for motor carriers that transport passengers in a commercial motor vehicle as defined by §218.2(8)(A)(ii) of this title:

(A) If the commercial motor vehicle is titled in the name of the motor carrier, a copy of the International Registration Plan registration receipt or a copy of the front and back of the title for each commercial motor vehicle; or

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(B) If the commercial motor vehicle is not titled in the name of the motor carrier, the following lease information and documentation, notwithstanding §218.18(a) of this title:

(i) A copy of a valid lease agreement for each commercial motor vehicle; and

(ii) The name of the lessor and their USDOT number for each commercial motor vehicles leased to the motor carrier under a short-term lease.

(b) Conditional acceptance of application. If an application has been conditionally accepted by the director pursuant to Transportation Code, §643.055, the applicant may not operate the following until the department has issued a certificate under Transportation Code, §643.054:

(1) a commercial motor vehicle or any other motor vehicle to transport household goods for compensation, or

(2) a commercial motor vehicle to transport persons or cargo.

(c) Approved application. An applicant meeting the requirements of this section and whose registration is approved will be issued the following documents:

(1) Certificate of registration. The department will issue a certificate of registration. The certificate of registration will contain the name and address of the motor

carrier and a single registration number, regardless of the number of vehicles requiring registration that the carrier operates.

(2) Insurance cab card. The department will issue an insurance cab card listing all vehicles to be operated under the carrier's certificate of registration. The insurance cab card shall be continuously maintained at the registrant's principal place of business. The insurance cab card will be valid for the same period as the motor carrier's certificate of registration and will contain information regarding each vehicle registered by the motor carrier.

(A) A current copy of the page of the insurance cab card on which the vehicle is shown shall be maintained in each vehicle listed, unless the motor carrier chooses to maintain a legible and accurate image of the insurance cab card on a wireless communication device in the vehicle or chooses to display such information on a wireless communication device by accessing the department's online system from the vehicle. The appropriate information concerning that vehicle shall be highlighted if the motor carrier chooses to maintain a hard copy of the insurance cab card or chooses to display an image of the insurance cab card on a wireless communication device in the vehicle. The insurance cab card or the display of such

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information on a wireless communications device will serve as proof of insurance as long as the motor carrier has continuous insurance or financial responsibility on file with the department.

(B) On demand by a department investigator or any other authorized government personnel, the driver shall present the highlighted page of the insurance cab card that is maintained in the vehicle or that is displayed on a wireless communication device in the vehicle. If the motor carrier chooses to display the information on a wireless communication device by accessing the department's online system, the driver must locate the vehicle in the department's online system upon request by the department-certified inspector or other authorized government personnel.

(C) The motor carrier shall notify the department in writing if it discontinues use of a registered commercial motor vehicle before the expiration of its insurance cab card.

(D) Any erasure or alteration of an insurance cab card that the department printed out for the motor carrier renders it void.

(E) If an insurance cab card is lost, stolen, destroyed, or mutilated; if it becomes illegible; or if it otherwise needs to be replaced, the department will print out a

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new insurance cab card at the request of the motor carrier. Motor carriers are authorized to print out a copy of a new insurance cab card using the department's online system.

(F) The department is not responsible for a motor carrier's inability to access the insurance information using the department's online system.

(G) The display of an image of the insurance cab card or the display of insurance information from the department's online system via a wireless communication device by the motor carrier does not constitute effective consent for a law enforcement officer, the department investigator, or any other person to access any other content of the wireless communication device.

(d) Additional and replacement vehicles. A motor carrier required to obtain a certificate of registration under this section shall not operate additional vehicles unless the carrier identifies the vehicles on a form prescribed by the director and pays applicable fees as described in this subsection.

(1) Additional vehicles. To add a vehicle, a motor carrier must pay a fee of $10 for each additional vehicle that the motor carrier proposes to operate under a seven-day, 90-day, or annual registration. To add a vehicle during the first year of a biennial registration, a motor carrier must pay a fee of

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$20 for each vehicle. To add a vehicle during the second year of a biennial registration, a motor carrier must pay a fee of $10 for each vehicle.

(2) Replacement vehicles. No fee is required for a vehicle that is replacing a vehicle for which the fee was previously paid. Before the replacement vehicle is put into operation, the motor carrier shall notify the department, identify the vehicle being taken out of service, and identify the replacement vehicle on a form prescribed by the department. A motor carrier registered under seven-day registration may not replace vehicles.

(e) Supplement to original application. A motor carrier required to register under this section shall submit a supplemental application under the following circumstances.

(1) Change of cargo. A registered motor carrier may not begin transporting household goods or hazardous materials unless the carrier submits a supplemental application to the department and shows the department evidence of insurance or financial responsibility in the amounts specified by §218.16.

(2) Change of name. A motor carrier that changes its name shall file a supplemental application for registration no later than the effective date of the change. The motor carrier shall include evidence of insurance or financial responsibility in the

new name and in the amounts specified by §218.16. A motor carrier that is a corporation must have its name change approved by the Texas Secretary of State before filing a supplemental application. A motor carrier incorporated outside the state of Texas must complete the name change under the law of its state of incorporation before filing a supplemental application.

(3) Change of address or legal agent for service of process. A motor carrier shall file a supplemental application for any change of address or any change of its legal agent for service of process no later than the effective date of the change. The address most recently filed will be presumed conclusively to be the current address.

(4) Change in principal officers and titles. A motor carrier that is a corporation shall file a supplemental application for any change in the principal officers and titles no later than the effective date of the change.

(5) Conversion of corporate structure. A motor carrier that has successfully completed a corporate conversion involving a change in the name of the corporation shall file a supplemental application for registration and evidence of insurance or financial responsibility reflecting the new company name. The conversion must be approved by the Office of the Secretary of State before the supplemental application is filed.

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(6) Change in drug-testing consortium status. A motor carrier that changes consortium status shall file a supplemental application that includes the names of the persons operating the consortium.

(7) Retaining a revoked or suspended certificate of registration number. A motor carrier may retain a prior certificate of registration number by:

(A) filing a supplemental application to re-register instead of filing an original application; and

(B) providing adequate evidence that the carrier has satisfactorily resolved the facts that gave rise to the suspension or revocation.

(f) Change of ownership. A motor carrier must file an original application for registration when there is a corporate merger or a change in the ownership of a sole proprietorship or of a partnership.

(g) Alternative vehicle registration for household goods agents. To avoid multiple registrations of a commercial motor vehicle, a household goods agent's vehicles may be registered under the motor carrier's certificate of registration under this subsection.

(1) The carrier must notify the department on a form approved by the director of its intent to register its agent's

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vehicles under this subsection.

(2) When a carrier registers vehicles under this subsection, the carrier's certificate will include all vehicles registered under its agent's certificates of registration. The carrier must register under its certificate of registration all vehicles operated on its behalf that do not appear on its agent's certificate of registration.

(3) The department may send the carrier a copy of any notification sent to the agent concerning circumstances that could lead to denial, suspension, or revocation of the agent's certificate.

(h) Substitute vehicles leased from leasing businesses. A registered motor carrier is not required to comply with the provisions of subsection (e) of this section for a substitute vehicle leased from a business registered under §218.18 of this title (relating to Short-term Lease and Substitute Vehicles). A motor carrier is not required to carry proof of registration as described in subsection (d) of this section if a copy of the lease agreement for the originally leased vehicle is carried in the cab of the temporary replacement vehicle.

(i) Once the motor carrier obtains a certificate of registration, the motor carrier must review its principal business address, mailing address, and email address in the

Texas Department of Motor Vehicles
Chapter 218, Motor Carriers

department's online system every six months and shall update such information if it is no longer correct.

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Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Date: June 14, 2018
Action Requested: APPROVAL

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Jimmy Archer, Director, Motor Carrier Division
Agenda Item: 9
Subject: Adoption of Rules under Title 43, Texas Administrative Code, Chapter 219, Oversize and Overweight Vehicles and Loads
Amendments, §§219.2, 219.34, 219.35, and 219.36
(Relating to definitions and clarification of statutory language)

RECOMMENDATION

Approve adoption of amendments for publication in the *Texas Register*

PURPOSE AND EXECUTIVE SUMMARY

The purpose of the amendments is to implement House Bill 2319, Senate Bill 1383, and Senate Bill 1524 by:

1) defining the terms "roll stability support safety system" and "truck blind spot systems;" and
2) clarifying the terms "approximately 612 inches" and "approximately 647 inches."

Industry needs clarification on these terms to obtain equipment that complies with the permit requirements.

FINANCIAL IMPACT

There will be no fiscal implications regarding the amendments.

BACKGROUND AND DISCUSSION

After the department proposed new §§219.34, 219.35, and 219.36 to the board at the August 2017 board meeting, industry representatives started asking department staff about our interpretation of these terms because the terms are subject to different interpretations by industry and enforcement personnel.

Amendments to §219.2 define the terms "roll stability support safety system" and "truck blind spot systems." The department conferred with industry and the Texas Department of Public Safety (DPS) to define these terms.

Amendments to §219.34 and §219.36 clarify the terms "approximately 612 inches" and "approximately 647 inches," which are the authorized distances between the front axle of the truck-tractor and the last axle of the semitrailer in the combinations that are eligible for permits under §219.34 and §219.36. The department conferred with the industry, the Texas Department of Transportation (TxDOT), and DPS regarding the interpretation of these terms. The discussions focused on the availability of equipment that is currently in production, as well as the TxDOT's concern about going below 612 inches and 647 inches. The department, TxDOT, and DPS agree that these terms mean the minimum distance; however, the distance can exceed these numbers.

TxDOT did not suggest a maximum distance; however, they stated the longer the distance, the better. DPS pointed out the potential benefit of not listing a maximum distance in case a manufacturer or engineer designs equipment that exceeds whatever maximum distance the department might establish in the rules. The amendments establish the maximum distance, so the department's personnel and industry have a clear maximum distance.

The proposal was published in the *Texas Register* for public comment on March 2, 2018. The comment period closed on April 2, 2018. The department received the attached comments from Kwik Equipment Sales, LLC (Kwik) and the Texas Trucking Association (TXTA). Kwik requested the department to increase the proposed 10 percent tolerance to a 15 percent tolerance on the 100,000-pound Intermodal Shipping Container Port Permit under §219.36(n), stating the permit would be useless unless the tolerance is increased. TXTA requested the department to increase the proposed 10 percent tolerance to a 15 percent tolerance on the following permits: 1) the 93,000-pound North Texas Intermodal Permit under §219.34(k); 2) the 93,000-pound Intermodal Shipping Container Port Permit under §219.36(m); and 3) the 100,000-pound Intermodal Shipping Container Port Permit under §219.36(n). Based on the data TXTA has seen, they feel that the 15 percent tolerance would allow the permittees to better utilize the overweight permits, while still being compliant with the maximum axle weight limitations contained in statute.

The department adopts §219.34 and §219.36 with amendments to increase the 10 percent tolerance to a 15 percent tolerance on the following permits: 1) the 93,000-pound North Texas Intermodal Permit under §219.34(k); 2) the 93,000-pound Intermodal Shipping Container Port Permit under §219.36(m); and 3) the 100,000-pound Intermodal Shipping Container Port Permit under §219.36(n).

TXTA also requested the department to modify the proposed definition for "truck blind spot systems" because the proposed definition could be interpreted to require the systems to detect objects in all positions located to the rear of the driver's seat in the truck-tractor. Although truck blind spot systems detect objects in the lanes that are adjacent to the lane in which the truck-tractor and semitrailer are operating, the systems don't detect objects in all positions located to the rear of the driver's seat.

The department adopts §219.2 with amendments to modify the definition for "truck blind spot systems" to make it clear that these systems don't detect objects in all positions located to the rear of the driver's seat in the truck-tractor. The department worked with DPS to modify the definition.

If the board adopts the new amendments during its June 14, 2018, open meeting, staff anticipates:

- publication in the July 6, 2018, issue of the *Texas Register*; and
- an effective date of July 15, 2018.

Date: 03/21/2018

To:

David D. Duncan,
General Counsel,
Texas Department of Motor Vehicles,
4000 Jackson Avenue,
Austin, Texas 78731
Email: rules@txdmv.gov

Dear Sir,

Sub: Regarding proposed DMV rule limiting maximum length to 10% over the proposed length (of 647" and 612") with proposed amendments to §219.34 and §219.36.

I am the President and Owner of KWIK Equipment Sales LLC, a specialty trailer manufacturer located in Pearland, TX (suburbs of Houston City). I have been in the transportation industry for almost 17 years now, building specialty equipment for every industry you can think of, i.e., Intermodal, Oil, Gas, Chemical, Wood, Food, Government entities (Military, Navy, Air Force), Nasa, Boeing, etc., to name a few.

We have been following overweight permit proposals for the last 4 years and we are glad that it is finally approved. This bill would help many industries move more material safely inside the containers thus increasing the revenue and profits for the parties involved.

As a manufacturer for many of the top industry players, we are concerned about the recent proposed amendments to the subjected sections, limiting the tolerance of the lengths by maximum of 10% for both 93K (647") and 100K (612") permits.

As per your proposed amendments (with 10% tolerance):

- 93K permit would allow the over all axle distances to be between 647" to 711.7"
- 100K permit would allow the over all axle distances to be between 612" to 673.2"

Even though the 10% tolerance on the length for 93K permit does not make much difference to the industry (since the tractor and trailer combination is already long enough to carry the allowable weights, though we would still like 10% tolerance to have the flexibility with tractor and trailer designs), However, it would effectively make the 100K permit useless and probably will never be used by anyone in any industry.

As per my understanding, the intent of the original bill was put in place with the lengths and weights allowed on the axle groups, was to keep our roads safer and at the same time allow the industry players import and export heavy containers. Even though the resin industry and other players pushed for these heavy weight permits, they will probably use 93K permit the most, but would never be able to use 100K

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Tel: 346-222-0750 / 844-881-3175 / 877-962-9590 ● Fax: 877-867-6339
Email: sales@kwikequip.com ● Web: www.kwikequip.com

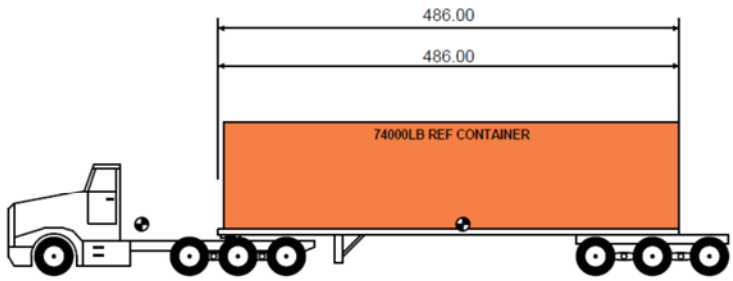
permit due to space constraints in the container. They will cube out before they max out with the payload for 100K permit, thus effectively making 100K permit useless for them.

But industries which transport products/materials such as frozen food, grains, seeds, vegetables, lumber, metals, equipment and special materials, etc., would be able to use this permit to increase their payload with import/export containers.

Typically, the 100K permit would allow a container weighing up to 74,000lb (total weight including the payload as well as the container weight). To keep the weights on the trailer axle groups within the limit of the bill and use the permit effectively, the trailer needs to be stretched to approximately 691" or more depending on the tractor design as well as the type of cargo inside the container. See below, an example of the weight distribution of the container of one of our customers (currently we are building trailers for them).

NOTE: While designing our trailers, we calculate the weight distributions on each axle group using industry standard weight distribution software LoadXpert. All the conclusions regarding the lengths and weights in the subsequent paragraphs are determined using this software.

All lengths in inches and weights in pounds



Inter Axle Spacing (Total =691)

51 51

60 60

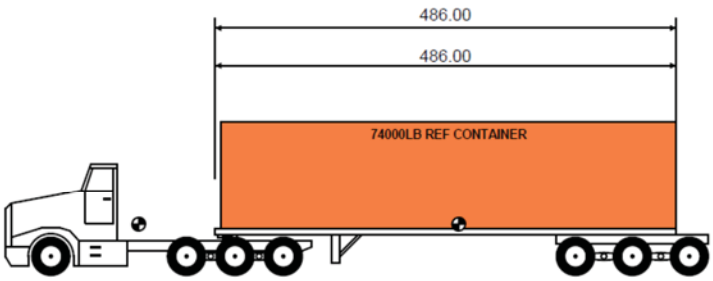
Axle Loads:	#1 (lb)	#2 (lb)	#3 (lb)	Total (lb)
Tare:	9115	10051	6833	26000
Accessories:	0	0	0	0
Payload:	1454	33800	38746	74000
Total:	10569	43852	45579	100000
Desired/(GVW)*:	15000	44500	46200	-
GAWR/(GVWR*):	-	-	-	-

As you can see, 74,000lb container with 691" inter axle spacing under 100K permit, distributes the weight evenly, all under the limits of 100K permit. Highlighted weights are the actual weights and the weights below those weights are the allowable weights for 100K Permit.

691" inter axle spacing would fall above 10% maximum tolerance, currently being proposed. By limiting the overall length to maximum of 10%, i.e. to 673.2", the trailer must be shortened by almost 18", thus increasing he weight on the trailer axle group. This would be a clear violation of 100K permit.

Please see the example below. This is the same weight distribution as above, but with shorter axle spacing (reduced from 691" to 673")., i.e., with 10% tolerance in the length.

All lengths in inches and weights in pounds



Inter Axle Spacing
(Total =673)

51 51

60 60

Axle Loads:	#1 (lb)	#2 (lb)	#3 (lb)	Total (lb)
Tare:	9114	10018	6868	26000
Accessories:	0	0	0	0
Payload:	1386	32234	40379	74000
Total:	10500	42252	47248	100000
Desired/(GVW)*:	15000	44500	46200	-
GAWR/(GVWR*):	-	-	-	-

As you can see, by reducing the length, the weight was pushed more on to the trailer axle group by 1,048lb for the same truck, trailer and container combination, effectively making this combination invalid for 100k permit.

To use 100K permit, this customer would be forced to reduce the payload by at least 1,048lb to be exact. But, to keep the material volume the same across the pallets (like number of packages, boxes, bags, etc.,), they would be forced to reduce much higher payload, probably between 3,000lb – 7,000lb, depending on the product or commodity, which would bring the container gross weight down to as low as 67,000lb.

67,000lb container gross weight is just over 4,000lb more than the 63,000lb gross container weight which is allowed under current 5% above 80,000lb permit, i.e., 84,000lb permit. Customers are currently able to carry 63,000lb container using light weight 40ft tandem axle container chassis.

For any customer, to spend $6,000.00 permit fee for each tractor, invest millions of dollars for new tractors, millions more for the trailers and lock-in contractors for years to come, for just 4,000lb than they are currently carrying, would not be worth the investment. No one would be able to use 100k permit.

With the 10% maximum tolerance limit, you are effectively eliminating the utility of the 100K permit.

Thus, I respectfully request that the Texas Department of Motor Vehicles, in the best interest of the industry, increase the maximum tolerance on the length from current proposed 10% to 15%. This would

allow any industry to use this permit to import/export more cargo and bring an additional revenue and profitability to the companies and communities involved.

If you have any questions or concerns, you can reach out to me through an email, or phone call. I am willing to provide any data you need to make this right for the industry.

Your sincerely

Pratap Lingam
President
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April 2, 2018

Mr. David Duncan
General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, Texas 78731

RE: Proposed Amendments to 43 TAC §§219.2, 219.34, 219.35, and 219.36

Dear Mr. Duncan:

Texas Trucking Association (TXTA) is a trade association which represents approximately 750 motor carriers. Some of these motor carriers move over-weight containers and are impacted by these proposed rules.

TXTA supports the language in the proposed definitions for "roll stability support safety system" and "truck blind spot systems". We believe manual actions or perceptions of a human do not qualify for these systems. Technology to support these systems is available.

Regarding length, TXTA agrees the distances laid out in SB 1524 and HB 2319 set the minimum a combination vehicle could be. To determine the maximum, TxDMV should consider what impact adding length between axles and the weight distributions on each axle group using industry standard weight distribution software like LoadXpert.

Adding more length allows the load to be shifted to reduce weight on individual axles and/or axle groups. Based on data we have seen we feel more tolerance would be more appropriate and allow for better utilization of the overweight permits while still being compliant with the maximum axle weight provisions of the legislation. Therefore, TXTA would recommend a 15 percent factor be codified instead of 10 percent.

TXTA is committed to a strong working relationship with the department to insure highway safety. TXTA respectfully urges the TxDMV Board to adopt the proposed changes to 43 Texas Administrative Code §§219.2,219.34, 219.35, and 219.36 with the percentage adjustment of 15 percent in paragraph (k) in §219.34 and paragraphs (m) and (n) in §219.36.

Respectfully submitted,

John D. Esparza
President and CEO

From: John D. Esparza [mailto:john@texastrucking.com]
Sent: Friday, May 11, 2018 10:17 AM
To: Archer, Jimmy <Jimmy.Archer@txdmv.gov>
Subject: Re: TAC Proposed Rule

Jimmy -

I've consulted with my team and per our discussion earlier I want to reaffirm my belief that this addresses the concerns we shared. Thank you very much Jimmy.

Best,
John D. Esparza

On May 11, 2018, at 8:44 AM, Archer, Jimmy <Jimmy.Archer@txdmv.gov> wrote:

> John, this is the language we were discussing this morning:
>
> 71) Truck blind spot systems--Vehicle-based sensor devices that detect other vehicles or objects located in ~~to~~ the vehicle's ~~driver's~~ adjacent lanes ~~sides and rear~~. Warnings can be visual, audible, vibrating, or tactile.
>
> Let me know if this language addresses your concerns. I think that it is much less confusing.
>
> Thanks!
> Jimmy
>
> Jimmy Archer, Director
> **Motor Carrier Division**
> **512.465-1380**
> **jimmy.archer@txdmv.gov**

Order oversize/overweight permits ~TxPROS or 1.800.299.1700
Order motor carrier registration and print cab cards ~MCCS or 1.800.299.1700
Order apportioned registration ~TxIRP or 1.888.368.4689

Texas Department of Motor Vehicles
Chapter 219, Oversize and Overweight Vehicles and Loads

Adoption Preamble

The Texas Department of Motor Vehicles (department) adopts amendments to Chapter 219, Oversize and Overweight Vehicles and Loads, Subchapter A, General Provisions, §219.2, Definitions; and Subchapter C, Permits for Over Axle and Over Gross Weight Tolerances, §219.34, North Texas Intermodal Permit; and §219.36, Intermodal Shipping Container Port Permit, with changes to the proposed text as published in the March 2, 2018, issue of the *Texas Register* (43 TexReg 1249). These rules will be republished. The department also adopts amendments to §219.35, Fluid Milk Transport Permit without changes to the proposed text, and this rule will not be republished.

EXPLANATION OF AMENDMENTS

The 85th Legislature, Regular Session, 2017, authorized three new permits for overweight vehicle combinations. Amendments to §§219.2, 219.34, 219.35, and 219.36 implement House Bill 2319, Senate Bill 1383, and Senate Bill 1524 by defining and clarifying terms that are used in these bills.

The department defines the terms “roll stability support safety system” and “truck blind spot systems” because industry and enforcement personnel could interpret these terms to mean

different things. These terms were included in House Bill 2319, Senate Bill 1383, and Senate Bill 1524 to attempt to make these permitted vehicles safer. The department's definitions focus on safety. For example, the roll stability support safety system is defined to require an electronic system. The manual actions or perceptions of a human driver do not qualify as a "roll stability support safety system" because a human driver might not be capable of detecting or preventing instability problems as well as an electronic system.

An amendment to §219.34 and §219.36 clarifies the term "approximately 647 inches," and an amendment to §219.36 clarifies the term "approximately 612 inches." These terms state the authorized distance between the front axle of the truck-tractor and the last axle of the semitrailer in the combinations that are eligible for permits under §219.34 and §219.36.

The department received calls from industry representatives who wanted to know how the department interpreted these terms because industry wanted to exceed these numbers. For example, a manufacturer told one motor carrier that they have equipment in production that exceeded the 612-inch requirement by 46 inches.

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The Legislature did not define these terms in House Bill 2319 or Senate Bill 1524. In construing a statute, the Code Construction Act says a court may consider the object sought to be attained, the consequences of a particular construction, the administrative construction of the statute, etc. *See* Government Code, §311.023.

The Legislature used the terms “approximately 647 inches” and “approximately 612 inches” to ensure a certain distance between the applicable axles to minimize or prevent damage to roadways that could be caused by the excess weight of the permitted vehicles. The department discussed this issue with the Texas Department of Transportation (TxDOT) because they design and maintain roadways on which the permitted vehicles could travel. The department also discussed this issue with the Texas Department of Public Safety (DPS) because they enforce laws and rules regarding weight. Further, the department discussed this issue at TxDOT’s Oversize and Overweight Stakeholder Workshop on November 20, 2017, when an industry representative asked for clarification on the meaning of the terms “approximately 612 inches” and “approximately 647 inches.”

In defining these terms, the department focused on the object

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sought to be attained, which is to minimize or prevent damage that could be caused by the excess weight of the permitted vehicles. The department also focused on the consequences of a particular interpretation or construction of the terms. TxDOT stated that distances below 612 inches or 647 inches could have a significant impact on their assessment of bridges and may result in additional load postings. Also, industry only asked if the distance could go above 612 and 647 inches, so they could purchase equipment that is currently in production.

The department, TxDOT, and DPS agree that 612 inches and 647 inches are the minimum distances allowed; however, the permitted vehicles can exceed these distances. TxDOT did not suggest a specific maximum distance; however, they stated the longer the distance, the better. DPS pointed out the potential benefit of not listing a maximum distance in case a manufacturer or engineer designs equipment that exceeds whatever maximum distance the department might establish in §219.34 and §219.36. The amendments establish the maximum distance, so the department’s personnel and industry have a clear maximum distance. =

Other amendments to §219.2 delete an incorrect statutory

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reference and update the language to be internally consistent.

COMMENTS

The department received comments from Kwik Equipment Sales, LLC (Kwik) and the Texas Trucking Association (TXTA).

Kwik requested the department to increase the proposed 10 percent tolerance to a 15 percent tolerance on the 100,000-pound Intermodal Shipping Container Port Permit under §219.36(n), which includes the term “approximately 612 inches.” Kwik stated that if the tolerance remained at 10 percent, this permit would be useless, and would probably never be used by anyone in the industry.

TXTA requested the department to increase the proposed 10 percent tolerance to a 15 percent tolerance on the following permits: 1) the 93,000-pound North Texas Intermodal Permit under §219.34(k); 2) the 93,000-pound Intermodal Shipping Container Port Permit under §219.36(m); and 3) the 100,000-pound Intermodal Shipping Container Port Permit under §219.36(n). Based on the data TXTA has seen, they feel that the 15 percent tolerance would allow the permittees to better utilize the overweight permits, while still being compliant with the maximum

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axle weight limitations contained in statute. TXTA agrees that the following distances specified in House Bill 2319 and Senate Bill 1524 are minimum distances: “approximately 612 inches” and “approximately 647 inches.”

TXTA also requested the department to modify the proposed definition for “truck blind spot systems” because the proposed definition could be interpreted to require the systems to detect objects in all positions located to the rear of the driver’s seat in the truck-tractor. Although truck blind spot systems detect objects in the lanes that are adjacent to the lane in which the truck-tractor and semitrailer are operating, the systems don’t detect objects in all positions located to the rear of the driver’s seat in the truck-tractor.

RESPONSE

The department adopts §219.34 and §219.36 with amendments to increase the 10 percent tolerance to a 15 percent tolerance on the following permits: 1) the 93,000-pound North Texas Intermodal Permit under §219.34(k); 2) the 93,000-pound Intermodal Shipping Container Port Permit under §219.36(m); and 3) the 100,000-pound Intermodal Shipping Container Port Permit under §219.36(n). These amendments allow the permittees to

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better utilize the overweight permits while still being compliant with the maximum axle weight limitations contained in statute. Also, these amendments do not change the length limitation on the semitrailer under Transportation Code, §621.204(a).

The department adopts §219.2 with amendments to modify the definition for “truck blind spot systems” to make it clear that these systems don’t detect objects in all positions located to the rear of the driver’s seat. The department worked with DPS to modify the definition.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; Transportation Code, §623.002, which authorizes the board to adopt rules that are necessary to implement and enforce Transportation Code, Chapter 623; and more specifically, Transportation Code §623.407(a), which requires the department to adopt rules that are necessary to implement Transportation Code, Chapter 623,

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Subchapter U, Vehicles Transporting Fluid Milk; and Transportation Code, §623.411(a), which requires the department to adopt rules that are necessary to implement Transportation Code, Chapter 623, Subchapter U, Intermodal Shipping Containers.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 623.

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Chapter 219, Oversize And Overweight Vehicles AND Loads

SUBCHAPTER A. GENERAL PROVISIONS

§219.2. Definitions.

(a) The definitions contained in Transportation Code, Chapters 621, 622, and 623 apply to this chapter. In the event of a conflict with this chapter, the definitions contained in Transportation Code, Chapters 621, 622, and 623 control.

(b) The following words and terms, when used in this chapter, will have the following meanings, unless the context clearly indicates otherwise.

(1) Annual permit--A permit that authorizes movement of an oversize and/or overweight load for one year commencing with the effective date.

(2) Applicant--Any person, firm, or corporation requesting a permit.

(3) Axle--The common axis of rotation of one or more wheels whether power-driven or freely rotating, and whether in one or more segments.

(4) Axle group--An assemblage of two or more consecutive axles, with two or more wheels per axle, spaced at least 40 inches from center of axle to center of axle, equipped with a weight-equalizing suspension system that will not allow more than a 10% weight difference between any two axles in the group.

(5) Board--The Board of the Texas Department of Motor

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Vehicles.

(6) Closeout--The procedure used by the department to terminate a permit, issued under Transportation Code, §623.142 or §623.192 that will not be renewed by the applicant.

(7) Complete identification number--A unique and distinguishing number assigned to equipment or a commodity for purposes of identification.

(8) Concrete pump truck--A self-propelled vehicle designed to pump the concrete product from a ready mix truck to the point of construction.

(9) Crane--Any unladen lift equipment motor vehicle designed for the sole purpose of raising, shifting, or lowering heavy weights by means of a projecting, swinging mast with an engine for power on a chassis permanently constructed or assembled for such purpose.

(10) Credit card--A credit card approved by the department.

(11) Daylight--The period beginning one-half hour before sunrise and ending one-half hour after sunset.

(12) Department--The Texas Department of Motor Vehicles.

(13) Digital signature--An electronic identifier intended by the person using it to have the same force and effect as a manual signature. The digital signature shall be unique to the

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person using it.

(14) Director--The Executive Director of the Texas Department of Motor Vehicles or a designee not below the level of division director.

(15) District--One of the 25 geographical areas, managed by a district engineer of the Texas Department of Transportation, in which the Texas Department of Transportation conducts its primary work activities.

(16) District engineer--The chief executive officer in charge of a district of the Texas Department of Transportation.

(17) Electronic identifier--A unique identifier which is distinctive to the person using it, is independently verifiable, is under the sole control of the person using it, and is transmitted in a manner that makes it infeasible to change the data in the communication or digital signature without invalidating the digital signature.

(18) Escort vehicle--A motor vehicle used to warn traffic of the presence of an oversize and/or overweight vehicle.

(19) Four-axle group--Any four consecutive axles, having at least 40 inches from center of axle to center of axle, whose extreme centers are not more than 192 inches apart and are individually attached to or articulated from, or both, to the vehicle by a weight equalizing suspension system.

(20) Gauge--The transverse spacing distance between tires on an axle, expressed in feet and measured to the nearest inch, from center-of-tire to center-of-tire on an axle equipped with only two tires, or measured to the nearest inch from the center of the dual wheels on one side of the axle to the center of the dual wheels on the opposite side of the axle.

(21) Gross weight--The unladen weight of a vehicle or combination of vehicles plus the weight of the load being transported.

(22) Height pole--A device made of a non-conductive material, used to measure the height of overhead obstructions.

(23) Highway maintenance fee--A fee established by Transportation Code, §623.077, based on gross weight, and paid by the permittee when the permit is issued.

(24) Highway use factor--A mileage reduction figure used in the calculation of a permit fee for a permit issued under Transportation Code, §623.142 and §623.192.

(25) Hubometer--A mechanical device attached to an axle on a unit or a crane for recording mileage traveled.

(26) HUD number--A unique number assigned to a manufactured home by the U.S. Department of Housing and Urban Development.

(27) Indirect cost share--A prorated share of

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administering department activities, other than the direct cost of the activities, including the cost of providing statewide support services.

(28) Load-restricted bridge--A bridge that is restricted by the Texas Department of Transportation, under the provisions of Transportation Code, §621.102, to a weight limit less than the maximum amount allowed by Transportation Code, §621.101.

(29) Load-restricted road--A road that is restricted by the Texas Department of Transportation, under the provisions of Transportation Code, §621.102, to a weight limit less than the maximum amount allowed by Transportation Code, §621.101.

(30) Machinery plate--A license plate issued under Transportation Code, §502.146.

(31) Manufactured home--Manufactured housing, as defined in Occupations Code, Chapter 1201, and industrialized housing and buildings, as defined in Occupations Code, §1202.002, and temporary chassis systems, and returnable undercarriages used for the transportation of manufactured housing and industrialized housing and buildings, and a transportable section which is transported on a chassis system or returnable undercarriage that is constructed so that it cannot, without dismantling or destruction, be transported within legal size limits for motor vehicles.

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(32) Motor carrier--A person that controls, operates, or directs the operation of one or more vehicles that transport persons or cargo over a public highway in this state, as defined by Transportation Code, §643.001 [~~in Chapter 218 of this title (relating to Motor Carriers)~~].

(33) Motor carrier registration (MCR)--The registration issued by the department to motor carriers moving intrastate, under authority of Transportation Code, Chapter 643 [~~as amended~~].

(34) Nighttime--The period beginning one-half hour after sunset and ending one-half hour before sunrise, as defined by Transportation Code, §541.401.

(35) Nondivisible load or vehicle--

(A) Any load or vehicle exceeding applicable length or weight limits which, if separated into smaller loads or vehicles, would:

(i) compromise the intended use of the vehicle, i.e., make it unable to perform the function for which it was intended;

(ii) destroy the value of the load or vehicle, i.e., make it unusable for its intended purpose; or

(iii) require more than eight workhours to dismantle using appropriate equipment. The applicant for a nondivisible

load permit has the burden of proof as to the number of workhours required to dismantle the load.

(B) Emergency response vehicles, including those loaded with salt, sand, chemicals or a combination thereof, with or without a plow or blade attached in front, and being used for the purpose of spreading the material on highways that are or may become slick or icy.

(C) Casks designed for the transport of spent nuclear materials.

(D) Military vehicles transporting marked military equipment or materiel.

(36) Oil field rig-up truck--An unladen vehicle with an overweight single steering axle, equipped with a winch and set of gin poles used for lifting, erecting, and moving oil well equipment and machinery.

(37) Oil well servicing unit--An oil well clean-out unit, oil well drilling unit, or oil well swabbing unit, which is mobile equipment, either self-propelled or trailer-mounted, constructed as a machine used solely for cleaning-out, drilling, servicing, or swabbing oil wells, and consisting in general of, but not limited to, a mast, an engine for power, a draw works, and a chassis permanently constructed or assembled for this purpose.

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(38) One trip registration--Temporary vehicle registration issued under Transportation Code, §502.095.

(39) Overdimension load--A vehicle, combination of vehicles, or vehicle and its load that exceeds maximum legal width, height, length, overhang, or weight as set forth by Transportation Code, Chapter 621, Subchapters B and C.

(40) Overhang--The portion of a load extending beyond the front or rear of a vehicle or combination of vehicles.

(41) Overheight--A vehicle or load that exceeds the maximum height specified in Transportation Code, §621.207.

(42) Overlength--A vehicle, combination of vehicles, or a vehicle or vehicle combination and its load that exceed(s) the maximum length specified in Transportation Code, §§621.203, 621.204, 621.205, and 621.206.

(43) Oversize load--A vehicle, combination of vehicles, or a vehicle or vehicle combination and its load that exceed(s) maximum legal width, height, length, or overhang, as set forth by Transportation Code, Chapter 621, Subchapter C.

(44) Overweight--A vehicle, combination of vehicles, or a vehicle or vehicle combination and its load that exceed(s) the maximum weight specified in Transportation Code, §621.101.

(45) Overwidth--A vehicle or load that exceeds the maximum width specified in Transportation Code, §621.201.

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(46) Permit--Authority for the movement of an oversize and/or overweight vehicle, combination of vehicles, or a vehicle or vehicle combination and its load, issued by the department under Transportation Code, Chapter 623.

(47) Permit account card (PAC)--A debit card that can only be used to purchase a permit and which is issued by a financial institution that is under contract to the department and the Comptroller of Public Accounts.

(48) Permit officer--An employee of the department who is authorized to issue an oversize/overweight permit.

(49) Permit plate--A license plate issued under Transportation Code, §502.146, to a crane or an oil well servicing vehicle.

(50) Permitted vehicle--A vehicle, combination of vehicles, or vehicle and its load operating under the provisions of a permit.

(51) Permittee--Any person, firm, or corporation that is issued an oversize/overweight permit by the department.

(52) Pipe box--A container specifically constructed to safely transport and handle oil field drill pipe and drill collars.

(53) Portable building compatible cargo--Cargo, other than a portable building unit, that is manufactured, assembled,

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or distributed by a portable building unit manufacturer and is transported in combination with a portable building unit.

(54) Portable building unit--The pre-fabricated structural and other components incorporated and delivered by the manufacturer as a complete inspected unit with a distinct serial number whether in fully assembled, partially assembled, or kit (unassembled) configuration when loaded for transport.

(55) Principal--The person, firm, or corporation that is insured by a surety bond company.

(56) Roll stability support safety system--An electronic system that monitors vehicle dynamics and estimates the stability of a vehicle based on its mass and velocity, and actively adjusts vehicle systems including the throttle and/or brake(s) to maintain stability when a rollover risk is detected.

(57) [~~(56)~~] Shipper's certificate of weight--A form approved by the department in which the shipper certifies to the maximum weight of the shipment being transported.

(58) [~~(57)~~] Single axle--An assembly of two or more wheels whose centers are in one transverse vertical plane or may be included between two parallel transverse planes 40 inches apart extending across the full width of the vehicle.

(59) [~~(58)~~] Single-trip permit--A permit issued for an overdimension load for a single continuous movement over a

specific route for an amount of time necessary to make the movement.

(60) [~~(59)~~] State highway--A highway or road under the jurisdiction of the Texas Department of Transportation.

(61) [~~(60)~~] State highway system--A network of roads and highways as defined by Transportation Code, §221.001.

(62) [~~(61)~~] Surety bond--An agreement issued by a surety bond company to a principal that pledges to compensate the Texas Department of Transportation for any damage that might be sustained to the highways and bridges by virtue of the operation of the equipment for which a permit was issued. A surety bond is effective the day it is issued and expires at the end of the state fiscal year, which is August 31st. For example, if you obtain a surety bond on August 30th, it will expire the next day at midnight.

(63) [~~(62)~~] Tare weight--The empty weight of any vehicle transporting an overdimension load.

(64) [~~(63)~~] Temporary vehicle registration--A 72-hour temporary vehicle registration, 144-hour temporary vehicle registration, or one-trip registration[~~, as defined by Transportation Code, §502.094~~].

(65) [~~(64)~~] Three-axle group--Any three consecutive axles, having at least 40 inches from center of axle to center

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of axle, whose extreme centers are not more than 144 inches apart, and are individually attached to or articulated from, or both, to the vehicle by a weight equalizing suspension system.

(66) [~~(65)~~] Time permit--A permit issued for a specified period of time under §219.13 of this title (relating to Time Permits).

(67) [~~(66)~~] Tire size--The inches of lateral tread width.

(68) [~~(67)~~] Traffic control device--All traffic signals, signs, and markings, including their supports, used to regulate, warn, or control traffic.

(69) [~~(68)~~] Trailer mounted unit--An oil well clean-out, drilling, servicing, or swabbing unit mounted on a trailer, constructed as a machine used for cleaning out, drilling, servicing, or swabbing oil wells, and consisting in general of, but not limited to, a mast, an engine for power, a draw works, and a chassis permanently constructed or assembled for this purpose.

(70) [~~(69)~~] Truck--A motor vehicle designed, used, or maintained primarily for the transportation of property.

(71) Truck blind spot systems--Vehicle-based sensor devices that detect other vehicles or objects located in the vehicle's adjacent lanes. Warnings can be visual, audible, vibrating, or tactile.

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(72) [~~(70)~~] Trunnion axle--Two individual axles mounted in the same transverse plane, with four tires on each axle, that are connected to a pivoting wrist pin that allows each individual axle to oscillate in a vertical plane to provide for constant and equal weight distribution on each individual axle at all times during movement.

(73) [~~(71)~~] Trunnion axle group--Two or more consecutive trunnion axles whose centers are at least 40 inches apart and which are individually attached to or articulated from, or both, to the vehicle by a weight equalizing suspension system.

(74) [~~(72)~~] Two-axle group--Any two consecutive axles whose centers are at least 40 inches but not more than 96 inches apart and are individually attached to or articulated from, or both, to the vehicle by a weight equalizing suspension system.

(75) [~~(73)~~] TxDOT--Texas Department of Transportation.

(76) [~~(74)~~] Unit--Oil well clean-out unit, oil well drilling unit, oil well servicing unit, and/or oil well swabbing unit.

(77) [~~(75)~~] Unladen lift equipment motor vehicle--A motor vehicle designed for use as lift equipment used solely to raise, shift, or lower heavy weights by means of a projecting, swinging mast with an engine for power on a chassis permanently constructed or assembled for such purpose.

(78) [~~(76)~~] USDOT Number--The United States Department of Transportation number.

(79) [~~(77)~~] Variable load suspension axles--Axles, whose controls must be located outside of and be inaccessible from the driver's compartment, that can be regulated, through the use of hydraulic and air suspension systems, mechanical systems, or a combination of these systems, for the purpose of adding or decreasing the amount of weight to be carried by each axle during the movement of the vehicle.

(80) [~~(78)~~] Vehicle identification number--A unique and distinguishing number assigned to a vehicle by the manufacturer or by the department in accordance with Transportation Code, §501.032 and §501.033.

(81) [~~(79)~~] Water Well Drilling Machinery--Machinery used exclusively for the purpose of drilling water wells, including machinery that is a unit or a unit mounted on a conventional vehicle or chassis.

(82) [~~(80)~~] Weight-equalizing suspension system--An arrangement of parts designed to attach two or more consecutive axles to the frame of a vehicle in a manner that will equalize the load between the axles.

(83) [~~(81)~~] Windshield sticker--Identifying insignia indicating that a permit has been issued in accordance with

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Subchapter C of this chapter.

(84) [~~(82)~~] Year--A time period consisting of 12 consecutive months that commences with the effective date stated in the permit.

(85) [~~(83)~~] 72-hour temporary vehicle registration--Temporary vehicle registration issued by the department authorizing a vehicle to operate at maximum legal weight on a state highway for a period not longer than 72 consecutive hours, as prescribed by Transportation Code, §502.094.

(86) [~~(84)~~] 144-hour temporary vehicle registration--Temporary vehicle registration issued by the department authorizing a vehicle to operate at maximum legal weight on a state highway for a period not longer than 144 consecutive hours, as prescribed by Transportation Code, §502.094.

SUBCHAPTER C PERMITS FOR OVER AXLE AND OVER GROSS WEIGHT TOLERANCES

§219.34. North Texas Intermodal Permit.

(a) Purpose. This section prescribes the requirements, restrictions, and procedures regarding the annual permit for transporting an intermodal shipping container under the provisions of Transportation Code, §623.0172.

(b) Application for permit.

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(1) To qualify for a North Texas intermodal permit, a person must submit an application to the department.

(2) The application shall be in a form prescribed by the department and at a minimum, will require the following:

(A) name and address of the applicant;

(B) name of contact person and telephone number or email address; and

(C) vehicle information, including vehicle year, make, license plate number and state of issuance, and vehicle identification number.

(3) The application shall be accompanied by the total annual permit fee of $1,000.

(4) Fees for permits issued under this section are payable as required by §219.11(f) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures).

(c) Amendments. An annual permit issued under this section will not be amended except in the case of department error.

(d) Transfer of permit. A permit issued under this section may only be transferred once during the term of the permit from one vehicle to another vehicle in the permittee's fleet provided:

(1) the permitted vehicle is destroyed or otherwise becomes permanently inoperable, to an extent that it will no

longer be utilized, and the permittee presents proof that the negotiable title or other qualifying documentation, as determined by the department, has been surrendered to the department; or

(2) the title to the permitted vehicle is transferred to someone other than the permittee, and the permittee presents proof that the negotiable title or other qualifying documentation, as determined by the department, has been transferred from the permittee.

(e) Restrictions pertaining to road conditions. Movement of a permitted vehicle is prohibited when road conditions are hazardous based upon the judgment of the operator and law enforcement officials. Law enforcement officials shall make the final determination regarding whether or not conditions are hazardous. Conditions that should be considered hazardous include, but are not limited to:

(1) visibility of less than 2/10 of one mile; or

(2) weather conditions such as wind, rain, ice, sleet, or snow.

(f) Curfew restrictions. The operator of a permitted vehicle must observe the curfew movement restrictions published by the department.

(g) Construction or maintenance areas. The permitted

vehicle may not travel through any state highway construction or maintenance area if prohibited by the construction restrictions published by the department.

(h) Night movement. Night movement is allowed under this permit, unless prohibited by the curfew movement restrictions published by the department.

(i) Manufacturer's tire load rating. Permits issued under this section do not authorize the vehicle to exceed the manufacturer's tire load rating.

(j) A truck-tractor and semitrailer combination is only eligible for a permit issued under this section if the truck-tractor is equipped with truck blind spot systems, and each vehicle in the combination is equipped with a roll stability support safety system.

(k) A truck-tractor and semitrailer combination is only eligible for a permit issued under this section if the distance between the front axle of the truck-tractor and the last axle of the semitrailer, measured longitudinally, is approximately 647 inches. For the purposes of this subsection, “approximately 647 inches” means the distance can be up to 15 percent above 647 inches for a total distance of 744.05 inches.

§219.35. Fluid Milk Transport Permit.

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(a) Purpose. This section prescribes the requirements, restrictions, and procedures regarding the annual permit for transporting fluid milk under the provisions of Transportation Code, Chapter 623, Subchapter U, as added by Chapter 750 (S.B. 1383), Acts of the 85th Legislature, Regular Session, 2017.

(b) Application for permit.

(1) To qualify for a fluid milk transport permit, a person must submit an application to the department.

(2) The application shall be in a form prescribed by the department and at a minimum, will require the following:

(A) name and address of the applicant;

(B) name of contact person and telephone number or email address;

(C) vehicle information, including vehicle year, make, license plate number and state of issuance, and vehicle identification number; and

(D) a list of counties in which the vehicle will be operated.

(3) The application shall be accompanied by the total annual permit fee of $1,200.

(4) Fees for permits issued under this section are payable as required by §219.11(f) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures).

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(c) Issuance and placement of permit and windshield sticker; restrictions.

(1) A permit and a windshield sticker will be issued once the application is approved, and each will be mailed to the applicant at the address contained in the application.

(2) The windshield sticker shall be affixed to the inside of the windshield of the vehicle in accordance with the diagram printed on the back of the sticker and in a manner that will not obstruct the vision of the driver. Any attempt to remove the sticker from the windshield will render the sticker void and will require a new permit and sticker.

(3) A replacement sticker for a lost, stolen, or mutilated windshield sticker may be issued, provided that the permittee submits a request on a form approved by the department which shall include a statement, signed by the permittee, affirming that the sticker was lost, stolen, or mutilated. The replacement sticker shall only be valid for the permitted vehicle.

(d) Amendments. An annual permit issued under this section will not be amended except in the case of department error.

(e) Transfer of permit. A permit issued under this section may only be transferred once during the term of the permit from one vehicle to another vehicle in the permittee's fleet

provided:

(1) the permitted vehicle is destroyed or otherwise becomes permanently inoperable, to an extent that it will no longer be utilized, and the permittee presents proof that the negotiable title or other qualifying documentation, as determined by the department, has been surrendered to the department; or

(2) the title to the permitted vehicle is transferred to someone other than the permittee, and the permittee presents proof that the negotiable title or other qualifying documentation, as determined by the department, has been transferred from the permittee.

(f) Termination of permit. An annual permit issued under this section will automatically terminate, and the windshield sticker must be removed from the vehicle:

(1) on the expiration of the permit;

(2) when the lease of the vehicle expires;

(3) on the sale or other transfer of ownership of the vehicle for which the permit was issued; or

(4) on the dissolution or termination of the partnership, corporation, or other legal entity to which the permit was issued.

(g) Restrictions pertaining to road conditions. Movement of

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a permitted vehicle is prohibited when road conditions are hazardous based upon the judgment of the operator and law enforcement officials. Law enforcement officials shall make the final determination regarding whether or not conditions are hazardous. Conditions that should be considered hazardous include, but are not limited to:

(1) visibility of less than 2/10 of one mile; or

(2) weather conditions such as wind, rain, ice, sleet, or snow.

(h) Curfew restrictions. The operator of a permitted vehicle must observe the curfew movement restrictions published by the department.

(i) Construction or maintenance areas.

(1) The permitted vehicle may not travel through any state highway construction or maintenance area if prohibited by the construction restrictions published by the department.

(2) The permittee is responsible for contacting the appropriate local jurisdiction for construction or maintenance restrictions on non-state maintained roadways.

(j) Night movement. Night movement is allowed under this permit, unless prohibited by the curfew movement restrictions published by the department.

(k) Manufacturer's tire load rating. Permits issued under

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this section do not authorize the vehicle to exceed the manufacturer's tire load rating.

(l) A truck-tractor and semitrailer combination is only eligible for a permit issued under this section if the truck-tractor is equipped with truck blind spot systems, and each vehicle in the combination is equipped with a roll stability support safety system.

§219.36. Intermodal Shipping Container Port Permit.

(a) Purpose. This section prescribes the requirements, restrictions, and procedures regarding the annual permit for transporting an intermodal shipping container under the provisions of Transportation Code, Chapter 623, Subchapter U, as added by Chapter 108 (S.B. 1524), Acts of the 85th Legislature, Regular Session, 2017.

(b) Application for permit.

(1) To qualify for an intermodal shipping container port permit, a person must submit an application to the department.

(2) The application shall be in a form prescribed by the department and at a minimum, will require the following:

(A) name and address of the applicant;

(B) name of contact person and telephone number or email address;

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(C) vehicle information, including vehicle year, make, license plate number and state of issuance, and vehicle identification number;

(D) a list of counties in which the vehicle will be operated; and

(E) a list of municipalities in which the vehicle will be operated.

(3) The application shall be accompanied by the total annual permit fee of $6,000.

(4) Fees for permits issued under this section are payable as required by §219.11(f) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures).

(c) Issuance and placement of permit and windshield sticker; restrictions.

(1) A permit and a windshield sticker will be issued once the application is approved, and each will be mailed to the applicant at the address contained in the application.

(2) The windshield sticker shall be affixed to the inside of the windshield of the vehicle in accordance with the diagram printed on the back of the sticker and in a manner that will not obstruct the vision of the driver. Any attempt to remove the sticker from the windshield will render the sticker void and will require a new permit and sticker.

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(3) A replacement sticker for a lost, stolen, or mutilated windshield sticker may be issued, provided that the permittee submits a request on a form approved by the department which shall include a statement, signed by the permittee, affirming that the sticker was lost, stolen, or mutilated. The replacement sticker shall only be valid for the permitted vehicle.

(d) Amendments. An annual permit issued under this section will not be amended except in the case of department error.

(e) Transfer of permit. A permit issued under this section may only be transferred once during the term of the permit from one vehicle to another vehicle in the permittee's fleet provided:

(1) the permitted vehicle is destroyed or otherwise becomes permanently inoperable, to an extent that it will no longer be utilized, and the permittee presents proof that the negotiable title or other qualifying documentation, as determined by the department, has been surrendered to the department; or

(2) the title to the permitted vehicle is transferred to someone other than the permittee, and the permittee presents proof that the negotiable title or other qualifying documentation, as determined by the department, has been

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transferred from the permittee.

(f) Termination of permit. An annual permit issued under this section will automatically terminate, and the windshield sticker must be removed from the vehicle:

(1) on the expiration of the permit;

(2) when the lease of the vehicle expires;

(3) on the sale or other transfer of ownership of the vehicle for which the permit was issued; or

(4) on the dissolution or termination of the partnership, corporation, or other legal entity to which the permit was issued.

(g) Restrictions pertaining to road conditions. Movement of a permitted vehicle is prohibited when road conditions are hazardous based upon the judgment of the operator and law enforcement officials. Law enforcement officials shall make the final determination regarding whether or not conditions are hazardous. Conditions that should be considered hazardous include, but are not limited to:

(1) visibility of less than 2/10 of one mile; or

(2) weather conditions such as wind, rain, ice, sleet, or snow.

(h) Curfew restrictions. The operator of a permitted vehicle must observe the curfew movement restrictions published

by the department.

(i) Construction or maintenance areas.

(1) The permitted vehicle may not travel through any state highway construction or maintenance area if prohibited by the construction restrictions published by the department.

(2) The permittee is responsible for contacting the appropriate local jurisdiction for construction or maintenance restrictions on non-state maintained roadways.

(j) Night movement. Night movement is allowed under this permit, unless prohibited by the curfew movement restrictions published by the department.

(k) Manufacturer's tire load rating. Permits issued under this section do not authorize the vehicle to exceed the manufacturer's tire load rating.

(l) A truck-tractor and semitrailer combination is only eligible for a permit issued under this section if the truck-tractor is equipped with truck blind spot systems, and each vehicle in the combination is equipped with a roll stability support safety system.

(m) A truck-tractor and semitrailer combination is only eligible for a permit issued under Transportation Code, §623.402(a) if the distance between the front axle of the truck-tractor and the last axle of the semitrailer, measured

longitudinally, is approximately 647 inches. For the purposes of this subsection, “approximately 647 inches” means the distance can be up to 15 percent above 647 inches for a total distance of 744.05 inches.

(n) A truck-tractor and semitrailer combination is only eligible for a permit issued under Transportation Code, §623.402(b) if the distance between the front axle of the truck-tractor and the last axle of the semitrailer, measured longitudinally, is approximately 612 inches. For the purposes of this subsection, “approximately 612 inches” means the distance can be up to 15 percent above 612 inches for a total distance of 703.8 inches.

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Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Date: June 14, 2018
Action Requested: APPROVAL

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Corrie Thompson, Director, Enforcement Division
Agenda Item: 10.1
Subject: Proposal of Rule under Title 43, Texas Administrative Code, Chapter 215, Motor Vehicle Distribution
Amendments, §215.85
(Relating to used motor vehicle referral fees)

RECOMMENDATION

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

PURPOSE AND EXECUTIVE SUMMARY

The purpose of the proposed amendments is to add new §215.85(d) and (e) clarifying how a licensed dealer may pay a referral fee.

FINANCIAL IMPACT

There will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments. There are no anticipated economic costs for persons required to comply with the proposed amendments.

BACKGROUND AND DISCUSSION

The amendments make the following changes:

- new subsection (d) provides that a licensed dealer may pay a referral fee in cash or value to an individual who has purchased a vehicle from the licensed dealer within the five-year period preceding the referral. The payment of the referral fee may be contingent upon the new referred individual purchasing a vehicle from the license dealer, or a fee may be paid for the referral of a new potential customer.
- new subsection (e) provides that the referral fees may not be offered or provided to an individual who is employed by the licensed dealer.

Texas Department of Motor Vehicles
Chapter 215, Motor Vehicle Distribution

Proposed Preamble

The Texas Department of Motor Vehicles (department) proposes amendments to Chapter 215, Motor Vehicle Distribution, Subchapter C, Licenses, Generally, §215.85, Brokering, Used Motor Vehicles.

EXPLANATION OF PROPOSED AMENDMENTS

The purpose of the proposed amendments is to clarify how a licensed dealer may pay a referral fee.

Amendments add new subsection (d) to provide that a licensed dealer may pay a referral fee in cash or value to an individual who has purchased a vehicle from the licensed dealer within the five-year period preceding the referral. The payment of the referral fee may be contingent upon the new referred individual purchasing a vehicle from the license dealer, or a fee may be paid for the referral of a new potential customer.

Amendments add new subsection (e) to provide that the referral fees may not be offered or provided to an individual who is employed by the licensed dealer.

FISCAL NOTE

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Texas Department of Motor Vehicles
Chapter 215, Motor Vehicle Distribution

Linda M. Flores, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments.

Corrie Thompson, Director of the Enforcement Division, has determined that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed amendments.

PUBLIC BENEFIT AND COST

Ms. Thompson has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendment will clarify used motor vehicle referral fees. There are no anticipated economic costs for persons required to comply with the proposed amendments. There will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

TAKINGS IMPACT ASSESSMENT

The department has determined that this proposal affects no

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private real property interests and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT

The department has determined that during the first five years the proposed amendments are in effect, no government program would be created or eliminated. Implementation of the proposed amendments would not require the creation of new employee positions or elimination of existing employee positions. Implementation would not require an increase or decrease in future legislative appropriations to the department or an increase or decrease of fees paid to the department. Additionally, the proposed amendments do not create a new regulation, or expand, limit, or repeal an existing regulation. The proposed amendments do not affect the number of individuals subject to the rule's applicability and will not affect this state's economy.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to

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Texas Department of Motor Vehicles
Chapter 215, Motor Vehicle Distribution

David D. Duncan, General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 or by email to *rules@txdmv.gov*. The deadline for receipt of comments is 5:00 p.m. on _____.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically, Transportation Code, Chapter 503.002 which provides the board may adopt rules for the administration of Chapter 503.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 503.

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Texas Department of Motor Vehicles
Chapter 215, Motor Vehicle Distribution

SUBCHAPTER C. LICENSES, GENERALLY

§215.85. Brokering, Used Motor Vehicles.

(a) Transportation Code, §503.021 prohibits a person from engaging in business as a dealer, directly or indirectly, including by consignment without a GDN. Except as provided by this section, [~~The phrase~~]"directly or indirectly" includes the practice of arranging or offering to arrange a transaction involving the sale of a used motor vehicle for a fee, commission, or other valuable consideration. A person who is a bona fide employee of a dealer holding a GDN and acts for the dealer is not a broker for the purposes of this section.

(b) A buyer referral service, program, plan, club, or any other entity that accepts a fee for arranging a transaction involving the sale of a used motor vehicle is required to meet the requirements for and obtain a GDN, unless the referral service, program, plan, or club is operated in the following manner.

(1) There is no exclusive market area offered to a dealer by the program. All dealers are allowed to participate in the program on equal terms.

(2) Participation by a dealer in the program is not restricted by conditions, such as limiting the number of line-makes or discrimination by size of dealership or location. The

total number of participants in the program may be restricted if the program is offered to all dealers at the same time, with no regard to the line-make.

(3) All participants pay the same fee for participation in the program. The program fee shall be a weekly, monthly, or annual fee, regardless of the size, location, or line-makes sold by the dealer.

(4) A person is not to be charged a fee on a per referral fee basis or any other basis that could be considered a transaction-related fee.

(5) The program does not set or suggest to the dealer any price of a motor vehicle or a trade-in.

(6) The program does not advertise or promote its plan in a manner that implies that the buyer, as a customer of that program, receives a special discounted price that cannot be obtained unless the customer is referred through that program.

(c) All programs must comply with Subchapter H of this chapter (relating to Advertising).

(d) A licensed dealer may pay a referral fee in cash or value to an individual who has purchased a vehicle from the licensed dealer within the five-year period preceding the referral. The fee may be made contingent upon the new referred individual purchasing a vehicle from the licensed dealer, or a

<< AGENDA

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Texas Department of Motor Vehicles
Chapter 215, Motor Vehicle Distribution

fee may be paid for the referral of a new potential purchaser.

(e) A referral fee under subsection (d) of this section may not be offered or provided to an individual who is employed by a licensed dealer.

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Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Date: June 14, 2018
Action Requested: APPROVAL

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Corrie Thompson, Director, Enforcement Division
Agenda Item: 10.2
Subject: Proposal of Rule under Title 43, Texas Administrative Code, Chapter 215, Motor Vehicle Distribution
Amendment, §215.155
(Relating to exemptions from the vehicle inspection requirements under Transportation Code, Chapter 548)

RECOMMENDATION

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

PURPOSE AND EXECUTIVE SUMMARY

An amendment makes §215.155(b) consistent with Transportation Code, Chapter 548.

FINANCIAL IMPACT

There will be no fiscal implications regarding the amendment.

BACKGROUND AND DISCUSSION

An amendment makes §215.155(b) consistent with Chapter 548, which includes exemptions from the vehicle inspection requirements. Section 215.155(b) currently says a buyer's temporary tag may only be displayed on a vehicle that has a valid inspection in accordance with Chapter 548. The amendment authorizes a buyer's temporary tag to be displayed on a vehicle that does not have a valid inspection if the vehicle is exempt from inspection under Chapter 548.

Texas Department of Motor Vehicles
Chapter 215, Motor Vehicle Distribution

Proposed Preamble

The Texas Department of Motor Vehicles (department) proposes an amendment to Chapter 215, Motor Vehicle Distribution, Subchapter E, Licenses, General Distinguishing Numbers, §215.155, Buyer's Temporary Tags.

EXPLANATION OF PROPOSED AMENDMENT

An amendment makes §215.155(b) consistent with Transportation Code, Chapter 548, which includes exemptions from the vehicle inspection requirements. The amendment authorizes a buyer's temporary tag to be displayed on a vehicle that does not have a valid inspection if the vehicle is exempt from inspection under Chapter 548.

FISCAL NOTE

Linda M. Flores, Chief Financial Officer, has determined that for each of the first five years the amendment as proposed is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendment.

Corrie Thompson, Director of the Enforcement Division, has determined that there will be no impact on local economies or

overall employment as a result of enforcing or administering the proposed amendment.

PUBLIC BENEFIT AND COST

Ms. Thompson has also determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of enforcing or administering the amendment will be a rule that is consistent with Transportation Code, Chapter 548. There are no anticipated economic costs for persons required to comply with the proposed amendment. There will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

TAKINGS IMPACT ASSESSMENT

The department has determined that this proposal affects no private real property interests and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT

The department has determined that during the first five years

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the proposed amendment is in effect, no government program would be created or eliminated. Implementation of the proposed amendment would not require the creation of new employee positions or elimination of existing employee positions. Implementation would not require an increase or decrease in future legislative appropriations to the department or an increase or decrease of fees paid to the department. Additionally, the proposed amendment does not create a new regulation, or expand, limit, or repeal an existing regulation, other than to eliminate the requirement for the vehicle to be inspected prior to obtaining a buyers temporary tag when the vehicle is exempt from the vehicle inspection requirements under Transportation Code, Chapter 548. The proposed amendment does not affect the number of individuals subject to the rule's applicability and will not affect this state's economy.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendment may be submitted to David D. Duncan, General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 or by email to *rules@txdmv.gov*. The deadline for receipt of comments is 5:00 p.m. on _____.

<< AGENDA

Texas Department of Motor Vehicles
Chapter 215, Motor Vehicle Distribution

STATUTORY AUTHORITY

The amendment is proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically, Transportation Code, §503.002, which authorizes the board to adopt rules for the administration of Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 548 and §503.063.

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Texas Department of Motor Vehicles
Chapter 215, Motor Vehicle Distribution

SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS

§215.155. Buyer's Temporary Tags.

(a) A buyer's temporary tag may be displayed only on a vehicle that can be legally operated on the public streets and highways and for which a sale has been consummated.

(b) A buyer's temporary tag may be displayed only a vehicle that has a valid inspection in accordance with Transportation Code, Chapter 548, unless the vehicle is exempt from inspection under Chapter 548.

(c) For a wholesale transaction, the purchasing dealer places on the motor vehicle its own:

(1) dealer's temporary tag; or

(2) metal dealer's license plate.

(d) A buyer's temporary tag is valid until the earlier of:

(1) the date on which the vehicle is registered; or

(2) the 60th day after the date of purchase.

(e) The dealer must ensure that the following information is placed on a buyer's temporary tag that the dealer issues:

(1) the vehicle-specific number obtained from the temporary tag database;

(2) the year and make of the vehicle;

(3) the VIN of the vehicle;

(4) the month, day, and year of the expiration of the

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buyer's temporary tag; and

(5) the name of the dealer.

(f) A dealer shall charge a buyer a fee of $5 for the buyer's temporary tag or Internet-down buyer's temporary tag issued, unless the vehicle is exempt from payment of registration fees under Transportation Code, §502.453 or §502.456 or an all-terrain vehicle or recreational off-highway vehicle under Transportation Code, §502.140 or Transportation Code, Chapter 663. The fee shall be remitted to the county in conjunction with the title transfer for deposit to the credit of the Texas Department of Motor Vehicles fund, unless the vehicle is sold to an out-of-state resident, in which case:

(1) the dealer shall remit the entire fee to the department for deposit to the credit of the Texas Department of Motor Vehicles fund if payment is made through the department's electronic title system; or

(2) the dealer shall remit the fee to the county for deposit to the credit of the Texas Department of Motor Vehicles fund.

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Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

DATE: June 14, 2018

Action Requested: APPROVAL

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Jeremiah Kuntz, Vehicle Titles and Registration Division
Agenda Item: 11
Subject: Specialty Plate Designs

RECOMMENDATION

The Vehicle Titles and Registration Division (VTR) seeks board approval or denial of two plate designs submitted for your consideration. One design is from a nonprofit organization (non-vendor). The other is a design from the marketing vendor, My Plates.

PURPOSE AND EXECUTIVE SUMMARY

Statutory authority for the board to approve non-vendor specialty plates is in Transportation Code Section 504.801. Statutory authority for the board to approve vendor specialty license plates and invite the public's comment on proposed vendor plate designs is in Texas Transportation Code Section(s) 504.851 (g) and (g-1) (1)). The board's approval criteria is clarified in Administrative Code(s) §217.45 *Specialty License Plates, Symbols, Tabs, and Other Devices* and §217.52, *Marketing of Specialty License Plates through a Private Vendor*.

The renewed vendor contract (paragraph #11, *Inventory Management Controls*) 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 the contract with My Plates was renewed in March 2014, the board has contingently approved 22 vendor plates. Of the 22, six 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 e-View, 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 e-View "dislikes" in 2010 (presumably because of college football rivalry) and has since sold over 1,500 plates.

Both plate designs were presented to the public in a May 2018 e-View. One negative comment was received on the Gulf Coast design. The count of the public's "like/dislikes" are below with the designs.

(New) Smokey Bear:
434 people liked this design and 52 did not.

(New) Gulf Coast:
258 people liked this design and 90 did not.

TEXAS Specialty PLATE BUSINESS

Texas Department of Motor Vehicles

Vehicle Titles and Registration Division
Special Plates Unit
(7 FTEs) 6/18

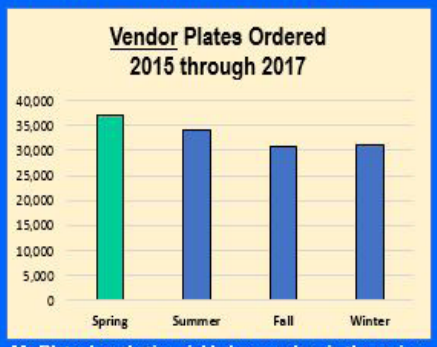
Division Director
Jeremiah Kuntz

CURRENT SPECIALTY LICENSE PLATE (SLP) PROGRAM

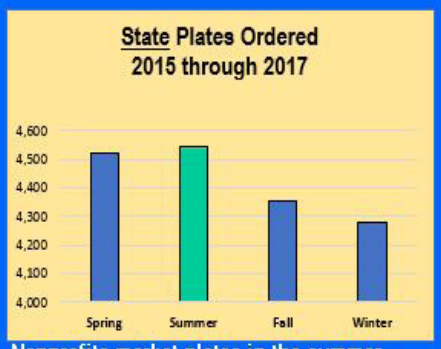
Total SLP offered: **476**

- Military plates: **180**
- Other restricted use plates: **50**
- State specialty plates: **125**
- Vendor specialty plates: **121**

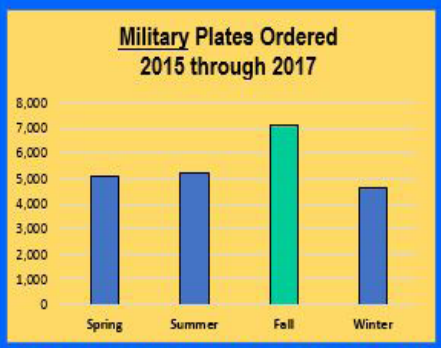
The "busy season" for specialty plates:



My Plates' marketing yielded new orders in the spring.



Nonprofits market plates in the summer.



The Legislature requires new military plates in the fall.

Results of My Plates' April 2018 GR8PL8 Auction	
47	Of the 50 patterns offered were sold.
$76,500	The sum of the winning bids (gross revenue).
$44,772	The GR Fund's share of revenue (60% after costs).
$29,848	My Plates' share of revenue (40% after costs).
235	Specialty plate subscription years sold (47 lots x 5 years)
$191	Average revenue to GR per subscription year.

Five most expensive lots sold at the auction:

Pattern	Winning bids
99	$9,000
Z	$6,750
1776	$5,250
888	$4,000
DODGE	$3,200

367 Sold to date.

New Orders End: August 31, 2018

SPECIAL PLATES UNIT CUSTOMER SERVICE FY 2018 TO DATE (SEPT - APR)

- **24,893** Telephone Calls
- **114** Walk-in Customers
- **8,102** Email
- **987** Refunds
- **21** Public Information/ Open Records
- **5,367** Correspondence (including plate applications)

Applications reviewed (6% declined)

<< AGENDA

Smokey Bear *(new design)*

Gulf Coast (new design)

Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

DATE: June 14, 2018
Continued From: -
Action Requested: BOARD APPROVAL

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Linda Flores
Agenda Item: 12.A
Subject: Carryforward and Capital Authority for Headquarters Maintenance Appropriation

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RECOMMENDATIONS

The Finance and Audit Committee recommends the Board of the Texas Department of Motor Vehicles (TxDMV) to approve the following:

- Creation of a new capital project line item in the FY2019 budget for a TxDMV Headquarters (HQ) Maintenance/Repair project with a total amount of $4,209,505 as shown in Table 1.
- Request carryforward $2,208,000 in unexpended balances (as shown in Table 2) in the TxDMV headquarters maintenance budget in order to fund additional HQ maintenance projects to be included in the Memorandum of Understanding (MOU) between TxDMV and the Texas Department of Transportation (TxDOT).

PURPOSE AND EXECUTIVE SUMMARY

The purpose of this document is to request the Finance and Audit Committee to recommend to the Board of the TxDMV to approve the use of authority outlined in General Appropriation Act (GAA) Article IX (Section 14.03(h) Limitations on Expenditures – Capital Budget, to transfer funds from funds budgeted for TxDMV headquarters maintenance in operating to a new capital project line item in the fiscal year 2019 budget for a TxDMV HQ Maintenance/Repair project.

Also to request authority as outlined in GAA Article IX (Section 14.05) Unexpended Balance Authority Between Fiscal Years in the Same Biennium, in order to use operating funds budgeted for TxDMV headquarters maintenance in order to fund additional expenses anticipated to be incurred in the MOU between TxDMV and TxDOT.

The complete text of the authorities outlined above is in the BACKGROUND AND DISCUSSION section of this document.

FINANCIAL IMPACT

The listing of projects identified by the workgroup to be allocated to the new HQ Maintenance/Repair project and those that can be funded from the TxDMV/TxDOT MOU are listed below. The total cost for FY2019 for the HQ Maintenance/Repair Capital Project is estimated to be $4,209,505 (see Table 1). Additional capital maintenance projects funded through the TxDMV/TxDOT MOU are estimated to cost $2,582,000 (see Table 1).

Table 1 - FY2019 TxDMV HQ Maintenance Projects

Project	TxDMV HQ Maintenance /Repair Capital Project	Maintenance & Repair Projects TxDMV/TxDOT MOU
Exterior Building "Face Lift"	$ 275,000	
CH1 Weatherization Consultant Services and Work/Project	$ 460,000	
Hard Wall Office Requests (including HVAC/electrical/cabling, with related needs)	$ 1,000,000	
Flooring: Buildings 1 and 5, beginning with shared/unoccupied areas, including lobbies and stairwells	$ 365,505	

Table 1 - FY2019 TxDMV HQ Maintenance Projects		
Project	**TxDMV HQ Maintenance /Repair Capital Project**	**Maintenance & Repair Projects TxDMV/TxDOT MOU**
Painting: Buildings 1 and 5, beginning with shared/unoccupied areas, including lobbies and stairwells	$ 895,000	
Roof Replacement – Building 5	$ 1,200,000	
Indoor Air Quality Checks	$ 14,000	
ADA Assessments		$ 31,000
Dock Leveler at CH-5		$ 21,000
Entire Bathroom Retrofit/Bathroom Fixture Replacements		$ 750,000
Interior Building Plumbing System Renovations		$ 150,000
Space Utilization Study of VTR/CH-1 and ITD/CH-5		$ 25,000
LED Lighting Upgrades		$ 430,000
ARCH Flash Study		$ 50,000
Electrical Upgrades		$ 125,000
Front & Rear Elevator Lobbies and Floor Cubbies Upgrades		$ 250,000
Electric Vehicle Charging Stations		$ 30,000
CH1 FAS-ADM Suite Retrofit		$ 130,000
CH1 FAS-ADM Warehouse/Mail Room Retrofit		$ 50,000
Sound Suppression/White Noise Installation CH1 and CH5		$ 150,000
Best Key System and Training		$ 20,000
Consultant to Perform Office and Conference Room Signage Updates		$ 20,000
Office and Conference Room Signage Updates		$ 15,000
CH1 Lift Truck Shelter		$ 55,000
Fire Alarm System Replacement CH1 & CH5		$ 280,000
Estimated Total Costs FY 2019	**$ 4,209,505**	**$ 2,582,000**

The increase in maintenance projects funded through the TxDMV/TxDOT MOU for FY2019 would require an amendment to the current MOU and the increase would necessitate an increase of $2,208,000. Table 2, shows the status of the FY2019 MOU and the impact of the additional HQ maintenance.

Table 2 - TxDMV/TxDOT MOU Status			
	Monthly Maintenance	**TxDMV Share of TxDOT DCS**	**Total**
Current MOU FY2019	$ 940,000	$ 60,000	$ 1,000,000
Less:			
Monthly Maintenance/Utility Charges	$ 456,000		$ 456,000
Headquarters Security	$ 110,000		$ 110,000
TxDMV/TxDOT DCS		$ 60,000	$ 60,000
Available TxDMV/TxDOT MOU	**$ 374,000**	**$ 0**	**$ 374,000**
Less			
Estimated HQ maintenance (Table 1)	$ 2,582,000	$ 0	$ 2,582,000
Surplus/Deficit	**$ (2,208,000)**	**$ 0**	**$ (2,208,000)**

Table 3 below illustrates that there are sufficient available balances in the biennial TxDMV headquarters maintenance budget to fund both the transfer to the capital budget and the request for unexpended balances. However, funding availability is dependent upon the approval of the request to carryforward unexpended balances.

Table 3 – HQ Maintenance Budget Analysis			
	FY2018	**FY2019**	**Biennial Total**
Original Exceptional Item HQ Maintenance			
Salaries	$ 205,000	$ 205,000	$ 410,000
Staff Operating	$ 13,950	$ 13,950	$ 27,900
Capital Budget (badge system)	$ 305,000		$ 305,000
Maintenance	$ 4,520,800	$ 4,564,300	$ 9,085,100
Total Exceptional Item HQ Maintenance	**$ 5,044,750**	**$ 4,783,250**	**$ 9,828,000**
Less:			
Estimated Expenditures	$ 27,014		$ 27,014
Additional MOU costs for FY2018 Maintenance	$ 392,250		$ 392,250
Total Available	**$ 4,625,486**	**$ 4,783,250**	**$ 9,408,736**
Less: Additional FY2019 Obligations			
HQ Maintenance/Repair Capital Project (Table 1)		$ 4,209,505	$ 4,209,505
MOU Additional HQ Maintenance (Table 2)		$ 2,208,000	$ 2,208,000
Total FY2019 Obligations		**$ 6,417,505**	**$ 6,417,505**
Balance	**$ 4,625,486**	**$ (1,634,255)**	**$ 2,991,231**

BACKGROUND AND DISCUSSION

TxDMV received approval from the 85th Legislature for $9,828,000 in funding for HQ Maintenance. The appropriation included funding for one capital project, a badge system. The Legislative Budget Board (LBB) staff did not allocate additional funding to a capital project due to the absence of a specific list of capital maintenance projects. The funding was appropriated as operating expenses.

During the last year, a workgroup including staff of TxDMV and the Texas Department of Transportation (TxDOT) worked together to develop a transition plan for facility maintenance tasks and costs at Camp Hubbard for the current and upcoming biennium. (The complete project list is included as Attachment 1). Several projects have been identified that can be accommodated within TxDOT capital budget authority. These projects will be funded by TxDMV with operating dollars through the existing MOU between TxDMV and TxDOT. The remaining identified projects are being requested as capital budget projects by TxDMV.

Agency discretionary transfer provisions in the GAA related to these requests:

Article IX Section 14.03. Limitation on Expenditure – Capital Budget. This section outlines the authority to transfer capital project appropriations as follows (*emphasis added*):

(h) (1) An agency may transfer appropriations:
(A) from a non-capital budget item to a capital budget item;
(B) from a capital budget item to another capital budget item; or
(C) *from a capital budget item to an additional capital budget item not presented in the agency's bill pattern.*
(2) Without the approval of the Governor and the Legislative Budget Board:

(A) the amounts transferred during a fiscal year as provided by Subdivision (1) of this Subsection (h) may not exceed 25 percent of either:

(i) the amount of the capital budget item, as presented in the agency's bill pattern from which funds are being transferred; or

(ii) the amount of the capital budget item, if presented in the agency's bill pattern, to which funds are being transferred;

(B) appropriations may not be transferred directly from a non-capital budget item to an additional capital budget item not presented in the agency's bill pattern;

(C) appropriations may not be transferred to an additional capital budget item that is not presented in the agency's bill pattern if that additional capital budget item was presented to a committee, subcommittee, or working group of the Eighty-fifth Legislature but was not adopted by the Eighty-fifth Legislature; and

D) an agency that does not have a capital budget provision following its items of appropriation in this Act may not use funds appropriated by this Act for capital budget purposes.

(3) An agency may not transfer appropriations from a capital budget item to a non-capital budget item without the prior written approval of the Governor and the Legislative Budget Board.

Article IX Section 14.05. Unexpended Balance Authority Between Fiscal Years within the Same Biennium. This section allows agencies to request authority to transfer funds between fiscal years in the same biennium.

An agency may transfer any unexpended and unobligated balances remaining as of August 31, 2018 for the same purposes for the fiscal year beginning September 1, 2018, if the agency has been granted, either:

(1) specific authority in another provision of this Act; or

(2) written approval of the Legislative Budget Board.

Attachment 1
TxDMV Maintenance Project Listing

PROJECT #	PRIORITY	Funding Source	REQUESTED NEED/REPAIR	FY2018	FY2019	FY2020/ 2021
30	1	TxDMV Operating	TxDMV Parking Permits	$ 1,500		
21	1		CH1 EDO Suite Furniture	22,000		
37	3		Board Room Dais Chair Rail	2,714		
15	4		Light Fixture Cleaning	800		
27	1	TxDVM Capital Budget Project	Exterior Building "Face Lift"		$ 275,000	
50	2		CH1 Weatherization Consultant Services and Work/Project		460,000	
25A	3		Hard Wall Office Requests (including HVAC/electrical/cabling, with related needs)		1,000,000	
2	4		Flooring: CH1 - Floors 1, 2, 3, 4, 5; CH5 - Floors 1, 2 *Start with shared areas, lobbies, stairwells, unoccupied areas*		365,505	
3	5		Painting: CH1 - Floors 1, 2, 3, 4, 5; CH5 - Floors 1, 2 Start with shared areas, lobbies, stairwells, unoccupied areas		895,000	
7	6		Roof Replacement CH5		1,200,000	
42	8		Indoor Air Quality Checks		14,000	
40	5		TxDMV Security System Installation			$ 450,000
ESTIMATED TOTAL COST - TxDMV Funded Projects				**$ 27,014**	**$ 4,209,505**	**$ 450,000**
21	1	MOU - TxDMV (operating) /TxDOT (capital)	CH1 EDO Suite Retrofit	$ 300,000		
49	2		CH-1 Dock Gate Replacement	7,900		
31	2		CID Suite Window Tinting CH5	800		
13	3		Overhaul CH1 - Elevator #3	165,000		
43	4		CH5 Door Actuator	3,000		
5	5		Replace Existing Water Fountains	60,000		
6	6		Water Softener CH1	100,000		
11	7		Parking Signage	4,500		
29	8		CH5 Wrangler Room Carpet	2,000		
44	9		Improved CH-5 Warehouse Security	1,700		
45	10		CH-5 Generator Security	1,700		
46	11		CH-5 IT MDF Room Security	2,550		
10	12		CH5 Window Lock Replacement	8,550		
20	1		ADA Assessments		$ 31,000	
48	2		Dock Leveler at CH-5		21,000	
16	3		Entire Bathroom Retrofit/Bathroom Fixture Replacements		750,000	
18	4		Interior Building Plumbing System Renovations		150,000	
51	5		Space Utilization Study of VTR/CH-1 and ITD/CH-5		25,000	
1	6		LED Lighting Upgrades		430,000	
19	7		ARCH Flash Study		50,000	

Attachment 1
TxDMV Maintenance Project Listing

PROJECT #	PRIORITY	Funding Source	REQUESTED NEED/REPAIR	FY2018	FY2019	FY2020/ 2021
4	8	MOU - TxDMV (operating) /TxDOT (capital)	Electrical Upgrades		125,000	
38	9		Front & Rear Elevator Lobbies and Floor Cubbies Upgrades		250,000	
14	10		Electric Vehicle Charging Stations		30,000	
39	11		CH1 FAS-ADM Suite Retrofit		130,000	
34	12		CH1 FAS-ADM Warehouse/Mail Room Retrofit		50,000	
23	13		Sound Suppression/White Noise Installation CH1 and CH5		150,000	
24	14		Best Key System and Training		20,000	
28A	15		Consultant to Perfrom Office and Conference Room Signage Updates		20,000	
28B	16		Office and Conference Room Signage Updates		15,000	
33	17		CH1 Lift Truck Shelter		55,000	
17	18		Fire Alarm System Replacement CH1 & CH5		280,000	
ESTIMATED TOTAL COST - TxDOT/TxDMV MOU Projects				**$ 657,700**	**$ 2,582,000**	**$ -**
GRAND TOTAL ALL PROJECTS				**$ 684,714**	**$ 6,791,505**	**$ 450,000**

Recap	TxDMV Capital/ Operating	TXDMV/ TXDOT MOU	Total
FY2018	$ 27,014	$ 657,700	$ 684,714
FY2019	$ 4,209,505	$ 2,582,000	$ 6,791,505
FY2020	$ 450,000		$ 450,000
Total	**$ 4,686,519**	**$ 3,239,700**	**$ 7,926,219**

Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

DATE: June 14, 2018
Continued From: -
Action Requested: Briefing

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Linda M. Flores, CPA, Chief Financial Officer
Agenda Item: 12.B.1.
Subject: Preliminary FY 2020-2021 Legislative Appropriations Request, Baseline and Exceptional Items

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RECOMMENDATION

Briefing of the Legislative Appropriations Request, or LAR, for the upcoming 2020-2021 biennium. As part of the development of the upcoming biennial appropriations process staff presents a preliminary baseline and exceptional items for consideration. The agency's appropriations request will be presented for approval at the August board meeting.

PURPOSE AND EXECUTIVE SUMMARY

The Texas Department of Motor Vehicles (TxDMV), in order to achieve its goals, strategies and objectives during the next biennium, and as the agency looks toward the future, is requesting approximately $312 million in its baseline budget request, which includes a request for capital authority in the amount of $46.96 million. Additionally, the agency is requesting $42 million in exceptional items.

FINANCIAL IMPACT

TxDMV is a net revenue-generating agency for the state. Effective September 1, 2016, TxDMV began depositing revenue into a new agency fund recreated by the 84th Legislature, the TxDMV Fund (0010). The agency's budget request is supported by collections. The staff estimates that TxDMV will collect approximately $3.9 billion for the State while retaining approximately $312 million for baseline agency operations over the biennium. The majority of the LAR request will be funded from the TxDMV Fund which includes the newly created processing and handling fee (P&H). The LAR request also includes General Revenue (GR) funding for baseline and exceptional items for the Automobile Burglary & Theft Prevention Authority.

BACKGROUND AND DISCUSSION

The agency's baseline request includes initiatives to continue centralized fulfillment of online registration renewals, address long standing headquarters maintenance needs and enhanced investigative fraud prevention initiatives by Compliance and Investigations and Enforcement divisions.

The capital budget includes funding for Automation ($6.6 million) for Refactoring of the Registration and Titling System; growth and enhancement of information resources ($1.6 million); replacement of computer equipment in the counties and at TxDMV headquarters ($10.5 million); cybersecurity projects ($400k); increase of the agency's fleet vehicles by 8 additional cars ($180k); renovations and repairs at the regional service centers ($500k); costs related to a TxDMV Headquarters facility improvements including funding for a badge security system ($5.5 million); and ongoing costs for the Data Center Services contract (21.8 million).

Ten exceptional items totaling $42 million and 22 new Full-Time Equivalent (FTEs) positions are recommended by the staff. The agency exceptional items includes:

- Initiatives to address Sunset recommendations for a biennial total of $28.5 million and 13 FTEs
- Non-Sunset related items to address
    - agency infrastructure operations ($6.2 million and 9 FTEs) and
    - Automobile Burglary Theft Prevention Authority grant funding for developing a crime reduction strategy for a biennial total of $7.3 million.

The proposed LAR also includes three new riders which would allow the agency to:

1. Spend any unexpended balances in appropriations between the first and second year of the biennium (FY 2020 and FY 2021);
2. Spend unexpended balances of state match funds for federal grants from FY 2020 in FY 2021, and
3. Spend money appropriated for capital projects for headquarters maintenance during both years of the biennium.

Texas Department of Motor Vehicles

Preliminary FY 2020 – 2021
Legislative Appropriations Request Summary

Legislative Appropriation Request Process

Legislative Appropriations Request (LAR) - The LAR is the agency's biennial funding budget request. The agency solicits information from all levels of management in order to identify future program needs and situations unique to each division. Advanced planning and comprehensive involvement provides the agency with the most complete budget information.

- The LAR begins with the base reconciliation and covers two separate fiscal years. The LAR becomes the basis for consideration of agency funding by the Legislature for the FY 2020-21 biennium, covering September 1, 2019 through August 31, 2021.

The LAR is divided into two components:

Baseline — funding necessary to maintain existing operations and existing capital projects; and,

Exceptional items — desired services above the baseline request.

Timeline

Baseline Development Process (Base Reconciliation) - The FY 2017-19 Base Reconciliation requires TxDMV to reconcile its original appropriations by method of finance and the full-time equivalent (FTE) positions to fiscal year 2017 expended, fiscal year 2018 estimated, and fiscal year 2019 budgeted amounts. The table below shows an estimated biennial baseline calculation of approximately $312 million ($25 million in GR for Automobile Burglary and Theft Prevention Authority (ABTPA), $285 million for the TxDMV Fund and the remainder in Federal Funds). These amounts will be sufficient to fund the baseline FY2020/21 budget request. The Base Reconciliation was submitted to the Legislative Budget Board (LBB) on May 24, 2018.

Estimated FY 2020-21 Base Calculation		
2018 Estimated Expenditures		161,127,022
2019 Budget		168,783,745
	Total 2018-19	**329,910,767**
Less - TxDMV Automation UB (GR/SHF6 & a small TxDMV Fnd UB from FY2017)		(18,093,268)
Estimated FY2020-21 Baseline		**311,817,499**

FY 2020-21 Estimated Revenue Collections by Fund

TxDMV is a net revenue generating agency for the state, collecting revenues from registrations, licenses, titles, permits, and credentials. Revenues collected by TxDMV are deposited into the State Highway Fund (Fund 0006), the primary source of funding for the state's transportation and infrastructure system, and into the General Revenue Fund (Fund 0001). Effective September 1, 2016, TxDMV began depositing revenue into a new agency fund re-created by the 84th legislature, the TxDMV Fund 0010. For the FY 2018-19 biennium, TxDMV estimates it will collect approximately $3.8 billion in total revenues: $3.27 billion in the State Highway Fund 0006, $220 million in General Revenue Fund 0001, and $319 million in TxDMV Fund 0010. In the FY 2020-21 biennium, TxDMV projects collections of $3.4 billion to be deposited to the State Highway Fund 0006, $324 million to the TxDMV Fund 0010, and $223 million to General Revenue Fund 0001.

Expected TxDMV Revenue Collections				
Fund Type	**FY 2018**	**FY 2019**	**FY 2020**	**FY 2021**
State Highway Fund 0006	$ 1,624,388,000	$ 1,646,624,000	$ 1,670,756,000	$ 1,695,244,000
TxDMV Fund 0010	$ 159,234,000	$ 159,607,000	$ 161,088,000	$ 162,415,000
General Revenue Fund 0001	$ 109,451,000	$ 110,051,000	$ 111,234,000	$ 112,139,000
Total	**$ 1,893,073,000**	**$ 1,916,282,000**	**$ 1,943,078,000**	**$ 1,969,798,000**

In FY 2017, TxDMV established a processing and handling fee to support registration-related operations. The table below reflects projected revenues to TxDMV Fund 0010 for the four-year period beginning in FY 2018 broken out by major categories, using moderate growth projections with the addition of the processing and handling fee.

TxDMV Revenue Forecast				
Category	**FY 2018**	**FY 2019**	**FY 2020**	**FY 2021**
Motor Vehicle Titles	$ 41,700,000	$ 41,397,000	$ 41,872,000	$ 42,177,000
Motor Vehicle Registration	$ 33,125,000	$ 33,291,000	$ 33,457,000	$ 33,624,000
Motor Carrier - Oversize / Overweight	$ 15,108,000	$ 15,259,000	$ 15,412,000	$ 15,566,000
Business Dealer Licenses	$ 8,378,000	$ 8,420,000	$ 8,462,000	$ 8,504,000
Processing & Handling Fee	$ 57,800,000	$ 58,082,000	$ 58,711,000	$ 59,352,000
Miscellaneous Fees	$ 3,123,000	$ 3,158,000	$ 3,174,000	$ 3,192,000
Total	**$ 159,234,000**	**$ 159,607,000**	**$ 161,088,000**	**$ 162,415,000**

The TxDMV Fund 0010 ending balance is projected to be $81.4 million at the end of the FY 2018-19 biennium. (Title revenue is expected in FY 2019 to return to more typical levels following a FY 2018 spike in non-repairable and salvage-title issuance attributed to vehicles affected by Hurricane Harvey.) The table below illustrates that the balance at the end of the FY2018-19 biennium will be sufficient to fund the requested exceptional items.

FY 2017-21 Pro Forma Summary					
	FY2017 Actual	FY2018 Estimated	FY2019 Budgeted	FY2020 Requested	FY2021 Requested
Beginning Balance	$ 23,000,000	$ 51,986,246	$ 73,363,863	$ 81,352,364	$ 66,286,625
Capital UB Authority	$ 41,374,089	$ 18,993,268	$ 14,133,388		
ABTPA Grant UB Authority			$ 500,000		
Subtotal	$64,374,089	$ 70,979,514	$ 87,997,251	$ 81,352,364	$ 66,286,625
Revenues					
General Revenue (ABTPA)	$ 14,912,006	$ 12,335,851	$ 12,835,851	$ 12,835,851	$ 12,835,851
TxDMV Fund	$ 152,276,454	$ 171,261,570	$ 172,505,316	$ 174,959,815	$ 177,371,725
Federal Reimbursement	$ 292,700	$ 743,750	$ 743,750	$ 743,750	$ 743,750
Total Revenues	$ 167,481,160	$ 184,341,171	$ 186,084,917	$ 188,539,416	$ 190,951,326
Total Income	$ 231,855,249	$ 255,320,685	$ 274,082,168	$ 269,891,780	$ 257,237,951
Obligations					
Operating Expenses	$ 163,018,511	$ 161,127,022	$ 168,783,745	$ 159,628,883	$ 152,188,617
Tx.Gov Fees from Online P&H	$ 4,561,359	$ 7,800,732	$ 8,598,316	$ 9,571,815	$ 10,656,725
Employee Benefits	$ 12,289,133	$ 13,029,068	$ 15,347,743	$ 15,347,743	$ 15,347,743
Total Obligations	$ 179,869,003	$ 181,956,822	$ 192,729,804	$ 184,548,441	$ 178,193,085
Fund Balance	$ 51,986,246	$ 73,363,863	$ 81,352,364	$ 85,343,339	$ 79,044,866
Exceptional Items (TxDMV Fund)					
Sunset Items				$ 13,420,624	$ 1,949,259
Non-Sunset Items				$ 5,636,090	$ 567,915
Total Exceptional Items				$ 19,056,714	$ 2,517,174
Revised Ending Fund Balance	$ 51,986,246	$ 73,363,863	$ 81,352,364	$ 66,286,625	$ 76,527,692

FY 2020-21 Baseline Budget Appropriations Request by Strategy

The following table illustrates the estimated baseline budget appropriations by strategy. The baseline represents the amount of money necessary to maintain existing operations across the agency. The LBB approves the baseline target for each agency. The key variances between the FY2018/19 appropriation of $332,861,576 and the estimated/budgeted FY2018/19 amount of $311,817,500 (see below) are adjustments between strategies and unspent appropriations for estimated credit card charges for Tx.Gov related to the P&H fee. The contract with Texas.gov allows the $2.00 Texas.gov fee for online transactions to be retained by Texas.gov and not deposited to the TxDMV Fund. This process eliminated the actual payments to Texas.gov.

Items of Appropriations	Appropriation			Preliminary Request			Variance
	FY2018	FY2019	Biennial Total	Base FY 2020	Base FY 2021	Biennial Total	
Goal A. Optimize Services and Systems							
Strategy A.1.1. – Titles, Registrations, and Plates	$ 85,087,705	$ 87,635,557	$ 172,723,262	$ 73,518,439	$ 73,343,443	$ 146,861,882	$(25,861,380)
Strategy A.1.2. – Vehicle Dealer Licensing	$ 4,147,355	$ 4,147,355	$ 8,294,710	$ 4,147,355	$ 4,147,355	$ 8,294,710	$ 0
Strategy A.1.3 – Motor Carrier Permits & Credentials	$ 9,363,145	$ 9,363,145	$ 18,726,290	$ 9,255,352	$ 9,255,352	$ 18,510,704	$ (215,586)
Strategy A.1.4 – Technology Enhancement & Automation	$ 9,285,457	$ 2,719,379	$ 12,004,836	$ 9,257,539	$ 2,691,461	$ 11,949,000	$ (55,836)
Strategy A.1.5 – Customer Contact Center	$ 2,211,234	$ 2,211,234	$ 4,422,468	$ 2,443,840	$ 2,443,840	$ 4,887,680	$ 465,212
Total, Goal A: Optimize Services and Systems	**$ 110,094,896**	**$ 106,076,670**	**$216,171,566**	**$ 98,622,525**	**$ 91,881,451**	**$ 190,503,976**	**$(25,667,590)**
Goal B. Protect the Public							
Strategy B.1.1. – Enforcement	$ 6,462,452	$ 6,164,666	$ 12,627,118	$ 6,899,303	$ 6,899,303	$ 13,798,606	$ 1,171,488
Strategy B.2.1. – Automobile Theft Prevention	$ 12,835,851	$ 12,835,851	$ 25,671,702	$ 12,835,851	$ 12,835,851	$ 25,671,702	$ 0
Total, Goal B: Protect the Public	**$ 19,298,303**	**$ 19,000,517**	**$ 38,298,820**	**$19,735,154**	**$ 19,735,154**	**$ 39,470,308**	**$ 1,171,488**
Goal C: Indirect Administration							
Strategy C.1.1. – Central Administration	$ 7,902,373	$ 7,902,373	$ 15,804,746	$ 8,022,484	$ 8,022,484	$ 16,044,968	$ 240,222
Strategy C.1.2. – Information Resources	$ 23,364,517	$ 22,964,021	$ 46,328,538	$ 25,329,696	$ 24,730,504	$ 50,060,200	$ 3,731,662
Strategy C.1.3. – Other Support Services	$ 8,209,703	$ 8,048,203	$ 16,257,906	$ 7,919,024	$ 7,819,024	$ 15,738,048	$ (519,858)
Total, Goal C: Indirect Administration	**$ 39,476,593**	**$ 38,914,597**	**$ 78,391,190**	**$ 41,271,204**	**$ 40,572,012**	**$ 81,843,216**	**$ 3,452,026**
Total Department of Motor Vehicles	**$ 168,869,792**	**$ 163,991,784**	**$332,861,576**	**$159,628,883**	**$ 152,188,617**	**$ 311,817,500**	**$(21,044,076)**
Method of Finance							
General Revenue (GR) Fund 0001	$ 12,835,851	$ 12,835,851	$ 25,671,702	$ 12,835,851	$ 12,835,851	$ 25,671,702	$ 0
Texas Department of Motor Vehicles Fund 0010	$ 155,290,191	$ 150,412,183	$ 305,702,374	$ 146,049,282	$ 138,609,016	$ 284,658,298	$(21,044,076)
Federal Funds	$ 743,750	$ 743,750	$ 1,487,500	$ 743,750	$ 743,750	$ 1,487,500	$ 0
Total Method of Finance	**$ 168,869,792**	**$ 163,991,784**	**$ 332,861,576**	**$ 159,628,883**	**$ 152,188,617**	**$ 311,817,500**	**$(21,044,076)**
Full Time Equivalents (FTE)			**779.0**			**779.0**	

FY 2020-21 Capital Budget Project Summary Baseline

The following table illustrates FY 2020-21 Capital budget:

Capital Budget	Biennial Appropriation FY 2018-19	Preliminary Biennial Base Request FY 2020-21
TxDMV Automation System	$ 6,566,078	$ 6,566,078
Growth and Enhancement – Agency Operations Support	1,616,496	1,614,996
Technology Replacement and Upgrades - Regional Support for County Tax Assessor Collector Offices	10,025,000	10,025,000
PC Replacement	205,595	451,600
Cybersecurity Initiative Projects	400,000	400,000
Transportation – Replacement Vehicles	825,000	
Special Investigations Unit Vehicles	100,000	
Transportation – New Vehicles (8 vehicles)		180,000
RSC Maintenance and Repair		500,000
TxDMV Headquarters Security and Badge System	305,000	450,000
TxDMV Headquarters Maintenance Projects		5,000,000
Data Center Consolidation	18,427,406	21,774,873
Total Capital Budget	**$ 38,470,575**	**$ 46,962,547**
Method of Finance		
Texas Department of Motor Vehicles Fund 0010	$ 38,470,575	$ 46,962,547
Total Method of Finance	**$ 38,470,575**	**$ 46,962,547**

2020-21 Capital Budget Descriptions

TxDMV Automation – The TxDMV Automation develops information technology assets to improve customer services and improve access to agency programs for customers and the public. This initiative is supported by the $.50 automation fee. The FY2020-21 Automation project will focus on two initiatives, Maintenance and Enhancement to the Registration and Titling System (RTS), including the re-architect of the RTS batch cycle processes.

Growth and Enhancement – Agency Equipment – This appropriation provides funding for activities that enhance or expand information resources in TxDMV individual program areas. Items included in this appropriation are telephone and communication system replacements and upgrades; and software licenses for enterprise applications.

County Equipment Technology Replacement and Upgrades – This appropriation provides funding to deploy and maintain printers, computers, monitors, laptops, cash drawers, and printer toner deployed at county Tax Assessor/Collector (TAC) offices throughout the state. These funds also maintain connectivity between the county Tax Assessor/Collector offices and the TxDMV Registration and Titling (RTS) system, as well as connectivity throughout statewide TxDMV offices.

PC Replacement - The PC Replacement project consists of funding for computer, printer and laptops replacement.

Cybersecurity Initiative - This project provides funding for initiatives to improve security for statewide information technology systems.

Vehicles – Funding to increase the TxDMV fleet by 8 vehicles. The vehicles would be used to support investigation activities in the Enforcement and Compliance and Investigations (CID) divisions. Seven (7) vehicles would be specifically assigned to Enforcement in Austin, Houston, Fort Worth, Odessa and Longview. One vehicle would be assigned to CID in Houston.

RSC Maintenance and Repair – Funding to update a two medium sized Regional Service Centers (RSC) in order to standardize the look of TxDMV facilities across the state.

TxDMV Headquarters Security and Badge System - Equipment which includes funding for headquarters security/badging equipment.

TxDMV Headquarters Maintenance Projects - Funding to update two floors of one of the buildings at Camp Hubbard. Costs include renovation, updated equipment and furniture, rental space for staff during the renovation and funds for updating cabling and other information technology items.

Data Center Services – This appropriation supports information technology infrastructure assets and functions through statutorily required participation in the State Data Center maintained by the Department of Information Resources (DIR). The Data Center Services (DCS) program enables state agencies to access data center computing as a managed service. DCS fees are based on a consumption based model with costs varying based on statewide usage of DCS services.

FY 2020-21 Preliminary Exceptional Item Requests

The following table is a preliminary list of exceptional items that will be requested by TxDMV for the FY 2020-21 biennium. Exceptional items are those desired services above the baseline request. Detailed information on the exceptional items contained in Appendix A.

Division	Exceptional Item	Description	Biennial Request	
			FTE	Amount
	Sunset Related			
Compliance & Investigations / Internal Audit	**Automated Fraud Monitoring and Resources**	**Sunset Item 2.4** The Compliance and Investigation Division plans to leverage technology to use proactive data utilization to provide management information for more efficient resource allocation focusing on problem areas.		220,000
Automobile Burglary and Theft Prevention Authority	**Broaden ABTPA's Statutory Mandate (GR Request)**	**Sunset Item 2.6** ABTPA requests $6.6 million per year to expand the presence and impact of the economic automobile theft enforcement teams (taskforces) authorized in ABTPA statute. The request is in response to the Sunset Advisory Commission staff recommendation to authorize ABTPA grant recipients to use grant funds to combat a broader range of motor vehicle crimes, such as title fraud, beyond the current statutory requirement to investigate and prevent automobile burglary and theft. To effectively administer these added responsibilities, the ABTPA network would need to have greater geographic coverage, prosecutor participation, and more technically skilled and specialized law enforcement professionals.		13,102,560
Enforcement	**Enforcement/ Online Dealer & Motor Carrier History Database and Case Management System Enhancements to Improve Data Tracking and Reporting**	**Sunset Item 3.9** A request of $90,000 in funding to develop a public facing database of enforcement case histories for motor vehicle licensees and for enhancements to the existing motor carrier licensee case history database. **Sunset Item 3.6** A request of $282,000 for contract services to fund the implementation of a case management system with enhancements to improve reporting of motor vehicle and motor carrier enforcement data including, complaints by sources and license type, nature of complaint, resolution by allegation type, and enhanced reporting of cases referred to the State Office of Administrative Hearings.		372,500

Division	Exceptional Item	Description	Biennial Request	
			FTE	Amount
Consumer Relations/ Enforcement/ Motor Carrier/ Motor Vehicle /Information Technology Services	**Complaint Management System (CMS)**	**Sunset Items 5.3 and 5.5** Develop and maintain a new complaint management system which would include data on the status of complaints, complaint procedures, and documentation of complaints. This item also includes coalescing complaints into a single repository for greater efficiency, instead of the current process of storing complaints in separate systems. Includes costs for staff and operating ($154,815) and funding for external contract services ($4,000,000).	1.00	4,154,815
Information Technology Services	**Information Technology Improvements - Infrastructure Sunset item 5.4**	**Sunset Item 5.4** Funding to implement improvements to facilitate a comprehensive approach to developing, maintaining, and updating TxDMV information technology infrastructure. Includes building out self-service password reset, creating self-service test data, obtaining automated testing tools and creating automated tests, modifying IRP to reduce errors, and building out non- production environments to support the software development lifecycle. Includes costs for external contract services ($1,000,000) and funding for Data Center Services for servers and database licenses ($1,700,000).		2,700,000
Information Technology Services	**Information Technology Improvements - Organizational Assessment**	**Sunset Item 5.4** Internal and third-party analyses of the Information Technology Services division Full-Time Equivalents (FTE) allocation determined that additional FTEs are needed to fulfill all existing obligations and to maintain service levels to avoid future backlog. This request will be used to implement operational improvements that enable the agency to develop and maintain TxDMV information technology projects and infrastructure.	12.00	1,922,568
Information Technology Services/ Motor Carrier	**Information Technology Improvements – Platform Modernization (Motor Carrier Credentialing System ((MCCS))**	**Sunset item 5.4** Modernize the current platform for MCCS. The current platform is written in an outdated technology which adds risk to the agency due to the difficulty of locating qualified resources for support. This investment will allow the agency to consolidate skillsets and allow for greater staff redundancy and maintain applications in a more efficient manner.		6,000,000
Total Sunset Related Items			**13.00**	**28,472,443**

Division	Exceptional Item	Description	Biennial Request	
			FTE	Amount
	Non-Sunset Related			
Information Technology Services/ Compliance and Investigations	**Enterprise Data Warehouse/Data Analytics**	Funding to create an enterprise-wide centralized data repository to enable true data analytics, deploy analytics and reporting tools, predictive analytics, and more efficient and effective reports. Request includes funding for external contract services ($5,000,000) and for Data Center Services - Servers ($300,000).		5,300,000
Consumer Relations	**Customer Service Staff**	Additional staff in the Consumer Relations Division (CRD) to reduce an average of 30 Vehicles Titles and Registration (VTR) FTEs who had been taking customer service calls. Freeing these FTE will allow them to fulfill the mission of VTR. Customers are served more efficiently with increased skills and knowledge with a dedicated trainer focused on consistency and quality. Funding for 8 Customer Service Representative, a trainer and related operating expenses.	9.00	904,005
Automobile Burglary and Theft Prevention Authority	**ABTPA Crime Reduction Strategy (GR Request)**	ABTPA has a statutory requirement to develop a plan of operation that must include: 1) an assessment of the problem, 2) an analysis of the various methods of combating these crimes, 3) a plan for financial support to combat motor vehicle burglary and theft, and 4) an estimate of the funds required to implement the plan. To be most effective, trained law enforcement officers need to have better geographical coverage of the state's 254 counties. Increasing the funds available to ABTPA will expand current ABTPA taskforces and create new taskforces to cover more areas. All funds will develop local resources to address problems that have a regional and statewide impact.		7,297,440
Total Non-Sunset Related Items			**9.00**	**13,501,445**
Totals by Method of Finance				
General Revenue				**20,400,000**
TxDMV Fund			**22.00**	**21,573,888**
TOTAL			**22.00**	**41,973,888**

Riders

A "rider" is a legislative directive or appropriation inserted in the General Appropriations Act (GAA) following the Items of appropriation for an agency or, in the special or general provisions of the act. A rider provides direction, expansion, restriction, legislative intent, or an appropriation. A rider may be requested by an agency or may be drafted and inserted by the legislature.

For the FY 2020-21 LAR, the agency, at minimum, intends to request five riders to assist in its operations. Two riders were previously approved in the FY 2018-19 General Appropriations Act and will be requested again in FY 2020-21. In addition to the previously approved riders, three new riders will be requested in FY 2020-21.

Riders Previously Approved in FY 2018-19 and Re-requested for FY 2020-21

- ***Special License Plate Fees*** – this rider provides additional appropriations each year of the biennium for the purpose of making payments to the contract vendor for the marketing and sale of personalized license plates. The rider also allows for unexpended balances to be carried forward into the next fiscal year of the biennium for the same purposes. This rider was included in the FY 2018-19 General Appropriation Act.

- ***Capital Projects - Automation—Unexpended Balance Authority*** – this rider will allow the agency to spend money appropriated for Automation capital projects during both years of the biennium. The agency is requesting that any unexpended funds appropriated for capital projects at the end of FY 2019 be carried forward to the new biennium beginning FY 2020 for the agency's use. This rider was included in the FY 2018-19 General Appropriation Act.

New Rider Requested for FY 2020-21

- ***Unexpended Balance Authority within the Biennium*** – this rider would allow the agency to spend any unexpended balances in appropriations between the fiscal years. This rider was requested in the last biennium but not approved. ABTPA requested and received specific authority to expend balances in FY2018 in FY2019 for grant projects. This rider would allow the department, including ABTPA the flexibility to fund operations with expend balances when appropriate.

- ***Federal Grants and State Matching Funds*** – this rider allows the agency to spend any unexpended balances of state match funds for federal grants from FY 2020 in FY 2021.

- ***Capital Projects - HQ Maintenance—Unexpended Balance Authority*** – this rider will allow the agency to spend money appropriated for capital projects for headquarters maintenance during both years of the biennium. The agency is requesting that any unexpended funds appropriated for capital projects at the end of FY 2019 be carried forward to the new biennium beginning FY 2020 for the agency's use.

Appendix A – Exceptional Item Detail

2020-21 LAR Exceptional Item Request Schedule

Division:	**Compliance and Investigations**	**Division Director:**	**Tim Menke**
Item Name:	Automated Fraud Monitoring and Resources	**Item Priority:**	**1**
Strategy:	B.1.1. Enforcement		

Code	Total Exceptional Item Request	Requested 2020	Requested 2021
2009	**Objects of Expense:** Other Operating Expense	110,000	110,000
	Total, Objects of Expense	110,000	110,000
0010	**Method of Financing:** TxDMV Fund	110,000	110,000
	Total, Method of Finance	110,000	110,000
Number of Full-time Equivalent Positions (FTE):			

Detail on Object of Expenses and FTEs: (Included above)

Other Expenses (list line items)	Unit Cost	Units	FY 2020	FY 2021
Other Operating - Mapping Software	1,000	10.00	10,000	10,000
Other Operating - Data Analysis, Mining Software	10,000	10.00	100,000	100,000
Subtotal, Detail on Object of Expenses and FTEs			$ 110,000	$ 110,000

Description/Justification (2000 character limit)

The Compliance and Investigation Division (CID) plans to leverage technology to use proactive data utilization to provide management "real time" information for more efficient resource allocation focusing on problem areas vs overutilization in non-problem areas. A central component will be the acquisition of mapping software to create an interactive color-coded map of 254 Texas counties highlighting vulnerable counties. The software would allow the maps to be updated weekly with hyperlink capability to vulnerability templates for cautionary or warning indicators specific to county issues. Three colors, green (Good), yellow (Caution with hyperlink to template), red (Warning with hyperlink to template).

In addition CID intends to use technology to produce results in minutes vs months of thousands of hours of human review of available data. This item also includes funding for the implementation of software to harness big data queries automating targeted, pro-active data mining to efficiently identify vulnerabilities, trends, outliers, anomalies, and potential criminal behavior. The speed, efficiency, and multitudes of graphics will provide investigators and managers near instantaneous results for efficiency in targeting investigative time and resources.

Automated Fraud Monitoring and Resources – Sunset Item 2.4

Issue 2 in the Sunset Report states “Texas Lacks Basic Safeguards to Identify and Address Title Fraud” and more specifically, “The department has not had sufficient resources or existing tools to proactively monitor and investigate fraud, instead only reacting to referrals of suspected or known fraud.”

The Compliance and Investigations Division (CID) is requesting funding to develop a proactive risk based approach to prevent and monitor vehicle title fraud. To achieve this, CID will need additional software for the creation of an interactive color-coded map of 254 Texas counties highlighting vulnerable counties updated weekly with hyperlink capability to vulnerability templates for cautionary or warning indicators specific to county issues. This proactive data utilization provides management "real time" information for more efficient resource allocation, focusing on problem areas vs overutilization in non-problem areas. Three colors on this interactive map will show at a glance where to best place resources for the most significant impact, green (Good), yellow (Caution with hyperlink to template), red (Warning with hyperlink to template). From a compliance perspective, quickly identifying vulnerabilities in TAC offices will result in identifying training opportunities and establishing best practices. The enhanced oversight will help ensure integrity in TAC offices resulting in public confidence.

CID will also utilize additional software to harness big data queries automating targeted, pro-active data mining, efficiently identifying vulnerabilities, trends, outliers, anomalies, and potential criminal behavior. This additional software will produce results in minutes rather than hundreds of hours of human review by investigators. Speed, efficiency, and a multitude of graphics will provide investigators and managers near instantaneous results extracting pertinent information for investigations while removing extraneous unrelated information. Currently, investigators manually review thousands of records in a time consuming process to find possible links associated with schemes. Since CID’s creation, numerous law enforcement agencies have requested assistance from CID investigators to search and review data associated with criminal activity to include fraud and public corruption in an attempt to establish probable cause for search and arrest warrants. These reviews are also necessary to determine the extent of loss to taxpayers. With the implementation of cutting-edge software, CID will be able to process data much faster and automatically extract intelligence and analyze evidence crucial to an investigation. Currently with the human review process, CID can only manage one large request for assistance at a time from law enforcement stakeholders. With the new software, CID will get results faster and will be able to process many law enforcement requests for assistance simultaneously. CID investigators and the criminal intelligence analyst will identify trends and conspiracies faster and increase return on investment with significantly more support for law enforcement resulting in fines, penalties, restitution, and seizures.

2020-21 LAR Exceptional Item Request Schedule			
Division:	**Automobile Burglary and Theft Prevention Authority**	**Division Director:**	**Bryan Wilson**
Item Name:	Broaden ABTPA's Statutory Mandate	**Item Priority:**	**2**
Strategy:	B.2.1 Automobile Theft Prevention		

Code	Total Exceptional Item Request	Requested 2020	Requested 2021
4000	**Objects of Expense:**		
	Grants	6,551,280	6,551,280
	Total, Objects of Expense	6,551,280	6,551,280
0001	**Method of Financing:**		
	General Revenue	6,551,280	6,551,280
	Total, Method of Finance	6,551,280	6,551,280

Description/Justification (2000 character limit)

The Automobile Burglary and Theft Prevention Authority (ABTPA) requests $6.6 million to expand the presence and impact of the economic automobile theft enforcement teams (taskforces) authorized in ABTPA statute. The additional grant funding is for an estimated forty-five new law enforcement investigators, seven new motor vehicle crimes prosecutors, seven new criminal intelligence analysts, seven new motor vehicle crimes technologists and operating cost for these positions. The Sunset Advisory Commission staff recommendation was made to authorize ABTPA grant recipients to use grant funds to combat a broader range of motor vehicle crimes, such as title fraud, beyond the current statutory requirement to investigate and prevent automobile burglary and theft. To effectively administer these added responsibilities, the ABTPA network would need to have greater geographic coverage, prosecutor participation, and more technically skilled and specialized law enforcement professionals. The additional funds introduced to the existing ABTPA grant funded network would be the most cost effective method to ensure local communities engage in extremely complex, multi-jurisdictional motor vehicle crimes defrauding the State of Texas and the public.

Broaden ABTPA Statutory Mandate – Sunset Item 2.6

The Automobile Burglary and Theft Prevention Authority (ABTPA) requests $6.6 million to expand the presence and impact of the economic automobile theft enforcement teams (taskforces) authorized in ABTPA statute to use grant funding to add up to forty-five new law enforcement investigators, seven new motor vehicle crimes prosecutors, seven new criminal intelligence analysts, and seven new motor vehicle crimes technologists. The Sunset Advisory Commission Staff made a recommendation to authorize ABTPA grant recipients to use funds to combat a broader range of motor vehicle crimes, such as title fraud, beyond the current statutory requirement to investigate and prevent automobile burglary and theft. To effectively administer these added responsibilities, the ABTPA network would need to have greater geographic coverage and better skilled law enforcement professionals.

The amount requested is in addition to the ABTPA's statutory requirement to develop a plan of operation that includes estimates of the funds required to combat the problems of automobile burglary, theft, and economic automobile theft across the entire state. The sunset staff recommendations are used to calculate what ABTPA would need to add in the expansion of other motor vehicle crime. The expansion would require an increase in expertise and in geography for the expanded motor vehicle crimes. The same officers would also serve Texas in combating current incidence of motor vehicle burglary and theft and those corresponding financial losses.

If the Texas Legislature modifies the ABTPA's statutory requirements to include additional motor vehicle crimes, the ABTPA board of directors will add the new requirements to the areas of responsibility for grant recipients; however, the ability to perform the additional responsibilities will be correlated to the availability of grant funding for specialized investigation and prosecution programs.

Because of the complex and technical nature of crimes such as title fraud, among others, the law enforcement officers, prosecutors, and support professionals who would have the capacity to effectively pursue such cases would need to possess a level of highly specialized skill and expertise that is not commonly available to local jurisdictions across the entire state. By making state grant funds available to local communities, ABTPA can help to develop local capacities to address problems that have a regional and statewide impact. ABTPA can also help to coordinate the development of specialized programs and provide other technical support that would not normally be available in every part of the state. ABTPA requires a minimum of 20% local cash match on all grants so the amount listed is only 80% of the cost of the staff and equipment that is required.

2020-21 LAR Exceptional Item Request Schedule			
Division:	**Enforcement Division**	**Division Director:**	**Corrie Thompson**
Item Name:	Online Dealer & Motor Carrier History Database and Case Management System Enhancements	**Item Priority:**	**1**
Strategy:	B.1.1. Enforcement		

Code	Total Exceptional Item Request	Requested 2020	Requested 2021
2001	**Objects of Expense:** Professional Fees & Services	372,500	
	Total, Objects of Expense	372,500	-
0010	**Method of Financing:** TxDMV Fund	372,500	-
	Total, Method of Finance	372,500	-
Number of Full-time Equivalent Positions (FTE):			
Detail for Capital Appropriation Items: (included in above amounts)			
5005	Acquisition of Information Resources Technologies	$ 372,500	
	Total, Capital Appropriation Items	$ 372,500	$ -

Detail for Capital Appropriation Items: (included above)

Professional Fees Automation	Acquisition of Information Resource Tech Estimated cost to enhance systems (3,725 hours @ $100/hr)	100	3,725.00	372,500

Description/Justification (2000 character limit)

Sunset Item 3.9

Development of a public facing database of enforcement case histories for motor vehicle licensees and for enhancements to the existing motor carrier licensee case history database. The estimated cost is $90,000.

Sunset Item 3.6

Case management system enhancements to improve reporting of motor vehicle and motor carrier enforcement data including, complaints by sources and license type, nature of complaint, resolution by allegation type, and enhanced reporting of cases referred to the State Office of Administrative Hearings. The estimated cost is $282,000.

Enforcement/Online Dealer & Motor Carrier History Database and Case Management System Enhancements to Improve Data Tracking and Reporting – Sunset Items 3.6 and 3.9

TxDMV is requesting $282,500 to enhance the motor vehicle and motor carrier case management systems to allow for improved reporting of motor vehicle and motor carrier enforcement data including, complaints by sources, license, nature of complaint and resolution in response to information provided in Sunset item 3.6. Enforcement currently maintains two case management databases for tracking motor vehicle and motor carrier cases.

Improvements to the eLicensing system for motor vehicle cases would include the ability to pull reports detailing number of cases by license type and would include a redesign of the violation section to allow for reporting on types of violations included within each case. Additional fields relating to the various ways in which cases can be resolved will allow for enhanced reporting on case resolution. For example, system enhancements will enable enforcement to report the number of cases closed by agreed order where dealer training was required as part of the settlement, the number of cases referred to the State Office of Administrative Hearings that ultimately settled by agreed order, and the number of cases referred to the State Office of Administrative Hearings that defaulted and resulted in a final order.

Improvements to the Case Management System for motor carrier cases would include the ability to pull reports detailing number of cases by license type; e.g. household goods carrier, bus/passenger carrier, motor carrier/general freight, as well as the ability to run reports on the types of violations included in each complaint. The addition of new fields relating to the various ways in which cases can be resolved will also allow for enhanced reporting that details the various ways in which cases are ultimately resolved.

These system enhancements will enable Enforcement to analyze data to determine the effectiveness of certain sanction actions and will assist with decisions concerning case prioritization and resource allocation.

TxDMV is requesting $90,000 for the development of an online public facing database of enforcement case histories for motor vehicle licensees and for enhancements to the existing motor carrier licensee case history database pursuant to information provided in Sunset item 3.9.

System development for motor vehicle cases would include online publication of motor vehicle dealer and salvage vehicle dealer case histories providing the public with information concerning the case history associated with a particular license number, as well as violations substantiated against a licensee via the final action taken in each case. Information concerning any penalty or other sanction action imposed would also be part of the case history detail. Development would require TxDMV Information Technology Services to develop a process for pulling pertinent data from the case management system to be loaded into the online database on a regular basis to ensure the information provided to the public is current.

System enhancements to the existing motor carrier case histories available online would include removal of pending actions and actions where no violation was ultimately found, as well as inclusion of additional information pertaining to violations that were substantiated, penalties or other sanction action imposed, and the final action taken in the case.

Enforcement actions involve the processing of complaints received from the public, licensees, law enforcement, county tax offices, and other state agencies; in addition to processing investigator self-initiated cases. Online publication of enforcement case histories of all licensees showing enforcement actions taken by the department along with the basis of the complaint will enable consumers to make informed decisions in choosing service providers and could potentially act as a deterrent against future violations.

2020-21 LAR Exceptional Item Request Schedule					
Division:	**Information Technology Division**	**Division Director:**	**Mike Higginbotham**		
Item Name:	Complaint Management System	**Item Priority:**	**4**		
Strategy:	A.1.4 Technology Enhancement and Automation				
				Requested	
Code	**Total Exceptional Item Request**			**2020**	**2021**
	Objects of Expense:				
1001	Salaries			71,000	71,000
1002	Other Personnel Costs			355	355
2001	Professional Fees & Services			4,000,000	
2003	Consumable Supplies			300	300
2005	Travel			500	500
2009	Other Operating Expense			9,055	1,450
	Total, Objects of Expense			4,081,210	73,605
	Method of Financing:				
0010	TxDMV Fund			4,081,210	73,605
	Total, Method of Finance			4,081,210	73,605
Number of Full-time Equivalent Positions (FTE):				**1.00**	**1.00**
Detail for Capital Appropriation Items: (included in above amounts)					
5005	Acquisition of Information Resources Technologies			$ 4,000,000	
	Total, Capital Appropriation Items			$ 4,000,000	$ -
Detail on Object of Expenses and FTEs: (Included above)					
Salary		**FTE**	**Monthly Salary**	**FY 2020**	**FY 2021**
	Job Class New Positions				
	Systems Analyst IV	1.00	5,917	71,000	71,000
Travel	Method of calculation ($500/FTE)			500	500
Other Expenses (list line items)		**Unit Cost**	**Units**	**FY 2020**	**FY 2021**
	Consumable Supplies $300/yr per FTE	300	1.00	300	300
	Other Operating - share of Xerox rental $30/FTE	30	1.00	30	30
	Other Operating - Training 1% of salary/yr per FTE			710	710
	Other Operating - Chair $350 per FTE	350	1.00	350	
	Other Operating - Computer, printer, monitor phone	2,255	1.00	2,255	
	Other Operating - Cubicles $5,000 per FTE	5,000	1.00	5,000	

2020-21 LAR Exceptional Item Request Schedule

Division:	**Information Technology Division**	**Division Director:**	**Mike Higginbotham**
Item Name:	Complaint Management System	**Item Priority:**	**4**
Strategy:	A.1.4 Technology Enhancement and Automation		

Code	Total Exceptional Item Request			Requested 2020	Requested 2021
	Other Operating - Payroll Health Contribution 1% (Legislatively Mandated)			710	710
	Other Personnel - Employee Retirement Contribution .5% (Legislatively Mandated)			355	355
	Subtotal, Detail on Object of Expenses and FTEs			$ 81,210	$ 73,605

Detail for Capital Appropriation Items: (included above)

Professional Fees Automation	Acquisition of Information Resource Tech Estimated cost to create new consolidated complaint management system on the Salesforce platform (40,000 hours @ $100/hr)	100	40,000.00	4,000,000

Description/Justification (2000 character limit)

Sunset item 5.3 & 5.5

Develop and maintain a complaint management system which would include data on the status of complaints, complaint procedures, and documentation of complaints. This item also includes coalescing complaints into a single repository for greater efficiency, instead of the current process of storing complaints in separate systems.

Complaint Management System – Sunset Item 5.3 and 5.5

As a customer-focused agency, it is important for the department to have easy access to a clear view of its customers' satisfaction, and a key indicator of the customer experience is the number of complaints.

As noted in the recent Sunset report, each division has its own complaint handling process without consistent central reporting or analysis of complaint trends. Additionally, complaints are stored in separate individual systems which complicates the ability to capture consistent information across the organization. This approach creates risk that the department may not adequately address complaints and that management does not have the ability to obtain a holistic view of customer service issues. This approach also increases the time to respond and resolve complaints due to the manner in which complaints are managed.

This funding request supports the development and maintenance of a new complaint management system which includes data on the status of complaints, complaint procedures, and documentation of complaints. This request also includes coalescing complaints into a single repository for greater efficiency, instead of the current process of storing complaints in separate systems. The system will streamline the complaint handling process and allow TxDMV's customers and stakeholders to benefit from reducing the time needed to resolve a complaint. The system will help facilitate the creation a centralized complaint intake process, assist tracking complaints as they move through the process to identify bottlenecks, and enable timely notification to complainants as to progress of their complaint.

2020-21 LAR Exceptional Item Request Schedule

Division:	**Information Technology Division**	**Division Director:**	**Mike Higginbotham**
Item Name:	IT Infrastructure Improvements	**Item Priority:**	**1**
Strategy:	C.1.2. Information Resources		

Code	Total Exceptional Item Request	Requested 2020	Requested 2021
	Objects of Expense:		
2001	Professional Fees & Services	1,850,000	850,000
	Total, Objects of Expense	1,850,000	850,000
	Method of Financing:		
0010	TxDMV Fund	1,850,000	850,000
	Total, Method of Finance	1,850,000	850,000
Number of Full-time Equivalent Positions (FTE):			
Detail for Capital Appropriation Items: (included in above amounts)			
5005	Acquisition of Information Resources Technologies	$ 1,000,000	
7000	Data Center Consolidation Services	$ 850,000	$ 850,000
	Total, Capital Appropriation Items	$ 1,850,000	$ 850,000

Detail for Capital Appropriation Items: (included above)

Professional Fees	Acquisition of Information Resource Tech	100	10,000.00	1,000,000	
Automation	Estimated cost to build out IT operational improvements (10,000 hours @ $100/hr)				
	Data Center Consolidation Services				
	20 Jumbo servers, DB2 database licenses			850,000	850,000

Description/Justification (2000 character limit)

Estimated cost to build out password self service reset, create self service test data, obtain automated testing tools and create automated tests, modify IRP to reduce errors, and build out non-production environments to support the software development lifecycle.

Information Technology Infrastructure Improvements – Sunset Item 5.4

The Information Technology Services Division (ITSD) is responsible for agency-wide information technology needs and overall maintenance and support of the department's major systems and technologies.

TxDMV has increased the number of applications that provide value to the state of Texas in the last four years that directly tie into the Registration and Title System (RTS). These systems include webDEALER, webSALVAGE and webDealer Commercial Fleet Buyer. Future applications include eTitle and webLIEN. Each application increases the complexity of the RTS system infrastructure and raises the level of contention for RTS testing environments. This increased complexity results in additional administrative and technical overhead and staff time. The contention places limitations on the number of releases that can be achieved for each application every year. Further, the increased number of applications have overextended ITSD's current staff and existing software development processes.

In an effort to identify opportunities to improve technology and project delivery, the agency conducted a competitive procurement for an organizational assessment of ITSD in the fall of 2017. The purpose was to hire an independent, qualified vendor to evaluate the existing mission, goals, workload, organizational structure, and human resource capacity and make recommendations to increase efficiency and effectiveness in meeting the agency's needs for technology. The contract was awarded to Software Engineering Services (SES) effective November 14, 2017 and was concluded with delivery of their final reports on February 9, 2018.

Also during 2017 and 2018, The Sunset Commission conducted a review of TxDMV. The Sunset review of ITSD resulted in several similar findings to those identified in the SES assessment.

While several major TxDMV applications currently provide users the ability to reset their passwords online, a few major applications still require human interaction to reset a password. A portion of the funding associated with this request will build out self-service password reset capabilities for the remaining major applications, which will result in an improved customer experience and reduced unit cost due to the elimination of the manual reset process.

Many quality assurance activities currently conducted by ITSD require the manual execution of test cases and the manual creation of test data by ITSD personnel. These manual processes are inefficient and error-prone, resulting in slower speed to market for software delivery and reduced quality of software products. A portion of the funding associated with this request will enable the creation of self-service test data, the procurement of automated testing tools, and the creation of automated test scripts. These additional testing enhancements will reduce errors and increase frequency of application deliveries.

Currently, several TxDMV applications utilize shared server and database infrastructure as a result of the rapid deployment of new applications in recent years. The shared infrastructure reduces software development throughput resulting in delayed implementation of projects. A portion of this investment will increase the number of non-production, development environments for each application in order to enable increased delivery velocity while maintaining or improving software development lifecycle rigor.

2020-21 LAR Exceptional Item Request Schedule					
Division:	**Information Technology Division**		**Division Director:**	**Mike Higginbotham**	
Item Name:	Information Technology Improvements - Organizational Assessment		**Item Priority:**	**2**	
Strategy:	C.1.2. Information Resources				
Code	**Total Exceptional Item Request**			**Requested 2020**	**Requested 2021**
	Objects of Expense:				
1001	Salaries			886,044	886,044
1002	Other Personnel Costs			4,430	4,430
2003	Consumable Supplies			3,600	3,600
2005	Travel			3,500	3,500
2009	Other Operating Expense			109,340	18,080
	Total, Objects of Expense			1,006,914	915,654
	Method of Financing:				
0010	TxDMV Fund			1,006,914	915,654
	Total, Method of Finance			1,006,914	915,654
Number of Full-time Equivalent Positions (FTE):				**12.00**	**12.00**
Detail on Object of Expenses and FTEs: (Included above)					
Salary		FTE	Monthly Salary	FY 2020	FY 2021
	Job Class New Positions				
	Systems Analyst IV	10.00	5,917	710,040	710,040
	Database Administrator IV	1.00	7,417	89,004	89,004
	Systems Analyst V	1.00	7,250	87,000	87,000
				-	-
Travel	Method of calculation ($500/FTE)			3,500	3,500
Other Expenses (list line items)		Unit Cost	Units	FY 2020	FY 2021
	Consumable Supplies $300/yr per FTE	300	12.00	3,600	3,600
	Other Operating - share of Xerox rental $30/FTE	30	12.00	360	360
	Other Operating - Training 1% of salary/yr per FTE			8,860	8,860
	Other Operating - Chair $350 per FTE	350	12.00	4,200	
	Other Operating - Computer, printer, monitor phone	2,255	12.00	27,060	
	Other Operating - Cubicles $5,000 per FTE	5,000	12.00	60,000	

2020-21 LAR Exceptional Item Request Schedule			
Division:	**Information Technology Division**	**Division Director:**	**Mike Higginbotham**
Item Name:	Information Technology Improvements - Organizational Assessment	**Item Priority:**	**2**
Strategy:	C.1.2. Information Resources		

Code	Total Exceptional Item Request	Requested 2020	Requested 2021
	Other Operating - Payroll Health Contribution 1% (Legislatively Mandated)	8,860	8,860
	Other Personnel - Employee Retirement Contribution .5% (Legislatively Mandated)	4,430	4,430
Subtotal, Detail on Object of Expenses and FTEs		$ 1,006,914	$ 915,654

Description/Justification (2000 character limit)

TxDMV consulted with an outside vendor to perform an organizational assessment of the Information Technology Services (ITSD) and Enterprise Project Management (EPMO) divisions. The report recommended additional FTEs in ITSD to implement operational improvements to facilitate a comprehensive approach to developing, maintaining and updating TxDMV information technology projects, and infrastructure.

Information Technology Improvements - Organizational Assessment Sunset Item 5.4

TxDMV has increased the number of applications that provide value to the state of Texas in the last four years that directly tie into the Registration and Title System (RTS). This increased complexity results in additional administrative overhead and staff time. Further, the increased number of applications have overextended ITSD's current staff and existing software development processes.

In an effort to identify opportunities to improve technology and project delivery, the agency conducted a competitive procurement for an organizational assessment of ITSD in the fall of 2017. The purpose was to hire an independent, qualified vendor to evaluate the existing mission, goals, workload, organizational structure, and human resource capacity and make recommendations to increase efficiency and effectiveness in meeting the agency's needs for technology.

Internal and third-party analyses of ITSD determined that additional staff members are needed within the application development section. Due to the increasing number of applications since the inception of the agency, the existing resources are insufficient to keep up with the application development and maintenance demand. This resource shortfall results in frequent employee burnout, a reduction in employee morale and productivity, an increase in software development errors, and a negative impact to the overall customer experience due to the increased number of software defects and the increasing length of time to resolve defects or deliver new system enhancements. Specifically, this request will fund the following Full-Time Equivalent (FTE) positions:

- 10 System Analyst IV
- 1 Database Administrator IV
- 1 Systems Analyst V

2020-21 LAR Exceptional Item Request Schedule

Division:	**Information Technology Division**	**Division Director:**	**Mike Higginbotham**
Item Name:	IT Operational Improvements - Platform Modernization (Motor Carrier Credentialing System (MCCS))	**Item Priority:**	**5**
Strategy:	A.1.4 Technology Enhancement and Automation		

Code	Total Exceptional Item Request	Requested 2020	Requested 2021
	Objects of Expense:		
2001	Professional Fees & Services	6,000,000	
	Total, Objects of Expense	6,000,000	-
	Method of Financing:		
0010	TxDMV Fund	6,000,000	
	Total, Method of Finance	6,000,000	-
Number of Full-time Equivalent Positions (FTE):			
Detail for Capital Appropriation Items: (included in above amounts)			
5005	Acquisition of Information Resources Technologies	$ 6,000,000	
	Total, Capital Appropriation Items	$ 6,000,000	$ -

Detail for Capital Appropriation Items: (included above)

Professional Fees	Acquisition of Information Resource Tech	100	60,000.00	6,000,000
Automation	Estimated cost to migrate the MCCS to a modern platform, SalesForce (60,000 hours @ $100/hr)			

Description/Justification (2000 character limit)

The current platform is written in an outdated technology which adds risk to the agency due to the difficulty of locating qualified resources for support. This investment will allow the agency to consolidate skillsets and allow for greater staff redundancy and maintain applications in a more efficient manner.

Information Technology Improvements - Platform Modernization Motor Carrier Credentialing System (MCCS) Sunset Item 5.4

The current Motor Carrier Credentialing System (MCCS) is written in the outdated ASP technology. Continued usage of legacy technologies add risk to the agency due to the difficulty of locating qualified resources for support. The legacy platform is also more cumbersome to maintain resulting in additional total cost of ownership compared to more modern platforms. This investment will support the migration of MCCS off of the ASP technology to the more modern Salesforce platform. The agency currently has several applications deployed to the Salesforce platform, including the award-winning eLicensing system. By migrating to Salesforce, ITSD will reduce the number of different development platforms and begin to consolidate more applications around the Salesforce platform. This consolidation will reduce the overall cost of maintenance by narrowing the variety of skillsets needed to maintain the applications while also allowing the department to develop deeper bench strength on the Salesforce platform that will enable the team to more easily scale to allow more frequent product deliveries.

2020-21 LAR Exceptional Item Request Schedule

Division:	**Information Technology Division**	**Division Director:**	**Mike Higginbotham**
Item Name:	Enterprise Data Warehouse/Data Analytics	**Item Priority:**	**3**
Strategy:	A.1.4 Technology Enhancement and Automation		

Code	Total Exceptional Item Request	Requested 2020	Requested 2021
2001	**Objects of Expense:** Professional Fees & Services	5,150,000	150,000
	Total, Objects of Expense	5,150,000	150,000
0010	**Method of Financing:** TxDMV Fund	5,150,000	150,000
	Total, Method of Finance	5,150,000	150,000
Number of Full-time Equivalent Positions (FTE):			
Detail for Capital Appropriation Items: (included in above amounts)			
5005	Acquisition of Information Resources Technologies	$ 5,000,000	
7000	Data Center Consolidation Services	$ 150,000	$ 150,000
	Total, Capital Appropriation Items	$ 5,150,000	$ 150,000

Detail for Capital Appropriation Items: (included above)

Professional Fees	Acquisition of Information Resource Tech	100	50,000.00	5,000,000	
Automation	Estimated cost to implement a data warehouse (50,000 hours @ $100/hr)				
	Data Center Consolidation Services				
	4 Jumbo servers			150,000	150,000

Description/Justification (2000 character limit)

Funding to create an enterprise-wide centralized data repository to enable true data analytics, predictive analytics, and more efficient and effective reports.

Enterprise Data Warehouse/Data Analytics

As the agency continues to mature, reporting and data analysis requests continue to increase.

For example, the Compliance and Investigations Division (CID) has requested an interactive map of Texas counties color coded to reflect fraud, waste, and abuse vulnerabilities based on data collected from across the state. CID has also requested the implementation of various tools to further analyze statewide data.

In order to effectively and efficiently analyze these types of data, the data needs to be housed in a centralized, professional-grade database, versus storing data in separate spreadsheets on local laptop or desktop computers. The database also needs to be designed and tuned for high-volume analysis processing, which is a different design than that used to support online transaction systems such as RTS or webDEALER.

While ITSD currently provides reporting capabilities on an ad-hoc and individual application basis, the agency lacks a single enterprise-wide data repository designed for reporting and analytics, which prevents the agency from easily analyzing and identifying cross-division trends (such as potential fraud). This limitation also prevents the agency from predicting trends, leaving the agency in the position to only respond to issues after-the-fact, versus preventing issues before they occur. Additionally, the recent Sunset report determined the department lacks basic trend data needed to effectively evaluate its enforcement efforts.

The lack of a data warehouse also prevents program areas from having easy access to their data, and requires the involvement of an ITSD project or programmer in order to access the program area's own data. Program areas are also currently unable to use more sophisticated reporting and analysis technologies, such as Tableau, due to the lack of current data analysis tools.

This funding request will allow the agency to create an enterprise-wide centralized data repository to enable program area users self-service access to their data in order to perform data and predicative analytics, use more sophisticated analysis and reporting tools (such as Tableau), and produce more efficient and effective reports.

2020-21 LAR Exceptional Item Request Schedule					
Division:	**Consumer Relations**	**Division Director: Ginny Booton**			
Item Name:	Customer Service Staff	**Item Priority:**		**1**	
Strategy:	A.1.5 Customer Contact Center				
Code	**Total Exceptional Item Request**			**Requested 2020**	**Requested 2021**
	Impact on Output Measures:				
	Number of Customers Served in Contact Center (*Expect 10,000 additional customers to be served each month by CRD)*			120,000	12,000
	Objects of Expense:				
1001	Salaries			405,088	405,088
1002	Other Personnel Costs			2,025	2,025
2003	Consumable Supplies			2,700	2,700
2009	Other Operating Expense			76,277	8,102
	Total, Objects of Expense			486,090	417,915
	Method of Financing:				
0010	TxDMV Fund			486,090	417,915
	Total, Method of Finance			486,090	417,915
Number of Full-time Equivalent Positions (FTE):				**9.00**	**9.00**
Detail on Object of Expenses and FTEs: (Included above)					
Salary		**FTE**	**Monthly Salary**	**FY 2020**	**FY 2021**
	Customer Servicer Representative IV	8.00	3,543	340,088	340,088
	Trainer	1.00	5,417	65,000	65,000
Consumables				2,700	2,700
Other Expenses (list line items)		**Unit Cost**	**Units**	**FY 2020**	**FY 2021**
	Other Operating - Training 1% of salary/yr per FTE	400	9.00	4,051	4,051
	Other Operating - Chair $350 per FTE	350	9.00	3,150	-
	Other Operating - Computer, printer, monitor phone	2,225	9.00	20,025	-
	Other Operating - Cubicles $5,000 per FTE	5,000	9.00	45,000	-

2020-21 LAR Exceptional Item Request Schedule			
Division:	**Consumer Relations**	**Division Director: Ginny Booton**	
Item Name:	Customer Service Staff	**Item Priority:**	**1**
Strategy:	A.1.5 Customer Contact Center		

Code	Total Exceptional Item Request	Requested 2020	Requested 2021
	Other Operating - Payroll Health Contribution 1% (Legislatively Mandated)	4,051	4,051
	Other Personnel - Employee Retirement Contribution .5% (Legislatively Mandated)	2,025	2,025
	Subtotal, Detail on Object of Expenses and FTEs	$ 486,090	$ 417,915

Description/Justification (2000 character limit)

The level of online, application and system support has increased the division's scope at the same time the number of customers needing assistance has increased significantly with an addition of only 2 FTEs in FY2017. The Consumer Relations Division (CRD) has remained within the overall Key Performance Indicators with the continued assistance of the Vehicle, Title and Registration Division (VTR) Regional Service Centers (RSC). An average of 30 VTR RSC staff from around the state assist with title calls every day. In FY2017, they assisted over 116,000 CRD title customers and averaged 12,000 customers/month in FY2016. Another 105,457 customers abandoned their call and either were not served or called back later. This is a total of 223,604 customers the division was not staffed to serve in FY2017.

CRD needs eight (8) dedicated FTE's to resume taking the title calls currently answered by VTR. It will require an additional 7 FTEs to answer all calls. The 8 requested positions will free up the RSC staff to focus on VTR customers, improve customer satisfaction ratings, reduce wait times and improve the level of service our customers receive.

Customer Service Staff

The Consumer Relations Division (CRD) is the agency contact center and front-line information resource for customers. The division receives requests for assistance by telephone, email and written correspondence daily. CRD has a broad customer base serving the motoring public, motor vehicle dealers, law enforcement, local, state and federal agencies, legislative officials and constituents, dealer associations, salvage yards, storage facilities, financial institutions, manufacturers, distributors, lease facilitators, insurance agencies, and department staff. In addition to providing customers and stakeholders with guidance and up-to-date information, the division provides technical troubleshooting and web navigation support for department-related programs, applications and systems.

Customer service demand has been on an upward trend every year since the division was formed in FY2011. Customer contacts have increased 50% from FY2011 (462,505 customers) to FY17 (692,677 customers). The highest volume year was in FY2016 when CRD received 722,778 customer contacts.

As a result of agency technology upgrades and movement to more online customer service interactions, the division has shifted from a "business guidance" customer service organization to a hybrid of a technology support desk and customer service center. Customers no longer call for just business information, they require assistance with online navigation issues and transaction problems. Dealers need the CRD team to help them navigate eLICENSING, troubleshoot application problems, and serve as the triage center for escalation to the Information Technology Services Division.

When the agency implements a project or technology upgrade, there is a correlating surge in calls. For example, when eLICENSING was launched in March 2017, dealer calls increased 233% and are still running 62% above the average dealer call volume prior to eLICENSING.

The level of online, application and system support has increased the division's scope at the same time the number of customers needing assistance has increased significantly with an addition of only 3 FTEs in FY2017. CRD has remained within the overall Key Performance Indicators with the continued assistance of the Vehicle, Title and Registration Division (VTR) Regional Service Centers (RSC). An average of 30 VTR RSC staff from around the state assist with title calls every day. In FY17, they assisted over 116,000 CRD title customers and averaged 12,000 customers/month in FY16. Another 105,457 customers abandoned their call and either were not served or called back later. This is a total of 223,604 customers the division was not staffed to serve in FY2017.

CRD needs eight (8) dedicated FTE's to resume taking the title calls currently answered by VTR. It will require an additional 7 FTEs to answer all calls. The 8 requested positions in order to free up the RSC staff to focus on VTR customers, improve customer satisfaction ratings, reduce wait times and improve the level of service our customers receive.

To meet the increased customer demand by the motoring public and dealers, staff need to be well-trained, provided accurate resources, and be consistently updated. This is the role of a trainer. The division is without a dedicated training team which is a staple in all contact centers. The lack of this critical resource has put a constant strain on the division staff who juggle the responsibilities of building training, onboarding and training new employees, updating and training existing staff, and ensuring all documentation and resource materials are kept up-to-date. Knowledge and

consistency are the pillars of good customer service. It all starts with training and the addition of one trainer will build and enhance the skills of the customer service representatives and, in turn, ensure customers have a good experience. The dedicated trainer will design, develop and deliver training materials for the division and ensure the staff are trained to provide consistent and accurate information to customers.

2020-21 LAR Exceptional Item Request Schedule			
Division:	**Automobile Burglary and Theft Prevention Authority**	**Division Director:**	**Bryan Wilson**
Item Name:	ABTPA Crime Reduction Strategy	**Item Priority:**	**1**
Strategy:	B.2.1 Automobile Theft Prevention		

Code	Total Exceptional Item Request	Requested 2020	Requested 2021
4000	**Objects of Expense:**		
	Grants	3,648,720	3,648,720
	Total, Objects of Expense	3,648,720	3,648,720
0001	**Method of Financing:**		
	General Revenue	3,648,720	3,648,720
	Total, Method of Finance	3,648,720	3,648,720

Description/Justification (2000 character limit)

ABTPA requests $3.6 million to provide an estimated twenty-five motor vehicle theft investigators officers along with crime interdiction and detection equipment to the current economic automobile theft enforcement teams (taskforces) authorized in ABTPA statute. The additional officers will be dispersed through grants to local law enforcement agencies to areas with the highest incidence of motor vehicle burglary and theft. Funds will also be used to meet two current statutory requirements of ABTPA that have remained unfunded for several years: media outreach to the public and development of experimental equipment to combat motor vehicle crime. The statute directs ABTPA to conduct educational programs designed to inform automobile owners of methods of preventing motor vehicle burglary and theft. It also directs ABTPA to provide equipment, for experimental purposes, to assist automobile owners in preventing automobile burglary or theft. Incidents of motor vehicle burglary and theft have been increasing in recent years and financial losses from these crimes are just under $1 billion each year despite ABTPA collecting over $46 million each year in fees on insurance policies. The proposed efforts are expected to result in significant reductions in both the incidence of motor vehicle burglary and theft and financial losses suffered by the public from these crimes.

ABTPA Crime Reduction Strategy

ABTPA requests $3.6 million to expand the current economic automobile theft enforcement teams (taskforces) authorized in ABTPA statute and to provide funds to begin meeting two of the current statutorily mandated requirements of ABTPA that has been unfunded for several years. These include funding for educational programs to teach the public how to reduce motor vehicle burglary and theft providing equipment to the public for experimental purposes to combat these crimes. The funding request includes adding about twenty-five additional investigators and minimum equipment and supplies needed for them to perform their duties. The request will provide a minimum amount of equipment such as tracking technology and other automotive equipment needed to support technologically challenging investigations. Funds are also included to provide education to communities as required by statute and pilot programs for experimental equipment to prevent motor vehicle burglary and theft. ABTPA requires a minimum of 20% local cash match on all grants so the amount listed is actually 80% of the costs of the staff and equipment.

Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

DATE: June 14. 2018
Action Requested: BRIEFING

To: **Texas Department of Motor Vehicles (TxDMV) Board**
From: **Sandra Menjivar – Suddeath, Internal Audit Director**
Agenda Item: 12.B.2
Subject: Peer Review

RECOMMENDATION
None.

PURPOSE AND EXECUTIVE SUMMARY
To provide the results on the 2018 Peer Review to the TxDMV Board.

Every three years, the Internal Audit Division (IAD) is required to obtain an External Assessment (Peer Review) on whether the internal audit function complies with the applicable professional auditing standards. In 2018, the IAD obtained the required Peer Review and received an overall rating of "Pass/Generally Conforms". In addition, IAD was found to be in compliance with the Institute of Internal Auditors (IIA) International Standards for the Professional Practice of Internal Auditing and Code of Ethics, the United States Government Accountability Office (GAO) Government Auditing Standards, and the Texas Internal Auditing Act (Texas Government Code, Chapter 2102). The Peer Review did issue one audit recommendation related to reviewing the Department's ethics.

FINANCIAL IMPACT
None.

BACKGROUND AND DISCUSSION
Every three years, IAD is required to obtain an External Assessment (Peer Review) on whether the internal audit function complies with the applicable professional auditing standards. As part of the 2018 Peer Review process, the IAD obtained a Peer Review team, prepared a self-assessment report, and coordinated the Peer Review activities. The Peer Review team evaluated the self-assessment report, conducted interviews, and reviewed audit work.

Based on the work done by the Peer Review team, the IAD was found to be in conformance with the Institute of Internal Auditors (IIA) International Standards for the Professional Practice of Internal Auditing and Code of Ethics, the United States Government Accountability Office (GAO) Government Auditing Standards, and the Texas Internal Auditing Act (Texas Government Code, Chapter 2102) and gave an overall opinion of "Pass/Generally Conforms". The overall opinion is the highest of the three possible ratings, means that policies, procedures, and practices are in place to implement the standards and requirements necessary for ensuring the independence, objectivity, and proficiency of the internal audit function.

In addition, the Peer Review team found that the IAD had fully implemented its previous Peer Review recommendation related to "obtaining additional audit resources whose primary expertise and responsibility is auditing technology, including the complexities of contracts required for technology projects." However, the Peer Review team issued a new recommendation related to ethics. The Peer Review team found that the IAD regularly allocates a portion of its resources to assessments and projects related to the prevention of fraud, waste, and abuse, but a periodic project that evaluates programs and activities on integrity and ethical values could provide additional support and information about the agency's control environment for use in performing the fraud, waste, and abuse prevention work. The IAD agreed and will consider performing a project related to the agency's ethics-related objectives, programs, and activities.

Report on the External Quality Assurance Review of the Texas Department of Motor Vehicles Internal Audit Division

May 2018

Performed by

Harold Rogers, CIA, CISA
Special Projects Auditor
Texas Workforce Commission

Patrick McKinney, CIA
External Audit & Advisory Services Section Director
Texas Department of Transportation

Performed in Accordance with the State Agency Internal Audit Forum Peer Review Policies and Procedures

Overall Opinion

Based on the information received and evaluated during this external quality assurance review, it is our opinion that the Texas Department of Motor Vehicles Internal Audit Division receives a rating of "**Pass/Generally Conforms**" and is in compliance with the Institute of Internal Auditors (IIA) *International Standards for the Professional Practice of Internal Auditing* and *Code of Ethics*, the United States Government Accountability Office (GAO) *Government Auditing Standards*, and the Texas Internal Auditing Act (Texas Government Code, Chapter 2102). This opinion, which is the highest of the three possible ratings, means that policies, procedures, and practices are in place to implement the standards and requirements necessary for ensuring the independence, objectivity, and proficiency of the internal audit function.

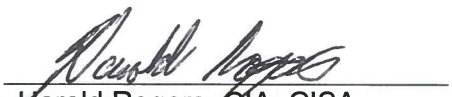
We found that the Internal Audit Division is independent, objective, and able to render impartial and unbiased judgments on the audit work performed. The staff members are qualified, proficient, and knowledgeable in the areas they audit. Individual audit projects are planned using risk assessment techniques; audit conclusions are supported in the working papers; and findings and recommendations are communicated clearly and concisely.

The Internal Audit Division is well managed internally. In addition, the Division has effective relationships with the Board and is well respected and supported by management. Surveys and interviews conducted during the quality assurance review indicate that management considers Internal Audit a useful part of the overall agency operations and finds that the audit process and report recommendations add value and help improve the agency's operations.

The Internal Audit Division has reviewed the results of the peer review team's work and has accepted them to be an accurate representation of the Division's operations.

Acknowledgements

We appreciate the courtesy and cooperation extended to us by the Internal Audit Director, Internal Audit Division staff, the Board members, the Executive Director, and the senior managers who participated in the interview process. We thank each person who completed surveys for the quality assurance review. The feedback from the surveys and the interviews provided valuable information regarding the operations of the Internal Audit Division and its relationship with management.



Harold Rogers, CIA, CISA
Special Projects Auditor
Texas Workforce Commission
SAIAF Peer Review Team Leader

6/1/18
Date

Patrick McKinney, CIA
External Audit & Advisory Services Section Director
Texas Department of Transportation
SAIAF Peer Review Team Member

6/1/18
Date

Background

The Institute of Internal Auditors (IIA) *International Professional Practices Framework*, U.S. Government Accountability Office (GAO) *Government Auditing Standards*, and the Texas Internal Auditing Act require that internal audit functions obtain external quality assurance reviews to assess compliance with standards and the Act and to appraise the quality of their operations. Government auditing standards require these reviews at least every three years. A periodic external quality assurance review, or peer review, of the internal audit function is an essential part of a comprehensive quality assurance program. This quality assurance review was performed in accordance with State Agency Internal Audit Forum (SAIAF) Peer Review guidelines. No member of the review team had a conflict of interest with the Texas Department of Motor Vehicles or its Internal Audit Division.

The most recent quality assurance review for the Texas Department of Motor Vehicles Internal Audit Division was performed in April 2015. The Internal Audit Division implemented the recommendation made in the previous quality assurance review report regarding "obtaining additional audit resources whose primary expertise and responsibility is auditing technology, including the complexities of contracts required for technology projects."

Objectives, Scope, and Methodology

The primary objective of the quality assurance review was to evaluate the Texas Department of Motor Vehicles Internal Audit Division's compliance with auditing standards and the Texas Internal Auditing Act. Additional objectives included identifying best practices as well as areas where improvement may be needed. The review covered all completed audit and management assistance projects performed by the Texas Department of Motor Vehicles Internal Audit Division from March 2015 through August 2017.

The work performed during the review included:

- Review, verification, and evaluation of the self-assessment prepared by the Internal Audit Division according to SAIAF guidelines.
- Review and evaluation of e-mailed surveys completed by management.
- Interviews with the Internal Audit Director, Internal Audit Division staff, the Executive Director, three senior managers, and four Board members, including the Chairman of the Board and the Chairman of the Finance & Audit Committee.
- Review and evaluation of audit working papers.
- Review of Internal Audit's policies and procedures, annual risk assessment, annual audit plan, and other relevant documents.

Detailed Results

The results of the quality assurance review for the Texas Department of Motor Vehicles Internal Audit Division are presented in the order of the *International Standards for the Professional Practice of Internal Auditing* (*Standards*). No significant weaknesses were identified during the review that would prevent the Division from fulfilling its responsibilities. The detailed results include identification of best practices as well as some opportunities for improvement that the Internal Audit Division may wish to consider.

IIA Code of Ethics

The Internal Audit Division maintains an ethical environment and complies with the IIA *Code of Ethics* by including the *Code of Ethics* in its Internal Audit Charter and Internal Audit Policies and Procedures Manual (standard operating procedures). In addition, the Internal Audit Division demonstrates its commitment to ethics by being an active participant in reducing fraud, waste, and abuse in the agency and by conducting work in an ethical manner.

The *Standards* state that "the internal audit activity must evaluate the design, implementation, and effectiveness of the organization's ethics-related objectives, programs, and activities." Implementation guidance states that these could include "mission and value statements, a code of conduct, hiring and training processes, an anti-fraud and whistleblowing policy, and a hotline and investigation process."

The Internal Audit Division regularly allocates a portion of its resources to assessments and projects related to the prevention of fraud, waste, and abuse. A periodic project that evaluates programs and activities that the agency conducts to demonstrate its commitment to integrity and ethical values could provide additional support and information about the agency's control environment for use in performing the fraud, waste, and abuse prevention work.

Opportunity for Improvement:
The Internal Audit Division should consider performing a periodic project related to the agency's ethics-related objectives, programs, and activities.

Director's Response:
The Internal Audit Division (IAD) will consider performing a project related to the agency's ethics-related objectives, programs, and activities. The Internal Audit Division is currently conducting a fraud, waste, and abuse risk assessment for the Department to determine if we have sufficient processes to mitigate current fraud, waste, and abuse risks. In addition, the Internal Audit Division plans on periodically performing informational campaigns on ethics for the Department.

Purpose, Authority, and Responsibility

The purpose, authority, and responsibility of the Internal Audit Division have been defined in a charter that is consistent with auditing standards. The current charter was signed by the Chairman of the Board, the Chairman of the Finance and Audit Committee, the Executive Director, and the Internal Audit Director in November 2016. The charter defines the nature of audit and consulting services and grants the Internal Audit Division authorized access to agency records, property, and personnel when performing their official duties.

Independence and Objectivity
The Internal Audit Division is independent both in terms of the agency's organizational structure and the Division's practices. The Internal Audit Director reports directly to the Board, which provides sufficient authority to promote independence and to ensure adequate consideration of audit reports and appropriate action on audit issues and recommendations. Removal of the Internal Audit Director requires Board approval.

The audit charter prohibits internal auditors from having any direct operational responsibility or authority over any activity that is audited, and none of the internal auditors has had prior responsibility for any areas that the Division audits. In addition, internal auditors reaffirm their independence before beginning an engagement.

Proficiency and Due Professional Care
The internal auditors individually and collectively possess the knowledge, skills, and abilities to perform their responsibilities. Three of the five auditors have at least one relevant professional certification, such as Certified Internal Auditor (CIA), Certified Government Auditing Professional (CGAP), Certified Fraud Examiner (CFE), and Certified Information Security Auditor (CISA). Internal auditors are required by the Division's policies and procedures to enhance their knowledge, skills, and abilities by obtaining at least 40 hours of continuing professional education each year.

The Internal Audit Division implemented the recommendation made in the April, 2015 quality assurance review report regarding "obtaining additional audit resources whose primary expertise and responsibility is auditing technology, including the complexities of contracts required for technology projects."

For example:

- All Internal Audit Division staff schedule and attend information technology training each year, and the Auditor VI has joined the Information Systems Audit and Control Association (ISACA) to obtain access to specialized information technology training and knowledge.

- The Internal Audit Director is a Certified Information Systems Auditor (CISA), and she is formalizing her acquisition of additional information technology knowledge and training through completion of coursework in an associate's degree in Computer Science curriculum.

- A knowledge area that was assessed before the CISA certification was awarded to the Internal Audit Director is "knowledge of IT acquisition and vendor management practices (e.g., evaluation and selection process, contract management, vendor risk and relationship management, escrow, software licensing), including third-party outsourcing relationships, IT suppliers and service providers."

- The Internal Audit Director prepared a business case for additional audit resources and received approval for those resources.

Quality Assurance and Improvement Program
The Internal Audit Director has implemented a quality assurance and improvement program to help ensure that Internal Audit adds value and improves the agency's operations and to provide assurance that the Division complies with the *Standards* and the IIA *Code of Ethics*. The quality

assurance program involves auditor performance evaluations, auditee surveys after each audit, and periodic peer reviews that are communicated to the Board. Each audit report indicates that the work was performed in accordance with *Standards.*

Managing the Internal Audit Activity
The Internal Audit Director conducts an annual risk assessment that forms the basis for the Annual Audit Plan that is approved by the Board. Each internal audit report addresses risk and control issues within the agency. The Director has developed policies and procedures to guide the internal audit activity. The Director reports the Division's performance relative to the annual plan in an annual report submitted to the agency's Board members, the Executive Director, and external oversight agencies consisting of the Governor's Office, the Legislative Budget Board, the Sunset Advisory Commission, and the State Auditor's Office.

Nature of Work
The Internal Audit Division evaluates risks related to financial and operating information as well as the effectiveness and efficiency of operations, safeguarding of assets, and compliance with laws and regulations. The Division also evaluates the extent to which operating and program objectives have been achieved. Internal Audit Division staff attend various governance and steering committee meetings to stay informed on Agency matters and initiatives that could have an impact on the nature of the Division's work.

To comply with the 2017 revision to the IIA *Standards* that requires the Internal Audit Division to contribute to the organization's risk management and governance processes, the Division provides information and assistance to executive management and the Board about how the accomplishment of goals is monitored and how accountability is ensured.

Engagement Planning
During planning, Internal Audit Division staff consider the objectives of the activity being reviewed and the related risks and controls. Resources needed for each audit are adequately considered during planning. Risk assessments are used to develop the objectives of each audit. Surveys and interviews conducted during this quality assurance review indicated that the objectives of audits are clearly communicated to the auditees. An audit project plan and an audit program are documented and approved for each audit. The scope of audits is adequately planned and documented in planning documents and audit reports.

Performing the Engagement
Internal Audit Division staff evaluate and document sufficient, reliable, relevant, and useful information to achieve their audit objectives. Audits are properly supervised by the Internal Audit Director. The Senior Auditor for each project monitors the day-to-day progress of the individual audits. The Internal Audit Director conducts planning meetings, approves control documents, and reviews working papers to ensure sufficiency of evidence and compliance with *Standards.*

Communicating Results
Interviews with management and Board members revealed a clear consensus that the Internal Audit Division excels in providing quality communication. Audit results are communicated in a timely manner. Potential findings are communicated throughout the audits, which provide management the opportunity to provide additional information and begin taking corrective action. Audit results are presented to management before they are finalized in a report, which helps ensure there is agreement about the areas for improvement and the recommended solutions.

Audit reports contain the audit objectives, results, conclusions, recommendations, and management's responses and implementation plans. The results of our surveys and interviews with Board members and agency management support that Internal Audit Division reports are accurate, objective, clear, concise, and complete. The Internal Audit Director distributes reports to the Board, to Executive Management, to management of the activity being audited, and to required external recipients.

In addition, results and progress are communicated to the TxDMV Executive Office and the Finance & Audit Chair monthly, and the Board Chair receives an update on audit results and progress every two weeks.

Monitoring Progress
The agency has a system for monitoring the disposition of audit issues. The status of management's progress in implementing recommendations is reported annually; however, the assessment of implementation statuses is performed continuously as completion dates are reached. Beginning in fiscal year 2018, agency management use TeamCentral to document implementation and provide the Internal Audit Division with the necessary documentation to evaluate if the recommendation was fully implemented. Interviews with agency management revealed that executive and senior management are knowledgeable about TeamCentral processes. Executive management also communicates expectations of proper use of TeamCentral to directors and managers.

Resolution of Senior Management's Acceptance of Risks
During the quality assurance review, no instances were identified of management accepting an inappropriate level of risk that would require the Internal Audit Director to notify the Board.

Best Practices

Internal Audit is a progressive division that is dedicated to continuous improvement. During the quality assurance review, we observed a number of practices that demonstrate outstanding commitment and professionalism. These leading practices include the following:

- The Internal Audit Division has effective working relationships with the Board and agency management that is based on mutual respect, trust, and commitment to improving controls within the agency.

- The Internal Audit Division significantly participates in the prevention of fraud, waste, and abuse through *Standards*-compliant assessments and projects, advisory participation in workgroups, and case investigation.

- Internal Audit Division staff are professional and proficient. They collectively hold six professional certifications and two graduate degrees. Certifications held include Certified Internal Auditor (CIA), Certified Government Auditing Professional (CGAP), Certified Fraud Examiner (CFE), and Certified Information Systems Auditor (CISA).

- All Internal Audit Division staff members obtain at least 80 hours of continuing professional education each two-year period provided by recognized training providers such as the State Auditor's Office (SAO), the Institute of Internal Auditors (IIA), the Texas Society of Certified Public Accountants (TSCPA), and academic institutions. Agency managers stated in interviews that the internal auditors are competent professionals.

- There is an excellent system for tracking and reporting the status of prior audit recommendations. The audit follow-up system includes tracking of all recommendations to the agency, regardless of source, continuous assessment of implementation status as completion dates are reached, and formal annual and quarterly reporting on the implementation status of recommendations.

- The Internal Audit Division has developed the *TxDMV Internal Audit Policies & Procedures Manual*. The manual provides excellent direction to Internal Audit Division staff and assures consistent internal audit practices and compliance with audit standards.

- Internal Audit Division staff participate in professional organizations, including the State Agency Internal Audit Forum (SAIAF), the Institute of Internal Auditors (IIA), the Information Systems Audit and Control Association (ISACA), and the Association of Certified Fraud Examiners (ACFE).

- The Internal Audit Director serves as the agency liaison for all external auditors and monitors that allows the Director to be informed about all agency audit activity and assist management in responding to requests for information.

Raymond Palacios, Jr., Chairman of the Board

Luanne Caraway, Chairman of the Finance & Audit Committee

Whitney Brewster, Executive Director

Sandra Menjivar-Suddeath, Director of Internal Audit

Internal Audit Division of the
Texas Department of Motor Vehicles
receives a rating of

"Pass/Generally Conforms"

In compliance with the Institute of Internal Auditors' International Professional Practices Framework, Government Auditing Standards, and the Texas Internal Auditing Act.

This opinion is based on a quality assessment review conducted by members of the Texas State Agency Internal Audit Forum (SAIAF) during the period of May, 2018. The review was based on the methodology developed by the Texas State Agency Internal Audit Forum.

Harold Rogers, CIA, CISA
Special Projects Auditor
Texas Workforce Commission

Patrick McKinney, CIA
External Audit & Advisory Services Section Director
Texas Department of Transportation

Texas Department *of* Motor Vehicles
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DATE: June 14, 2018
Action Requested: Briefing Item

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Sandra Menjivar-Suddeath, Director, Internal Audit
Agenda Item: 12.B.3
Subject: Fiscal Year (FY) 2019 Draft Annual Audit Plan

RECOMMENDATION
None.

PURPOSE AND EXECUTIVE SUMMARY
The Texas Internal Auditing Act (Govt Code 2102.008) requires that the annual audit plan be approved by the agency's governing board. This briefing item is to provide information on the draft annual audit plan for FY 2019.

The annual audit plan is the work plan for the Internal Audit Division in FY2019. The audit plan lists the audits and advisory services (engagements), as well as contingency engagements and other internal audit duties, to be done during Fiscal Year 2019. Background information, identified risks (if applicable), and estimated time requirements have been provided for all items and engagement

FINANCIAL IMPACT
None.

BACKGROUND AND DISCUSSION
The Texas Internal Auditing Act (Govt Code 2102.008) requires that the annual audit plan be approved by the agency's governing board. The audit plan lists the following:

- 10 proposed engagements in Fiscal Year 2019;
- 5 contingency engagements; and
- other Internal Audit Division duties.

Specifically, the proposed audit plan includes 10 proposed engagements, including two required items, six audits or advisory services, one follow-up audit, and a special request placeholder. The special request placeholder will allow the Internal Audit Division to respond to and address any unforeseen risks that may come up throughout the fiscal year.

The annual audit plan was developed using a risk based approach and input from Board members and senior management. Hour estimates were included in the plan.

Texas Department of Motor Vehicles

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Draft Fiscal Year 2019 Internal Audit Plan
18-12

Internal Audit Division
June 2018

Fiscal Year 2019 Annual Audit Plan

The Internal Audit Plan for Fiscal Year (FY) 2019 will be composed of ten engagements, five contingency engagements, and five Internal Audit Division duties.

Audit and Advisory Service Engagements

The table below provides information on the ten engagements that will be conducted in FY 2019, including the hours allocated to each engagement, the alignment to the TxDMV strategic goals, the initial contact division (if applicable), the engagement background information, and the identified risks (if applicable).

Engagement Topic	Strategic Goal(s)	Division	Background and Identified Risks
1. **Compliance & Investigations Division** 800 hours	Customer Centric & Performance Driven	Compliance & Investigation Division (CID)	Background: In the 85th Legislature, TxDMV requested an exceptional item of 13 Full – Time Equivalents (FTEs) with $1.9 million in funding to address external fraud, waste, and abuse. The exceptional item was approved by the Legislature, which resulted in a new division (CID). CID is responsible for processing complaints and investigating fraud allegations of fraud related to motor vehicle title and registration, providing support for law enforcement, and working on compliance with tax assessor-collectors' offices and Regional Service Centers. Identified Risks • Title fraud may be impacting the state by reducing taxes and hurting the consumer. • CID may not be meeting desired outcomes. • CID may not justify cost. • Field Service Representatives may not understand their role in preventing and detecting fraud.

Engagement Topic	Strategic Goal(s)	Division	Background and Identified Risks
2. Lemon Law Investigation and Resolution Process 500 hours	Customer Centric & Performance Driven	Enforcement Division (ENF) & Office of Administrative Hearing (OAH)	Background: The Lemon Law resolution process was transferred from the State Office of Administrative Hearings (SOAH) to the Department when HB 1692 (83rd Texas Legislature, Reg. Session) passed. As of January 2014, the Office of Administrative Hearings, with help from the Enforcement Division, has been in charge of handling Lemon Law investigations and resolutions. This audit would review if expected outcomes have been achieved, and if there are any improvements to the process to help customers receive resolution faster. Identified Risks • Customers may not receive appropriate resolution on Lemon Law cases due to the process being handled by two divisions
3. Employee Classification & Hiring 500 hours	Performance Driven	Human Resources Division (HRD)	Background: Effective talent management, including hiring staff, is a critical function to ensure the Department is properly staffed. The HRD is responsible for acquiring, developing, and retaining talent to meet the business needs of the Department. For HRD to meet its responsibilities, it works with Department staff to hire for vacant positions and conducts job audits to make sure staff are in the correct position and classification. In FY 2018, it currently takes the Department 84 days to hire an employee, and it takes HRD anywhere from a day to 105 days to process a job audit. Identified Risks • The Department may not be able to address staffing needs in a timely basis due to the job audit process. • The Department may not be staffed at appropriate levels. • Hiring processes may not be sufficiently agile to address current and emerging staffing needs.

Engagement Topic	Strategic Goal(s)	Division	Background and Identified Risks
4. Information Security Risk Management 600 hours	Performance Driven	Information Technology Services (ITS) Division	Background: Cybersecurity continues to be one of the highest risk areas for any state agency. Cybersecurity requires a process to identify and manage security risks to avoid costly and significant consequences. Identified Risks • Information security risks may not be sufficiently monitored. • Information security risks may not be sufficiently identified.
5. Payment Card Industry (PCI) Compliance 450 hours	Performance Driven	ITS	Background: Customers' credit cards are accepted for some of the Department's transactions. To be able to accept credit cards, TxDMV has to attest to the Payment Card Industry (PCI) Security Standards Council that the credit card information obtained from transactions is being safeguarded, and that the Department is meeting the twelve PCI requirements. The requirements range from installing and maintaining a firewall to maintaining an information security policy. Identified Risks • TxDMV may not be in compliance with certain aspects of PCI.
6. Enterprise Project Management 800 hours	Optimized Services and Innovation	Enterprise Project Management Office (EPMO)	Background: The eight current enterprise projects require significant time commitments from key staff, including Executive Management. Staff may not always be fully aware of their role and responsibilities in projects, which may lead to inefficient use of time and ineffectiveness in their role. Further, EPMO and ITS went through an organizational assessment that identified significant issues in the process for project planning and management. Identified Risks • Enterprise IT Projects may be inconsistently planned. • Enterprise IT Projects maybe inconsistently managed.

Engagement Topic	Strategic Goal(s)	Division	Background and Identified Risks
			• EPMO Staff may not have the right skillset to manage their projects. • Project staff assigned to the project may not understand their role.
7. Management or Board Requests 800 hours	TBD	TBD	Background: Time has been allotted for a special requests or reviews of a new or emerging risk for the department. This time includes any type of request and may include specific reviews of Regional Service Centers, Driver's Privacy Protection Act, or other items.
8. FY 2019 Internal Audit Follow-Up 100 hours	Optimized Services and Innovation, Customer Centric, & Performance Driven	Department-wide	Background: This project would verify if outstanding internal and external audit recommendations have been fully implemented. Quarterly reporting and an annual report will be provided.
9. Fiscal Year 2020 Internal Audit Plan 100 hours	Optimized Services and Innovation & Customer Centric	Department-wide	Background: The annual audit plan is prepared using risk assessment techniques to identify individual audits to be conducted during the year. The TxDMV Board must review and approve the annual audit plan as required by Government Code.
10. Fiscal Year 2018 Annual Internal Audit Report 30 hours	Not Applicable	Department-wide	Background: A summary of internal audit activities, including the status of the FY2018 audit plan, non-audit services provided, and external audit services procured, and the FY2019 audit plan. Government Code requires this annual report be submitted before November 1 to the TxDMV Board, the Governor, the Legislative Budget Board, the State Auditor's Office, and the Sunset Advisory Commission.

Contingency Audit and Advisory Services

The IAD has identified alternate, or contingency, engagements that it can perform. These engagements were identified through the annual risk assessment process and are high risk areas for the Department, but they are not as high risk as the primary engagements identified.

The table below provides information on the contingent engagements for FY2019, including the alignment to the strategic goals, the initial contact division (if necessary), and the engagement background information. Identified risks and allocated hours were developed for the contingency audits and advisory services.

The engagements below may be conducted if additional resources become available or if no Management or Board Requests are received.

Engagement Topic	Strategic Goal(s)	Division	Background and Identified Risks
1. **Procurement & Contract Management** 800 hours	Optimized Services and Innovation & Performance Driven	FAS, EPMO	Background: Procurement processes and contracts continue to be an area of focus for the Texas Legislature and external regulators. Recently, there has been a focus on ensuring that contracts are properly procured, reviewed by management, and have oversight by the Board of Directors. As of April 2018, the Department had issued over $78 million in procurements for FY 2018. Identified Risks • Vendor contractors may not be managed or monitored properly. • Procurement process may not be sufficiently developed to ensure vendor contract terms are met. • Monitoring of the Deloitte Contract may not be sufficient to ensure that all deliverables and hours are met.
2. **ELinc Application Review** 600 hours	Optimized Services and Innovation	ITS & Motor Carrier Division	Background: ELinc will allow motor carriers to self-issue operating authority in Texas, which will reduce the approval time. Identified Risk • ELinc processing may not produce customer credentials correctly or timely fashion.
3. **Access Management** 600 hours	Performance Driven	ITS	Background: Access Management is a pivotal and key component of any information technology system. Ensuring that access is

Engagement Topic	Strategic Goal(s)	Division	Background and Identified Risks
			managed properly, to ensure only those employees or staff access only the right data, is needed. Identified Risks • Access Management may not be sufficient to ensure confidentiality, integrity, and authenticity of users.
4. ITS Infrastructure 800 hours	Optimized Services and Innovation & Performance Driven	ITS	Background: The Department relies on the Texas Data Center Services (DCS) to host and manage its key IT infrastructure, including services. DCS is responsible for ensuring servers are appropriately patched and maintained to reduce the risk of a cyber-attack and keep up with technology changes. Since DCS is a third-party provider, oversight by the Department is key to ensure objectives are met and IT infrastructure is properly maintained. Identified Risks: • ITS Division may not have sufficient processes to ensure applications receive necessary maintenance in a timely fashion. • ITS Division may not have appropriate controls or processes to ensure that DCS patches and manages the servers and operating systems properly.
5. Regional Service Centers 800 hours	Customer Centric & Performance Driven	VTR	Background: The Regional Service Centers (RSCs) play an integral role in serving TxDMV customers located throughout the state of Texas. Each RSC has a regional manager that manages the RSC and an assistant chief that oversees the RSC. Identified Risks • RSC security upgrades may not meet the security needs of local staff and facilities. • Queuing systems may not achieve time savings for customers. • Regional Service Centers staff may not understand or have clear expectations on their duties related to Titles.

Engagement Topic	Strategic Goal(s)	Division	Background and Identified Risks
			• Regional Service staff may not understand their role in processing transaction, including identifying fraudulent transactions.

Other Internal Audit Duties

In addition to conducting engagements, the Internal Audit Division (IAD) has other duties that it performs each fiscal year. These duties include conducting quality control on issued audit and advisory service reports, preparing and facilitating the required Peer Review, working on Anti-Fraud, Waste, and Abuse Items, and providing ad hoc advisory services to the Department. The table below summarizes the other Internal Audit duties and the hours allocated to each item. In addition, the table provides information on total budgeted hours for IAD activities, including hours allocated to engagements and to other duties.

Other Internal Audit Duties	
1. Coordinating with external auditors and reviewers (30 hours) 2. Working on Anti-Fraud, Waste, and Abuse Items (200 hours) 3. Conducting an annual Quality Assurance and Improvement Program as required by auditing standards (80 hours) 4. Advising the agency's Governance Team and Executive Steering Committees (200 hours) 5. Providing ad hoc advisory services or consultations (100 hours)	
Total Budgeted Hours on Required Reports, Audits, and Advisory Service:	**4,700**
Total Budgeted Hours on Other Internal Audit Division Duties:	**610**
Total Budgeted Hours for Reports and Division Duties in FY 2018:	**5,310**

Methodology

Scope

The Internal Audit Plan for FY 2019 covers the period of September 1, 2018 to August 31, 2019.

Risk Assessment

The audit plan was developed using a risk-based methodology, which incorporated input from board members, senior management, division management, and risks identified by audit staff through FY 2018 engagements and observations. The Internal Audit Division also analyzed department information and reviewed internal audit and industry publications to identify and rank potential audit topics by risk. Projects' risk rankings were developed using the following factors:

- Revenue or expense impact
- Asset or liability impact
- Operational effectiveness and efficiency impact
- Legal or regulatory impact
- Brand or reputational impact
- Degree of change in the program, function, or process
- Degree of complexity
- Degree of centralization

In total, 100 Department risks were identified through the risk assessment. Each risk was scored using the above factors. The risk scores ranged from zero, which is the lowest risk score, to six, which is the highest risk score. An inherent risk score of four or higher is consider high risk for the Department. Low and medium risk scores are from 0 to 3.99, as depicted below.

Low Risk	Medium Risk	High Risk
0 – 1.99	2 – 3.99	4 - 6

Hour Analysis

Hours were calculated using historical data and auditor's judgement. For FY 2019 hours, the IAD calculated having five FTEs for the fiscal year. Hours are an estimate and could be adjusted during the fiscal year.

Texas Department of Motor Vehicles
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DATE: June 14, 2018
Action Requested: BRIEFING

To: **Texas Department of Motor Vehicles (TxDMV) Board**
From: **Sandra Menjivar-Suddeath, Internal Audit Director**
Agenda Item: 12.B - 4
Subject: **Internal Audit Division Status**

RECOMMENDATION
None.

PURPOSE AND EXECUTIVE SUMMARY
The status update provides information on current Internal Audit Division (IAD) activities. The June 2018 status update contains the fiscal year (FY) 2018 Audit Plan Status.

FINANCIAL IMPACT
None.

BACKGROUND AND DISCUSSION
At each board meeting, the IAD provides a status on current activities done.

FY 2018 Audit Plan Status
The IAD is currently working on five internal engagements and three completed engagements:

- Fraud, Waste, and Abuse Risk Assessment Advisory Service (Fieldwork)
  - **Objective:** An advisory service to identify and rank fraud, waste, and abuse risks for the Department.

- FY 2018 Internal Audit Follow-Up (Fieldwork)
  - **Objective**: To verify if outstanding audit recommendations have been fully implemented.
  - **Third Quarter Results:** The IAD is reporting on the implementation status of 7 internal audit recommendations due in the third quarter. The TxDMV implemented five (71%) and started two (29%) internal audit recommendations. The TxDMV provided revised due date for the two started audit recommendations.

- Texas Commission for Law Enforcement (TCOLE) Advisory Service (Completed)
  - **Objective:** To review the Texas Commission for Law Enforcement (TCOLE) training compliance.

- Travel and Training Audit (Completed)
  - **Objective**: To determine if training and travel requests have appropriate approvals and justifications as well as determining if the requests are appropriate and meet the need of the TxDMV.

- Social Media (Completed)
  - **Objective:** To determine if the department's social media policies and processes have been sufficiently developed to protect the Department's brand.

- Inventory (Fieldwork)
  - **Objective:** To evaluate if the Department has adequate processes to control, safeguard, and accurately track assets. In addition, to determine if the Department is in compliance with statutory requirements.

- eLicensing (Planning)
  - **Objective:** To determine if eLICENSING is achieving desired outcomes related to faster services to customers and the impact on the licensing process. In addition, to review the adequacy of access controls within eLICENSING.

- FY 2019 Annual Audit Plan (Fieldwork)
  - **Objective**: To determine the highest risk areas for FY 2019 audit plan.

In addition, the audit status update includes information on the audit that has not been started yet (Payment Card Industry Compliance).

Internal Audit Division Status Update

Status of Fiscal Year (FY) 2018 Internal Audit Plan

Project	Description	Status
Fraud, Waste, and Abuse Risk Assessment Advisory Service	An advisory service to identify and rank fraud, waste, and abuse risks for the department.	Fieldwork. Anticipated release date: August 2018
FY 2018 Internal Audit Follow-Up	This project verifies if outstanding audit recommendations have been fully implemented. Currently, the IAD is reviewing internal recommendations that had a completion date or that a division submitted an implementation action between June 1, 2018 to August 31, 2018.	Fieldwork. Third Quarter Results memorandum is attached. Anticipated release date: August 2018
Management Request - Texas Commission for Law Enforcement (TCOLE)	An advisory service, requested by TxDMV management, to review the Texas Commission for Law Enforcement (TCOLE) training compliance.	Completed. Report attached.
Travel and Training Audit	An audit to determine if training and travel requests have appropriate approvals and justifications as well as determining if the requests are appropriate and meet the need of the TxDMV.	Completed. Report attached.
Social Media	An audit to determine if the Department's social media policies and processes have been sufficiently developed to protect the Department's brand.	Completed. Report Attached
Inventory	An audit to evaluate if the Department has adequate processes to control, safeguard, and accurately track assets. In addition, to determine if the department is in compliance with statutory requirements.	Reporting. Anticipated release date: June 2018
eLICENSING	An audit to determine if eLICENSING is achieving desired outcomes related to faster services to customers and the impact on the licensing process. In addition, the audit will review the adequacy of access controls within eLICENSING.	Planning. Anticipated release date: August 2018
FY 2019 Annual Audit Plan	Identify high risk areas that may warrant an audit or advisory service in fiscal year 2019.	Draft Completed.
Payment Card Industry (PCI) Compliance	To determine whether TxDMV is compliant with certain aspects of PCI.	Not Started. Anticipate start date: mid-June 2018 Anticipated release date: August 2018

Attachments

1. FY 2018 Internal Audit Follow Up – Third Quarter Results Memorandum
2. TCOLE Compliance Advisory Service Report
3. Travel and Training Policies and Practices Audit Report
4. Social Media Audit Report
5. eLicensing Audit Engagement Letter

Texas Department of Motor Vehicles

MEMORANDUM

Date: June 5, 2018

To: Texas Department of Motor Vehicles Board

From: Sandra Menjivar – Suddeath, Internal Audit Director

Subject: Fiscal year (FY) 2018 Internal Audit Follow-Up: Third Quarter Results

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Background

The Internal Audit Division (IAD) continuously conducts follow-up activities to determine if appropriate action has been taken to address previously issued internal audit recommendations (recommendations). On a quarterly basis, the IAD reports to the TxDMV Board whether appropriate action was taken by assigning an implementation status to each recommendation reviewed during the designated period. The implementation status IAD assigns includes the following:

- **Fully Implemented**: The division fully implemented the audit recommendation by developing and using processes, systems, or policies. The changes are operating as intended.
- **Started**: The division began developing and using processes, systems, or policies to implement a recommendation but not all elements were complete. The division revised the completion date.
- **Pending:** The division has not begun developing processes or using processes, systems, or policies to implement a recommendation. The division revised the completion date.
- **Not Implemented/ Management Accepts the Risk**: The division and department no longer intends to develop a process, system, or policy to address a recommendation.
- **Not Applicable**[1]: The recommendation is no longer relevant.

The IAD determines whether appropriate action was taken and assigns an implementation status to the recommendations when the completion date is due or when the division submits an implementation action.

Third Quarter Results

For the third quarter of FY 2018, the IAD reviewed seven audit recommendations, from five internal audit reports, that had an estimated completion date or had been completed between March 1 and May 31, 2018. Out of the seven audit recommendations, two audit recommendations had a priority of HIGH and five audit recommendations had a priority of LOW.

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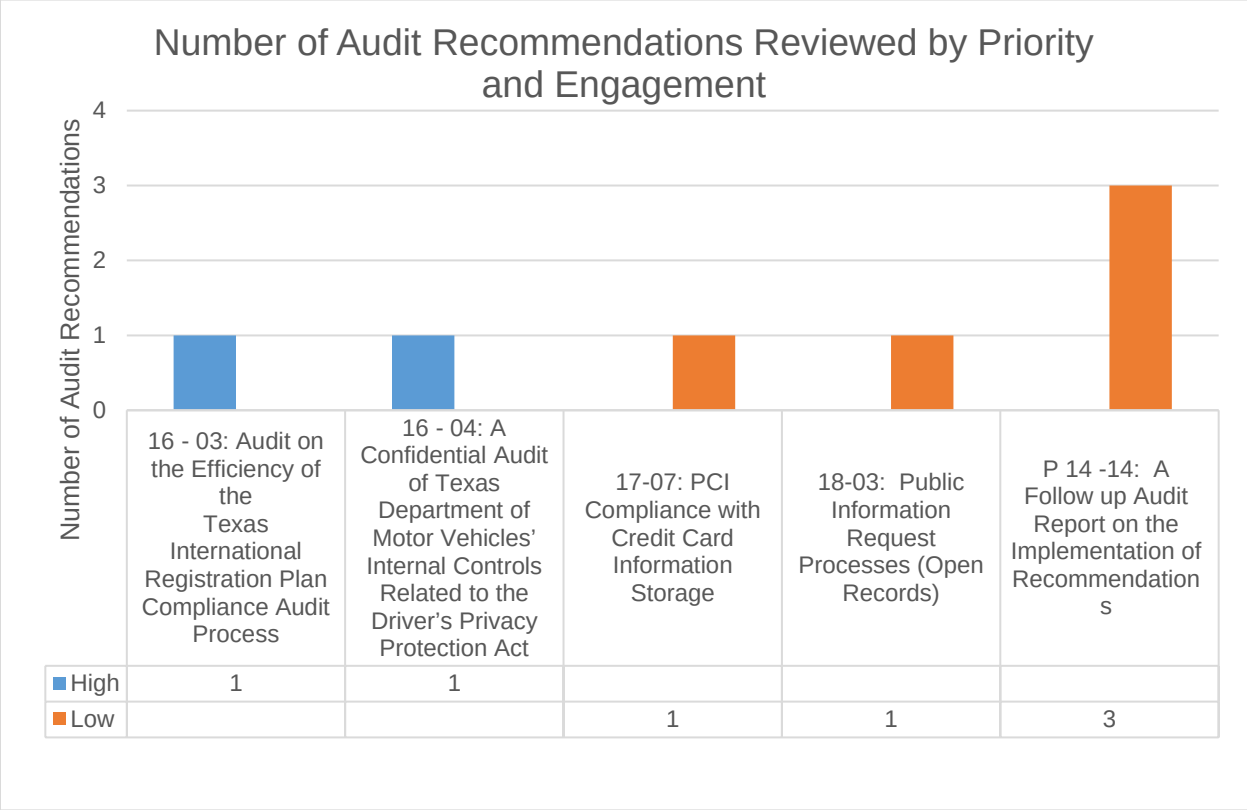
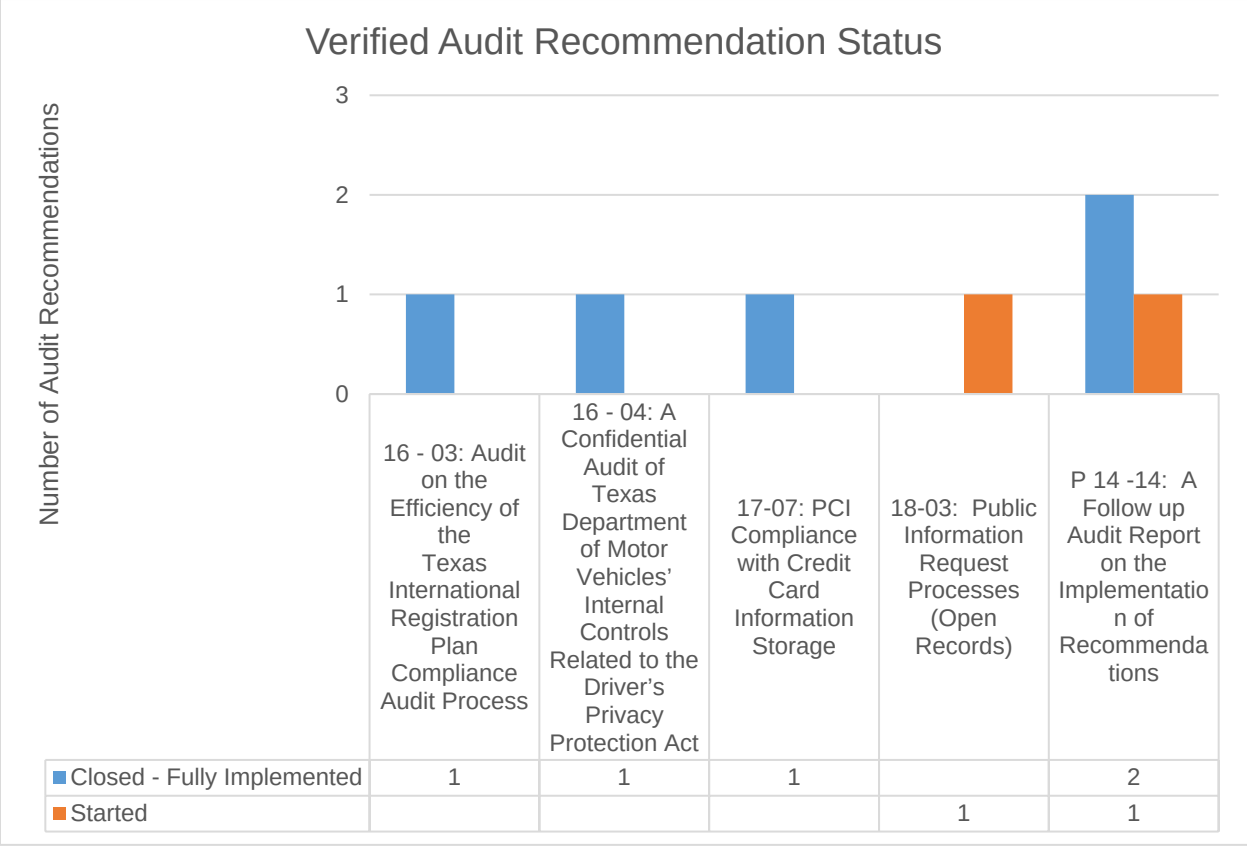
[1] Some recommendations are no longer applicable due to the age of the recommendation and organizational changes.

FY 2018 Third Quarter Follow – Up Results



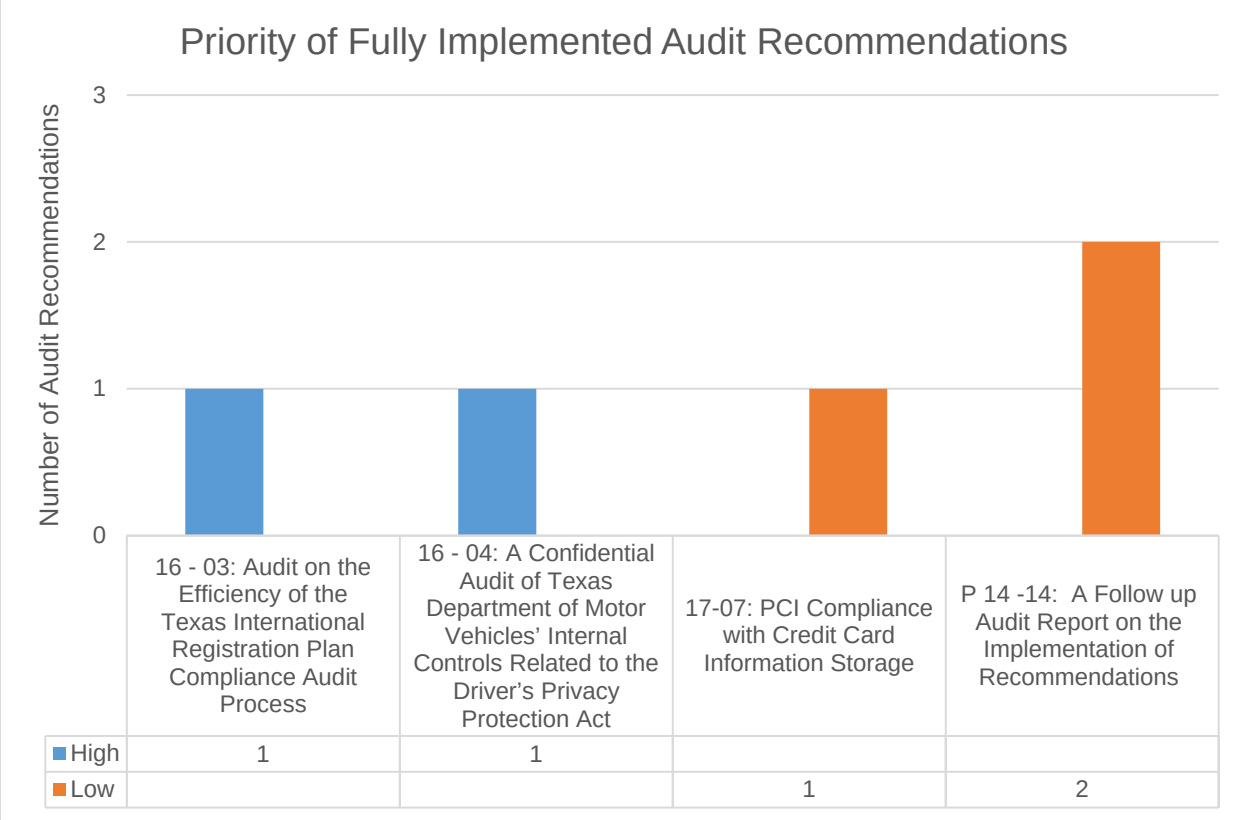
The IAD verified that the department fully implemented five recommendations (71%) and started the implementation for two recommendations (29%).



<< AGENDA

Fully Implemented Audit Recommendations

TxDMV management fully implemented five (71%) of the seven audit recommendations. Out of those five, two had a HIGH priority and three had a LOW priority.



On average, the fully implemented audit recommendations were implemented within 32 days of the estimated completion date.

Started Audit Recommendations

For the two recommendations that were started but not completed by the estimated completion date, management provided an updated completion date. On average, these updates extended the completion dates by 91 days. None of the started audit recommendations had a priority of HIGH.

Both started audit recommendations had significant work done prior to the original completion date. The audit recommendation related to developing law enforcement guidance for Public Information Request was drafted by the original completion date, however, it had not been fully approved by the Department and required an updated completion date. The other audit recommendation related to developing a strategic management system was fully drafted by the estimated completion date, however it had not been approved by the TxDMV Board and required a date revision. The strategic management system audit recommendation had a date revision once before, from December 31, 2017 to March 31, 2018. The table below summarizes the recommendations, including priority level and the updated completion date for each report.

Report Number and Name	Summary of Started Recommendation(s)	Priority	Original Completion Date	Revised Completion Date	Updated Completion Date
P14-14 A Follow-Up Audit on the Implementation of Recommendations	The Office of Innovation and Strategy updated the estimated completion date for one recommendation related to developing and deploying a strategic management system for the agency.	LOW	12/31/2017	3/31/2018	07/01/2018
18-03: Public Information Request Processes (Open Records)	The TxDMV should develop uniform department-wide guidance addressing the TxDMV's definition of valid law enforcement requests and required procedures for validating law enforcement requests.	LOW	04/01/2018	N/A	06/30/2018

cc: Whitney Brewster, Executive Director
Shelly Mellott, Deputy Executive Director
TxDMV Executive Management

Texas Department of Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

TCOLE Compliance Advisory Service Report
18-10

Internal Audit Division
May 2018

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Appendix 1: Objectives, Scope, and Methodology **6**

Objectives 6

Scope and Methodology 6

Texas Department of Motor Vehicles

TCOLE Compliance, 18-10

Executive Summary

BACKGROUND

The Texas Department of Motor Vehicles (TxDMV) provides Texas Commission on Law Enforcement (TCOLE) training for law enforcement. The training allows TxDMV to promote its services vital training to law enforcement. In fiscal year (FY) 2017, TxDMV offered 48 TCOLE trainings to law enforcement. TxDMV is not required to provide training or participate in the TCOLE program.

The TCOLE training is administered through the Enforcement Division, and training provider requirements are monitored by the TxDMV's TCOLE training coordinator.

The Internal Audit Division (IAD) was asked to conduct an advisory service to review the TCOLE training compliance. The advisory service deliverables were the following:

- A determination of whether the TxDMV is compliant with TCOLE training requirements.
- An identification of where improvements may be needed to be in compliance with TCOLE training requirements.
- An evaluation on whether the reporting structure has been implemented to sufficiently monitor TCOLE compliance.

RECOMMENDATIONS

No recommendations were made in this report. All information presented is for informational purposes.

RESULTS

TxDMV is not in full compliance with TCOLE training requirements, although a concerted effort has been made to be compliant. The IAD reviewed and concluded on the following TCOLE training compliance requirements:

- Training Coordinator – The TxDMV is in compliance with the TCOLE training coordinator requirements.
- Training Provider Eligibility – The TxDMV is in compliance with training provider eligibility requirements. However, advisory board eligibility forms were not always completed prior to appointment.
- Instructor Qualification – The TxDMV is not in full compliance with instructor qualification requirements. Of the 33 instructor qualifications reviewed, only 11(33%) had required biographies available for review.
- Training Course – The TxDMV is not in full compliance with all training course requirements because the TxDMV did not always submit training reports within 30 days as required.
- Training Course File – The TxDMV was mostly in compliance with the training course file requirements. Of the 15 files reviewed, only one file was missing a course evaluation.
- Training System Access – The TxDMV was in compliance with the completion of Non-Disclosure and User Verification forms requirement. However, three of the six TxDMV staff members who have access to TCLEDDS are not actively involved in the administration of the TCOLE training program.

TxDMV should consider developing an annual strategic training plan for the TCOLE trainings and fully developing and documenting policies and procedure. The policies and procedures should also define the responsibilities of the training coordinator to ensure compliance with the TCOLE training requirements.

Background

The Texas Department of Motor Vehicles (TxDMV) provides accredited training to law enforcement personnel throughout the fiscal year, but is not required to provide training to law enforcement. This allows TxDMV to promote its services (e.g., basic motor carrier enforcement, enforcement of oversize/overweight carriers and motor vehicle industry, specialized knowledge of motor vehicle regulations and laws) while providing vital training to law enforcement. Regularly, TxDMV provides the following trainings to law enforcement:

- Basic motor carrier enforcement training - available to all law enforcement and not restricted to Commercial Vehicle Enforcement Units. Training to discuss recognition of unlicensed household goods mover activities and recognition of bus companies that may require TxDMV intrastate operating authority.
- Dealer training – training to discuss common dealer violations, dealer operation within state laws, sales taxes, sales financing licenses, title and registration procedures, and marketing and advertising rules and regulations.
- e-Tag training – training to disseminate information on temporary tag issuance, options for issuance, general use requirements, and tag prohibitions.
- Auto Burglary & Theft Prevention Authority (ABTPA) training – training on motor vehicle burglary theft-related statutes and on motor vehicle burglary and theft investigations

TxDMV also provides other trainings. Those training courses are developed and provided as needed or when requested by law enforcement. Past examples of requested training include Oversize/Overweight motor carrier enforcement.

For the training to be accredited for law enforcement, TxDMV must be certified as a Proprietary Training Provider (training provider) by the Texas Commission on Law Enforcement (TCOLE). Being a training provider requires compliance with all provisions outlined in the Texas Administrative Code Title 37 Part 7 and the Texas Occupations Code §1701.252 (TCOLE training requirements). The TCOLE training requirements include assigning a training coordinator, obtaining qualified instructors, keeping training course records, and documenting training course attendance. Other requirements include having an advisory board to review and approve all training material and courses for law enforcement.

TCOLE also requires training providers to regularly receive a comprehensive evaluation performed by a TCOLE field agent, known as a TCOLE Training Provider Evaluation. TxDMV's previous review was on March 20, 2018, where TCOLE reviewed the previous year's training for compliance with state codes. The review identified two minor areas of compliance issues, which TxDMV is currently addressing.

TCOLE relies on the assigned training coordinator to ensure compliance with the requirements. The training coordinator is responsible for ensuring all courses are taught as defined and reporting all courses to TCOLE. The training coordinator is responsible for the following:

- ensuring compliance with TCOLE commission rules and guidelines;
- submitting training completion reports;
- completing self assessments;
- maintaining copies of advisory board minutes;
- maintaining training schedules;
- ensuring training facilities are suitable for instruction; and,

- ensuring training course objectives are taught and evaluated.

The TCOLE training is currently managed by the Enforcement Division. The Enforcement Division has assigned an investigator to be the training coordinator as an additional duty. The Enforcement Division staff, also, make up most of the advisory board, although not all the TCOLE training is the responsibility of the division.

In December 2017, the Enforcement Division Director requested that the Internal Audition Division review the law enforcement training program to ensure all requirements were being met. Specifically, the IAD agreed to review the compliance of the program and provide information on the following items:

- Determine compliance with TCOLE training requirements
- Identify improvement areas to ensure compliance with TCOLE training requirements
- Evaluate the reporting structure to ensure TCOLE compliance.

TxDMV is not required to participate in the TCOLE program to provide law enforcement with training, however, providing accredited training allows TxDMV to engage law enforcement.

This advisory service was included in the fiscal year (FY) 2018 Audit Plan. We conducted this advisory service in conformance with the Internal Standards for the Professional Practice of Internal Auditing.

Advisory Service Results

Overall Conclusion

TxDMV is not in full compliance with all TCOLE training requirements, although TxDMV and the advisory board staff have made a concerted effort to be in compliance and monitor compliance. Staff developed processes and maintained documentation to be in compliance with TCOLE requirements, but staff did not consistently perform the process or maintain the documentation.

TxDMV should consider developing and documenting policies and procedures, as well as defining the responsibilities of the training coordinator, to ensure consistent and full compliance with the TCOLE training requirements. The documented policies and procedures should define who is ultimately responsible for maintaining TCOLE training program, including which division, to ensure reporting structures are sufficient to monitor TCOLE compliance and address the compliance issues noted below.

TCOLE training requirements are extensive, and it may require significant time to develop and document policies and procedures. IAD believes after policies and procedures are developed and documented, the amount of time needed to ensure compliance may be minimal. If TxDMV believes that the cost of compliance is more than the value added, TxDMV may want to explore other methods of providing accredited law enforcement training without having to be a provider.

Strategic Considerations

In fiscal year (FY) 2017, TxDMV offered 48 TCOLE trainings to law enforcement. Most of these trainings are scheduled on an as-needed basis or as requested by area law enforcement (except for the Dealer Training). To add more value to the TCOLE training, TxDMV should consider developing an annual strategic training plan for the TCOLE trainings. The strategic training plan should be established with input from participating divisions and the advisory board. The strategic plan should be approved by the Executive Director, or designee, and the advisory board.

Compliance Results

IAD reviewed compliance requirements related to TCOLE training providers listed in the Texas Administrative Code (TAC) Title 37 Part 7 and the Texas Occupations Code §1701.252 and tested whether TxDMV was in compliance with those requirements in FY 2017. IAD classified the compliance requirements into the following areas, based on risk and importance:

- Training Coordinator - ensures the TxDMV is compliant with all TCOLE reporting requirements.
- Training Provider Eligibility – ensures the TxDMV has met all requirements to be a training provider.
- Instructor Qualification – ensures trainings are taught by qualified instructors.
- Training Course – ensures training curriculum and materials align with approved courses.
- Training Course File – ensures training materials and evidence of course completion (course final rosters, course evaluations, and exams) have been submitted to TCOLE.
- Training System Access - ensures only personnel with TCOLE reporting requirements have access to the TCOLE training reporting system.

Training Coordinator

TCOLE requires that a training coordinator be assigned to help with the administration of the TCOLE trainings. The training coordinator should be a Full-Time Equivalent (FTE), unless an exception is requested from TCOLE. The training coordinator must be appointed by the advisory board and must forward all communication to an appointed authority. IAD reviewed documentation of the training coordinator, including their job description.

TxDMV is in compliance with the training coordinator requirement. The training coordinator is an FTE, and the by-laws of the TxDMV advisory board discuss that the training coordinator is appointed by the advisory board. In addition, the training coordinator stated that all communications are forwarded to the appointed authority. Although in compliance with the TCOLE requirement, IAD did not find any documented procedures that detail the process for forwarding communications to appointed authority and the process to become the training coordinator. In addition, the training coordinator's current job description does not discuss or describe the TCOLE responsibilities.

Training Provider Eligibility

TCOLE requires that the agency be approved as a training provider prior to providing any accredited training to law enforcement. To obtain approval, the agency is required to submit an application and have evidence of an advisory board. The advisory board should be made of members who meet the eligibility requirements, which include having completed the TCOLE advisory board training course. Board members may have to show that they are a member of the public or a TxDMV FTE, as TCOLE requires that the advisory board be made up of at least three TxDMV's FTEs and a third of the board be public members. To show eligibility, each board member is required to complete and submit an eligibility form prior to appointment. IAD reviewed the training provider approval documentation and advisory board eligibility forms to determine compliance.

IAD determined that TxDMV was in compliance with these requirements. IAD verified that TxDMV was an approved training provider prior to providing any accredited training to law enforcement. IAD also verified that TxDMV was an approved training provider, and that advisory board members had completed their eligibility form by December 2017. The forms, however, were not always filled prior to the board member's appointment.

Instructor Qualifications

TCOLE requires that all training courses be taught by a qualified instructor. TCOLE requires that all instructor biographies be maintained. IAD determined compliance by selecting a sample of instructors who taught TCOLE training. In total, 78 instructors taught the 48 TCOLE trainings. Out of the 78 instructors, IAD selected 33 instructors to verify instructor qualifications.

IAD determined that TxDMV is not in full compliance with this requirement. Out of the 33 instructor qualifications reviewed, 11 (33%) included qualification elements such as training instructor certifications and Master Peace Officer certifications. For the other 22 instructors in the sample, biographies were not found and IAD could not determine if the instructors were qualified.

Training Courses

TCOLE established the requirements needed for the training courses. These requirements include having adequate training facilities, having course exams be proctored after each training, and having the training reports be submitted within 30 days of course completion. IAD reviewed training course documentation and submission of the training reports.

The TxDMV was mostly in compliance with all training course requirements. The TxDMV ensures training facilities are adequate prior to the training is conducted. The TxDMV verifies and works with the training facility to verify that all necessary items are available.

The TxDMV is also compliant with requirements to proctor and supervise all examinations. Course instructors ensure course administration and exams are proctored during or after the training course.

The TxDMV, however, has not always submitted the training reports within 30 days of training completion. The IAD found that two training courses did not have the training reports submitted within 30 days of reporting. In addition, the 2016 and 2018 TCOLE Training Provider Evaluation also identified that the TxDMV did not submit training reports within the 30-day requirement.

Training Course File

TCOLE requires that any training taught must have a documentation file. The file must include the completed lesson plan, documentation that states the clear learning objective, the instructor's biography, the approved roster sheet, the original sign-in sheet, the course evaluation, and the completed and graded exams. To determine compliance, IAD reviewed 15 course files of the 48-course taught in FY 2017.

TxDMV was mostly in compliance with the training course file requirements. Out of the 15 files tested, only one was missing a course evaluation. The instructor biographies were included in the file, but the biographies did not always contain adequate information to determine instructor qualification.

System Access

TxDMV has a recurring annual contract for access to the Texas Commission on Law Enforcement Data Distribution System (TCLEDDS). TCLEDDS is an electronic system that provides TxDMV staff with access to submit information and documentation to Texas Commission of Law Enforcement as needed. TCLEDDS requires the TCLEDDS Administrator to read and sign a Non-Disclosure form. Each user is required to read the Non-Disclosure and sign the User Verification form. IAD reviewed the forms and system access for current users.

The TxDMV is complaint with this requirement because its TCLEDDS users completed the Non-Disclosure and User verification forms. However, IAD found that three of the six current TCLEDDS users are not actively involved in the administrative responsibilities for the TCOLE training program and do not need access to the system.

Appendix 1: Objectives, Scope, and Methodology

Objectives

The objective of this advisory service was to determine whether the TxDMV is compliant with TCOLE training provider requirements. This advisory service agreed to provide the following:

- A determination of whether the TxDMV is compliant with TCOLE training requirements.
- An identification of where improvements may be needed to be in compliance with TCOLE training requirements.
- An evaluation on whether the reporting structure has been sufficiently implemented to monitor TCOLE compliance.

Scope and Methodology

The Internal Audit Division interviewed managers and staff of the Enforcement, Motor Carrier, and Vehicle Titles and Registration Divisions.

The IAD reviewed TCOLE reporting procedures and reporting materials for FY 2017. TCOLE training reporting requirements were reviewed and compared to TCOLE requirements to determine the TxDMV's compliance with TCOLE training requirements.

- Interviews with TxDMV staff, including the training coordinator, course instructors, and TCOLE Board members
- Review of provisions outlined in Texas Administrative Code Title 37 Part 7 and the Texas Occupations Code §1701.252, including the following requirements:
    - TAC Lesson Plan Elements
    - TCLEDDS/TCOLE Contract Requirements
    - TAC Training Provider application and renewal
    - TAC Training Provider Evaluations
    - TAC Training Coordinator
    - TAC Examination Administration
    - TAC Training Instructor
    - Occupations Code Advisory Board
- 2016 and 2018 Texas Commission on Law Enforcement (TCOLE) Training Program Evaluation Report (TPER)
- TxDMV Approved TCOLE Trainings Offered
- TCOLE Lesson Plan Lesson Course outlines
- TCOLE Roster 30-day report
- Enforcement Investigator IV Job Description
- TCOLE Advisory Board Minutes December 2017
- ABTPA April 18-21, 2017 Final Course Evaluations Compiled bios and Course Evaluation
- TCLEDDS Instruction form
- TCLEDDS User Verification Form
- TCLEDDS Application License Agreement Form
- TCLEDDS Confidentially and Non-Disclosure Form

Texas Department of Motor Vehicles

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Travel and Training Policies and Practices Audit Report

Audit 18-06

Internal Audit Division
April 2018

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Texas Department of Motor Vehicles

Travel and Training Policies and Practices Audit Report, 18-06

Executive Summary

BACKGROUND

During the 85th Legislature, concerns arose on the appropriateness of travel and training events that state agencies attend. As a result, the Internal Audit Division (IAD) included an audit to review the Department's travel and training processes. In fiscal year (FY), the Department only expended $756,861 in travel and training. At the request of the TxDMV Board, board travel was also reviewed.

The Department travels in-state and out-of-state for various reasons, including attending annual conferences; conducting or assisting with investigations and monitoring site visits; attending staff development functions; and conducting other state business. Similarly, the Department purchases a variety of training materials and courses for its staff.

The objectives of the audit were the following:

- To determine if training and travel requests and reimbursements have the appropriate approvals and justifications.
- To determine if a process exists to ensure travel and training expenses are appropriate and achieve the needs of the Department.
- To evaluate how the TxDMV's handling of board member travel compares with other state agencies.

RECOMMENDATIONS

The IAD made two recommendations related to better defining and clarifying the travel authorization process, including documentation requirements.

RESULTS

The TxDMV has developed processes to ensure training related requests are justified and expenses are appropriate. Training related requests and expenses are approved by the division director or designee and two sections of the Finance & Administrative Services (FAS) Division before the purchase can occur. Similarly, travel expenses are reviewed by FAS and the traveling division prior to reimbursement to verify that the expenses were appropriate and justified. Out-of-state travel is authorized by the executive director and the division director prior to the travel.

However, the authorization for in-state travel authorizations is informal. The Department has not sufficiently established procedures to ensure in-state travel authorization is fully documented and retained by divisions. In addition, there are unclear guidelines for what documentation needs to be included when submitting out-of-state travel plans for authorization.

The Department may have insufficient support demonstrating it authorized in-state travel with clear business justification prior to the trip. In addition, staff may not have sufficient supervisory authorization for travel prior to the trip.

TxDMV board travel practices are in compliance with the Texas Government Code, Comptroller rules, and the General Appropriations Act, and are like other state agencies' reimbursement practices for board and commission members' travel expenses.

MANAGEMENT RESPONSE

Management agrees with the audit results and recommendations. Management has begun working on the recommendations, including updating the Travel Authorization form and travel policies and procedures. Management expects recommendations to be implemented by December 2018.

Overall Conclusion

Maturity Assessment Rating

4 - *Managed and Measurable Process Level*: The process has a standardized, documented, communicated, and followed process. Management monitors and measures compliance with process. Process is under constant improvement and provides good practice. The use of information technology would help automate workflow and improve quality and effectiveness.

Other possible maturity assessment ratings and their definitions are found under Appendix 1.

Strengths

The Texas Department of Motor Vehicles (TxDMV) has developed several processes to ensure travel is appropriate and is being reimbursed for only allowable items, including the following processes:

- Finance and Administrative Services (FAS) Division developed controls to ensure that reimbursement claims submitted for all travel related expenses are documented, supported, and appropriate. IAD tested travel related expenses from 72 travel vouchers reimbursed in fiscal year (FY) 2017 and found all expenses tested were vetted by FAS in their travel voucher review process. All expenses tested contained the required supporting documentation in the purchase voucher file.
- The out-of-state travel process requires staff to request authorization through a form prior to traveling. The Travel Authorization form includes information on expected travel dates, locations, purpose of travel, and cost estimates of lodging, meal, travel, and incidental expenses. The out-of-state travel authorization form requires the employee's supervisor, division director, and executive director approval.
- The Vehicle Titles & Registration Division developed an in-state process that included obtaining authorization prior to traveling, confirming travel dates and destinations, and meeting quarterly to discuss and plan routine monitoring visits. After the travel occurs, the division keeps detailed records of the travel expenses incurred by division staff. The detailed record keeping includes information on the purpose of the travel.

The TxDMV has also developed processes to ensure training related requests and expenses are appropriate and justified. The training related requests and expenses are processed through the Centralized Accounting and Payroll/Personnel System (CAPPS) purchasing module. Before a purchase can occur, CAPPS requires division director or designee approval, the FAS Budget and Planning Section's approval, and the FAS Purchasing Section's approval. IAD tested training related expenses from 51 purchase orders paid in FY 2017 and found all training expenses received approval in CAPPS prior to the purchase.

Improvements

The TxDMV could improve its travel authorization processes defined in the TxDMV Travel Policies and Procedures manual.

Below are the audit results and recommendations that further expand on these areas.

- Audit Result #1: Travel authorization processes need to be clarified and better defined.

  - o Recommendation # 1: The TxDMV should define and document the in-state travel authorization process, including identifying which authorization is needed based on the purpose of travel. (High)
  - o Recommendation #2: The TxDMV should update its travel policies and procedures to include guidance on the documentation requirements for travel authorizations, including expectations for retention of supporting documentation. (Low)

- Audit Result #2: The TxDMV's board travel policies and practices comply with Comptroller requirements and align with other state agencies' practices
  - o No recommendations were made.

The detailed audit results can be found under the Audit Results section beginning on page 5.

Observation

The TxDMV's travel policy is currently being updated to create a uniform approval and documentation process across the Department all while balancing the Department's need to accommodate travel plans for a variety of business needs across the Department. Proposed updates included the changes to the Department's travel authorization policies and Travel Authorization form for both in-state and out-of-state travel. The proposed travel authorization form emphasizes cost efficiency more than the appropriateness or need for the travel. In its current draft, the form does not have sufficient detail to capture information on the appropriateness and justification for the travel. However, it does capture significant detail on the estimated expenses. Since the detail is an estimate, there is no indication that additional information capture beyond what is already on the Department's current travel authorization form would be beneficial. The IAD compared the cost estimates captured on the current out-of-state travel authorization form with the actual costs incurred for 20 out-of-state line item expenditures since the Department does not currently require a cost estimate or travel authorization form for in-state travel. The IAD found that 14 (70%) of the out-of-state cost estimates were within $25 of actual costs and an additional 4 (20%) of the 20 are within $60 of actual costs.

Background

In FY2017, the TxDMV expended $756,861 for in-state and out-of-state travel and training. In addition, the 85th Legislature showed concern regarding the appropriateness of travel and training events that state agencies attend.

Travel

The TxDMV's travel authorization process allows divisions to respond to scheduled and unscheduled travel events based on each division's business needs. In the sample tested, TxDMV personnel traveled to conduct state business on behalf of the Department for the following reasons:

- conducting or assisting with investigations and monitoring site visits (31%),
- participating in motor vehicle industry and regulatory conferences (31%),
- attending staff development functions (17%),
- providing training to stakeholders (11%),
- coordinating with legislators (1%), and
- conducting other state business such as on-site equipment maintenance (10%).

Some travel events cannot be anticipated such as law enforcement requests for investigation assistance. Other travel can be foreseen and planned such as routine site visits and annual national conferences. For example, in FY 2017, Department managers and staff attended annual conferences and participated on regulatory boards including the following:

- American Association of Motor Vehicle Administrators
- American Association of State Highway and Transportation Officials,
- National Odometer and Title Fraud Enforcement Association,
- International Registration Plan board, and
- Unified Carrier Registration board.

The TxDMV's Travel Policies and Procedures manual requires all employees receive prior approval before traveling (e.g., authorization) from the employee's direct supervisor. Each division is responsible for authorizing proposed travel for their own staff traveling in-state.

Employees traveling outside of the state must submit the Travel Authorization form for approval prior to travel by their division director and executive director. The Travel Authorization form must include the purpose of travel and a cost estimate. Divisions can also submit a Travel Advance Request form to obtain a monetary advance for anticipated travel costs. The use of travel advances is optional and at the discretion of each division.

After traveling, an employee must submit a travel voucher to obtain reimbursement. FAS staff review the voucher and accompanying support documentation to verify that the reimbursement request is for actual costs incurred and the final approved reimbursement does not include disallowed costs (i.e. gratuities) or exceed allowable maximum rates set by the Texas Comptroller's Office (Comptroller).

The Department has taken steps to update its travel policy, which was last revised in October 2014. The draft travel policy is intended to help ensure sufficient lead time of travel approvals prior to the trip date, to select the most cost-effective travel arrangements are obtained considering the purpose of the travel, and to provide clearer guidance to Department staff arranging travel or submitting vouchers for claimed expenses. The draft travel forms are being designed to consolidate multiple forms such as; the travel advance request, mileage calculator, travel authorization, and travel voucher, into one workbook.

Training

The TxDMV utilizes the Comptroller's Centralized Accounting and Payroll/Personnel System (CAPPS) to submit and approve purchase requisitions for staff development materials and events. CAPPS enforces approval workflow by requiring authorization for training expenses from the division director or their designee, the FAS Budget and Planning Section, and the FAS Purchasing Section.

This audit was included in the fiscal year 2018 Audit Plan. The Internal Audit Division conducted this performance audit in accordance with Generally Accepted Government Auditing Standards and in conformance with the Internal Standards for the Professional Practice of Internal Auditing. These standards require that IAD plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. IAD believes that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The audit was performed by Jacob Geray (Internal Auditor), Derrick Miller (Project Manager), and Sandra Menjivar-Suddeath (Internal Audit Director).

In accordance with the Texas Internal Auditing Act, this report is distributed to the Board of the Texas Department of Motor Vehicles, Governor's Office of Budget, Planning, and Policy, Legislative Budget Board. State Auditor's Office, and the Sunset Advisory Commission. The report was also distributed to the Department's executive management team.

Audit Results

Travel authorization processes needs to be clarified and better defined.

Condition

Travel expenses tested received a review by FAS prior to reimbursement, verifying that the expenses were appropriate, justified, and included appropriate signatures approving reimbursement.

However, in-state travel authorizations are informal and ad hoc, with evidence of authorizations varying by division. For example, IAD found verbal approvals were given to staff for monitoring visits and annual conferences, as well as unplanned events. In addition, documentation submitted with the Travel Authorization form for out-of-state travel authorization varied.

Effect

The Department may have insufficient support demonstrating that authorized travel has a clear business justification prior to the trip date. In addition, staff traveling for the Department may not have sufficient supervisory authorization of travel prior to the trip.

Cause

The Department has not sufficiently established procedures to ensure in state travel authorization is fully documented and retained by the division.

In addition, there are unclear guidelines for what documentation needs to be included when submitting out-of-state travel plans for authorization.

Criteria

The TxDMV Travel Policies and Procedures require staff receive approval from the direct supervisor prior to travel when traveling in-state. For both out-of-state and in-state travel, the Department is required under Texas Government Code §660.003 to ensure that travel expenses receiving reimbursement clearly involve official state business.

Evidence

The Internal Audit Division selected and tested 72 travel expense claims disbursed during FY 2017 from nine divisions. The 72 travel expense claims were related to in-state and out-of-state travel. Specifically, 62 of the expenses were for in-state travel and 10 expenses were for out-of-state travel. From the testing, the following items were noted:

- Five of the nine divisions sampled attested to having some in-state approval processes consisting of verbal discussion. One of these divisions reported that staff did not consistently obtain supervisory approval prior to travel, which the division has since corrected.
- 72 expenses were verified by FAS during their travel voucher review to be actual and allowable costs incurred.
- 10 out-of-state travel expenses included an approved Travel Authorization form.
- 14 in-state travel expenses had authorization documentation.
- 47 of the 62 in-state travel expenses tested did not have authorization evidence.

- 24 of the 47 expenses without authorization evidence were from one division which previously stated that it did not have an in-state travel authorization process prior to FY 2018.

Recommendations

The Internal Audit Division recommends the following:

1.1 The TxDMV should define and document the in-state travel authorization process, including identifying which authorization is needed based on the purpose of travel. (High)

1.2 The TxDMV should update its travel policies and procedures to include guidance on the documentation requirements for travel authorizations, including expectations for retention of supporting documentation. (Low)

Management's Response and Action Plan

Management Response & Action Plan 1.1

Management agrees with the recommendation. Staff has been working with stakeholders to identify improvements to the travel authorization form, including the incorporation of in-state travel documentation and approval requirements. The updated form will be rolled out to the Department by the end of the calendar year.

Management Action Plan Owner(s): Sergio Rey, Director of Accounting

Anticipated Completion Date: December 31, 2018

Management Response & Action Plan 1.2

Management agrees with the recommendation. Staff has been working with stakeholders to identify best practices for documenting travel purpose of trip and benefit statements. FAS has completed an initial review and edits of the Department's travel policies and procedures. A draft document will be routed to executive management for final recommendations before final roll out to the Department.

Management Action Plan Owner(s): Sergio Rey, Director of Accounting

Anticipated Completion Date: December 31, 2018

The TxDMV's board travel policies and practices comply with Comptroller requirements and align with other state agencies' practices

As part of this audit IAD compared the TxDMV's practices for board travel and reimbursement with the practices of other state agencies. IAD analyzed board member travel reimbursements disbursed during FY 2017 and surveyed 31 other state agencies regarding their travel policies for board and commission members, receiving responses from nine state agencies.

TxDMV board travel practices are in compliance with the Texas Government Code, Comptroller rules, and the General Appropriations Act requirements for allowable costs and reimbursement rates. TxDMV board members are allowed the same daily meal, lodging, and mileage rates as other TxDMV personnel subject to the General Appropriations Act. Mileage reimbursement rates applied by the Department for board member reimbursement of personal vehicle and personal aircraft use comply with those published by the Texas Comptroller's Office and the United States Government Services Administration.

Other state agencies responding to the survey reported similar reimbursement practices regarding board and commission member meals and lodging, vehicle mileage, and use of commercial aircraft. None of the nine respondents reported board or commission member use of a personal aircraft. The responding agencies cited their own travel policies, Texas Travel Regulations Act (Government Code 660), and the state reimbursement rules promulgated by the Texas Comptroller's Office as the guidance governing their reimbursement practices.

Appendix 1: Objectives, Scope, Methodology and Maturity Assessment

Objectives

The objectives of the audit were the following:

- To determine if training and travel requests and reimbursements have the appropriate approvals and justifications.
- To determine if a process exists to ensure travel and training expenses are appropriate and achieve the needs of the Department.
- To evaluate how the TxDMV's handling of board member travel compares with other state agencies.

Scope and Methodology

The scope of the audit included travel and training related expenditures disbursed during fiscal year 2017.

IAD interviewed TxDMV Division Directors and division travel coordinators to gather information on the travel approval process for TxDMV personnel, and reviewed available documentation of supervisory travel approvals. IAD reviewed travel vouchers and supporting documentation for 72 travel expenses sampled from the population of FY 2017 expenditures in 27 travel related expenditure accounts, and reviewed purchase requisitions and approval signoffs for 51 training expenses sampled from the population of FY 2017 expenditures in 5 travel related expenditure accounts. The expenditure accounts were selected based on a review of CAPPS account code descriptions and in agreement with FAS. The sample size was selected based on the proportionate volume of FY 2017 expenditures by each TxDMV division, excluding the Internal Audit Division for objectivity.

IAD reviewed the Department's draft travel policies and forms currently under development. The TxDMV's current travel policy and procedures was finalized in October 2014. The proposed revisions have been in development by the Executive Office and FAS since fiscal year 2016.

At the request of the TxDMV's governing board, Internal Audit reviewed the Department's policies and practices regarding board member travel how those compare with the policies and practices of other state agencies. IAD surveyed other state agencies to gather information on their agency policies and practices for board member reimbursements, receiving responses from nine state agencies. The survey was sent through the State Agency Internal Audit Forum (SAIAF), which has approximately 40 members. A total of 31 of those members received the survey.

Information and documents reviewed in the audit included the following:

- Texas Travel Regulations Act (Texas Government Code 660)
- State of Texas Travel Guidance (Texas Administrative Code Title 34, part 1, Chapter 5, Subchapter C, §5.22
- Texas General Appropriations Act Travel Regulations (Texas General Appropriations Act for the 2016-17 Biennium, Article IX, Part 5)
- Texas Government Code Chapter 656 Job Notices and Training (Texas Government Code Chapter 656)
- Texas Department of Motor Vehicles Finance and Administrative Services Division Travel Policies and Procedures, Version 1.1, October 2014
- Texas Department of Motor Vehicles Fiscal Year 2017 Expenditures by Coding Block

- Appendix E – Expenditure Account Codes (CAPPS Desk Reference Packet FY 2015)
- State Agency Internal Audit Forum members
- Texas Department of Motor Vehicles purchase vouchers and support documentation
- Texas Department of Motor Vehicles Draft Travel Authorization and Reimbursement Policy, November 2017
- Texas Department of Motor Vehicles Draft Travel Authorization Form, December 2017

Maturity Assessment Rating Definitions

The maturity assessment rating and information were derived from the Control Objectives of Information and Related Technologies (COBIT) 5 IT Governance Framework and Maturity Model and the Enterprise Risk Management (ERM) Maturity Model. The model was adapted for the TxDMV assurance audit purposes and does not provide a guarantee against reporting misstatement and reliability, non-compliance, or operational impacts. Below are the definitions for each rating level.

0 - A rating level of 0, also known as a non-existent process level, is defined as no process has been defined or used.

1 - A rating level of 1, also known as an initial and ad-hoc process level, is defined as a standardized process has not been developed and an ad hoc approach is being used when issues arise.

2 - A rating level of a 2, also known as repeatable but intuitive process level, is defined as having developed a process where similar procedures are followed by several employees, but the results may not be consistent. The process is not documented and has not been sufficiently evaluated to address risks.

3 - A rating level of a 3, also known as a defined process level, is defined as having a standardized, documented, communicated, and followed process. The process, however, may not detect any deviation due to the process not being sufficiently evaluated to address risks.

4 - A rating level of a 4, also known as a managed and measurable process level, is defined as having a standardized, documented, communicated, and followed process. Management monitors and measures compliance with process. Process is under constant improvement and provides good practice. The use of information technology would help automate workflow and improve quality and effectiveness.

5 - A rating level of a 5, also known as refined level, is defined as having a good process (e.g., standardized, documented, communicated, and followed process) because of continuous improvement and the use of technology. Information technology is used in an integrated way to automate workflow and to improve quality and effectiveness.

Texas Department of Motor Vehicles

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Social Media Governance Audit

Audit 18-07

Internal Audit Division

June 2018

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Texas Department of Motor Vehicles

Social Media Governance, 18-07
Executive Summary

BACKGROUND

Social media presents a variety of legal, security, privacy, human resources, and records management challenges not found with traditional information technology or communication channels.

The TxDMV uses social media to directly address customer questions and complaints, promote programs and initiatives, broadcast and receive public safety information during disasters, and share industry news. The Department maintains multiple social media accounts including three Facebook pages and three Twitter handles that target both the general public and industry-specific audiences such as motor carriers and law enforcement agencies.

TxDMV has more than 10,900 followers on Facebook and more than 4,214 followers on Twitter across all official accounts. The accounts are moderated by designated social media administrators within the Government Strategic & Communication, Motor Carrier and the Automobile Burglary and Theft Prevention Authority (ABTPA) Divisions.

RECOMMENDATIONS

The Internal Audit Division made three recommendations to develop guidance related to defining and promoting the Department's brand and message, creating privacy protocols for official social media accounts, and establishing a process to evaluate, approve, and track social media platforms.

RESULTS

The Texas Department of Motor Vehicles (TxDMV or Department) uses social media as a cost-effective method of reaching customers, reaching, 36,391 unique users at an average cost to the Department of $0.16 per user between October 2017 to February 2018. Job descriptions of the Department's designated official social media account administrators include duties related to social media.

TxDMV information security, human resources, and record retention policies cover employees' activity and behavior on official social media outlets and TxDMV records management strategy for preventing disclosure of confidential information through social media. In addition, the Motor Carrier Division (MCD) and the Automobile Burglary and Theft Prevention Authority (ABTPA) have division policies for staff managing official social media accounts.

However, the Department has not developed an agency-wide social media strategy to align the use of social media throughout the various divisions. Each division has their own security and privacy configurations for their social media pages, and have different expectations on how to manage customer comments based on business objectives rather than Department strategy.

A central process for reviewing social media platform terms and conditions and their associated risk to the Department, and approving and tracking all official social media accounts has not been created. The decision to register new official TxDMV account is made by each division without required review from TxDMV Office of General Counsel, Information Security Section, or the Executive Office.

MANAGEMENT RESPONSE

Management agrees with all three recommendations and will develop a comprehensive social media plan to include branding, content, and privacy standards by August 31, 2019 and a process for evaluating social media platforms on which the Department operates its official social media accounts by August 31, 2019.

Overall Conclusion and Executive Management Response

Maturity Assessment Rating

2 - Repeatable but Intuitive Process Level: The process is defined as having developed a process where several employees follow similar procedures, but the results may not be consistent. The process is not documented and has not been sufficiently evaluated to address risks.

Other possible ratings and definitions can be found in Appendix 1, under Maturity Assessment Rating Definition.

Strengths

The Texas Department of Motor Vehicles (TxDMV or Department) is using social media as a cost effective method of reaching customers. From October 2017 to February 2018, the Department reached 36,391 unique users at an average cost of $0.16 per user for the Department. The cost was associated to the time taken by staff to develop content and respond to customers. Staff that are responsible for social media have job descriptions that discuss their duties related to the administration of official social media accounts.

Additionally, the Automobile Burglary and Theft Prevention Authority (ABTPA) developed division policies for staff interacting on official social media accounts, including coordinating with Government and Strategic Communication Division (GSC) on major social media initiatives. Similarly, the Motor Carrier Division (MCD) developed a comprehensive policy that covered the following;

- which employees are designated to represent the division on social media and the process for posting, addressing communications goals and objectives of using social media,
- responding to or commenting in a personal capacity on official TxDMV posts or comments.
- the types of information the division will post,
- guidelines for crafting posts including tone,
- executive management review and approval prior to posting, and
- information accuracy and confidentiality, and use of copyrighted material.

Although no specific TxDMV wide policies have been developed for social media, the current Information Security Manual, Human Resource Manual, and Record Retention manual effectively extend to online social media activity and behavior when representing TxDMV through official social media outlets. The TxDMV Records Management Manual specifically outlines the Department's records management strategy for social media – prohibiting by policy the sharing of any information on social media that is not transitory or otherwise available as a record copy elsewhere.

Improvements

The Department has not developed an agency-wide social media strategy, including defining security standards for administrators of official TxDMV social media accounts, to align the use of social media throughout the various divisions. Similarly, each division has set up their own security and privacy configurations, such as whether public comment is immediately visible to everyone, for their social media pages, and have different expectations on how to manage customer comments.

A central process for reviewing new platform terms and conditions, the associated risk to the Department, and approving and tracking all official social media accounts has not been formalized or

created. The decision to register an official TxDMV account on new social media platforms is made by each division without required review from the Office of General Counsel, Information Security Section, or the Executive Office.

Below are the audit results that further expand on these areas.

- Audit Result #1: A Department-wide social media strategy does not exist
  - Recommendation #1: The Department should develop guidance for employees administering official social media accounts and content to define and promote the Department's brand and message. (High)
  - Recommendation #2: The Department should develop privacy protocols for official social media accounts. (High)
- Audit Result #2: The Department does not have a process for evaluating, approving, and tracking all its official social media accounts
  - Recommendation #1: The Department should develop and document a process to evaluate, approve, track, and periodically review its continued presence on social media platforms including that terms, conditions, and platform account management configurations are acceptable to the Department. (High)

The detailed audit results can be found under the Audit Results section (begins on page 5).

Executive Director's Management Response

Management appreciates the Internal Audit Division's work and recommendations to improve TxDMV's social media strategy. Management agrees with all three recommendations and will develop a comprehensive social media plan to include branding, content, and privacy standards by August 31, 2020 and a process for evaluating social media platforms on which the Department operates its official social media accounts by August 31, 2019.

Observation

Currently, the Department tracks the number of followers, views, and comments on posts. Further analysis of available social media metrics is generally reserved for specific media campaigns. However, social media platforms such as Facebook and Twitter allow users and page administrators' access to historical activity information that can be leveraged to better measure and target the Department's impact of social media posts on customer interaction. As the Department matures its use of social media, the historical information should be used to measure the impact and cost associated to using and managing social media.

Background

Social media is defined as using Internet-based applications or broadcast capabilities to disseminate and/or collaborate on information. TxDMV has registered accounts on Facebook, Twitter, Instagram, YouTube, Periscope, and Google+, however, only Facebook and Twitter were considered during this audit as they are the primary social media platforms through which the Department engages customers.

The general public, news outlets, and other stakeholders are increasingly utilizing social media outlets as a primary information and communication source for a growing segment of the population. Through the appropriate use of social media, the Department has the opportunity to do the following:

- Increase traffic to websites and services
- Communicate with the public more directly and efficiently
- Increase outreach and brand recognition with stakeholders, and
- Turn negative complaints into positive experiences with timely customer service.

Social media presents a variety of legal, security, privacy, human resources, and records management challenges not found with traditional information technology or communication channels. With a growing dependency on social media as a primary communication channel, it is increasingly important to have a well-planned social media strategy to mitigate risks inherent in social media communications including a lack of control over engagements with customers, inadvertent posting of ill-advised content, and inconsistent internal processes or lack of governance.

TxDMV uses social media to directly address customer questions and complaints, promote programs and initiatives, broadcast and receive public safety information during disasters, and share industry news. The Department maintains multiple social media accounts including three Facebook pages and three Twitter handles targeted to both the general public and industry-specific audiences such as motor carriers and law enforcement agencies. The Department has over 10,900 followers on Facebook and over 4,214 followers on Twitter across all official accounts. Designated social media administrators within the GSC, MCD, and the ABTPA moderate the accounts.

GSC administers the Texas Department of Motor Vehicles Twitter (@TxDMV) and Facebook accounts, the MCD administers the TxDMV Motor Carrier Services Twitter account (@TxDMVGoTrucksGo) and Facebook page (@TxDMVMCD), and ABTPA administers the ABTPA Twitter (@TxAutoBurgTheft) and Texas Auto Burglary and Theft Prevention Authority Facebook page.

A core asset of social media is the ability to target and directly engage with a specific customer base. In the past six months, the GSC, MCD, and ABTPA divisions have made 50 Facebook posts and 178 Twitter posts to provide information on Department programs and disaster information, and engage customers to address questions and customer feedback. Those posts had the following reach to customers, as shown below in Table 1 and 2.

Table1 – Facebook Post Impact Analysis

Type of Post	Number of Posts	Lifetime Post Total Reach[1]	Lifetime Engaged Users[2]
ABTPA	26	4348	259
GSC	16	31410	1163
MCD	8	633	3
Grand Total	**50**	**36391**	**1425**

Table 2 – Twitter Post Impact Analysis

Type of Post	Number of Posts	Number of Impressions[3]	Number of Engagements[4]
GSC	170	295334	1993
MCD	8	1962	4
Grand Total	**178**	**297296**	**1997**

This audit was included in the fiscal year (FY) 2018 Audit Plan. The Internal Audit Division conducted this performance audit in accordance with Generally Accepted Government Auditing Standards and in conformance with the Internal Standards for the Professional Practice of Internal Auditing. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The audit was performed by Derrick Miller (Senior Auditor), Jacob Geray (Staff Auditor), and Sandra Menjivar-Suddeath (Internal Audit Director).

In accordance with the Texas Internal Auditing Act, this report is distributed to the Board of the Texas Department of Motor Vehicles, Governor's Office of Budget, Planning, and Policy, Legislative Budget Board. State Auditor's Office, and the Sunset Advisory Commission. The report was also distributed to the Department's executive management team.

[1] The number of people who had a page's post enter their screen. (Unique Users)
[2] The number of unique people who engaged in certain ways with a page post, For example by commenting on, liking, sharing, or clicking upon particular elements of the post. (Unique Users)
[3] Impressions represent the number of times that a given Tweet has been viewed on the Twitter platform.
[4] Engagements represent the number of times that a given Tweet was engaged upon by a viewer. Engagements include, but are not limited to, Retweets, Replies, Clicks.

Audit Results

A Department-wide social media strategy does not exist.

Condition

TxDMV uses social media for varying reasons that have not been strategically aligned to make sure Department goals and objectives are met. Each division has their own process to manage social media content and customer interaction and does not follow the same guidelines. For example, GSC relies on staff expertise and experience to manage social media content and customer interactions, without formal documented guidance, while ABTPA and MCD have policies in place for customer interaction. The policies developed by ABTPA and MCD vary in detail, with ABTPA policy addressing high-level division communication goals and the MCD policy describing staff processes for posting content.

Similarly, each division has set up their own security and privacy configurations for their social media pages, such as whether public comment is immediately visible to everyone, and have different expectations on how to manage customer comments.

Effect

TxDMV customer engagement through social media has remained relatively flat, with a net increase of five followers, and varied significantly between divisions from October 2017 to February 2018. GSC reached 31,410 customers while ABTPA reached 4,348 and MCD reached 633 customers through its Facebook posts. Similarly, only 259 ABTPA and three MCD customers were actively engaged (e.g., commented, reacted, or shared postings) while GSC had 1,162 customers actively engage with Facebook posts in that same time period.

The varying policies could allow for inappropriate language or sensitive information to be posted by the public on the Department's social media. Currently some TxDMV social media pages allow commenting to be immediately viewable by the public without review or approval by the Department. Furthermore, the different social media platforms' available security configuration options may not align with TxDMV information security policy.

Cause

The Department has not developed an agency-wide social media strategy, including defined security standards for administrators of official TxDMV social media accounts, to align the use of social media throughout the various divisions.

Criteria

A well-planned social media strategy mitigates risks and provides the agency a roadmap toward continued growth and success while allowing divisions to achieve their own business goals using social media.

Evidence

- Divisions have differing privacy and security configurations across divisions and platforms.
  - GSC disabled the ability to send private messages because Facebook users have sent personally identifiable and vehicle identifiable information covered by the Driver's Privacy Protection Act. GSC disabled the ability to rate and review because the majority of reviews

reflected experiences with the Texas Department of Public Safety and local county tax assessor-collectors, rather than with TxDMV.
    - MCD does not review comments before they are posted. MCD does allow followers to send private messages and rate and review the division.
    - ABTPA periodically reviews comments after they have been posted, but does not currently review comments before they are publicly visible.
    - GSC's two social media administrators' Facebook roles are associated with their personal Facebook accounts as required by Facebook terms and conditions, while MCD's and ABTPA's social media administrators' Facebook roles are associated with one Facebook account each, created specifically to manage their Facebook pages.
- Divisions have not aligned the purpose and use of social media to the Department's overall strategy.
    - GSC uses social media to promote Department services, media campaigns, and directly answer customer comments and complaints. GSC relies on staff expertise and experience, without formal documented guidance, to manage social media content and customer interactions.
    - ABTPA's uses social media to promote ABPTA's work and grantee's work to combat automobile burglary and theft. ABTPA's operational manual outlines their communication goals for social media.
    - MCD uses social media to engage customers for exchanging information, broadcasting immediate information, and correct misinformation. MCD's divisional social media policy addresses social media communication goals, approved content, staff's social media management responsibilities, and guidelines for tone, accuracy, and confidentiality.

Recommendations

The Internal Audit Division recommends the following:

1.1 The Department should develop guidance for employees administering official social media accounts and content to define and promote the Department's brand and message. (High)

1.2 The Department should develop privacy protocols for official social media accounts. (High)

Management's Response and Action Plan

Management Response & Action Plan 1.1

Management agrees with the recommendation and will develop branding and content standards and messaging guidelines for Department social media accounts.

Management Action Plan Owner(s): Wendy Cook, Government and Strategic Communications Division Information Specialist

Anticipated Completion Date: August 31, 2019

Management Response & Action Plan 1.2

Management agrees with the recommendation and will develop privacy protocols for Department social media accounts.

Management Action Plan Owner(s): Wendy Cook, Government and Strategic Communications Division Information Specialist

Anticipated Completion Date: August 31, 2019

The Department does not have a process for evaluating, approving, and tracking all its official social media accounts

Condition

The decision to register an official TxDMV account on new social media platforms is made by each division. It is up to the division to track the platforms, pages, and usernames which they have registered on behalf of the Department. Review and approval by key divisions and functions, such as the Office of General Counsel, Information Technology Services Division - Information Security Section, or Executive Office are not required.

Effect

The Department may not be aware of its official representation, current or former staff maintaining access to official accounts on various social media platforms. The risk that an unapproved account is created and operated without oversight from TxDMV management is also increased. Without appropriate oversight, social media sites can be used by dissatisfied customers, employees or individuals with an issue against an enterprise to disseminate misinformation and negative information.

The TxDMV may also be accepting legal and information security risks it is unaware of by agreeing to user terms and conditions of social media platforms without a review of said terms and conditions from the Office of General Counsel or the Information Security Section.

Cause

A central process for reviewing new platform terms and conditions and their associated risk to the Department, and approving and tracking all official social media accounts has not been formalized or created.

Criteria

A formal process for approving and tracking official social media accounts helps agencies to address how selected social media platforms and usage continue to align with the Department's mission, address program goals and objectives, and assign roles and responsibilities.

Evidence

- The Department currently has 10 registered social media accounts, including Twitter, Facebook, and YouTube accounts. None of the accounts or platforms were reviewed by the Office of General Counsel or the Information Security Section to ensure terms were acceptable to the Department.
    - The Facebook and Twitter platforms include tools which allow multiple users to be assigned administrator roles while maintaining their own unique login and passwords.
    - The MCD Facebook administrators share a single login and password.
    - GSC's two social media administrators' Facebook roles are associated with their personal Facebook accounts as required by Facebook terms and conditions.
    - MCD's and ABTPA's social media administrators' Facebook roles are associated with one Facebook account each, created specifically to manage their Facebook pages. The

Facebook accounts associated to these pages may not be in agreement with Facebook's terms and conditions.

- GSC maintains a list of the accounts usernames, and staff assigned administrator roles, while MCD and ABTPA were able to verbally provide this information as needed.
- Divisions have not historically sought Executive approval before registering additional social media accounts. Divisions may inform the Executive Office before registering new social media accounts.

Recommendation

The Internal Audition Division recommends the following:

2.1 The Department should develop and document a process to evaluate, approve, track, and periodically review its continued presence on social media platforms including that terms, conditions, and platform account management configurations are acceptable to the Department. (High)

Management's Response and Action Plan

Management Response & Action Plan 2.1

Management agrees with the recommendation and will develop a comprehensive social media management plan to include periodic review and evaluation of Department presence on social media platforms.

Management Action Plan Owner(s): Wendy Cook, Government and Strategic Communications Division Information Specialist

Anticipated Completion Date: August 31, 2019

Appendix 1: Objectives, Scope, Methodology and Maturity Assessment

Objectives

To determine whether the Department has established a social media governance structure designed to protect the Department's brand.

Scope and Methodology

The scope of the audit included official TxDMV Facebook and Twitter accounts, and the Department's social media governance and management policies and procedures as of September 1, 2017.

IAD interviewed designated social media account administrators in the Government and Strategic Communications Division (GSC), Motor Carrier Division (MCD), and Automobile Burglary and Theft Prevention Authority Division (ABTPA), and GSC staff responsible for developing the strategic communications plans for TxDMV projects and initiatives to understand the governance processes and structure over the Department's official social media usage. IAD interviewed other Department personnel including the Human Resources Division Director, General Counsel, Information Security Officer, and TxDMV Records Manager to determine how policies apply to the Department personnel representing TxDMV on official social media accounts.

IAD also performed a cost-effectiveness analysis of the Department's use of social media based on historical social media activity data and metrics from Facebook and Twitter and the time and salary resources the Department dedicates to manage its social media presence.

Information and documents reviewed in the audit included the following:

- TxDMV Strategic Communications Publications Inventory 2017
- TxDMV Human Resources Manual, November 2017
- TxDMV Form 1836 Policy and Benefit Notification for New Employees, January 2018
- TxDMV Form 1836B Policy Notification and Acknowledgement for Employees, November 2017
- TxDMV job descriptions and salaries for designated social media administrator staff
- TxDMV Information Security Manual, May 2017
- TxDMV Form 1828 Information Resources Security Compliance and Confidentiality Agreement, September 2017
- TxDMV Records Retention Schedule, September 2017
- TxDMV Records Management Manual, Version 1.0, February 2018
- TxDMV Motor Carrier Division Online Social Media Policy
- TxDMV Auto Burglary and Theft Prevention Authority Social Media Policy
- Texas Department of Information Resources Social Media Resource Guide, February 2013
- ISACA's Social Media Audit/Assurance Program
- Facebook's page roles definitions and requirements
- Twitter's Terms and Conditions

- Facebook Page Insights activity metrics
- Twitter Analytics activity metrics

Maturity Assessment Rating Definitions

The maturity assessment rating and information were derived from the Control Objectives of Information and Related Technologies (COBIT) 5 IT Governance Framework and Maturity Model and the Enterprise Risk Management (ERM) Maturity Model. The model was adapted for the TxDMV assurance audit purposes and does not provide a guarantee against reporting misstatement and reliability, non-compliance, or operational impacts. Below are the definitions for each rating level.

0 - A rating level of 0, also known as a non-existent process level, is defined as no process has been defined or used.

1 - A rating level of 1, also known as an initial and ad-hoc process level, is defined as a standardized process has not been developed and an ad hoc approach is being used when issues arise.

2 - A rating level of a 2, also known as repeatable but intuitive process level, is defined as having developed a process where several employees follow similar procedures, but the results may not be consistent. The process is not documented and has not been sufficiently evaluated to address risks.

3 - A rating level of a 3, also known as a defined process level, is defined as having a standardized, documented, communicated, and followed process. The process, however, may not detect any deviation due to the process not being sufficiently evaluated to address risks.

4 - A rating level of a 4, also known as a managed and measurable process level, is defined as having a standardized, documented, communicated, and followed process. Management monitors and measures compliance with process. Process is under constant improvement and provides good practice. The use of information technology would help automate workflow and improve quality and effectiveness.

5 - A rating level of a 5, also known as refined level, is defined as having a good process (e.g., standardized, documented, communicated, and followed process) as a result of continuous improvement and the use of technology. Information technology is used in an integrated way to automate workflow and to improve quality and effectiveness.

Texas Department of Motor Vehicles
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May 24, 2018

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

Subject: Engagement Letter for the Internal Audit of eLICENSING

Dear Mrs. Brewster:

The Internal Audit Division (IAD) will be auditing the eLICENSING system. The preliminary audit objectives are to:

- determine if eLICENSING is achieving desired outcomes related to faster services to customers
- review the adequacy of access controls within eLICENSING, and
- determine eLICENSING's impact on the licensing process.

Audit objectives may be revised during the planning phase of the audit. The IAD will provide management with proposed revisions to the objectives, if any, before the IAD finalizes the objectives.

IAD's work may also include the Information Technology Services Division in addition to the Motor Vehicle Division, Enforcement Division, Compliance & Investigations Division and Office of Administrative Hearings. We will conduct the audit in accordance with generally accepted government auditing standards and the Institute of Internal Auditors *International Professional Practices Framework*.

The planning phase of the audit is scheduled from May 25, 2018 to June 29, 2018 and the fieldwork phase is tentatively scheduled from July 2, 2018 to July 30, 2018. The IAD expects to release the audit report in August 2018.

The IAD will meet periodically with management to discuss interim and final audit results. At minimum, the IAD will provide an e-mail update on the audit progress twice a month. In addition, the IAD will provide management with a draft report and request management responses and action plans (if needed). The client will have up to 10 working days to review the audit report prior to being submitted the Executive Director and the Deputy Executive Director for final review.

If you have any questions, please contact me at (512) 465-4118. We look forward to working with the Compliance & Investigations Division, Motor Vehicle Division, Enforcement Division, and Office of Administrative Hearings.

Sincerely,

Sandra Menjivar-Suddeath, CISA, CIA, CGAP
Internal Audit Director

cc: Raymond Palacios Jr., Chairman, TxDMV Board

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Luanne Caraway, Finance and Audit Committee Chairman, TxDMV Board
Brett Graham, Finance and Audit Committee, TxDMV Board
Kate Hardy, Finance and Audit Committee, TxDMV Board
John Henry Walker III, Finance and Audit Committee, TxDMV Board
Mr. Blake Ingram, Vice-Chair, TxDMV Board
Robert “Barney” Barnwell III, TxDMV Board
Guillermo “Memo” Treviño, TxDMV Board
Gary Painter, TxDMV Board
Shelly Mellott, Deputy Executive Director
David Duncan, General Counsel
Carrie Fortner, Board Liaison
Derrick Miller, Senior Auditor
Daniel Avitia, Motor Vehicle Division Director
Corrie Thompson, Enforcement Division Director
Edward Sandoval, Office of Administrative Hearings Director
Tim Menke, Compliance & Investigations Division Director
Mike Higginbotham, Chief Information Officer

Texas Department *of* Motor Vehicles
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DATE: June 14, 2018

Action Requested: Approval

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Tom Shindell, Innovation and Strategic Analyst
Agenda Item: 13
Subject: Department Key Performance Indicators and Balanced Scorecard

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RECOMMENDATION

The TxDMV Board adopt the Balanced Scorecard (BSC) as the department's performance measurement system as a replacement for the Key Performance Indicators (KPIs). The implementation date is July 1, 2018.

PURPOSE AND EXECUTIVE SUMMARY

Purpose
To improve upon the KPIs currently in place by replacing them with a BSC.

Executive Summary
While KPIs collect relevant, pertinent information regarding the department's performance, the data collected and analyzed is all "after the fact" which means management cannot take action in a timely manner to improve outcomes. A distinct advantage of a BSC is that it collects both "actionable" (Lead) data and "after the fact" (Lag) data. Further, the BSC also includes a Strategy Map useful in guiding department activities to achieve desired outcomes. Finally, a BSC includes Strategic Initiatives designed to improve the department.

FINANCIAL IMPACT

No financial impact has been identified.

BACKGROUND AND DISCUSSION

As recommended in the Azimuth report (2011), the department should develop a strategic management system. One component of that system is a BSC.

The TxDMV Executive Team has been working on the development of their BSC for over a year in order to develop the following components:

- Strategy Map
- Objectives
- Measures
- Targets
- Strategy Map Initiatives

While the BSC is a systemic strategic management system, KPIs are important too. The TxDMV Executive Team has decided that KPIs will continue to be maintained, as they provide useful operational data.

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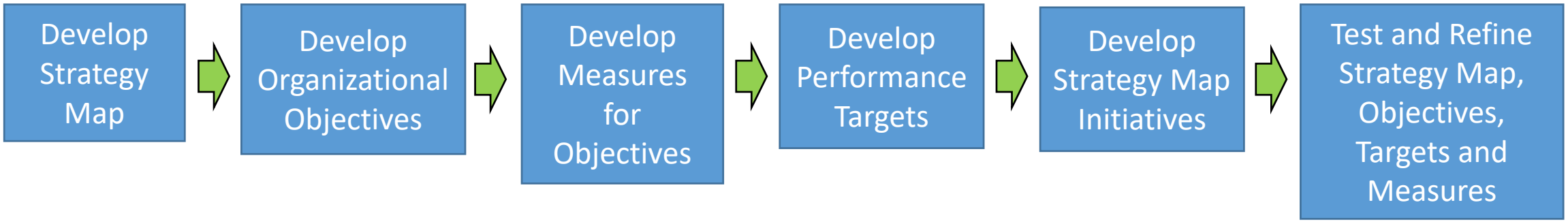
TxDMV Balanced Scorecard

June 2018

Balanced Scorecard Development Process



Objectives, Measures, Targets and Initiatives

Perspective	Objectives	Measures	Targets	Strategy Map Initiatives
Stakeholder	See page 5	See page 9	See page 9	See page 10
Customer	See page 5	See page 8	See page 8	See page 10
Internal Process	See page 5	See page 7	See page 7	See page 10
Learning and Growth	See page 5	See page 6	See page 6	See page 10

Objectives: The major outcomes an organization strives to achieve, monitors and rarely actually achieves. Think continuous quality improvement – always reaching but never obtaining.

Measures: The observable metrics an organization uses to assess its progress towards reaching its objectives. Measures should be concrete, observable and specific. Measures should include both lead (actionable) and lag (results) measures.

Targets: The specific values set for the measures. Often targets are "stretch goals."

Strategy Map Initiatives: The actions an organization takes to meet its objectives. Initiatives are often organized around strategic themes from a strategy map. Try to limit initiatives to 3 or less to ensure success.

TxDMV Vision	***Vision: The Texas Department of Motor Vehicles sets the standard as the premier provider of customer service in the nation.***
TxDMV Mission	***Mission: To serve, protect and advance the citizens and industries in the state with quality motor vehicle related services.***

Stakeholder Perspective
"How should we look to our stakeholders?"

- Providers of value to motor vehicle industries
- Providers of value to taxpayers
- Providers of value to governmental partners

Customer Perspective
"How should our customers see us?"

- Protectors of the public and their assets
- Providers of consistent, predictable and fair regulation
- Providers of products and services when and where customers want them
- Providers of prompt, accurate and clear information

Internal Process Perspective
"What should we be best at?"

Strategic Goal #1: Performance Driven

- Being responsive, agile and effective
- Working with purpose and urgency
- Refining processes to prevent fraud
- Promoting cross organizational teamwork and accountability

Strategic Goal #2: Optimized Services and Innovation

- Enhancing customer convenience and providing multiple service options
- Driving innovation through people, technology and governance
- Removing regulatory barriers and reducing bureaucracy
- Knowing and understanding processes

Strategic Goal #3: Customer Centric

- Fostering and managing customer interaction
- Educating before enforcing
- Offering stakeholder education
- Seeking employee, customer and stakeholder input
- Providing timely and transparent communication

Learning and Growth Perspective
"How can we improve to create value?"

- Ensuring workforce has needed knowledge and competencies
- Fostering a culture of innovation and continuous process improvement
- Creating a learning organization
- Providing leadership and growth opportunities for employees

Perspective	Objectives
Stakeholder Perspective	S 1 Regulated industries receive equitable, predictable and consistent treatment from TxDMV. S 2 Motor vehicle and motor carrier related industries and government entities seek the TxDMV's expertise in developing collaborative solutions.
Customer Perspective	C 1 Customers trust that the TxDMV will safeguard their personal information. C 2 Customers see the TxDMV as a driving force in the deterrence of motor vehicle fraud. C 3 Customers receive TxDMV services when, how and where they want them. C 4 Customers receive correct and complete information and services during their initial interaction with TxDMV.
Internal Process Perspective	IP 1 All employees work with a sense of urgency. IP 2 All employees display accountability and accuracy in work assignments. IP 3 All employees are diligent in identifying and preventing fraud, waste and abuse. IP 4 All employees demonstrate superior customer service skills in all interactions.
Learning and Growth Perspective	LG 1 All supervisors demonstrate superior leadership skills and competencies. LG 2 All employees are engaged in improving the department. LG 3 All employees understand the functions of the department (internal).

Objective	Lead (Actionable)	Lag (Results)	Notes
LG 1 *All supervisors demonstrate superior leadership skills and competencies.*	Percentage of leadership courses completed. Target tbd (when curriculum is final).	Annual department average for Supervisor Competency.	Leadership courses need to be developed, lead target established afterwards; lag target to be included in supervisory course.
LG 2 *All employees are engaged in improving the department.*	Number of improvement opportunities offered agency-wide to employees. Ex: total of workgroups, innovation ideas implemented, operational plan initiatives, performance plan includes feedback on this (improved customer service), team building activities (charitable). Annual/target 12.	Survey of Employee Engagement SEE) Scores – department Q#3. SEE add'l Q#20. Every two years/target 3.5.	
LG 3 *All employees understand the functions of the department (internal) and how their work adds value and contributes to the department.*	Number of employees who complete "TxDMV 101" training course. Every two years/target 100%.	Response on SEE (Q: I understand the core functions of the department). Every two years/target 4.5. Response on SEE to proposed "I understand the core functions of the department."	TxDMV 101 course to be developed.

Objective	Lead (Actionable)	Lag (Results)	Notes
IP 1 *All employees work with a sense of urgency.*	Divisions will develop service delivery expectations. These measures will be rolled up. Monthly/target 85%.	Customer satisfaction survey responses (Getting services when they need them; 1-5 rating). Percentage of customers rating 4 or higher. Monthly/target 85%.	Review customer satisfaction surveys for all divisions; core Qs same; but other Q's can be included; make sure 1-5 rating consistent.
IP 2 *All employees display accountability (or, "are accountable") and accuracy in work assignments.*	Percentage of major processes with polices and procedures. Target TBD after inventory of policies and procedures.	Customer satisfaction survey responses (Did I receive the correct information?). Percentage of customers rating 4 or higher – Monthly/target is 85%.	Need to inventory major processes and determine which processes have both policies and procedures in place.
IP 3 *All employees are diligent in identifying and preventing fraud, waste and abuse.*	Number of agency-wide awareness events and communications completed. Monthly/target 1.	1. Number of reports of fraud, waste and abuse received. Quarterly – TBD after some data collection. 2. Percentage of reports received that are fraud, waste and abuse. Quarterly – TBD after some data collection.	Need to coordinate tracking with GSC on communication notices sent and events held.
IP 4 *All employees demonstrate superior customer service skills in all interactions.*	Percentage of employees who complete customer service training. Mandatory for onboarding. Annual/target 100%.	Department wide customer satisfaction rating (KPI #47). Monthly/target 90%.	

Objective	Lead (Actionable)	Lag (Results)	Notes
C 1 *Customers trust that the TxDMV will safeguard their personal information.*	Training offered and attended Annual/target 100%.	Data breaches by TxDMV reported. Annual/target 0.	Need to develop a DPPA course. Have courses in place such as "Securing the Human" and "Fraud, Waste and Abuse." PCI course is also under development.
C 2 *Customers see the TxDMV as a driving force in the deterrence of motor vehicle fraud.*	Percentage of counties that participate in title and registration fraud training. Target is 85% of counties participate in fraud training (Frequency TBD after training developed).	Number of externally identified reports of fraud to TxDMV. Target is TBD after initial data collection.	Courses in fraud detection need to be developed and/or adapted for TAC staff.
C 3 *Customers receive TxDMV services when, how and where they want them.*	Track the number of implemented improvements that enhance or expand customer access. Annual/target 5.	Annual customer feedback results "I am able to access TxDMV's services when or how I need them." Percent of customers rating 4 or higher Survey mechanism: Website Annual/target 85%.	
C 4 *Customers receive correct and complete information and services during their initial interaction with TxDMV.*	Number of initiatives that prepare TxDMV customers for successful transactions. Annual/target 2.	Percent of customers rating 4 or higher. Annual/target 85%.	Make sure consistent question is asked across all department surveys.

Objective	Lead (Actionable)	Lag (Results)	Notes
S1 *Regulated industries receive equitable, predictable and consistent treatment from TxDMV.*	Number of initiatives that improve consistency in processes and services. Annual/target 2.	Percent of customers rating 4 or higher. Annual/target 85%.	
S2 *Motor vehicle and motor carrier related industries and government entities seek the TxDMV's expertise in developing collaborative solutions.*	Number of outreach efforts (workgroups, speaking engagements, etc.). Annual/ target 10.*	Number of invitations or requests for collaboration. Annual/ target 10.	* Data for baseline to be collected.

Strategy Map Initiatives	Notes
Training Alignment *Theme:* To ensure knowledge is delivered to employees and business partners to support BSC goal attainment.	The following courses need to be developed/adapted: • Leadership Courses for LG 1 • TxDMV 101 Course for LG 3 • Customer Service Course for IP 4 • DPPA Course for C 1 • Fraud Course for TACs for C 2
Policy and Procedure Review *Theme:* To ensure employees have clear guidelines to ensure progress towards BSC goals of accountability, customer service and consistency in treatment/response.	Initial steps for this initiative include: • Inventory major policies and procedures for IP 2 • Develop a plan to complete review
Organizational Survey Alignment *Theme:* To ensure consistent data collection to provide accurate, meaningful information on progress towards BSC goals.	The following survey questions/items need to be standardized and coordinated across the department: • Supervisor Competency Survey for LG 1 • Survey of Employee Engagement questions for LG 2 • Customer Satisfaction Survey items for IP 1, IP 2, IP 4, C 3, C 4 and S 1

Texas Department of Motor Vehicles
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DATE: June 14, 2018

Action Requested: APPROVAL / BRIEFING

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Caroline Love
Agenda Item: 14
Subject: Legislative and Public Affairs Update

PURPOSE AND EXECUTIVE SUMMARY

This briefing is part of a continued series of updates providing the board with information on Texas Department of Motor Vehicles (TxDMV) implementation activities from legislation passed by the 85th Legislature, Regular Session; as well as department planning and preparation for the 86th Legislature, Regular Session.

FINANCIAL IMPACT

None.

BACKGROUND AND DISCUSSION

The briefing includes the status of implementation efforts. Key dates related to the legislative session and effective dates for bills enacted will be included. The Government and Strategic Communications Division provides regular updates throughout the 2018-2019 biennium on the status of implementation efforts.

Additionally, this briefing will include an update on recommended changes in statute to provide for more efficiency in department operations as we prepare for the 86th Legislative Session. The TxDMV Board is charged with considering opportunities to improve the operations of the department and recommending statutory changes to the Texas Legislature under Texas Transportation Code, Section 1001.025. TxDMV's Government and Strategic Communications Division will work with all department divisions and offices to identify statutory changes the board could recommend. Those changes will also be evaluated by stakeholders, with staff providing the board with recommendations for further consideration and approval in fall 2018.

Legislative and Public Affairs Update

I. 85th Legislature Implementation

The 85th Texas State Legislative Session began on January 10, 2017 which started the 140 day process for elected officials to consider changes to state statutes. The legislature adjourned Sine Die on May 29, 2017 and the Governor's opportunity to sign legislation, allow legislation to become law without signature, or veto legislation ended on June 18, 2017.

Most implementation activities from legislation passed during the Regular Session of the 85th Legislature have been completed. Some implementation activities continue as noted below.

SB 2076 by Sen. Rodriguez (House Sponsor: Pickett)

- **Summary:** The legislation changes statute to allow the most recently issued "Certified Copy of Original Title" (CCO) to supersede all preceding iterations of title and serve as the only valid proof of ownership, along with other various clarifications to statute. This also includes new recommendations changing state statute to properly reference and conform to the appropriate Code of Federal Regulations regarding odometer disclosure statement requirements, establishes a process to provide for Vehicle Identification Number (VIN) inspections, and further cleans up references to trailer dimensions and definitions of salvage vehicles. In addition, language was added requiring TxDMV to partner with the Texas Department of Public Safety (TxDPS) on a study of elements related to the titling, registration and inspection of vehicles with any recommendations due to the legislature by December 2018.
- **Implementation:** Most implementation efforts for this legislation are complete. Rules related to trailer size updates (43 TAC 271.3) and Vehicle Identification Number (VIN) inspections (43 TAC 217.141-143 and 144) were proposed and adopted, which became effective 11/14/17. All associated stakeholder outreach efforts have been completed. The Certified Copy of Original Title (CCO) provision

becomes effective January 1, 2019 to allow adequate time for programming and further outreach/guidance to Tax Assessor-Collectors. Implementation efforts, including system programming and training, remain ongoing. The department has entered into an agreement with Texas State University to assist with researching and studying the language requiring an analysis of those elements related to the titling, registration, and inspection of vehicles with recommendations due to the legislature by December 31, 2018. The research and study remain on target for completion within the required time frame.

HB 1959 by Rep. Senfronia Thompson (Senate Sponsor: Larry Taylor)

- **Summary:** The legislation requires the department to conduct a study that identifies and assesses alternative procedures for commercial vehicle registration, licensing, and permitting. In addition, it authorizes TxDMV to collaborate with another state agency or a research division of an institution of higher education in Texas to conduct the study. The study is due to the legislature by December 2021. If the study provides that a pilot program would be feasible, such a program could be conducted with the corresponding report due to the legislature by December 2022. TxDMV and TxDPS staff have met to discuss partnering on this study, and TxDMV has an agreement with Texas State University to start the research process. The study requirements of this legislation are being combined with the study required in SB 2076. Staff continues to meet with the vendor and the studies are on target to provide the reports as outlined in statute.

SB 869 by Sen. Huffman (House Sponsor: Farrar)

- **Summary:** The bill creates a new process for vehicle owners to designate a beneficiary to receive legal title to a vehicle upon the owner's death. The ability for this designation was implemented May 21, with the appropriate guidance provided to county tax assessor-collector offices to assist with processing such requests.

II. Looking Ahead: 86th Legislature

The Texas Department of Motor Vehicles (TxDMV) Board is charged with considering opportunities to improve the operations of the department and recommending statutory changes to the Texas Legislature under Texas Transportation Code, Section 1001.025. TxDMV's Government and Strategic Communications Division will work with all department divisions and offices to identify statutory changes the board could recommend. Those changes will then been evaluated by stakeholders and then brought to the TxDMV Board for further consideration and adoption in fall 2018.

Upon approval, the changes included in the proposed agenda will be discussed with members of the legislature for potential filing as bills. The Government and Strategic Communications Division will provide regular updates prior to and throughout the session on the status of the approved agenda items.

Status of Potential Recommendations

TxDMV staff is in the process of finalizing those items to move forward in the next few months to obtain stakeholder feedback. Some of the items under consideration include those recommendations previously adopted by the board that have not yet become law, as well as some helpful statutory clarifications that have been identified as a result of Hurricane Harvey impacts.

Staff will be begin working with the TxDMV Board's Legislative Committee to coordinate a meeting later this summer or early in the fall to review feedback from stakeholders and interest groups on the potential recommendations. It is anticipated a final group of recommendations to the 86th Legislature will be ready for review by the full TxDMV Board by October this year, which will allow for board approval prior to the start of bill filing for the 86th Legislative Session.

Key Dates for the 86th Legislature

The 86th Legislative Session is set to begin on January 8, 2019. However, bill filing will begin November 12, 2018 and the last day to file legislation will be March 8, 2019. The 86th Legislature will adjourn Sine Die on May 27, 2019.

Other key dates to keep in mind as we move toward the 86th Legislative Session include the department's Sunset Advisory Commission hearings. The TxDMV public hearing will be held on May 23 (and May 24 if needed); and the Sunset Advisory Commission will consider decisions on Sunset member and staff recommendations related to department operations at their August 29 (and August 30 if needed) hearings. Those decisions will provide the outline for the department's continuing legislation to be filed for the 86th Legislature to consider further.

Texas Department of Motor Vehicles
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DATE: June 14, 2018

Action Requested: Briefing

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Jeremiah Kuntz, Vehicle Titles and Registration Division
Agenda Item: 15
Subject: Assembled Vehicles Working Group Update

RECOMMENDATION

This is only a briefing, and no decisions are requested.

PURPOSE AND EXECUTIVE SUMMARY

The Assembled Vehicles Working Group has identified five primary issues impacting assembled vehicles. These issue are:

1) It is difficult for hobbyists and low-volume manufacturers to comply with the Federal Motor Vehicle Safety Standards (FMVSS). These are federal requirements that apply to the manufacturing of all new motor vehicles regardless of the number of vehicles produced.
2) Texas statutes governing manufacturers (regardless of the number of vehicles produced) and dealers do not provide exemptions to licensing requirements and sales restrictions.
3) There are vast differences in vehicle design, construction, and the assembler's skill level.
4) The absence of certain safety equipment on a motor vehicle may increase the risk of liability for both the operator of the vehicle, who may be an assembler or a subsequent owner, and other drivers that may be involved in a crash causing personal injury or property loss that may have been lessened or avoidable. Additionally, owners may not have disclosed to the insurance company that the original vehicle has been substantially altered from its original design resulting in a loss of insurance coverage.
5) The rule changes in 2012 and 2014 affected existing titles and registration of assembled vehicles.

The Assembled Vehicles Working Group met April 26. The Vehicle Titles and Registration Division hosted the meeting in the Lone Star Room with Division Director Kuntz leading the meeting. The Office of General Counsel, Motor Vehicle Division, and the Government and Strategic Communications Division also represented the department. In addition to department staff, attendees represented the Department of Public Safety, Factory Five Racing, DF Kit Car, Specialty Equipment Market Association, Texas Automobile Dealers Association, American Association of Motor Vehicle Administrators, Assembled Vehicles Coalition of Texas, and Tax Assessor-Collectors. Members of the working group not present included representatives of the National Highway Traffic Safety Administration and Auto Theft Task Forces.

Participants were presented with the recommendations provided by the Specialty Equipment Market Association and the Assembled Vehicles Coalition of Texas. The Specialty Equipment Market Association recommended the department seek input from the National Highway Traffic Safety Administration's Chief Counsel regarding these topics. The Assembled Vehicles Coalition recommendations focused on efforts the department should pursue absent action by the federal government. Their four recommendations were: 1) Re-instate all revoked titles and registration, 2) Amend Texas Administrative Rule, 3) Seek legislation to establish new definitions and strengthen inspection procedures; and 4) Clarify and strengthen county tax assessor-collector title and registration processes.

Since the April 26 meeting, the department has been reviewing the issues and the associated statutes and rules impacting assembled vehicles. The department has identified options corresponding to the five primary issues that the board may consider and address through administrative rule. Administrative Rule options include:

- Establishing an assembled vehicle is considered a "used motor vehicle" when utilizing an unmodified frame from a manufacturer of a motor vehicle that has been subject to a previous first retail sale
- Requiring the vehicle description on the vehicle's insurance policy to match the vehicle description entered into the Registration and Title System

- Replacing reference to assembled vehicles complying with federal motor vehicle safety standards with requiring the vehicle contain safety equipment compliant with Transportation Code, Chapter 547
- Establishing a grandfathering provision would provide relief to certain dune buggy owners whose dune buggies correctly reflect the year in which the dune buggy was assembled with the make reflecting ASSEMBLED (ASVE)
- Removing the blanket prohibition on dune buggies

Dune buggies utilizing a used, unaltered frame that have replaced the body would be able to obtain title and registration. Custom vehicles and street rods would still be able eligible for title and registration as they are today.

The proposed amendments would not provide a method for a newly constructed dune buggy that is using a "new" frame rather than a "used" frame. This would prevent pipe frame constructed vehicles such as sand rails and the DF Goblin from obtaining title and registration.

The department is continuing to work on this issue and specific rule language that may be adopted by the TxDMV Board to address concerns until such time as the Legislature has the opportunity to fully address the identified issues.

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Board Policy Documents

Governance Process (10/13/11)

Strategic Planning (10/13/11)

Board Vision (4/7/16)

Agency Boundaries (9/13/12)

KPIs (9/12/14)

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 Legitimating

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.

Key Performance Indicator Measures
Adopted by TxDMV Board 9/12/14

GOAL	STRATEGY	#	MEASURE	Baseline	Target	Actual	OWNER
Performance Driven	Effective and efficient services	1	Average processing time for new franchise license applications	45 days	35 days		MVD
		2	Average processing time for franchise renewals	11 days	5 days		MVD
		3	Average processing time of franchise license amendments	20 days	8 days		MVD
		4	Average processing time for new Dealer's General Distinguishing Number (GDN) license applications	35 days	17 days		MVD
		5	Average processing time for GDN renewals	14 days	7 days		MVD
		6	Average processing time for GDN license amendments	19 days	7 days		MVD
		7	Average turnaround time for single-trip routed permits	33.88 mins	32 mins		MCD
		8	Average turnaround time for intrastate authority application processing	1.47 days	1.4 days		MCD
		9	Average turnaround time for apportioned registration renewal applications processing	2 days	2 days		MCD
		10	Average turnaround time to issue salvage or non-repairable vehicle titles	5 days	4 days		VTR
		11	Average time to complete motor vehicle complaints with no contested case proceeding	131 days	120 days		ENF
		12	Average time to complete motor vehicle complaints with contested case proceeding	434 days	400 days		ENF
		13	Average time to complete salvage complaints with no contested case proceeding	131 days	120 days		ENF
		14	Average time to complete salvage complaints with contested case proceeding	434 days	400 days		ENF
		15	Average time to complete motor carrier complaints with no contested case proceeding	297 days	145 days		ENF
		16	Average time to complete motor carrier complaints with contested case proceeding	133 days	120 days		ENF
		17	Average time to complete household goods complaints with no contested case proceeding	432 days	145 days		ENF
		18	Average time to complete household goods complaints with contested case proceeding	371 days	180 days		ENF
		19	Average time to complete Oversize/Overweight (OS/OW) complaints with no contested case proceeding	40 days	35 days		ENF
		20	Average time to complete OS/OW complaints with contested case proceeding	265 days	250 days		ENF
		21	Percent of lemon law cases resolved prior to referral for hearing	76%	60%		ENF
		22	Average time to complete lemon law cases where no hearing is held	147 days	65 days		ENF
		23	Average time to complete lemon law cases where hearing is held	222 days	150 days		ENF
		24	Percent of total renewals and net cost of registration renewal: A. Online B. Mail C. In Person	A. 15% B. 5% C. 80%	A. 16% B. 5% C. 79%		VTR
		25	Total dealer title applications: A. Through Webdealer B. Tax Office	Baseline in development	A. 5% B. 95%		VTR

GOAL	STRATEGY	#	MEASURE	Baseline	Target	Actual	OWNER
		26	Percent of total lien titles issued: A. Electronic Lien Title B. Standard Lien Title	A. 16% B. 84%	A. 20% B. 80%		VTR
		27	Percent of total OS/OW permits: A. Online (self-issued) B. Online (MCD-issued) C. Phone D. Mail E. Fax	A. 57.47% B. 23.03% C. 11.33% D. 1.76% E. 6.4%	A. 58% or greater B. 25% or greater C. 10% or less D. 1.7% or less E. 5.3% or less		MCD
		28	Average time to complete lemon law and warranty performance cases after referral	Baseline in development	25 days		OAH
		29	Average time to issue a decision after closing the record of hearing	Baseline in development	30 days		OAH
	Implement appropriate best practices	30	Percent of audit recommendations implemented	Baseline in development	90% annual goal for these recommendations which Internal Audit included in a follow-up audit		IAD
Optimized Services and Innovation	Continuous business process improvement and realignment	31	Percent of projects approved by the agency's governance team that finish within originally estimated time (annual)	57%	100%		EPMO
		32	Percent of projects approved by the agency's governance team that finish within originally estimated budget (annual)	71%	100%		EPMO/ FAS
		33	Percent of monitoring reports submitted to Texas Quality Assurance Team (TXQAT) by or before the due date	79%	100%		EPMO
		34	Percent of project manager compliance with EPMO project management standards based upon internal quality assurance reviews	Baseline in development	100%		EPMO
	Executive ownership and accountability for results	35	Percent of employees due a performance evaluation during the month that were completed on time by division.	Baseline in development	100%		HR
		36	Percent of goals accomplished as stated in the directors performance evaluation	Baseline in development	Measure annually at the end of the fiscal year		EXEC
	Organizational culture of continuous improvement and creativity	37	Employees who rate job satisfaction as above average as scored by the Survey of Employee Engagement (SEE)	3.47 (SEE 2012)	3.65	3.60 (SEE 2013)	HR
		38	Increase in the overall SEE score	337 (SEE 2012)	360	351 (SEE 2013)	HR
ic	Focus on the internal customer	39	Percent of favorable responses from customer satisfaction surveys	Baseline in development	90%		EPMO
		40	Annual agency voluntary turnover rate	6.5% (FY 2013)	5.0%		HR
	Increase transparency with external customers	41	Number of education programs conducted and number of stakeholders/customers attending education programs	4.48/80.61	4/80		MCD
		42	Number of education programs conducted and number of stakeholders/customers attending education programs	36/335	42/390		VTR
		43	Number of eLearning training modules available online through the Learning Management System and number of modules completed by stakeholders/customers	eLearning Modules Available - 28 Completed - 735	Available - 31 Completed - 814		VTR

GOAL	STRATEGY	#	MEASURE	Baseline	Target	Actual	OWNER
Customer Centr		44	Number of Shows and Exhibits attended to educate stakeholders/customers about TxDMV services and programs	6	7		MVD
		45	Number of education programs conducted and number of stakeholders/customers attending education programs	3/250	3/250		ENF
		46	Number of education programs conducted and number of stakeholders/customers attending education programs	3/150	4/300		ABTPA
		47	Percent of customers and stakeholders who express above average satisfaction with communications to and from TxDMV	Baseline in development	80%		All Divisions
	Excellent Service Delivery	48	Average hold time	9 min	9 min		CRD
		49	Abandoned call rate	22%	20%		CRD
		50	Average hold time	Baseline in development	1 min		ITS
		51	Abandoned call rate	Baseline in development	5%		ITS
		52	Average hold time	Credentialing -1.6 minutes Permits - 2.08 minutes CFS - 54.38 seconds	Credentialing - 1.5 minutes Permits - 2 minutes CFS - 50 seconds		MCD
		53	Abandoned call rate	Credentialing - 7% Permits - 6.42% CFS - 5.63%	Credentialing - 6% Permits - 5% CFS - 5%		MCD
Key:		**Critical**	**Off Target**		**On target**		**Not yet started**

Vision: The Texas Department of Motor Vehicles sets the standard as the premier provider of customer service in the nation.

Mission: To serve, protect, and advance the citizens and industries in the state with quality motor vehicle related services.

Philosophy: The Texas Department of Motor Vehicles is customer-focused and performance driven. We are dedicated to providing services in an efficient, effective and progressive manner as good stewards of state resources. With feedback from our customers, stakeholders and employees, we work to continuously improve our operations, increase customer satisfaction and provide a consumer friendly atmosphere.

Values: We at the Texas Department of Motor Vehicles are committed to: **TEXAS-T**ransparency, **E**fficiency, E**X**cellence**, A**ccountability, and **S**takeholders.