



Texas Department *of* Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.



TxDMV Board Meeting

8:00 a.m.

Thursday, October 1, 2020

**AGENDA
BOARD MEETING
TEXAS DEPARTMENT OF MOTOR VEHICLES
OPEN MEETING VIA
TELEPHONE CONFERENCE CALL*
PURSUANT TO GOVERNOR'S MARCH 16, 2020, TEMPORARY SUSPENSION OF
CERTAIN OPEN MEETING PROVISIONS**
THURSDAY, OCTOBER 1, 2020
8:00 A.M.**

THIS MEETING WILL BE HELD REMOTELY VIA TELEPHONE CONFERENCE CALL*

Instructions for accessing the meeting via Webex:

<https://txdmv.webex.com/txdmv/onstage/g.php?MTID=ea5b4d87c6a1176bae003441909b1dd3c>

Phone number for accessing the meeting via phone:

United States Toll Free: 1-844-740-1264

Event number/Access code: 133 344 7208

Event Passcode: 10012020

You are solely responsible for your system and the installation and use of Webex software.

Link to October 1, 2020, TxDMV Board Meeting Documents:

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

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

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

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

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

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

7 [Proposed 2021 Board Meeting Schedule](#)**4. Executive Director's Reports - Whitney Brewster**

- 8 A. COVID-19 Disaster Response
- 9 B. [Introduction of Motor Vehicle Division Director Roland Luna, Sr.](#)
- 9 C. [Awards, Recognition of Years of Service, and Announcements](#)

CONTESTED CASE

- 10 **5. Dealership's Protest of Manufacturer's Proposed Termination under Texas Occupations Code §2301.453 and §2301.455.** MVD Docket No. 16-0018.LIC; SOAH Docket No. 608-16-4676. [Star Houston, Inc. d/b/a Star Motor Cars v. Volvo Cars of North America, LLC](#). - Roland Luna, Sr.

RULES - ADOPTIONS

- 313 **6. Chapter 211, Criminal History Offense and Action on License - Daniel Avitia and Roland Luna, Sr.**
New, §§211.1 - 211.5
Chapter 215, Motor Vehicle Distribution
Amendment, §215.89
Repeal, §215.88
Chapter 221, Salvage Vehicle Dealers
Amendments, §§221.15, 221.19, 221.111, and 221.112
Repeal, §221.113 and §221.114
(Relating to:
• [Sunset Advisory Commission's recommendation, criminal history evaluations consistent with Occupations Code, Chapter 53:](#)
• [SB 604, relating to changes to salvage dealer licenses;](#)
• [HB 1342, relating to a person's eligibility for an occupational license; and](#)
• [SB 1217, prohibiting consideration of certain arrests in determining license eligibility\)](#)
- 366 **7. Chapter 217, Vehicle Titles and Registration - Jeremiah Kuntz**
Amendments, §217.74
(Relating to [SB 604, requirement of each county tax assessor-collector to make webDEALER available to any licensed motor vehicle dealer requesting access](#))
- 382 **8. Chapter 215, Motor Vehicle Distribution - Jeremiah Kuntz**
Amendments, §§215.150 - 215.158
(Relating to [HB 3760, issuance of buyer's tags for vehicles sold by governmental agencies](#))

RULES - PROPOSALS

- 412 **9. Chapter 217, Vehicle Titles and Registration - Jeremiah Kuntz**
Amendments, §217.3
(Relating to [motor vehicle titling for mopeds](#))

BRIEFING AND ACTION ITEMS**10. Legislative and Public Affairs Committee Update - Committee Chair Scott**

- 420 A. [Sunset Implementation Status Update](#) - (BRIEFING ONLY)
- 428 B. [Driver Licensing Study Update](#) - (BRIEFING ONLY)
- 433 C. [Agency Process for Legislative Session](#) - Caroline Love (BRIEFING ONLY)
- 434 D. [Recommended Legislation to the 87th Legislature Pursuant to Transportation Code, §1001.025](#) - Caroline Love

440 11. [Specialty Plate Designs](#) - Jeremiah Kuntz

- A. Zeta Phi Beta - New Design proposed by My Plates under Transportation Code, §504.851
- B. Texas is Home - New Design proposed under Transportation Code, §504.801
- C. Texas Master Naturalist - New Design proposed under Transportation Code, §504.801

12. Finance and Audit

(BRIEFINGS ONLY)

- 445 A. [FY 2022 - 2023 Legislative Appropriations Request, Baseline, and Exceptional Items](#) - Linda M. Flores and Sergio Rey
- 487 B. [FY 2020 Fourth Quarter Financial Summary Report](#) - Linda M. Flores and Sergio Rey
- 509 C. [Financial Impacts of COVID-19 on TxDMV](#) - Linda M. Flores and Brian Kline
- 514 D. [Internal Audit Division Status](#) - Sandra Menjivar-Suddeath
 - FY 2020 Annual Audit Report

EXECUTIVE SESSION**13. The Board may enter into closed session under one or more of the following provisions of the Texas Open Meetings Act, Government Code, Chapter 551:****Section 551.071** - Consultation with and advice from legal counsel regarding:

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

Section 551.074 - Personnel matters.

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

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

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

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

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

14. Performance Plan of Executive Director

Performance Plan of Executive Director, including any delegations to a board Subcommittee

15. Public Comment

16. Adjournment

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

If you want to comment on any agenda item (including an open comment under Item #15), you must send an email to GCO_General@txdmv.gov or call (512) 465-5665 with one of the following prior to the agenda item being taken up by the Board:

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

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

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

Any individual with a disability who plans to attend this meeting and requires auxiliary aids or services should notify the department as far in advance as possible, but no less

than two days in advance, so that appropriate arrangements can be made. Contact David Richards by telephone at (512) 465-1423.

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

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

2021 Board Meeting Hold Dates are highlighted yellow

Hold dates for full Board Meetings are first Thursdays of February, April, June, August, October and December; and at the call of the Chairman.

Call to Order is typically is 8:00 a.m., unless otherwise updated. Availability and quorum will be confirmed with all Board Members. See legend below.

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Roland D. Luna, Sr. serves as the Director of the Motor Vehicle Division for the Texas Department of Motor Vehicles (TxDMV). Roland began his service with the Texas Department of Public Safety as a State Trooper and promoted into other positions which include serving as an Agent on the Protective Detail for Governor Greg Abbott (then Attorney General), a Criminal Investigation Sergeant, and Lieutenant in Internal Affairs.

Roland served in various directorships as an Assistant Chief with the Texas Alcoholic Beverage Commission, Deputy Inspector General and Chief of Investigations for the Health and Human Services Commission Office of the Inspector General, and Chief Inspector General for the Texas Juvenile Justice Department (TJJD) Office of the Inspector General where he reported to the TJJD Board. Prior to joining the TxDMV, Roland served as the Director of Administration for the Williamson County Judiciary.

In Roland's career, he has developed and implemented state-wide compliance, monitoring, regulatory, and investigative initiatives, served on various committees and advisory boards, and provided instruction at conferences, academies, and universities.

Roland earned a Bachelor of Business Administration from Sam Houston State University and a Master of Arts in Legal Studies from Texas State University. He is certified in mediation and legal research, holds a Texas Commission on Law Enforcement Master Peace Officer License, and is a certified Inspector General.



Board Meeting Date: 10/1/2020

BRIEFING

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

RECOMMENDATION

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

PURPOSE AND EXECUTIVE SUMMARY

The Executive Director announces the name of individuals who retired from the agency and recognizes employees who have reached a state service milestone of 20 years and every five-year increment thereafter. Recognition at the October 1, 2020 Board Meeting for state service awards and retirements include:

- Lori Ely in Human Resource Division reached 20 years of state service
- Rachel Vasquez in Vehicle Titles and Registration reached 25 years of state service
- Rosario Villarreal in Motor Carrier Division reached 40 years of state service
- John Poole III in Motor Carrier Division reached 25 years of state service
- Lisa Conley in Finance and Administrative Services Division reached 30 years of state service

- Ellen Blackwell – Motor Vehicle Department
- Juanita Bustos - Vehicle Titles and Registration Division – San Antonio
- Victoria Nichols – Compliance and Investigations Division

FINANCIAL IMPACT

No financial impact.

BACKGROUND AND DISCUSSION

No additional background and discussion.

To: Texas Department of Motor Vehicles Board
From: Roland Luna, Motor Vehicle Division Director
Agenda Item: 5
Subject: Dealership's Protest of Manufacturer's Proposed Termination under Tex. Occ. Code § 2301.453 and § 2301.455. MVD Docket No. 16-0018.LIC; SOAH Docket No. 608-16-4676. *Star Houston, Inc. d/b/a Star Motor Cars v. Volvo Cars of North America, LLC.*

RECOMMENDATION

This contested matter is between two license holders. No staff recommendation is being made.

PURPOSE AND EXECUTIVE SUMMARY

The State Office of Administrative Hearings (SOAH) issued a Proposal for Decision (PFD). This contested case involves Star Houston, Inc. d/b/a Star Motor Cars' (Star) protest of the franchise termination proposed by Volvo Cars of North America, LLC (Volvo), a distributor.

BACKGROUND

On February 8, 2016, and on February 28, 2016, Volvo notified Star of its intent to terminate the franchise. On April 1, 2016, Star protested Volvo's proposed termination.

On May 25, 2016, the parties participated in mandatory mediation. The Motor Vehicle Division referred this contested case matter to SOAH on June 16, 2016. On August 8, 2017, and on June 28, 2018, Star amended its Notice of Protest, including defenses and counterclaims against Volvo.

A panel of two administrative law judges (ALJs) conducted the hearing on the merits September 11-14 and 26-27, 2018. After the administrative hearing, but before the ALJs closed the evidentiary record, the ALJs directed Volvo to consider—in its regular course of business—Star's application to build a new sales and service facility on property adjacent to the current facility.¹ Volvo considered Star's relocation application and declined Star's request.²

The ALJs closed the record of the administrative hearing on February 7, 2019, and issued the PFD on April 2, 2019. The ALJs found that Volvo met its burden to show good cause for the termination and recommended the Board deny Star's protest of the termination.

¹ SOAH Order No. 20 (November 12, 2018).

² By their December 19, 2018, Order No. 22, the ALJs admitted Exhibits 250 and 251 into the evidentiary record in this termination matter, stating that the documents reflect Volvo's due consideration of Star's application and the documents clearly stated Volvo's reasons for declining the relocation request.

On May 14, 2019, Star and Volvo both filed Exceptions to the PFD. On June 7, 2019, Star and Volvo both filed a Reply to the other party's Exceptions to the PFD. The ALJs considered the Exceptions and the Reply pleadings and issued their Exceptions Letter on June 24, 2019. The ALJ's Exceptions Letter recommended minor changes to Findings of Fact 63 and 201 to clarify or correct any overstatement of the degree to which Star is isolated from other luxury auto dealerships.

Attachments

The following documents are attached to this Executive Summary:

1. June 23, 2016 Notice of Hearing
2. April 2, 2019 SOAH ALJs' Proposal for Decision
3. May 14, 2019 Star's Exceptions to the ALJs' PFD
4. May 14, 2019 Volvo's Exceptions to the ALJs' PFD
5. June 7, 2019 Star's Reply to Volvo's Exceptions to the PFD
6. June 7, 2019 Volvo's Reply to Star's Exceptions to the PFD
7. June 24, 2019 SOAH ALJs' Exceptions Letter

**TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION**

Star Houston Inc. d/b/a Star Motor Cars,	§	
Protestant	§	
	§	
v.	§	
	§	SOAH DOCKET No. 608-16-4676.LIC
Volvo Cars of North America, LLC	§	DOCKET NO. 16-0018 LIC
Respondent	§	
	§	
	§	

NOTICE OF HEARING

Pursuant to formal written protest filed with the Motor Vehicle Division of the Texas Department of Motor Vehicles, by the above-named Protestant, a copy of which is attached hereto and incorporated herein by reference, and under the authority of TEX. OCC. CODE §2301.001 *et seq.*, the Motor Vehicle Division has docketed and referred the matter to the State Office of Administrative Hearings (SOAH) for hearing in accordance with 1 TEX. ADMIN. CODE §155.1, *et seq.* and 43 TEX. ADMIN. CODE §215.301, *et seq.* A preliminary hearing has been scheduled at the SOAH offices located at the William P. Clements Building, 300 West 15th Street, 4th Floor in Austin, Texas for July 18, 2016, 2:00 pm.

The purpose of the hearing is to determine whether:

1. Respondent's notice of termination complied with TEX. OCC. CODE §2301.453;
2. Respondent established good cause for termination in accordance with TEX. OCC. CODE §2301.455;
3. Sanctions, penalties, or orders are appropriate under Texas Occupations Code Chapter 2301, including TEX. OCC. CODE §2301.651, §2301.801 and §2301.802;
4. Declaratory decisions or orders are required in accordance with TEX. OCC. CODE §2301.153(a)(8).

In accordance with 1 TEX. ADMIN. CODE §155.501, the factual allegations listed in the attached

Complaint or in this Notice of Hearing could be deemed admitted, and the relief sought in the Complaint and Notice of Hearing might be granted by default against the defaulting party that fails to appear at hearing.

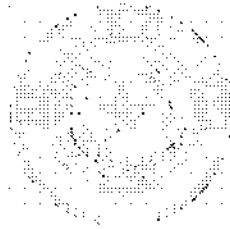
The statutory stay previously noticed under TEX. OCC. CODE §2301.803 continues to be in effect. TEX. OCC. CODE §2301.453 (f)(3) provides that the party seeking to terminate or discontinue the franchise may not do so until the Board issues a final order of decision in this matter.

DATE: June 22, 2016

Daniel Avitia

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

State Office of Administrative Hearings



Lesli G. Ginn
Chief Administrative Law Judge

April 2, 2019

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

VIA INTERAGENCY MAIL

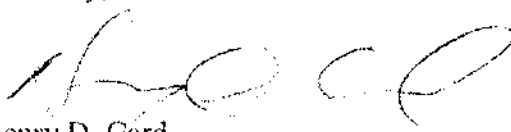
RE: **Docket No. 608-16-4676.LIC; MVD Docket No. 16-0018.LIC; Star Houston, Inc. d/b/a Star Motor Cars v. Volvo Cars of North America, LLC.**

Dear Mr. Avitia:

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

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

Sincerely,


Henry D. Card
Administrative Law Judge

Sincerely,


Sarah Starnes
Administrative Law Judge

HDC/SS/sh

Enclosure

cc: David Coffey III and Martin Alaniz, Coffey & Alaniz PLLC, 13810 FM 1826, Austin, TX 78737 - **VIA REGULAR MAIL**
Brit T. Brown and Benjamin A. Escobar, Akerman LLP, 1300 Post Oak Blvd., Suite 2500, Houston, TX 77056-3000 - **VIA REGULAR MAIL**
Marie Medina, Docket Clerk, Texas Department of Motor Vehicle, 4000 Jackson Avenue, Austin, Texas 78731 - **VIA INTERAGENCY MAIL** (with 1 CD)

SOAH DOCKET NO. 608-16-4676.LIC
MVD DOCKET NO. 16-0018.LIC

STAR HOUSTON, INC. d/b/a STAR MOTOR CARS, Protestant	§ § § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
v. VOLVO CARS OF NORTH AMERICA, LLC, Respondent		

TABLE OF CONTENTS

I.	JURISDICTION, NOTICE, AND PROCEDURAL HISTORY	2
II.	APPLICABLE LAW	4
	A. Statutory Framework for Termination.....	4
	B. Statutory Framework for Star’s Counterclaims	6
III.	FACTUAL BACKGROUND	9
	A. The Parties.....	9
	B. Star’s Dealership.....	10
	1. The Dealer Agreement.....	10
	2. Star’s Facilities	13
	a. Location.....	13
	b. Existing Facility and Operations.....	14
	c. Planned New Facility	21
	3. The Houston Market and Star’s Performance	24
	a. Planning Volume and Sales Objectives.....	25
	b. Sales Effectiveness	27
	c. Pump-In Sales	28
	d. Service Concerns	29
	e. Other Areas of Concern to Volvo.....	31
	4. Customer Satisfaction Scores	32
	5. Improvement Efforts	37

C.	Dealer Incentive Programs	41
1.	Facility Investment and Support Initiative	41
2.	Retailer Bonus Program.....	42
a.	Volvo 360 Program	43
b.	Factory Option/Package Bonus/Sales Mix.....	43
c.	CSI/SSI Bonuses.....	43
d.	Retailer Standards	44
3.	Impact on Star's Ability to Compete/Alleged Violations of Law.....	44
a.	Star's Witnesses	44
b.	Volvo's Witnesses	47
IV.	EXPERT OPINIONS	51
A.	Testimony and Opinions of Jay Lytle	51
1.	Sales Effectiveness	51
a.	Fairness of Sales Effectiveness.....	53
b.	Alternative Performance Measures	54
2.	Potential Causes of Poor Performance.....	55
3.	Bonus Programs	59
B.	Testimony and Opinions of Edward Stockton	61
1.	Relevance of Sales Effectiveness	61
2.	Other Performance Considerations	62
3.	Star's Anticipated New Facility	64
4.	Bonus Programs	66
a.	Retailer Bonus Program	67
b.	FISI Program.....	69
V.	ADEQUACY OF TERMINATION NOTICE	70
VI.	ANALYSIS OF STATUTORY GOOD-CAUSE FACTORS FOR TERMINATION	72
A.	Star's Sales in Relation to the Market	72
B.	Star's Investment and Obligations	76
C.	Injury or Benefit to the Public	78
D.	Adequacy of Star's Service Facilities, Equipment, Parts, and Personnel	80

E.	Star's Warranty Service.....	83
F.	Compliance with the Franchise.....	84
G.	Enforceability and Reasonableness of Star's 1970 Franchise Agreement.....	90
H.	Other Relevant Circumstances.....	91
VII.	ANALYSIS OF STAR'S COUNTERCLAIMS AND DEFENSES.....	92
A.	Effect of Bonus Programs on Star's Sales	92
B.	Star's Counterclaims.....	95
1.	Summary of Statutory Claims	95
2.	Robinson-Patman Act (15 U.S.C. §13(a)).....	97
3.	Applicable Code Sections.....	98
4.	Agency Case Law.....	99
a.	<i>New World Car Nissan, Inc. d/b/a World Car Hyundai v. Hyundai Motor America</i> , SOAH Docket No. 608-14-1208.LIC (Department Order on Rehearing Nunc Pro Tunc Aug. 17, 2017 (<i>World Car Hyundai</i>))	99
b.	<i>Star Houston, Inc. d/b/a Star Motor Cars v. Mercedes-Benz, USA</i> , TxDOT MVD Docket No. 02.0028.LIC (PFD Mar. 6, 2008; Final Order July 10, 2008) (<i>Star 2</i>)	100
c.	<i>In the Matter of Nissan Motor Corp. in USA</i> , TxDOT MVD Docket No. 97-316 (PFD July 23, 1998; Final Order Jan. 14, 1999) (<i>Nissan</i>)	101
d.	<i>In the Matter of Ford Motor Company</i> , TxDOT MVD Docket No. 01-0211-ENF (PFD May 4, 2005; Dismissed by Final Order Feb. 8, 2007) (<i>Lincoln Premiere</i>)	102
e.	<i>Autobahn Imports, LP v. Volvo Cars of North America, LLC</i> , SOAH Docket No. 608-09-4053.LIC (PFD Sept. 27, 2018) (<i>Autobahn</i>).....	102
5.	FISI Counterclaims	102
a.	Code § 2301.467(a)(1)	103
b.	Code § 2301.468.....	104
c.	Code § 2301.473(2)(C).....	104
d.	Code § 2301.478.....	105
6.	Retailer Bonus Program Counterclaims	105
a.	Volvo 360 Program	105

SOAH DOCKET NO. 608-16-4676.LIC

PROPOSAL FOR DECISION

PAGE iv

i.	Code § 2301.451	105
ii.	Code § 2301.467(a)(1) and (2)	106
iii.	Code § 2301.468	107
iv.	Code § 2301.476	107
v.	Code § 2301. 478	107
b.	CSI/SSI Bonuses.....	107
i.	Code § 2301.467(a)(1) and (2)	108
ii.	Code § 2301.468	110
iii.	Code § 2301.476	111
iv.	Code § 2301.478	111
v.	Effect of ALJs' Conclusions.....	111
c.	Factory Options Bonus	111
d.	Retailer Standards Bonus	112
VIII.	CONCLUSION	113
IX.	FINDINGS OF FACT.....	114
	<i>Procedural Background</i>	114
	<i>The Parties & the Dealer Agreement</i>	115
	<i>Star's Facilities</i>	116
	<i>Pump-In Sales</i>	120
	<i>Service Department & Other Concerns</i>	120
	<i>Customer Satisfaction Scores</i>	121
	<i>Improvement Efforts</i>	122
	<i>Dealer Incentive Programs</i>	123
	<i>Statutory Good-Cause Factor: Star's Sales in Relation to the Market</i>	124
	<i>Statutory Good-Cause Factor: Star's Investment and Obligations</i>	126
	<i>Statutory Good-Cause Factor: Injury or Benefit to the Public</i>	127
	<i>Statutory Good-Cause Factor: Adequacy of Star's Service Facilities, Equipment, Parts, and Personnel</i>	127
	<i>Statutory Good-Cause Factor: Star's Warranty Service</i>	128

	<i>Statutory Good-Cause Factor: Compliance with the Franchise</i>	129
	<i>Statutory Good-Cause Factor: Enforceability of the Dealer Agreement.....</i>	131
	<i>Statutory Good-Cause Factor: Other Relevant Circumstances.....</i>	131
	<i>Effect of Bonus Programs on Star's Sales.....</i>	132
	<i>Star's Counterclaims.....</i>	132
X.	CONCLUSIONS OF LAW	135

**SOAH DOCKET NO. 608-16-4676.LIC
MVD DOCKET NO. 16-0018.LIC**

STAR HOUSTON, INC. d/b/a STAR MOTOR CARS, Protestant	§	BEFORE THE STATE OFFICE
	§	
	§	
	§	
v.	§	OF
	§	
VOLVO CARS OF NORTH AMERICA, LLC, Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Star Houston, Inc. d/b/a Star Motor Cars (Star),¹ a franchised dealership, filed a protest with the Texas Department of Motor Vehicles (Department or Board)² regarding the decision by Volvo Cars of North America, LLC (Volvo) to terminate its dealership agreement for the Volvo dealership Star has operated since 1970 in Houston, Texas. Star also asserted counterclaims challenging the legality of two of Volvo's dealer incentive programs.

After considering the evidence and arguments presented, the Administrative Law Judges (ALJs) find that Volvo's notice of termination complied with Texas Occupations Code (Code) § 2301.453 (the procedural process for termination) and Volvo has established good cause to terminate Star's dealer agreement in accordance with Code § 2301.455. The ALJs further find that Volvo's customer-satisfaction bonus program (a component of one of the dealer incentive programs at issue) violates two Code provisions, but those violations do not affect the determination that there is good cause to terminate the franchise. Star failed to show that Volvo's incentive programs otherwise violate the Code or federal antitrust law as alleged.

¹ Star also owns several other dealerships. Unless otherwise specified, in this Proposal for Decision (PFD) "Star" refers only to the Volvo dealership at issue.

² The applicable statutes reference the "board" which, for purposes herein, is the Department and its governing board. Tex. Occ. Code (Code) §§ 2301.002(2), .005(a). The terms Board and Department are used interchangeably in this PFD.

Accordingly, the ALJs recommend termination of Star's franchise. The ALJs further determine that sanctions, penalties, and further orders or declaratory decisions are not required. Even though the ALJs find a portion of Volvo's dealer incentive programs violates certain Code provisions, those violations do not affect their good cause determination and Star does not request any specific action on that issue from the Department. Therefore, the ALJs do not recommend any particular action by the Department regarding the discontinuation of the customer-satisfaction bonus program, but leave that issue to the Department's discretion.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this proceeding. These matters are addressed in the findings of fact and conclusions of law without further discussion.

On February 8, 2016, Volvo sent a letter notifying Star of its intent to terminate Star's dealership agreement. An amended termination notice was sent on February 29, 2016. On April 1, 2016, Star filed its Original Notice of Protest with the Department. On June 16, 2016, the Department referred the protest to the State Office of Administrative Hearings (SOAH) for a contested hearing and issued a Notice of Hearing to the parties. On the same date, the Department referred to SOAH a related protest proceeding involving Star's objection to a new Volvo dealership planned for the Houston market (the Add-Point Proceeding).³ This case was then abated until the Add-Point Proceeding was concluded.⁴

The hearing on the merits in the Add-Point Proceeding was held on June 19-20, 2017, but the parties reached a settlement during the hearing, and the Add-Point Proceeding was dismissed on July 6, 2017. Shortly after the Add-Point Proceeding ended, Star amended its Notice of

³ See SOAH Docket No. 608-16-4675.LIC. Star's Add-Point Proceeding was consolidated with two other protests filed against the same proposed dealership, in SOAH Docket Nos. 608-16-4673.LIC and 608-16-4674.LIC.

⁴ SOAH Order No. 4.

Protest and asserted its defenses and counterclaims in this case.⁵ The abatement in this case was then lifted, effective August 11, 2017.⁶

Star filed a Motion to Dismiss that challenged the adequacy of Volvo's termination notice. On January 19, 2018, the ALJs denied the Motion to Dismiss and expressly found that the notice of termination was sufficient pursuant to Code § 2301.453.⁷

The hearing on the merits was held September 11-14 and 26-27, 2018, before ALJs Henry D. Card and Sarah Starnes. At the hearing, Star was represented by its counsel, David Coffey, III and Martin Alaniz. Volvo was represented by its counsel, Brit T. Brown and Benjamin Escobar.

Pursuant to the stipulation of the parties, all of the exhibits from the Add-Point Proceeding were admitted into evidence in this case, along with the testimony of Alfredo Velasco, Star's general manager.⁸ In addition, eight witnesses testified live at the hearing. Volvo presented testimony from (1) Steven Klipstein, Volvo's Senior Manager of Strategic Network Development; (2) Charles William "Bill" De Winne, Volvo's Market Manager for the Texas South Market; (3) Sanford Seidman, Volvo's retired Strategic Network Manager; (4) Rodney Bunch, Star's service manager, who testified for Volvo as an adverse witness; (5) Mr. Alfredo (Al) Velasco, who testified for Volvo as an adverse witness; and (6) Jay Lytle, an expert witness. Star presented testimony from (1) its expert witness, Edward Stockton, and (2) Glenn Seureau, owner of Star. During and after the hearing, the parties had over 300 exhibits admitted into evidence.⁹

⁵ Star's First Amended Original Notice of Protest, Defenses, and Counterclaims was filed on August 8, 2017. A Second Amended Original Notice of Protest, Defenses, and Counterclaims was filed on June 28, 2018.

⁶ SOAH Order No. 6.

⁷ SOAH Order No. 12.

⁸ Mr. Velasco was the only witness who testified in the Add-Point Proceeding before that hearing ended with the parties' settlement.

⁹ See SOAH Order Nos. 18 and 22. Star's exhibits were marked P-#, and Volvo's exhibits were marked R-#.

While this case was pending, but before the hearing on the merits, Star sought permission from Volvo to build a new sales and service facility on property adjacent to the current facility. After the hearing on the merits, on October 15, 2018, Star filed a Motion to Clarify and Enforce the Statutory Stay issued in this Case (Motion to Enforce) alleging that, by failing to act on Star's request, Volvo had violated the statutory stay imposed by Code § 2301.803. The ALJs convened a limited hearing on the Motion to Enforce and, on November 12, 2018, granted the Motion to Enforce and ordered Volvo to consider Star's application as it would any other application, in its regular course of business.¹⁰ Volvo then considered the application and denied permission for the new facility. Star argued that Volvo's denial violated the order granting the Motion to Enforce and filed a new Motion to Enforce, asking the ALJs to enforce their prior order. The second Motion to Enforce was denied.¹¹

The record closed on February 7, 2019, after the parties' post-hearing briefs were submitted.

II. APPLICABLE LAW

A. Statutory Framework for Termination

Code chapter 2301 grants the Department statutory authority to regulate franchise relationships between dealers and motor vehicle manufacturers. Among other things, the Code contains limits on a manufacturer's ability to terminate a franchise agreement with a dealership, requiring that any protested termination must first be approved by the Department.¹² Specifically, Code § 2301.453 provides:

- (a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not terminate or discontinue a franchise with a franchised dealer . . . unless the manufacturer, distributor, or

¹⁰ SOAH Order No. 20.

¹¹ SOAH Order No. 22.

¹² Code § 2301.453.

representative provides notice of the termination or discontinuance as required by Subsection (c) and:

- (1) the manufacturer, distributor, or representative receives the dealer's informed written consent;
- (2) the appropriate time for the dealer to file a protest under Subsection (e) has expired; or
- (3) the board makes a determination of good cause under Subsection (g).

In determining whether to there is "good cause under Subsection (g)" to approve a franchise termination, the Department must determine, following a hearing, whether the manufacturer has established, by a preponderance of the evidence, that there is good cause for the proposed termination.¹³ Code § 2301.455 lists the factors that inform the Department's good-cause determination. It states:

- (a) Notwithstanding the terms of any franchise, in determining whether good cause has been established under Section 2301.453 . . . the board shall consider all existing circumstances, including:
 - (1) the dealer's sales in relation to the sales in the market;
 - (2) the dealer's investment and obligations;
 - (3) injury or benefit to the public;
 - (4) the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make;
 - (5) whether warranties are being honored by the dealer;
 - (6) the parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter; and
 - (7) the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power.¹⁴

¹³ Code § 2301.453(g).

¹⁴ Code § 2301.455(a).

A desire for market penetration, standing alone, does not establish good cause for termination of a dealer's franchise.¹⁵ If a dealer files a timely protest, then the Department is required to notify the manufacturer, a hearing must be held, and the manufacturer may not terminate the franchise until the Department issues a final decision finding good cause for the termination.¹⁶

Volvo has the burden of proving, by a preponderance of the evidence, that there is good cause to terminate Star's franchise.¹⁷

B. Statutory Framework for Star's Counterclaims

As counterclaims and affirmative defenses to termination, Star asserts that two of Volvo's dealer incentive programs—called the "Retailer Bonus Program" and the "Facility Investment Support Initiative"—discriminate against Star and violate several provisions of the Code.

Star alleges that the programs violate Code § 2301.468, which currently states that "[n]otwithstanding the terms of a franchise," a manufacturer may not:

treat franchised dealers of the same line-make differently as a result of the application of a formula or other computation or process intended to gauge the performance of a dealership or otherwise enforce standards or guidelines applicable to its franchised dealers in the sale of motor vehicles if, in the application of the standards or guidelines, the franchised dealers are treated

¹⁵ Code § 2301.455(b).

¹⁶ Code § 2301.453(a)(3), (f)(1)-(3).

¹⁷ Code § 2301.453(g) ; 1 Tex. Admin. Code § 155.427.

unfairly or inequitably in the sale of a motor vehicle owned by the manufacturer or distributor.¹⁸

There are two versions of Code § 2301.468: the 2003 version and the 2011 version. Although the two are substantively the same for the purposes of this proceeding, there is some confusion over which of the two versions applies to Star. The Department has not ruled on the issue and SOAH Proposals for Decision (PFDs) have reached different conclusions.¹⁹

When Code § 2301.468 was amended in 2011, the Texas Legislature indicated that the revised provisions applied to franchises entered into or renewed after that date. Star's franchise was issued well before that date. However, Code § 2301.263 provides that "[a] license issued under this chapter is subject to each provision of this chapter and board rule in effect on the date the license is issued and each provision of this chapter and board rule that takes effect during the term of the license." Distributors must renew their licenses bi-annually.²⁰ Therefore, Code § 2301.263 may make the 2011 version of Code § 2301.468 applicable. Star filed its counterclaims under both versions and the parties generally cited the 2003 version. The outcome is the same under either version. For the purpose of discussing the applicable law, the ALJs conclude the 2011 version applies and cite that version's language in this PFD.

Additionally, Star alleges that Volvo's dealer incentive programs violate:

- Code § 2301.451, which states that a manufacturer cannot "require or attempt to require a franchised dealer to order, accept delivery of, or pay anything of value, directly or

¹⁸ Code § 2301.468. This statute was amended effective September 1, 2011. Prior to that date, the statute stated that a manufacturer could not:

- (1) notwithstanding the terms of any franchise, directly or indirectly discriminate against a franchised dealer or otherwise treat franchised dealers differently as a result of a formula or other computation or process intended to gauge the performance of a dealership; or
- (2) discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor.

Code § 2301.468(1)-(2) (2003 ver.).

¹⁹ The issue and previous PFDs are discussed in Star's Post-Hearing Brief at 11-14.

²⁰ Star's Post-Hearing Brief at 12.

indirectly, for a motor vehicle or an appliance, part, accessory, or any other commodity unless the dealer voluntarily ordered or contracted for the item.”²¹

- Code § 2301.467, which states that, “[n]otwithstanding the terms of any franchise, a manufacturer . . . may not: (1) require adherence to unreasonable sales or service standards; or (2) unreasonably require a franchised dealer to purchase special tools or equipment.”²²
- Code § 2301.473, which prohibits a manufacturer from “requir[ing] as a prerequisite to receiving a model or series of vehicles that a franchised dealer . . . remodel, renovate, or recondition the dealer’s existing facilities.”²³
- Code § 2301.476, which bars manufacturers in most circumstances from directly or indirectly owning, operating or controlling, or acting in the capacity of a dealer.²⁴
- Code § 2301.478, which imposes “a duty of good faith and fair dealing that is actionable in tort” on parties to a franchise agreement.²⁵

Additionally, Star alleges that the Retailer Bonus Program and the Facility Investment Support Initiative violate the Robinson-Patman Act, a federal antitrust act that generally prohibits price discrimination

between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them²⁶

Star has the burden of proving its counterclaims and affirmative defenses by a preponderance of the evidence.²⁷

²¹ Code § 2301.451.

²² Code § 2301.467(a)(1)-(2).

²³ Code § 2301.473(2)(C).

²⁴ Code § 2301.476(c).

²⁵ Code § 2301.478(b).

²⁶ 15 U.S.C. § 13(a).

²⁷ 1 Tex. Admin. Code § 155.427.

III. FACTUAL BACKGROUND

A. The Parties

Star has been operating since 1970, when Glenn Seureau acquired the “almost new” Volvo dealership from its previous owner.²⁸ At the time, Star was the only Volvo dealer in the Houston area; today, Star is one of six Volvo dealers in the Houston area.²⁹

In addition to the Volvo dealership at issue in this case, Mr. Seureau and Star also operate Mercedes, Lotus, and Aston Martin dealerships in the same complex.³⁰ Mr. Seureau is a licensed lawyer, though he indicated that he has not had an active law practice since the late 1960s.³¹ His family is also involved in the Star business. Mr. Seureau has a son who has worked for Star in the past and plans to become involved again in the future, and two grandsons who are currently training to become Volvo salespeople.³² Another family member, Justin Seureau, is currently Star’s manager of pre-owned vehicles.³³ Star’s other managers include service manager Rodney Bunch and new-vehicle sales manager Al Velasco.

Star is in Volvo’s Southern Region, a region that covers thirteen states, extending from Maryland to Florida to Texas.³⁴ Until early 2017, Sanford Seidman was the Senior Manager who oversaw the Southern Region; when Mr. Seidman retired, Steven Klipstein succeeded

²⁸ Tr. 1231 (Seureau). The hearing transcript was sequentially numbered through the six volumes, so citations to the transcript in this Proposal for Decision will cite a page number and a parenthetical indication of the witness whose testimony is cited.

²⁹ Tr. 141 (Klipstein). The Houston dealer immediately to Star’s west—Bubba Gentry’s Volvo Cars West Houston—opened in September 2018, shortly after the hearing on the merits. That location was the subject of the Add-Point Proceeding. Prior to that date, the west Houston dealer was Volvo of Houston, a dealership that closed in 2015.

³⁰ Tr. 663 (Seidman); Tr. 1340 (Seureau).

³¹ Tr. 1220 (Seureau).

³² Tr. 1334, 1420-21 (Seureau); Tr. 1510-11 (Velasco).

³³ Tr. 1371 (Seureau).

³⁴ Tr. 56, 124 (Klipstein); Tr. 650 (Seidman).

him.³⁵ Within the Southern Region, Star is in Volvo's Texas South Market, a market currently comprised of thirteen dealers (three in Louisiana, ten in Texas).³⁶ For most of the last nineteen years, Bill DeWinne has been the Market Manager for the Texas South Market.³⁷

Volvo counts Mercedes, BMW, Audi, Lexus, Acura, and Infiniti among its competitors in the premium or luxury market segment.³⁸ Mr. DeWinne said that the economic recession led to difficult economic circumstances for the Volvo brand in 2009 and 2010, but that sales started picking up in 2011 and, since then, Volvo has made a "fairly dramatic turnaround" and has enjoyed strong sales in recent years.³⁹ Nationwide, according to Mr. Klipstein, Volvo sold more cars in both 2016 and 2017 than at any other point in the brand's history.⁴⁰ As of the hearing in September 2018, Volvo was on track to again have record sales in 2018, and Mr. Klipstein expects that growth to continue in the coming years.⁴¹

B. Star's Dealership

1. The Dealer Agreement

The dealer agreement between Star and Volvo is dated April 1, 1970, and has never been updated.⁴² The agreement, which is only six pages long, has no fixed term, but rather states that it "shall continue until terminated in accordance with the provisions hereof."⁴³ In Clause 6, the parties addressed grounds for termination and, relevant to this case, Clause 6(a)(5) states that the following may be grounds for immediate termination:

³⁵ Tr. 39-40 (Klipstein); Tr. 649-50 (Seidman).

³⁶ Tr. 267 (DeWinne).

³⁷ Tr. 268-69, 72 (DeWinne).

³⁸ Tr. 72-73 (Klipstein); Tr. 705 (Seidman).

³⁹ Tr. 404-05 (DeWinne).

⁴⁰ Tr. 47 (Klipstein).

⁴¹ Tr. 47-48 (Klipstein).

⁴² Ex. P-5; Tr. 61 (Klipstein); Tr. 712 (Seidman).

⁴³ Ex. P-5 at SMC000651.

The breach by the Dealer of any of the provisions of this agreement, including a failure of the Dealer to develop the locality assigned to him to the satisfaction of the Distributor, or failure to conduct his business in accordance with any requirements set forth in this agreement, or the violation of any of the lawful rules, regulations, and policies of The Manufacturer or the Distributor[.]⁴⁴

The agreement's "standard provisions" also includes the following requirements:

3. POLICY

The Dealer shall maintain a place of business and sales room and service facilities satisfactory to the Distributor

During the continuance of this agreement the Dealer shall conform to all rules and regulations not inconsistent with the terms and conditions of this agreement and from time to time issued by the Distributor or by The Manufacturer, and furnished to the Dealer in relation to service to owners of the vehicles, and the Dealer shall sell all such vehicles and service parts therefor in such manner as to maintain and increase the good reputation of The Manufacturer's products.

. . . .

14. ADVERTISING

The Dealer shall, during the continuation of this agreement, advertise and in all ways promote the sale of the vehicles in his locality in a satisfactory and proper manner to the satisfaction of [Volvo]"⁴⁵

According to Volvo, Star's dealer agreement is a form that was developed in 1958, and there is no other Volvo dealer in the United States that still operates under that form.⁴⁶ At least two other form dealer agreements have been developed in the years since, one in the 1990s and another that was issued in 2016. Mr. Seureau refused each of Volvo's requests to update the 1970 agreement in favor of a more contemporary form.⁴⁷ He testified that he refused to accept any of the new agreements offered because he thought they were "unreasonable and unfair" in

⁴⁴ Ex. P-5 at SMC000652.

⁴⁵ Ex. P-5 at SMC000654, SMC000656.

⁴⁶ Tr. 64-65 (Klipstein); Tr. 683 (Seidman); Tr. 1469 (Seureau).

⁴⁷ Tr. 64 (Klipstein); Tr. 658 (Seidman).

the obligations they would impose on the dealer, and that Volvo never attempted to legally impose a new agreement in the face of his resistance.⁴⁸

When the dealer agreement was signed in 1970, Star was the only Volvo dealer in Houston. Thus, at that time, the parties construed the contract term requiring Mr. Seureau to “develop the locality assigned to him” as referring to a duty for Star to develop the Houston area in general.⁴⁹ In years since, Volvo has developed a system of calculating and assigning areas of responsibility (AORs) to dealers, and today Volvo construes the “locality” referred to in the dealer agreement to mean Star’s AOR.⁵⁰ Generally speaking, an AOR is comprised of a group of contiguous ZIP codes that are closest and most convenient to the respective Volvo dealership.⁵¹

In February 2016, Volvo made the decision to terminate Star’s franchise, and sent a notice of termination on February 8, 2016.⁵² An amended notice was sent February 29, 2016.⁵³ The reasons for the amendment were not entirely clear, but the grounds for termination were identical in both termination letters, and the parties agree that the amended notice was the operative notice for purposes of determining the effective date and related deadlines.

The termination notice invoked “Clauses 6 and 7 of the Sales Agreement”⁵⁴ and Code § 2310.453(c), and went on to identify the specific grounds for termination as follows:

Star Motor Cars has consistently failed to adequately represent Volvo Cars in its assigned area of responsibility and has failed to achieve any reasonable degree of sales penetration in its assigned area. Star Motor Cars’ actual sales performance is consistently and substantially below average achieved by other dealers in the

⁴⁸ Tr. 1221-23 (Seureau).

⁴⁹ Tr. 140 (Klipstein); Tr. 1228-29 (Seureau).

⁵⁰ Tr. 127, 140, 151, 226 (Klipstein); Tr. 685, 715 (Seidman).

⁵¹ Ex. R-62 at 007.

⁵² Ex. P-7.

⁵³ Ex. P-8.

⁵⁴ The relevant portion of Clause 6 is quoted above. Clause 7 describes procedures that apply once notice of termination is given and there is no dispute in this case regarding those provisions. Ex. P-5 at SMC000652.

Volvo Cars' dealer body [and] far below that achieved by our competitors in your area of responsibility. This consistently inadequate performance has caused and is continuing to cause significant injury to Volvo Cars in the form of substantial lost sales, lost market penetration, loss of brand recognition and continued loss of market share. Additionally, Star Motor Cars is failing to adequately serve the consuming public by providing inadequate product and customer service. Star Motor Cars' failure is further exacerbated by major shortcomings in its customer and service facilities, equipment and personnel, especially when compared to those of other dealers in the Volvo Cars' dealer body selling and servicing the same line-make. Finally, Star Motor Cars continues to provide inadequate warranty service, which further harms the consumer as well as the Volvo brand.

The reasons provided above have significantly impaired Volvo Cars' representation in the market and injured the Volvo Cars' brand loyalty and acceptance as a result of continued inadequate service to the consuming public. Star Motor Cars has also consistently refused to make an adequate investment to the dealership and the franchise resulting in no measurable improvement or expectation of improvement.⁵⁵

When asked to elaborate on the reasons for Star's termination, Mr. Klipstein, the senior manager who helped make that decision, explained that a combination of factors informed the decision to terminate Star, including that the facility was outdated and "not brand image compliant"; Star's sales effectiveness and performance were consistently poor; and Star's customer satisfaction scores were consistently below average.⁵⁶ Each of these factors is addressed in more detail below.

2. Star's Facilities

a. Location

Star's facility is located on Old Katy Road, a location close to but not visible from Interstate 10.⁵⁷ It is the only Volvo dealership in Houston that is not on a major freeway.⁵⁸ Star

⁵⁵ Ex. P-8 at SMC000660.

⁵⁶ Tr. 129-31 (Klipstein).

⁵⁷ Tr. 92 (Klipstein); 1497-98 (Velasco). According to Star's expert, the location was originally planned to face Interstate 10, but then the interstate was rerouted. Ex. P-155 at 10.

⁵⁸ Ex. P-242 at 117 (Velasco Add-Point testimony).

is easy to get to, according to Mr. DeWinne, but the location lacks the “billboard effect” of more successful locations that are readily visible to potential customers from the freeway.⁵⁹ Mr. Velasco, Star’s sales manager, admitted that the local community is largely unaware of Star.⁶⁰ In fact, Mr. Velasco was unaware of Star’s existence until shortly before he began working there in 2015, despite having lived in Houston for over a decade and having most recently worked for the west Houston Volvo dealer in the AOR adjacent to Star’s.⁶¹

Star’s location may have been suitable in 1970, Mr. Klipstein testified, but today the location is not ideal because it is in a low-traffic area, lacks visibility, and lacks proximity to other premium auto dealers or high-end retail.⁶² If starting anew today, Mr. Klipstein said, Volvo would probably prefer for the dealer in that AOR to be placed in a different location, and he believes the location’s deficits have contributed to Star’s poor performance overall.⁶³ He also noted that, unlike Star, many other dealers have relocated since the 1970s to adjust to changes in the market.⁶⁴ Still, Mr. Klipstein said that other dealers in less-than-ideal locations around the country have been able to achieve high performance by developing business strategies that overcome a location’s deficits, but at Star, “that business plan has yet to be developed in 48 years.”⁶⁵

b. Existing Facility and Operations

Mr. Seureau acquired Star’s facility in 1970, when he purchased the dealership from its previous owner. At the time, Mr. Seureau testified, he considered it a “fabulous facility” that he was fortunate to buy, and Volvo regarded it as satisfactory, as well.⁶⁶ Since then, Star’s facility

⁵⁹ Tr. 282-93 (DeWinne).

⁶⁰ Tr. 1492 (Velasco); Ex. P-242 at 69-70 (Velasco Add-Point testimony).

⁶¹ Tr. 1490-91 (Velasco); Ex. P-242 at 58-60 (Velasco Add-Point testimony).

⁶² Tr. 196-97 (Klipstein).

⁶³ Tr. 196 (Klipstein).

⁶⁴ Tr. 197 (Klipstein).

⁶⁵ Tr. 198, 201 (Klipstein).

⁶⁶ Tr. 1232 (Seureau).

has never relocated or undergone any significant renovation or remodeling.⁶⁷ Mr. Seureau admitted that other Houston-area dealers have periodically upgraded their facilities over the years, while Star has not undergone any major upgrades.⁶⁸

At present, the best any witness could say about Star's facility is that it is "clean" but undeniably dated.⁶⁹ Mr. DeWinne said visiting Star is "almost going to a museum [or] like a time capsule" from the 1970s, describing the facility as "the worst physical facility presentation that I've ever been in or witnessed," and "deficient in almost every area" compared to what other dealers have done in the last 20-30 years.⁷⁰ Mr. Seidman agreed, describing Star as having "probably one of the worst facilities" in the Southern Region.⁷¹ The furniture is dated and no longer consistent with the brand's standards, according to Volvo's witnesses.⁷² Mr. Seureau bristled at this characterization, testifying that Star's furniture was brand-compliant when it was purchased and is still functional and "sure not useless."⁷³ Star's employees acknowledged that customers have sometimes commented on how dated the dealership appears.⁷⁴ Mr. Velasco testified that Star's facility compares poorly to other Houston-area dealers, which offer a more premium experience, and that the need to improve and update the facilities has been a topic of conversation since he started working there.⁷⁵ He estimated that as many as three-quarters of premium-car customers would be turned off by the appearance of Star's facility.⁷⁶

⁶⁷ Tr. 62, 176 (Klipstein).

⁶⁸ Tr. 1354 (Seureau).

⁶⁹ Tr. 281 (DeWinne); Tr. 522, 544 (Bunch); Tr. 667-68, 690-91 (Seidman).

⁷⁰ Tr. 281-82 (DeWinne).

⁷¹ Tr. 691 (Seidman).

⁷² Tr. 193-94 (Klipstein); Tr. 702, 769 (Seidman).

⁷³ Tr. 1299 (Seureau).

⁷⁴ Tr. 523, 555 (Bunch).

⁷⁵ Tr. 1496, 1508 (Velasco).

⁷⁶ Tr. 1496-97 (Velasco); Ex. P-242 at 78 (Velasco Add-Point testimony).

The Volvo sign on the front door of the showroom is so dated that Mr. Klipstein testified he had never seen it anywhere else.⁷⁷ Inside, the showroom is small and there is only room to display four to six vehicles; Mr. Klipstein said they are “parked like they’re in a parking garage,” and fail to adequately showcase the vehicles for customers.⁷⁸ Overall, Mr. Klipstein criticized the appearance of Star’s dealership, describing it as being “as far from a premium level environment as you can get. The items here are obviously very dated, they’re faded, and they’re not communicating any type of premium experience.”⁷⁹

Witnesses described a general reluctance on Mr. Seureau’s part to make any significant upgrades to the facility, or to offer amenities that are standard at other dealerships. Under pressure from Volvo and Star’s managers to offer a comfortable waiting area for customers, a couple of years ago Mr. Seureau agreed to convert a former office into a small lounge for customers who are waiting for service at Star. To create the illusion that the waiting room has large windows, curtains have been hung in front of a painted, cinder-block wall.⁸⁰ The waiting room now has a table, a couch, a couple of chairs, wireless internet access, a television, and a small refrigerator stocked with water.⁸¹ The couch had been at the dealership for at least a decade, but was reupholstered and refurbished when the waiting area was created.⁸² The television is a large, flat-screen model that Volvo provided a few years ago to all dealerships in order to promote new model vehicles; prior to that, Star had only a small, 32-inch tube TV in the waiting room.⁸³ Mr. Seureau also painted the showroom, installed tile flooring, and began offering coffee and water for customers, and Mr. Velasco said all of these changes have helped

⁷⁷ Tr. 96 (Klipstein); Ex. R-29.2 at 015.

⁷⁸ Tr. 95 (Klipstein). While Mr. Seureau disputed that the showroom display was deficient, photographs of Star’s showroom show five new vehicles parked tightly in a row, with little room for customers to open the doors and walk around or between the vehicles. Ex. R-29.2 at 041-49.

⁷⁹ Tr. 96 (Klipstein).

⁸⁰ Tr. 598 (Bunch).

⁸¹ Tr. 523, 555, 593 (Bunch); Tr. 1344-45 (Seureau); Ex. R-29.2 at 059-63.

⁸² Tr. 592-93 (Bunch).

⁸³ Tr. 587-88 (Bunch).

somewhat with improving the impression Star gives customers.⁸⁴ Even with the improvements, however, Star's customers still remark on the lack of amenities like snacks or a selection of drinks that are common at other high-end dealers.⁸⁵ Mr. Bunch said he would love to see these features added to the waiting area—and noted that the closest place for customers to get a snack is half a mile down the road from Star—but said “management” would have to approve the expense and has not done so.⁸⁶

Another point of contention is the Volvo sign outside the dealership. Star's sign is an old “hockey stick” design that is no longer approved by Volvo, has not been manufactured since the 1970s, and is no longer in use at any other dealership in the world.⁸⁷ Mr. Seureau denied that the sign is inadequate, testifying that Star's sign is well lit and shows the Volvo trademark prominently.⁸⁸ Further, he contended that the “hockey stick” sign stands at 30 feet, taller than Houston's current sign ordinance would allow, and replacing the sign would mean he would have to replace it with a 24-foot sign, which would negatively impact Star's visibility.⁸⁹

Mr. Seureau has been asked, over the years, to install more current signage but he refused because “he took objections to some of the terms that all of the other retailers were agreeing to,” according to Mr. Klipstein.⁹⁰ For example, in or about 2007, Mr. Seidman encouraged Star to join Volvo's then-current sign program, which provided that Volvo would own and install a new sign and lease it back to the dealer for fifteen years, with a maintenance program.⁹¹ Mr. Seureau balked, according to Mr. Seidman, because he wanted to own the sign rather than lease it from Volvo; he pointed out that the 1970 dealer agreement provided that signs would be purchased

⁸⁴ Tr. 1507-08 (Velasco); Ex. P-242 at 78-79, 115-17 (Velasco Add-Point testimony).

⁸⁵ Tr. 585-86 (Bunch).

⁸⁶ Tr. 585-86, 623 (Bunch).

⁸⁷ Tr. 93-94, 97 (Klipstein); Tr. 290-91 (DeWinne); Ex. R-29.2 at 013-14.

⁸⁸ Tr. 1302 (Seureau).

⁸⁹ Tr. 1302-03 (Seureau).

⁹⁰ Tr. 97 (Klipstein); *see also* Tr. 290 (DeWinne).

⁹¹ Tr. 659 (Seidman).

from Volvo and owned by the dealer, unless otherwise agreed to by the parties, and Mr. Seureau did not agree.⁹² Eventually, Mr. Seureau agreed to lease the sign from Volvo but refused to pay for Volvo's maintenance program, an offer Volvo rejected.⁹³ Mr. Seureau confirmed this, testifying that Volvo's maintenance plan would have required him to pay about \$45 per month to Volvo, and he was unwilling to incur this expense when his dealer agreement provided that he, not Volvo, would maintain the sign.⁹⁴ According to Mr. Seidman, no other dealers refused to put up the new sign or to accept the maintenance program.⁹⁵ Volvo later adjusted its policy to allow dealers to own, rather than lease, the signs, but Star has not purchased a new sign since that change.⁹⁶ The 1970s-era "hockey stick" sign remains the only prominent signage outside Star's dealership.

Volvo is also dissatisfied with other areas of Star's dealership facilities. Star shares a service facility with Mr. Seureau's Mercedes dealership, but the Mercedes entrance is easier to see and access than the Volvo entrance.⁹⁷ The service facility also lacks fresh paint, is poorly lit, and lacks air conditioning in the service drive (where customers arrive) and the service floor (where technicians work on vehicles), according to Mr. Klipstein.⁹⁸ The service desk, where customers' service paperwork is done, is in the middle of the service area, a space that is un-air-conditioned and exposed to the fumes and noise from the service floor.⁹⁹ Star is the only Volvo dealer in Houston that does not have an air-conditioned service drive, or that writes up

⁹² Tr. 659, 742 (Seidman), Ex. P-5 at SMC000656.

⁹³ Tr. 661 (Seidman); Ex. P-44.

⁹⁴ Tr. 1303, 1305 (Seureau).

⁹⁵ Tr. 661 (Seidman).

⁹⁶ Tr. 660 (Seidman).

⁹⁷ Tr. 524, 526 (Bunch).

⁹⁸ Tr. 184, 187 (Klipstein). Mr. Klipstein also criticized the unsightly floor surface in the service area, but Mr. Bunch testified that the shop floor had recently been cleaned and resurfaced. Tr. 532 (Bunch).

⁹⁹ Tr. 529-30 (Bunch).

customer tickets in a space that is not air conditioned.¹⁰⁰ While not every dealer has an air-conditioned service floor, of the six Volvo dealers in Houston, two have service floors that are already fully air-conditioned, and one is in the process of adding air conditioning.¹⁰¹ Mr. Klipstein testified that the lack of air conditioning affects employee satisfaction and productivity, and is likely to impact Star's ability to attract and retain talented service technicians.¹⁰² Mr. Bunch agreed that he is concerned technicians might leave Star to work at other air-conditioned dealers in the area.¹⁰³

As in the showroom, some improvements have been made to the service area in recent years. For example, Mr. Seureau testified that he has painted the floors and some fixtures and has installed a suspended ceiling, better lighting, and an upgraded in-ground oil tank in the service department.¹⁰⁴ Addressing the various improvements Mr. Seureau has agreed to make to the dealership, Mr. Klipstein characterized them as general maintenance, not capital improvements.¹⁰⁵

Another deficiency raised by Volvo is Star's website which, according to Mr. DeWinne, has been inadequate and poorly maintained for years.¹⁰⁶ Volvo's evidence included screen shots from Star's website that were taken during the hearing on the merits.¹⁰⁷ At that time, the website had no special vehicles advertised and made no mention of any particular models currently in stock; showed no current specials on the pages for the finance, parts, or service departments; and included profiles of several of the staffers who had died or otherwise left Star many months

¹⁰⁰ Tr. 252-53 (Klipstein). Star also does not have fans to cool customers while they wait in the heat, because they would blow the paperwork away. Tr. 184 (Klipstein); Tr. 595 (Bunch). On especially hot days, if he senses a customer is uncomfortable, Mr. Bunch said he will have his service writers escort the customer into the air-conditioned showroom to talk there. Tr. 530-31 (Bunch).

¹⁰¹ Tr. 184, 253 (Klipstein).

¹⁰² Tr. 253 (Klipstein).

¹⁰³ Tr. 560 (Bunch)

¹⁰⁴ Tr. 1356 (Seureau).

¹⁰⁵ Tr. 176 (Klipstein).

¹⁰⁶ Tr. 308 (DeWinne).

¹⁰⁷ Ex. R-83.

prior.¹⁰⁸ In Volvo's view, Star's website would create a negative impression of the dealership for any online shopper. This was especially concerning because most customers begin their new-car search online and visit several dealer websites before they ever venture into a showroom.¹⁰⁹ In his testimony, Mr. Bunch admitted that the website had not been updated for several months and resolved to monitor it more closely in the future.¹¹⁰ Mr. DeWinne said Star has been repeatedly asked to update and maintain the website over the years but has failed, without explanation, to do so.¹¹¹

Volvo has had several incentive programs in recent decades that were intended to encourage dealers to update their facilities—the Partnering for Excellence Program in the 1990s, a Volvo Next Face program in the 2000s, and the current Volvo Retail Experience program—and encouraged Star to take part in them.¹¹² Mr. Seureau acknowledged that Mr. DeWinne has pushed him to make improvements over the years, and that Mr. Klipstein has told him that Star's facility was “totally inadequate in virtually every area.”¹¹³ He said he knew that Volvo wanted him to build a new facility for Star, but that he has resisted each iteration of their facilities plans because “frankly . . . I didn't think they were very good, and I didn't think they were worth tearing down my facility to do.”¹¹⁴ According to Mr. DeWinne, in 2013 he tried to discuss the need for Star to improve its facilities, and Mr. Seureau told him that Star was “in maintenance mode” and had no plans to make any meaningful improvements or renovations.¹¹⁵ Mr. Seureau essentially confirmed this, testifying that until recently he thought it would be unwise to undergo significant renovations due to the anticipated expense of obtaining building plans that could be approved by Volvo, because renovations would be disruptive to Star's business, and because

¹⁰⁸ Tr. 392-96 (DeWinne).

¹⁰⁹ Tr. 394, 396 (DeWinne).

¹¹⁰ Tr. 590 (Bunch).

¹¹¹ Tr. 308-09, 392 (DeWinne).

¹¹² Tr. 282 (DeWinne).

¹¹³ Tr. 1344-45 (Seureau).

¹¹⁴ Tr. 1345-46 (Seureau).

¹¹⁵ Tr. 334 (DeWinne); Ex. R-8 at 2.

there was no room to build a substantially larger facility in any event.¹¹⁶ All witnesses agreed that there was little room to expand or improve within the existing footprint of Star's 1970 facility.¹¹⁷

While he was not interested in joining one of the incentive programs that would require him to design and build a new facility, Mr. Seureau said he repeatedly asked Volvo representatives to tell him what specific improvements they would require in the current facility, but he could not get a straightforward response. Mr. Klipstein denied this, explaining that it is unreasonable to expect any Volvo representative to make such suggestions off the cuff. Instead, Mr. Klipstein testified, Mr. Seureau was consistently told that Star needed to enroll in Volvo's design program and go through the process of hiring an architect, developing plans that conform with Volvo's brand requirements, and getting bids from contractors.¹¹⁸ Until very recently, Star refused to engage in this process.

c. Planned New Facility

On June 26, 2018—two years and four months after Volvo sent its notice of termination—Mr. Seureau signed a form to join the Volvo Retail Experience program and agreed to pay the \$12,500 program fee, indicating that he planned to build a new, brand-compliant facility for Star.¹¹⁹ Two months later, on August 27, 2018, Mr. Seureau signed a contract with an architect to officially begin the design process.¹²⁰ Volvo's witnesses and Star employees testified that this was first time Mr. Seureau had ever indicated any willingness to consider building a new, modern facility for Star.¹²¹

¹¹⁶ Tr. 1260-61, 1402 (Seureau).

¹¹⁷ Tr. 1508 (Velasco).

¹¹⁸ Tr. 177-79 (Klipstein).

¹¹⁹ Ex. P-175.

¹²⁰ Ex. P-240.

¹²¹ Tr. 98 (Klipstein); Tr. 544 (Bunch).

In his testimony at the hearing, Mr. Seureau offered several reasons for finally deciding to pursue a new facility. First, he said it had only recently occurred to him that he owned an empty three-acre tract adjacent to Star's current facility where a larger dealership could be built without disrupting Star's business during construction.¹²² He also felt financially pressured to build a new facility because Volvo has announced an incentive program (the revised 2019 Retailer Standards, discussed below in § III(C)(2)) that will withhold some operational support from dealers that are not in modern, Volvo-compliant facilities.¹²³ Mr. Seureau said he believed Star would go bankrupt if it lost that support, and so he decided Star had to build a new facility to comply with that program.¹²⁴ In addition, Mr. Seureau testified, until recently Volvo's products did not support the need for a larger, more modern facility. Now, with new vehicles being introduced, Mr. Seureau said he believes that Volvo will become "major competitors to the luxury line of cars" and that Star needs to be ready for that.¹²⁵ Mr. Seureau also admitted that visiting the brand new Bubba Gentry's Volvo Cars West Houston dealership highlighted for him how poorly Star's facility compared to its neighbor, and he recognized "[t]his is what we need [and] [n]ow is the time to do it."¹²⁶

Mr. Seureau expects the new facility to cost \$18 million or more, and said that he has the financial liquidity to pay cash for the new facility. He plans to donate his land to the project and estimates its value at roughly \$10 million, though he admitted he has never had the tract appraised. Then, he anticipates spending between \$8 and \$9 million to construct the new dealership.¹²⁷ Volvo does not dispute Mr. Seureau's financial ability to construct the new facility.

¹²² Tr. 1261-62 (Seureau).

¹²³ Ex. P-178.

¹²⁴ Tr. 1478-19 (Seureau).

¹²⁵ Tr. 1330, 1352 (Seureau).

¹²⁶ Tr. 1402 (Seureau).

¹²⁷ Tr. 1336, 1350-52, 1394 (Seureau).

Though only very preliminary plans have been drawn up,¹²⁸ the new facility is planned to be much larger (about 47,000 square feet) and at least partially air-conditioned. The service area is planned to be about three times the size of the current facility, though Mr. Seureau said he has not yet decided whether to air condition the service area.¹²⁹ Mr. Velasco testified that he and the other salespeople are looking forward to having a facility with sufficient space to showcase the model cars and with modern amenities to offer customers, and he anticipates being able to double the size of the sales force with the larger facility.¹³⁰ Mr. Seureau testified that with a larger, more functional dealership, he believes Star can sell 500 vehicles a year, and the building plans will be based on that capacity.¹³¹ Volvo has expressed reservations that the planned facility is too large and that, in view of Star's past performance, it is unrealistic to think Star could ever sell enough vehicles to justify the size and expense of the planned new facility.¹³² Mr. Seureau firmly disagrees with Volvo's concerns.¹³³ However, other than running numbers in his head, Mr. Seureau said he has done no formal business planning, cost-benefit analysis, or break-even analysis to determine whether the new facility could be profitable, and said he generally finds that kind of planning to be speculative and unnecessary.¹³⁴ Asked whether he had sought any professional advice on whether the new facility would be a good investment, Mr. Seureau answered, "I'm not sure I knew anyone that was capable of giving me proper advice, so I wouldn't ask for it, and I sure wouldn't pay for it."¹³⁵

¹²⁸ Ex. P-176.

¹²⁹ Tr. 560, 639 (Bunch); Tr. 1379, 1405-06 (Seureau).

¹³⁰ Tr. 1506, 1531 (Velasco).

¹³¹ Tr. 1262 (Seureau).

¹³² Tr. 1379 (Seureau).

¹³³ Tr. 1412-13 (Seureau).

¹³⁴ Tr. 1380, 1404-05, 1409-10 (Seureau).

¹³⁵ Tr. 1417 (Seureau).

Volvo's witnesses testified that they do not believe a new facility will transform Star into a high-performing dealership. Mr. Klipstein testified that, although the facility's deficiencies are serious, there are other performance issues at Star that will not be cured by a new building.¹³⁶ Mr. DeWinne agreed, testifying that a new facility might improve customer satisfaction with the experience of shopping at Star, but that the dealership's overall performance would not improve without "[w]holesale changes in virtually every department, every fundamental part of that business."¹³⁷

Mr. Velasco acknowledged that without expanded advertising and improved signage, the new facility would not overcome the dealership's overall lack of visibility.¹³⁸ The new facility would still have all the same challenges that are presented by its current location—namely, a lack of visibility from the interstate and no proximity to other dealers or complementary businesses.¹³⁹ Mr. Seureau agreed that a new facility alone would not cure all of Star's challenges.¹⁴⁰

3. The Houston Market and Star's Performance

The west Houston area where Star is situated has been, and remains, one of the fastest-growing, affluent areas of Houston. When Star's Volvo dealership was established in 1970, the greater west Houston area had a population of less than 200,000, and about 17,000 jobs. By 1990, the population had jumped to over 700,000, with 242,000 jobs. By 2020, greater west Houston is projected to have a population of approximately 1.9 million and 594,000 jobs.¹⁴¹ Star's sales have not kept up with the rapid growth in the region.

¹³⁶ Tr. 101-02 (Klipstein).

¹³⁷ Tr. 453, 464 (DeWinne).

¹³⁸ Tr. 1509 (Velasco).

¹³⁹ Tr. 1499 (Velasco).

¹⁴⁰ Tr. 1418 (Seureau).

¹⁴¹ Tr. 227-30 (Klipstein); Ex. R-46 at 3.

Volvo employs several ways of measuring its dealers' sales performance, and by any of these measures, Star has performed poorly for many years.¹⁴² Volvo argues that Star's poor sales performance shows that Star has failed to "develop the locality assigned to [Star] to the satisfaction of [Volvo]," as required by the dealer agreement.¹⁴³ Mr. Seureau argues that his dealer agreement creates an "incentive" to sell cars, but does not require Star to achieve any particular level of sales performance.¹⁴⁴

a. Planning Volume and Sales Objectives

Each year, Volvo provides dealers with a planning volume (also called market potential) and a sales objective. These are figures that anticipate the size of the market available to the dealer (planning volume) and the sales Volvo expects the dealer to achieve (sales objective).¹⁴⁵ Since at least 2016, Star has had the largest planning volume of all the Houston Volvo dealers, and is projected to have largest planning volume through at least 2021.¹⁴⁶ It also has one of the top three market potentials in the state of Texas.¹⁴⁷ Mr. Klipstein said that when a retailer has the largest planning volume for a particular market, that retailer would normally be expected to lead the market in sales, service, and parts sales.¹⁴⁸ However, according to Mr. Seidman, since at least 2002 Star has not been able to sell enough cars to meet "anywhere near the potential of that AOR."¹⁴⁹

¹⁴² More details on the sales figures and performance measures are provided in the discussion of the testimony of Jay Lytle, Volvo's expert. *See* § IV(A).

¹⁴³ Ex. P-5 at SMC000652.

¹⁴⁴ Tr. 1241, 1474 (Seureau).

¹⁴⁵ Tr. 435 (DeWinne).

¹⁴⁶ Tr. 75 (Klipstein); Ex. R-16 at 38.

¹⁴⁷ Tr. 114 (Klipstein).

¹⁴⁸ Tr. 76-77, 235 (Klipstein).

¹⁴⁹ Tr. 694 (Seidman). Volvo's witnesses emphasized that planning volume is not intended as a sales target, but rather a figure that informs capital investment a dealer may make in its facilities. Tr. 79 (Klipstein); Tr. 439 (DeWinne).

Sales objectives are annual sales targets that are calculated based 60 percent on the retailer's previous performance and 40 percent on the dealer's market potential.¹⁵⁰ Because previous performance is weighed more heavily than market potential in calculating the sales objectives, annual sales targets are lowered for underperforming dealers and raised for strong performers.¹⁵¹ Thus, while Star's market potential is the highest in the Houston market, it has a lower sales objective than other Houston dealers, all of whom sell more cars than Star does.¹⁵² Therefore, according to Volvo, it should theoretically be easier for Star to achieve its sales objectives than for its better-performing peers. Despite this seeming advantage, Star has not been able to achieve its sales objective for a number of years.¹⁵³

Volvo also pointed out that the AOR immediately to Star's west also has a large planning volume, and there was no dealer operating in that AOR for approximately three years, from when the Volvo of Houston dealership closed in 2015, until the new Bubba Gentry's Volvo Cars West dealership opened in September 2018. Mr. Klipstein testified that while the dealership in that AOR was shuttered, sales at Star should have "exploded" without competition from a neighboring dealer.¹⁵⁴ Mr. Seureau had expressed confidence that Star would capture up to 70 percent of the sales in the west Houston AOR during that time, according to Mr. DeWinne.¹⁵⁵ Instead, Star's sales changed only nominally between 2015 and 2018, despite having "an open AOR with one of the fastest-growing markets right next door."¹⁵⁶

Through the first eight months of 2018, Volvo's highest-volume dealer in the Southern Region was in Austin, with 414 new-vehicle sales in that dealer's AOR; and the

¹⁵⁰ Tr. 77 (Klipstein).

¹⁵¹ Tr. 78-81 (Klipstein); Tr. 348-49 (DeWinne).

¹⁵² Tr. 347-49 (DeWinne).

¹⁵³ Tr. 78, 80-81 (Klipstein).

¹⁵⁴ Tr. 114 (Klipstein).

¹⁵⁵ Tr. 359-60 (DeWinne).

¹⁵⁶ Tr. 233 (Klipstein).

lowest-volume dealers were in Edinburg and Temple, with 64 sales in their respective AORs.¹⁵⁷ During the same period, Star had only 79 sales in its AOR, including sales made in Star's AOR by other dealers.¹⁵⁸ According to Mr. DeWinne, Edinburg and Temple are both smaller markets than Houston and have "miniscule" market potentials compared to Star and other metro-area dealers, so Star's sales should be much higher.¹⁵⁹

Volvo also calculates how many competitive vehicles (Mercedes, BMW, Audi, Lexus, etc.) have been registered in the zip codes in Star's AOR, then uses those figures to project the market penetration that Volvo can expect to achieve in that AOR.¹⁶⁰ Star has the largest market opportunity in Houston, meaning that consumers in Star's AOR have registered the highest number of vehicles that are comparable to those vehicles that Volvo sells.¹⁶¹ That Star is the lowest-selling dealer in Houston despite having the largest market opportunity is another sign that Star is not able to adequately serve the AOR, according to Volvo.

b. Sales Effectiveness

Sales effectiveness is another metric that Volvo uses to measure its dealers' success. Sales effectiveness takes the number of vehicles a dealer sells and compares that to the number of expected sales, which are based on the total number of new vehicles registered in the dealer's AOR that are comparable to (competitive with) Volvo's models and Volvo's overall average market share in a larger geographic area.¹⁶² So if, for example, there were 100 competitive vehicles registered in an AOR, and the Volvo dealer there sold 10 vehicles (capturing 10 percent of the local competitive market), but dealers nationwide sold 200 Volvos for every 1,000 competitive registrations (or 20 percent of the nationwide market), that local dealer is

¹⁵⁷ Ex. R-82 at 2.

¹⁵⁸ Tr. at 358 (DeWinne); Ex. R-82 at 2. As of late September 2018, Star had sold 86 vehicles year-to-date. Tr. 1529 (Velasco).

¹⁵⁹ Tr. 357 (DeWinne).

¹⁶⁰ Tr. 433 (DeWinne).

¹⁶¹ Tr. 73 (Klipstein).

¹⁶² Tr. 82, 122-23, 125 (Klipstein).

50 percent below sales effectiveness. If the same dealer sold 20 Volvo vehicles in his AOR, he would achieve sales effectiveness measured on a nationwide basis.¹⁶³ Volvo calculates sales effectiveness by model, dealer, and geographic region.

Typically, according to Mr. Klipstein, Star has measured 80 to 85 percent worse than the average Volvo retailer.¹⁶⁴ At the end of 2013, for example, Star's sales effectiveness for the year was 11 percent (89 percent below sales effectiveness), while dealers in the Texas South Market averaged 109 percent, and dealers in the Southern Region averaged 111 percent.¹⁶⁵ Its performance has not improved since then, according to Mr. Klipstein, who testified that in terms of sales effectiveness, Star has consistently had the "lowest performance in the state of Texas, and quite often the lowest in the entire country."¹⁶⁶

c. Pump-In Sales

Another indicator of Star's weakness, according to Volvo, is the large number of sales made in Star's AOR by Volvo dealers from other AORs ("pump-in" sales), and the comparatively low number of "pump-out" sales, or sales that Star makes to customers from another dealer's AOR. When sales are pumped into Star's AOR, this indicates that customers who live in that AOR are driving some distance away from their closest Volvo dealer to purchase a Volvo from a dealer in another AOR. Mr. Seureau agrees that it is "not the ideal scenario" for the customer, dealer, or Volvo brand.¹⁶⁷

Volvo's witnesses testified—and Mr. Seureau acknowledged—that since at least 2012, an average of 20 to 25 vehicles have been pumped in to Star's AOR each month, while only one or

¹⁶³ Tr. 123-24 (Klipstein).

¹⁶⁴ Tr. 82 (Klipstein).

¹⁶⁵ Ex. R-11 at 1. At the time, the baseline score for sales effectiveness was 100 percent; today the baseline score is 0 percent, and anything above zero is more than sales effective. Tr. 498-99 (DeWinne).

¹⁶⁶ Tr. 81 (Klipstein); *see also* Tr. 513 (DeWinne).

¹⁶⁷ Tr. 314-15 (DeWinne), 1427-28 (Seureau).

two cars are being pumped out.¹⁶⁸ For example, of 299 new Volvos sold in Star's AOR from May 2012 through April 2013, only 14 of those vehicles were sold by Star, while 273 were sold by other Houston-area Volvo dealers. Dealers in other cities, like Austin, San Antonio and Dallas, were able to sell nearly as many vehicles in Star's AOR as Star did (12, versus 14).¹⁶⁹

At other dealerships, the number of pump-ins and pump-outs are usually roughly equivalent, so that they offset each other.¹⁷⁰ Mr. DeWinne testified that he could not recall any other dealer having such a discrepancy between pump-in and pump-out sales, or having as many pump-in sales as Star has seen in its AOR for the last six or more years.¹⁷¹ Mr. DeWinne was also concerned that Star's high number of pump-in sales might lead other area dealers to become complacent, because they are able to achieve their sales targets by pumping sales out to Star's AOR, rather than working harder to find customers and sell cars in their own AOR.¹⁷²

Mr. Klipstein believes that, because customers have been avoiding Star for so long, Volvo is losing market share in the entire Houston market. A more aggressive, successful dealer in Star's AOR would lift the performance of everyone in the market.¹⁷³

d. Service Concerns

In addition to underwhelming sales, Star's service business also falls below Volvo's expectations, according to Volvo's witnesses. Though generally complimentary of the *quality* of service offered by Star's service department, Volvo contends that Star's inadequate facility and poor sales performance have hurt Star's service business and pushed down volume.

¹⁶⁸ Tr. 279, 314, 322-23 (DeWinne); Tr. 680 (Seidman); Tr. 1358 (Seureau).

¹⁶⁹ Tr. 332-33 (DeWinne); Ex. R-6 at 17.

¹⁷⁰ Tr. 680 (Seidman).

¹⁷¹ Tr. 324, 337 (DeWinne).

¹⁷² Tr. 496 (DeWinne).

¹⁷³ Tr. 112 (Klipstein).

Mr. Klipstein said that Volvo looks at how many Volvo vehicles ten years old or newer are registered in a dealer's AOR and uses that figure to project how many vehicles should be serviced by the dealer, and that Star fails to meet those projections.¹⁷⁴ Volvo is concerned that customers have been avoiding Star and taking their vehicles to other Houston-area dealers, often driving in heavy Houston traffic to do so. According to Mr. Klipstein, "they will only do that for so long" and it hurts Volvo's brand for Star to underserve its service customers in this way.¹⁷⁵ This was echoed by Mr. Seidman, who said that when a large number of customers are going to a more distant, less-convenient AOR for sales or service, those customers may not buy a Volvo again, and, once their warranty expires, they may seek service from more convenient independent mechanics, rather than a Volvo dealer. This hurts the brand overall, and causes the dealer in that AOR to lose those customers' business for parts and service.¹⁷⁶

Star disputes that it is underserving customers, noting that it handles about 15-20 cars a day in the service department.¹⁷⁷ Mr. Seureau testified that the service department does a good job and he is not aware of any significant customer complaints.¹⁷⁸ Mr. Bunch testified confidently that his service department does an excellent job of "fix[ing] it right the first time" for his customers, and said that customers frequently tell him they prefer his service department to other dealers, where service can be "slow and hard to get into."¹⁷⁹ He also said that his service department maintains a good relationship with customers and retains them for many years, and Star's evidence included several letters from customers, sent between 2005 and 2016, that praised the service they received from Star's service department.¹⁸⁰

¹⁷⁴ Tr. 190-91 (Klipstein).

¹⁷⁵ Tr. 194 (Klipstein).

¹⁷⁶ Tr. 701 (Seidman).

¹⁷⁷ Tr. 529 (Bunch).

¹⁷⁸ Tr. 1270 (Seureau).

¹⁷⁹ Tr. 607-09, 14 (Bunch).

¹⁸⁰ Tr. 556 (Bunch); Ex. P-733 to P-735.

Volvo did not dispute the competence of Star's service department. Mr. Klipstein acknowledged that he knew of no instance where a car was serviced improperly by any of Star's technicians, or that any warranty work was done incorrectly, while Mr. DeWinne rated Mr. Bunch as "above average" compared to the other service managers in his market.¹⁸¹ Still, Mr. Klipstein contends that if Star could sell more cars and achieve sales effectiveness, there would be more Volvos in operation for Star to perform service work on.¹⁸²

e. Other Areas of Concern to Volvo

Volvo raised other general concerns that it contends contribute to Star's poor sales performance and lack of profitability. For one thing, Volvo asserts that Star had failed to invest adequately in advertising that would raise the dealership's profile and overcome some of the limitations of its location. Volvo elicited testimony from Mr. Velasco, who identified a lack of advertising as one of the major impediments to increasing Star's sales.¹⁸³ Mr. Velasco testified that Mr. Seureau makes the advertising decisions for Star and, in recent years, Star has advertised on television and radio, in magazines, and through email blasts to potential customers, but that advertising was reduced in 2017 and 2018 due to budget constraints.¹⁸⁴

Volvo also criticized Star's failure to convert internet leads into car sales. Mr. DeWinne explained that, every day, Volvo feeds internet leads to Star and other dealers from customers in their respective areas who have expressed online interest in purchasing a new Volvo. Star receives "hundreds" of these leads a year, more than all but two of the thirteen dealers in Texas South Market.¹⁸⁵ Compared to other dealers, Star turns very few of these leads into new car sales. According to Mr. DeWinne, Star's closing ratio is less than 2 percent, while dealers in the Texas South Market average about 8 percent and dealers in the Southern Region average about

¹⁸¹ Tr. 193, 196 (Klipstein); Tr. 414 (DeWinne).

¹⁸² Tr. 191-92 (Klipstein).

¹⁸³ Tr. 1494-95 (Velasco).

¹⁸⁴ Tr. 1499-1501 (Velasco); Ex. P-242 at 70-72 (Velasco Add-Point testimony).

¹⁸⁵ Tr. 288, 363-65 (DeWinne).

12 percent.¹⁸⁶ Mr. Velasco acknowledged that Star receives the highest number of internet leads in the Houston area but has one of the lowest conversion rates when it comes to turning those leads into sales.¹⁸⁷

Star also sells fewer assurance products—things like tire and wheel warranties and prepaid maintenance warranties—than other dealers, according to Volvo. In the first eight months of 2018, Star did not sell a single one of those products; by contrast, the average dealer in the Southern Region sells about sixty assurance products per year.¹⁸⁸

According to Mr. Klipstein, Volvo's market strength depends on retailers who can develop the sales and service opportunities within their AOR, and Star has not been able or willing to do that.¹⁸⁹ While parts of Star's business have been profitable, Mr. Seureau admitted that, overall, the dealership is not currently profitable, and he could not recall whether it had ever turned a profit in the last ten years.¹⁹⁰

4. Customer Satisfaction Scores

Customers of a premium brand like Volvo expect a level of luxury from a dealer, according to Mr. Klipstein, and customer satisfaction is part of the “core foundation” of Volvo's brand.¹⁹¹ When a customer purchases a vehicle or brings a vehicle in for service, the dealer is supposed to ask for the customer's email address and then follow up by sending a customer-satisfaction survey.¹⁹² Volvo uses the survey responses to track customer satisfaction and to reward dealers who earn high marks with bonuses. While Volvo has created a bonus

¹⁸⁶ Tr. 289, 365-66 (DeWinne).

¹⁸⁷ Tr. 1513 (Velasco).

¹⁸⁸ Tr. 293-94 (DeWinne).

¹⁸⁹ Tr. 44 (Klipstein).

¹⁹⁰ Tr. 1377-78 (Seureau).

¹⁹¹ Tr. 45 (Klipstein).

¹⁹² Tr. 389 (DeWinne).

program that is tied to customer-satisfaction scores, Mr. Seureau pointed out that he never agreed to any contract term that required him to achieve any particular scores.¹⁹³

The two principal measures at issue here are the customer satisfaction index (CSI) and sales satisfaction index (SSI). SSI is a measurement of what consumers are saying about their experience purchasing a new vehicle at the dealership, while CSI measures the customer's satisfaction with the service experience.¹⁹⁴ Volvo measures dealers' CSI and SSI scores to determine how they compare to each other and, according to Klipstein, Star has typically performed "well below average." Volvo believes that when a retailer is not "delighting customers," this has a long-term impact not just on the individual retailer, but the entire Volvo brand.¹⁹⁵

The SSI scores are based on four "enabler questions"—one that asks about the customer's overall opinion of the facility, in terms of cleanliness and appearance; one that asks how likely the customer would be to recommend the dealership; one that asks whether the customer was satisfied with the features and controls of the vehicle purchased; and one that asks whether the customer had been contacted by the dealer since taking delivery of the vehicle.¹⁹⁶ Likewise, the CSI scores are also based on four enabler questions—one that asks about the customer's overall opinion of the waiting area; one that asks whether the customer was satisfied with the explanation of the work done; one that asks whether the customer was satisfied with the car's condition when it was returned; and one that asks whether the customer received any follow-up contact from the dealer.¹⁹⁷

In scoring the enabler questions, Volvo uses a "top box" scoring method that gives all but the highest scores a zero value. For example, customers are asked to rate their experience in the

¹⁹³ Tr. 1236-37 (Seureau). This is part of the Retailer Bonus Program, discussed below in § III(C)(2).

¹⁹⁴ Tr. 50-51 (Klipstein).

¹⁹⁵ Tr. 51-52 (Klipstein).

¹⁹⁶ Tr. 387-88 (DeWinne); Ex. R-79.

¹⁹⁷ Tr. 382-85 (DeWinne); Ex. R-78.

service waiting area on a 10-point scale. A score of 9 or 10 is considered a “top box” score and given that number of points, but a score of 8 or lower is counted as zero points when the score for all four enabler questions are averaged together to come up with the overall SSI and CSI scores.¹⁹⁸ According to DeWinne, top-box scoring is justified because Volvo has found that customers who give a score of 9 or 10 are delighted by the dealership and more likely to recommend it to others, but they do not tend to become advocates for stores that receive lower scores.¹⁹⁹ Star argues top-box scoring unfairly benefits dealers in newer facilities, because low scores on questions relating to its facility will drag down the average no matter how well it scores on the remaining questions.²⁰⁰ Volvo’s witnesses essentially agreed, with Mr. DeWinne acknowledging that deficiencies in Star’s facility and waiting area are “typically very difficult to overcome” when service customers are responding to surveys.²⁰¹

Volvo’s exhibits included charts showing Star’s scores on each enabler question on the CSI and SSI surveys on a rolling three-month basis and a rolling 12-month basis, for each month between July 2017 and August 2018.²⁰² In that time, sales customers rated Star far below the national average on the question asking about their overall opinion of the facility, and also generally rated Star poorly on the question asking if they would recommend the dealership to others. Star scored better on the remaining two questions, but the overall SSI average was too low for Star to earn the SSI bonus in any month after October 2017.²⁰³ The same was true with the CSI scores. Service customers consistently rated Star poorly on the first question, which asked the customers’ opinion of the waiting room.²⁰⁴ The scores on the other three enabler questions were often at or above the national average, but because the overall CSI score represents an average of the four enabler questions, the very low scores on the first question

¹⁹⁸ Tr. 441-42 (DeWinne).

¹⁹⁹ Tr. 433 (DeWinne).

²⁰⁰ Tr. 551-52 (Bunch).

²⁰¹ Tr. 278 (DeWinne).

²⁰² Exs. R-78, R-79.

²⁰³ Ex. R-79.

²⁰⁴ Tr. 382-83 (DeWinne); Ex. R-78.

dragged down the overall average, making it so that Star did not qualify to earn the CSI bonus even once between July 2017 and August 2018.²⁰⁵ According to Mr. DeWinne, these scores demonstrate that Star does not meet customers' expectations for a luxury car experience.²⁰⁶

Another chart compared Star's CSI and SSI scores from January 2016 to July 2018 to the national average, and to average scores for each of Volvo's geographic regions in the United States (the northeastern, southern, and western regions).²⁰⁷ In all but three months during that period, Star's SSI fell below the national average and the regional average for each geographic region. In some months, Star's SSI was only a point or two below average, but in other months, Star's SSI was nearly 30 points below the national or regional average. In Star's lowest-scoring month (January 2016), its CSI was 26.5 points below the average for the southern region, and 27.9 points below the nationwide average. In Star's highest-scoring month (December 2017), its CSI was only 0.2 points above the southern region average, and only 0.6 points above the national average.²⁰⁸ On the same chart, Star's CSI scores are even poorer. Between January 2016 and July 2018, Star's CSI scores never once reached the national average or the average for any geographic region in the United States. In its highest-scoring month (May 2017), Star's CSI was 6.5 points lower than the dealers in its region, and 6.7 points lower than the national average. In Star's lowest-scoring month (February 2016), Star's average CSI was 18.8 points lower than the regional average, and 20 points lower than the national average.²⁰⁹

Other records indicate slightly higher CSI and SSI scores during the same period. For example, in April 2016, Star's SSI on a rolling 12-month basis was 66.7 and its CSI score was 75.2, according to one report Volvo sent.²¹⁰ Though higher than what was shown in Ex. R-75

²⁰⁵ Ex. R-78.

²⁰⁶ Tr. 387-88 (DeWinne).

²⁰⁷ Ex. R-75.

²⁰⁸ Ex. R-75.

²⁰⁹ Ex. R-75.

²¹⁰ Ex. P-225.

(which indicate Star's SSI for that month was 77.5 and its CSI score was 53.0), Star's SSI scores were still approximately 20 points lower than the market, regional, and national averages, while its CSI score was slightly higher than the market average and only a few points below the regional and national averages.²¹¹

According to Mr. Klipstein, Star's consistently low SSI and CSI scores reflect that "consumers are not getting what they would expect" from Star's dealership.²¹² In particular, Klipstein said the service CSI scores are among the poorest he has ever seen and indicate that there is no "small fix" that could improve Star's performance.²¹³ The low scores reflect "consistent underperformance" and show that Star can, at best, only occasionally reach average, "a far cry from what customers expect on a daily basis," according to Mr. Klipstein.²¹⁴

Star's witnesses believe that Star's CSI and SSI scores are low in part because Star has fewer customers than other dealers, and thus receives fewer survey responses. When only a handful of survey responses are received each month, one low score can drag the whole average down.²¹⁵ Mr. Seureau also asserted that affluent customers like Star's are "generally opposed to being imposed upon to fill out surveys of any kind."²¹⁶ Volvo concedes that dealers cannot control whether a customer responds to a survey.²¹⁷ However, Star's customers respond to surveys at a lower rate than customers at other Volvo dealers, and Mr. Bunch admitted that Star could do a better job of following up with customers after their vehicles have been serviced and encouraging them to answer the surveys.²¹⁸

²¹¹ Ex. P-225. Witnesses at the hearing could not explain discrepancy between CSI and SSI scores shown in Ex. R-75 and those in Ex. P-225.

²¹² Tr. 59 (Klipstein).

²¹³ Tr. 61 (Klipstein).

²¹⁴ Tr. 135-36 (Klipstein).

²¹⁵ Tr. 550-51 (Bunch); Tr. 1393 (Seureau).

²¹⁶ Tr. 1392 (Seureau).

²¹⁷ Tr. 389 (DeWinne).

²¹⁸ Tr. 580-82 (Bunch).

5. Improvement Efforts

Volvo has regarded Star as an underperforming dealership for well over a decade. In 2007, Volvo approached Mr. Seureau to see if he would be interested in selling his franchise back to the manufacturer.²¹⁹ Mr. Seidman explained Volvo had started an initiative to offer this exit for dealers who were not performing or growing and might be ready to voluntarily leave the business. Star was a good candidate because of ongoing performance issues—namely, that Star was not selling anywhere near the volume expected given its market potential—and Volvo was eager to make a change in that market.²²⁰ According to Seidman, Mr. Seureau rejected the offer, telling Volvo that he was eager to buy more dealerships, not sell the one had.²²¹

Star's business did not improve in the ensuing years, however, and Volvo's witnesses described longstanding efforts to urge Star to modernize its business practices, invest in the business, and improve the dealership's operations. Though he makes periodic visits to all of the dealers in his market area, Mr. DeWinne said that Star's consistently poor performance triggered a "disproportionately high" number of meetings with Mr. Seureau and Star's managers.²²² Mr. DeWinne said Mr. Seureau would make himself available for these meetings and would listen politely to Volvo's suggestions, but he would generally ignore the advice or explain to Mr. DeWinne why Star was unwilling to make the requested changes. Mr. DeWinne said that in dealing with Mr. Seureau, there was typically "a lot of dialogue" but little action, and he could not recall any instance when Mr. Seureau was willing to follow through with implementing any meaningful changes.²²³ After each meeting with Star principals and managers, Mr. DeWinne would write up a Contact Report that summarized the recommendations made to Star, and the actions Star and Volvo had agreed Star would take. Volvo's evidence in this case included

²¹⁹ Tr. 656 (Seidman).

²²⁰ Tr. 664 (Seidman).

²²¹ Tr. 665 (Seidman).

²²² Tr. 273 (DeWinne).

²²³ Tr. 284-87, 335 (DeWinne).

Contact Reports dating back over six years.²²⁴ Volvo also sent monthly Retailer Improvement Letters to each dealer that spelled out how the dealer was measuring up against Volvo's goals.²²⁵ Together, these letters and reports paint a longstanding picture of a dealer that struggled to make adequate sales.

The Volvo Retailer Improvement Program (VRIP) is a program Volvo encourages dealers to participate in when their performance falls significantly below average, and Mr. DeWinne said Star had been asked to join several iterations of VRIP programs over the years.²²⁶ VRIPs are limited to "very severe situations," according to Mr. Seidman, and there are no other dealers in the Texas South Market on a VRIP.²²⁷ Mr. Seureau never agreed to commit to a VRIP plan or comply with the terms Volvo recommended.²²⁸

Star has also been asked many times over the years to work on a business plan, and Mr. Seureau has steadfastly refused, according to Mr. DeWinne. Each time he was asked, Mr. Seureau would tell Mr. DeWinne that Star adjusts its business strategies as needed on a daily, weekly, or monthly basis, and that he saw little value in trying to plan ahead.²²⁹ In his testimony, Mr. Seureau confirmed that he has resisted Volvo's requests for business plans over the years, stating the he does not like do business plans "because [he] can't predict the future."²³⁰ Mr. DeWinne testified that no other dealer had ever resisted his requests for business planning and forecasts, and in fact many dealers have told them they thought the exercise was very beneficial, particularly when a dealer was struggling and needed to find ways to turn the business around.²³¹ Though he could not see any valid reason for Mr. Seureau's refusal to do any

²²⁴ Exs. R-2 to R-14, R-26, R-28, R-70, R-74, R-81.

²²⁵ Tr. 305-06; Exs. R-2 to R-5.

²²⁶ Tr. 284 (DeWinne).

²²⁷ Tr. 286 (DeWinne); Tr. 751 (Seidman).

²²⁸ Tr. 1238 (Seureau).

²²⁹ Tr. 293 (DeWinne); Ex. R-6 at 1.

²³⁰ Tr. 1222 (Seureau).

²³¹ Tr. 329, 518 (DeWinne).

business planning, Mr. DeWinne said he eventually gave up on asking Mr. Seureau for any business plans because, “based on history, I’m pretty confident we would get the same result.”²³²

Volvo’s evidence included other examples of Star’s reluctance to implement practices that were standard at other dealerships. Whereas every other Volvo dealer in the network pays their salespeople on a commission-only basis, Mr. Seureau pays Star’s salespeople a fixed salary.²³³ They have the potential to earn a commission over and above the base salary of \$2,300 per month, but salespeople rarely, if ever, sell enough vehicles to earn an extra commission.²³⁴ Mr. DeWinne believes the guaranteed salary removes any incentive for the salespeople to work harder to sell more cars, and he has counseled Mr. Seureau to switch to commission-only compensation.²³⁵ Mr. Seureau responded that, because Star’s gross profit is so low, it has to guarantee minimum salaries or it could not retain any salespeople.²³⁶

Volvo also asserted that top-quality salespeople will not be attracted to work for Star because they know they are unlikely to earn much there, and has pushed Star for years to implement a bonus program to motivate better performance out of the sales and service employees.²³⁷ Mr. Bunch testified that he personally had to advocate for about a year before, in March 2018, Mr. Seureau finally agreed for the first time to allow bonuses of up to \$100 per month for salespeople and service writers who are able to exceed national customer satisfaction averages.²³⁸

Star has also resisted joining the inventory management programs that other Volvo dealers readily adopted. In the mid-1980s, Volvo started a Stock Management Program to help

²³² Tr. 330, 502 (DeWinne).

²³³ Tr. 465 (DeWinne); Tr. 1516 (Velasco); Tr. 1250 (Seureau).

²³⁴ Tr. 1516-17 (Velasco); Ex. P-242 at 82 (Velasco Add-Point testimony).

²³⁵ Tr. 278 (DeWinne).

²³⁶ Tr. 1250 (Seureau). Mr. Seureau attributes Star’s low gross profit to the unfair disadvantage Star is placed in by Volvo’s various dealer incentive programs. These arguments are addressed in §VII(A) below.

²³⁷ Tr. 466 (DeWinne); Tr. 647 (Bunch).

²³⁸ Tr. 535, 647-48 (Bunch); Ex. P-201, P-202.

dealers' parts departments manage their inventory and, a few years ago, the Stock Management Program became what is now called the Volvo Managed Inventory (VMI) program. Star has never enrolled in either iteration.²³⁹ According to Mr. DeWinne, Star's parts department manager wanted to implement the VMI program, but Mr. Seureau balked at the \$250 monthly cost, telling Volvo he did not think the benefits were worth the expense.²⁴⁰ Mr. Seureau confirmed this, testifying that he was initially willing to enroll until he learned that he would have to pay about \$1,000 to install the software and train his employees on how to use it, then pay \$250 in monthly fees. He was happy with the job his parts manager was doing and said, "why should I have to pay Volvo to do the parts manager's job if it's already being done?"²⁴¹ Nearly every other Volvo dealer in the country has enrolled and finds the program very beneficial, according to Mr. DeWinne.²⁴²

While Mr. DeWinne criticized what he characterized as "lack of a go-getter sales attitude" in Star's sales department, he was generally complimentary of Star's sales and service managers and indicated that Star's managers were competent and did the best they could with the resources available.²⁴³ Mr. DeWinne testified that he puts blame for Star's stagnation principally on Mr. Seureau and his unwillingness to invest in the business, do long-range planning, or make any meaningful changes. Whereas Star's managers tended to agree with the recommendations Mr. DeWinne and Volvo made to improve Star's performance, they found that changes were "not endorsed or supported by upper management and ownership."²⁴⁴ Instead, Mr. Seureau would point to his dealer agreement and tell Volvo's representatives that he had no contractual obligation to make the recommended improvements. Mr. DeWinne said Volvo was "completely

²³⁹ Tr. 294-95, 313-14 (DeWinne).

²⁴⁰ Tr. 296-97 (DeWinne).

²⁴¹ Tr. 1324 (Seureau).

²⁴² Tr. 312 (DeWinne).

²⁴³ Tr. 277, 287, 413-14 (DeWinne).

²⁴⁴ Tr. 414 (DeWinne).

mystified” by Mr. Seureau’s resistance to suggestions that other dealers readily embraced and Star’s refusal to implement “very common fundamentals of car sales.”²⁴⁵

Ultimately, Volvo decided to terminate Star’s franchise because, for years, Star had rebuffed every suggestion Volvo made to improve Star’s marketing, staffing, and investment and “we just didn’t see that there was going to be a change in action.”²⁴⁶ The decision to terminate is not one Volvo takes lightly, according to Mr. Seidman; he could not recall Volvo ever initiating an involuntary termination proceeding against any other dealer in the Southern Region.²⁴⁷ Mr. Klipstein said that, new facility or not, there is no reason to think Star will ever be a high-volume dealer.²⁴⁸ Mr. DeWinne was not part of the decision to terminate Star’s franchise, but he testified that he fully supports the decision because, in his view, Star has never shown a willingness to invest in the business or implement any suggestions from Volvo on how to improve. For reasons he cannot explain, Mr. DeWinne said, Star has shown little interest in trying to “really penetrate and sell and satisfy customers in that market.”²⁴⁹

C. Dealer Incentive Programs

1. Facility Investment and Support Initiative

The Facility Investment and Support Initiative (FISI) was begun by Volvo in 2016.²⁵⁰ For dealers who conform their sales and service facilities to Volvo’s brand image and exclusivity standards, FISI paid \$750 per new unit retailed for up to three years, up to a maximum of 50 percent of the dealer’s facility investment. The payment drops to \$375 for 2019. Although

²⁴⁵ Tr. 416 (DeWinne).

²⁴⁶ Tr. 42 (Klipstein).

²⁴⁷ Tr. 655-56 (Seidman).

²⁴⁸ Tr. 234 (Klipstein).

²⁴⁹ Tr. 276 (DeWinne).

²⁵⁰ FISI was preceded by a 2013 program called the Volvo Performance and Growth Strategy, which awarded different bonuses to dealerships based on a dealership’s classification under one of four tiers. That program was succeeded by the 2014-2016 Facility Investment Initiative (FII), which awarded different bonus payments ranging from \$500 to \$0 per qualified vehicle sale to different tiers of dealerships. Ex. P-10.

construction has not begun on Star's proposed new facility, Star is treated as eligible for the FISI per-vehicle sold payments for 2019 and for the additional bonus provided under the revised Retailer Standards.²⁵¹

The facility bonus payments made to Star and other Houston-area dealers under FISI and its predecessors through 2017 are set out below:²⁵²

Dealer	2012	2013	2014	2015	2016	2017
A	\$ 0	272	0	0	0	0
B	\$ 0	465	0	65,000	192,000	207,000
C	\$ 0	19,936	77,500	97,000	150,000	0
D	\$ 0	0	0	0	0	0
Star	\$ 0	0	0	0	0	0

2. Retailer Bonus Program

The margin and bonuses under the Volvo Retailer Bonus Program are outlined below:²⁵³

	<u>MY15/16</u>	<u>MY17/18</u>	<u>2019</u>
TOTAL AVAILABLE MARGIN/BONUS	14.0%	14.0%	14.0%
Fixed Front End Margin	6.0%	6.0%	6.0%
NEW CAR BONUS PROGRAM			
Non-Performance-Based			
Operations Support	5.5%	3.0%	0.0%
Performance-Based (Max. Potential)			
Volvo 360 Program	1.5%	1.0%	1.0%
Factory Option/Package Bonus/Sales Mix	1.0%	1.0%	1.0%
Service CSI	0.0%	1.0%	1.0%
Sales SSI	0.0%	1.0%	1.0%
Retailer Standards	0.0%	1.0%	4.0%
Total Performance-Based Margin Potential:	2.5%	5.0%	8.0%

²⁵¹ Ex. R-66; Star's Post-Hearing Brief at 84; SOAH Order No. 20.

²⁵² Ex. P-165. For confidentiality reasons, the names of the other dealers were redacted from this exhibit, so they are referred to only by letter.

²⁵³ Ex. P-160.1.

Star contends that other dealers have benefited more from the performance-based bonuses (as well as from FISI), adversely affecting Star's sales, and that Volvo's imposition of the performance-based bonus approach violates the statutes cited earlier in this PFD. The various bonus programs are described briefly below:

a. Volvo 360 Program

To receive the 11percent bonus under the current Volvo 360 program, dealers must purchase a certain number of used Volvos from off-lease returns, certify a given percentage of those as certified pre-owned (CPO), and sell 100 percent of the CPO vehicles. The dealer's "purchase objective" is based on a percentage of that dealer's new car sales. The originating-lease dealer has the option, during the first 48 hours after the leased vehicle is returned, to purchase it at a "Buy It Now" price set by Volvo. After the first 48 hours, the vehicle is put into an auction accessible to franchised Volvo dealers only. For the next 24 hours, a dealer may buy the car at the "Buy It Now" price, or bid a lower amount, with the highest bid prevailing, provided it meets a minimum price. The vehicle subsequently is opened up for auction to both Volvo and non-Volvo dealers.

b. Factory Option/Package Bonus/Sales Mix

Star has generally received this bonus, which is paid for the sale of Volvo-brand options on new vehicles. Complying with those requirements amounts to a 1-percent margin price reduction on the wholesale cost of new vehicles purchased by the dealer.²⁵⁴

c. CSI/SSI Bonuses

The service (CSI) and sales (SSI) customer satisfaction bonus programs are described above in § II.B.4.

²⁵⁴ Tr. 106-07 (Klipstein), 1254-55 (Seureau); Star's Post-Hearing Brief at 120.

d. Retailer Standards

The Retailer Standards require dealers to submit a yearly business plan; submit monthly financial statements; achieve quarterly training certification goals; use and adhere to the Dealer.com website and communication standards; use an approved lead management system; subscribe to a particular online scheduling platform; and display online pricing for basic services.²⁵⁵ Although Star considers those standards to violate the law, it has met those standards in the past and received the bonus payments. Starting in 2019, however, the Retailer Standards required that an additional 3-percent bonus will be available only to dealers “who meet . . . brand standards.”²⁵⁶ Under that change, only facility-compliant dealers, which Star currently is not, would be able to achieve the 3-percent bonus.²⁵⁷ Mr. Seureau testified that this change in the Retailer Standards requirement was one of the catalysts for his desire for a new facility.

3. Impact on Star’s Ability to Compete/Alleged Violations of Law

a. Star’s Witnesses

Mr. Seureau, Mr. Velasco, and Mr. Bunch testified about the impact of the bonus programs on Star’s ability to compete with other dealers and about the alleged discriminatory aspect of those programs.²⁵⁸

Mr. Seureau testified that Star has been at a competitive disadvantage for some time. He stated that the FISI program was preceded by other programs that not only provided financial assistance to other dealers, but gave those dealers preferential treatment on the more popular Volvo models. He stated that regardless of the payments’ purposes, other dealers use the facility support payments to lower the price of vehicles. Even if the dealers do not have the support

²⁵⁵ The number of standards has increased over time. Star’s Post-Hearing Brief at 121-22.

²⁵⁶ Ex. P-164.

²⁵⁷ Some dealers with relatively new facilities would be grandfathered from the facility-compliance requirement. Star is not one of those.

²⁵⁸ Mr. Velasco and Mr. Bunch actually were called as adverse witnesses by Volvo.

money in hand, they know it will be available. He stated that the deals he saw from other dealers reflected “unrealistic” amounts of discounts that were otherwise unexplainable. He testified that the facility support payments were unfair and inequitable, and therefore unlawful, in his opinion.²⁵⁹

Mr. Seureau testified that, in general, the Retailer Bonus components also could also be used by a dealer as trading margin to secure a better deal for a customer.²⁶⁰

Mr. Seureau observed that, with the Volvo 360 program, it was “an open question” whether a dealer would make money on the sales of those cars. He cited the quota for purchases, along with various expenses associated with those transactions. Given the costs, he was not sure whether Star would participate in the Volvo 360 program if not for the bonus component. Mr. Seureau acknowledged that the Volvo 360 program was administered in a uniform manner and that, after the premium “Buy It Now” option, all dealers had the opportunity to bid equally on the vehicles. He stated that the Volvo 360 program might be profitable for dealers, but he deemed it a “Hobson’s Choice” whether to participate or not.²⁶¹

Mr. Seureau stated that Star only occasionally gets the CSI/SSI bonuses. He believed Star’s customers, who are generally very well-off, were averse to filling out surveys, so Star’s sample size is small. He did not know if Star was having more difficulty than its competitors in getting surveys returned, however. In addition, he stated, even if Star’s facility is adequate or above-adequate, it is not “wow inspiring,” so customers were unlikely to give it the necessary top-box scores. He believed the surveys, and the bonuses, were unfairly weighted toward new facilities. He stated that Star does not separately track the costs of complying with the CSI/SSI programs.²⁶²

²⁵⁹ Tr. 1241-47 (Seureau).

²⁶⁰ Tr. 1255-56 (Seureau).

²⁶¹ Tr. 1317-23, 1438-46 (Seureau); Ex. P-239 at 105-10 (Seureau depo.).

²⁶² Tr. 1256-58, 1452-53 (Seureau); Ex. P-239 at 115, 122-23 (Seureau depo.).

Mr. Seureau testified that the 2019 change in the Retailer Standards program, to require brand-compliant facilities, forced Star to decide to build its proposed new facility. He stated that the previous margin was merely a return of Star's costs.²⁶³

Mr. Seureau discussed similar complaints he had presented against Volvo in the early 2000s regarding margin programs. Those cases eventually settled, after which Volvo paid the 14-percent margin to Texas dealers, as opposed to dealers in other parts of the country.²⁶⁴

Mr. Seureau stated he was not certain why Star had extremely high pump-ins even during the period from approximately 2000-2015, when all dealers received the same 14-percent margin. He believed earlier building programs, preceding the FISI program, may have played a role. He asserted that dealers participating in those programs received more favorable allocations. Mr. Seureau stated that, for whatever reason, Star was never able to match those dealers' prices, regardless of the identical 14-percent margin. He had not performed any audit or study to identify those reasons more clearly.²⁶⁵

In his deposition in this proceeding, Mr. Velasco testified that the SSI bonus procedures are discriminatorily weighted against Star, because only four questions out of 25 total survey questions are used in calculating the bonus, and one of those pertains to the quality of the facility and requires a top-box score. He conceded that those "enabler" questions were reasonable ones to ask and that CSI and SSI data were used at other Volvo dealerships. He believed that Star was disadvantaged by its small number of survey responses as well, which places a premium on receiving top-box scores for each response. He agreed with the assertion that Star is missing out on the 1-percent bonuses for CSI and SSI because it does not have the "wow effect" of a new facility.²⁶⁶

²⁶³ Tr. 1258-60, 1292 (Seureau).

²⁶⁴ Tr. 1309-11 (Seureau).

²⁶⁵ Tr. 1360-65, 1375-76 (Seureau).

²⁶⁶ Ex. P-238 at 73-74, 80-81, 216 (Velasco depo.); Ex. P-242 at 132-33 (Velasco Add-Point testimony).

Mr. Velasco testified that Star typically receives the factory option package bonus and the retailer standards bonus, but not the Volvo 360 and the CSI/SSI bonuses.²⁶⁷

Mr. Velasco testified that many customers come into Star with a price quote they have already received from another Volvo dealer, and he feels obliged to meet the other dealer's price in order to make the sale, even if Star loses money on the transaction. He cited instances of potential customers coming in with offers he could not match. Mr. Velasco stated that other dealers use the bonus monies to their competitive advantage. He also stated that he is allowed to dip into the 6-percent front-end margin to attempt to make a deal, but generally not below that level.²⁶⁸

Mr. Bunch also believed that the use of the four enabler questions to structure the CSI bonus program, combined with Star's dated facility and small service volume, make it more difficult for Star to achieve the CSI bonus: "If I get six, . . . customer replies back and I get one bad survey, it's sunk." He conceded that Star's survey return rate is low, but observed that he does not "beat on the customer" to return them. He stated that Volvo has not given him suggestions on how to improve Star's CSI scores.²⁶⁹

b. Volvo's Witnesses

Mr. Klipstein testified regarding the various bonus programs, in addition to other topics. He stated that all the bonus programs require investment by the dealers to become compliant. He could not quantify those costs, except for the costs of facilities themselves. The bonuses, he stated, are not intended to totally compensate the dealers for those costs.²⁷⁰

²⁶⁷ Ex. P-238 at 127-31 (Velasco depo.); Ex. P-242 at 133-34 (Velasco Add-Point testimony).

²⁶⁸ Tr. 1531-33, 1539 (Velasco); P-238 at 128-35.

²⁶⁹ Tr. 542, 551-53, 580, 635 (Bunch).

²⁷⁰ Tr. 108-09, 155-57 (Klipstein); Ex. P-233 at 58-59 (Klipstein depo.). Mr. Klipstein believed the costs of meeting Retailer Standards, before the change in 2019, would be minor.

Q: Put another way, though, . . . the program is going to cost more than the value of the bonus?

A: Absolutely.²⁷¹

Mr. Klipstein explained that, at the request of the Volvo Retailers' Advisory Board (RAB), the FISI bonuses per sale are paid only twice a year. He explained that the RAB felt that more frequent payments would encourage retailers to use those bonuses as part of sales transactions. He acknowledged that some retailers may nevertheless use the bonuses for trading purposes. Mr. Klipstein asserted that the FISI program and any facilities bonus program would give a financial advantage to the participants only if one ignored the major costs of the investments in the facilities themselves. He believed that no dealer made more in bonuses than he or she spent in improvement dollars. Mr. Klipstein stated that every dealer in Houston, except Star, had participated in either the FISI program or one of its predecessors.²⁷²

Mr. Klipstein discussed some of the costs involved in participating in the Volvo 360 program. As with the bonus programs in general, he stated that the Volvo 360 bonus payments themselves would not outweigh the costs. He asserted that Star's sales performance was inadequate before the institution of performance bonuses, when everyone was on a fixed margin.²⁷³

With regard to CSI and SSI, Mr. Klipstein stated that the customer experience is very important in determining where a customer is going to do business: "[I]f a retailer is not delighting customers, it's going to have a long-term impact not just to the individual retailer, but to the brand they represent."²⁷⁴

The Retailer Standards bonus, which has been converted from a bonus of 1 percent to a performance bonus of 4 percent for 2019, is now designed to reward dealers for being in a

²⁷¹ Tr. 109 (Klipstein).

²⁷² Tr. 86, 154, 207, 213-15 (Klipstein); Ex. P-233 at 53-55, 110 (Klipstein depo).

²⁷³ Tr. 173, 244-46 (Klipstein).

²⁷⁴ Tr. 52, 111 (Klipstein).

branded facility or a grandfathered facility. Mr. Klipstein argued that the additional bonus of 3 percent, to be awarded beginning in 2019 only to brand-compliant or grandfathered facilities, would not come close to paying for either a renovated or a brand-new facility.²⁷⁵

Mr. DeWinne testified that in August of 2012, none of the margin percentages given by Volvo to dealers were performance-based. Star's rank among dealers on the September 10, 2012 contact report for year-to-date sales as a percent of objective was 303, which was "toward the bottom, could even be the lowest" in the country. Its sales effectiveness was at 5.6 percent, compared with the market average of 109.1 percent (the baseline was 100.0 percent). Mr. DeWinne stated that in the fall of 2012, approximately 25 new cars per month (roughly 300 new cars per year), were being pumped in to Star's AOR.²⁷⁶

The March 2013 contact report showed a similar situation. Star's sales effectiveness was 12th out of 12 in the Texas South Market. For the rolling 12-month period ending April of 2013, Star sold 14 units in its AOR, and other dealers sold 273 units in Star's AOR. In January of 2014, Star's sales effectiveness was 11 percent, as opposed to a 109-percent average for the Texas South Market. Star's pump-ins were 232 new units, versus 14 pump-outs. Mr. DeWinne testified he had never seen that degree of disparity with any other dealer.²⁷⁷

Mr. DeWinne testified that Star's sales, sales effectiveness, and pump-ins showed similar patterns through 2014.²⁷⁸

Mr. DeWinne testified that Star struggles to make the threshold for CSI and SSI bonus payments. He agreed with Mr. Velasco that Star's facility is "impossible to overcome" in that regard, but he believed that other factors—such as sales staff, internet staff, personnel turnover, and the lack of a "go-getter sales attitude"—contributed to Star's SSI difficulties. Mr. DeWinne

²⁷⁵ Tr. 105 (Klipstein).

²⁷⁶ Tr. 297-306, 314-15, 322-23 (DeWinne); Ex. R-2.

²⁷⁷ Tr. 330-37 (DeWinne); Exs. R-6, R-11.

²⁷⁸ Tr. 337-39 (DeWinne); Exs. R-12, R-13.

acknowledged that no dealer can control whether customers actually fill out their surveys. He agreed that a higher-volume dealer is more likely to receive more survey responses. Although Mr. DeWinne stated that the four enabler questions were equally weighted, he also agreed that it would be difficult for Star to get a top-box score on the facility question. He believed that was reasonable because historically, customers that are “surprised and delighted” by their customer experience are more likely to recommend a brand or facility. Although he could not quantify the cost of achieving a higher facility score or CSI/SSI score in general, he believed dealers themselves could roughly quantify that cost.²⁷⁹

Mr. DeWinne testified that dealers are discouraged from using bonuses for trading. He conceded, however, that dealers are free to do so if they so desire.²⁸⁰ He stated that some dealers are “very aggressive” in using all variable bonus monies, while others are more conservative.²⁸¹

Mr. Seidman also testified that Star was not selling a reasonable number of vehicles, in his view, during the period when all Texas Volvo dealers received the exact same margin.²⁸²

Mr. Seidman testified that Volvo’s accounting procedures did not envision a dealer using its \$750 FISI payments to lower the price of cars to consumers. He agreed that a dealer “theoretically” could do so, however. He stated the FISI bonus payments did not provide a competitive advantage to dealers because they did not reimburse the dealers for their millions of dollars in facility investment.²⁸³

²⁷⁹ Tr. 277, 389, 440-43, 450-53, 487 (DeWinne).

²⁸⁰ Tr. 475, 480 (DeWinne).

²⁸¹ Ex. P-234 at 21 (DeWinne depo).

²⁸² Tr. 699 (Seidman).

²⁸³ Ex. P-138 at 77-82 (Seidman depo). Mr. Seidman also pointed out that the FISI payments are capped at 50 percent of the dealer’s investment, excluding the real estate costs. Ex. P-138 at 81 (Seidman depo).

IV. EXPERT OPINIONS

The parties each retained an expert to opine on the performance of Star relative to the Houston market. Jay Lytle testified for Volvo, and Edward Stockton testified for Star. Their testimony is summarized below.

A. Testimony and Opinions of Jay Lytle

Mr. Lytle is the Analytical Services Director for Urban Science Applications, Inc., a large consulting firm that serves, primarily, the automotive industry. He has been with the firm for more than 15 years, and the company has done consulting work for most of the major automobile manufacturers in the world.²⁸⁴

1. Sales Effectiveness

Mr. Lytle regards sales effectiveness as a fair metric for evaluating a dealer's sales performance, noting that it has been used for decades and most other auto manufacturers use some variation of sales effectiveness, as well.²⁸⁵ He echoed Volvo's witnesses in explaining that sales effectiveness compares the number of sales a dealership makes against the expected sales, or sales opportunity, that exists for the dealer in its local area.²⁸⁶ Expected sales are calculated by looking at the number of competitive registrations—that is, registrations of all brands competing in Volvo's market segments—that are occurring in the dealer's area, then applying the brand's average penetration rate to that number to calculate the dealer's number of expected sales.²⁸⁷ At Volvo, sales effectiveness goals are based on a census division standard.²⁸⁸ Star is in the West South Central census division, defined by the United States Census Bureau as four

²⁸⁴ Tr. 797-804 (Lytle); Ex. R-62 at 003-05.

²⁸⁵ Tr. 909-11 (Lytle); Ex. R-62 at 008.

²⁸⁶ Tr. 819 (Lytle); Ex. R-62 at 028.

²⁸⁷ Tr. 822 (Lytle).

²⁸⁸ Tr. 820 (Lytle).

states—Texas, Oklahoma, Arkansas, and Louisiana, an area that includes about 22 Volvo dealers.²⁸⁹ Thus, if Volvo has a five-percent share of the market in the census division for a particular segment, then Volvo generally expects each dealer in the census division to capture five percent of the market in the dealer's AOR for that segment, as well. The dealer's sales expectation is the number equaling five percent of the total number vehicle of registrations in his AOR in that segment, and his sales effectiveness is the percentile of his actual sales above or below expected sales.²⁹⁰

Mr. Lytle aggregated Star's sales effectiveness scores in each segment in 2017 and found that Star was expected to sell 325 vehicles that year, but actually sold only 69, a sales effectiveness of -78.77 percent, or about 79 percent below what the dealer expected.²⁹¹ Every other Houston-area dealer in operation that year achieved sales effectiveness.²⁹² In 2017, Star was, by far, the worst performer of the 22 dealers in the census division. It was 50 percent worse than the next-lowest-performing dealer (which has since closed), and 70 percent worse, or more, than every other dealer in the census division.²⁹³ On a nationwide basis, Star's sales effectiveness ranked last among the 281 Volvo dealers in the nation, and was "the worst by a large margin," according to Mr. Lytle.²⁹⁴

That year was not an aberration. Mr. Lytle also analyzed data for each year from 2012 to 2017 and found that, in terms of sales effectiveness, Star was the worst-performing dealer in both the census division and nation in each year.²⁹⁵ Between 2012 and 2017, Star averaged a sales effectiveness of only 13.3 percent, while the average in the census division was 134.4 percent.²⁹⁶

²⁸⁹ Tr. 824-25 (Lytle); Ex. R-62 at 030-31.

²⁹⁰ Ex. R-62 at 035.

²⁹¹ Tr. 838-40 (Lytle); Ex. R-62 at 035.

²⁹² Ex. R-62 at 048. Because the west Houston dealership was closed at the time, there were only five Houston-area dealers operating in 2017.

²⁹³ Tr. 844 (Lytle); Ex. R-62 at 038.

²⁹⁴ Tr. 846-47 (Lytle); Ex. R-62 at 039.

²⁹⁵ Tr. 847-48 (Lytle); Ex. R-62 at 040-41.

²⁹⁶ Ex. R-62 at 041.

a. Fairness of Sales Effectiveness

Mr. Lytle defended sales effectiveness as a fair and useful measure to evaluate a dealer's performance. In particular, Mr. Lytle asserted that Volvo's method of measuring its dealers' sales effectiveness sets "a very low benchmark" and that other manufacturers (particularly larger brands with bigger, more mature networks) set even higher standards.²⁹⁷

When sales effectiveness scores for every dealer in the census division are examined, the data shows that most dealers end up approximately meeting their sales expectations, with some variations for good and bad performers. According to Mr. Lytle, this shows that sales expectations are "doing a good job of measuring the opportunity available for dealers and showing what the dealers should sell, because in most instances . . . that is what they're selling."²⁹⁸ In Star's census division, 19 of the 22 dealers were able to achieve sales effectiveness in 2017, and 85 to 90 percent of Volvo dealers nationwide achieved sales effectiveness that year. This shows that sales effectiveness is a reasonable, achievable goal for Volvo's dealers, according to Mr. Lytle.²⁹⁹ Star, however, is a clear outlier, falling far below expectations in a way that no other dealer in the census division or nation did.³⁰⁰ Star's dismal sales effectiveness, year after year, shows that Volvo is not being adequately represented in the AOR, according to Mr. Lytle. He said it is effectively "like there isn't a dealer in the area" at all.³⁰¹

²⁹⁷ Tr. 821 (Lytle).

²⁹⁸ Tr. 841 (Lytle).

²⁹⁹ Tr. 845, 847 (Lytle).

³⁰⁰ Tr. 841-43 (Lytle); Ex. R-62 at 036.

³⁰¹ Tr. 847 (Lytle).

b. Alternative Performance Measures

Mr. Lytle noted that Star and its expert did not really dispute the accuracy of the sales effectiveness figures, but instead, argued that sales effectiveness is an inappropriate metric for measuring dealer performance.³⁰² In response, Mr. Lytle asserted that Star compares poorly no matter what metric is used. He noted that in a roughly comparable proceeding, Star's expert, Mr. Stockton, used the concept of "sales portion" to measure a dealer's performance in its own AOR. This method measures the percentage of vehicles registered in an AOR that have been sold by the assigned dealer.³⁰³ Using this metric, in 2017 Star was still the worst-selling dealer in all 22 AORs in the census division, and the worst-selling of all 281 dealers in the nation, meaning it sold the lowest portion of the sales made in its own AOR relative to any of the other dealers.³⁰⁴ And, Star was significantly worse than the next-worst dealer in the country.³⁰⁵ This was not a new phenomenon, either. Using the "sales portion" metric, Star has been the worst-performing Volvo dealer in the nation each year since 2012, according to Mr. Lytle.³⁰⁶

Another alternative metric looks at sales penetration in a dealer's assigned AOR. This is very similar to sales effectiveness, according to Mr. Lytle, except that, unlike sales effectiveness, a "sales penetration" method excludes consideration of sales that other dealers made into Star's AOR.³⁰⁷ Under this metric, Star continues to be the worst-performing dealer in the census division and the country, and has been since at least 2012, according to Mr. Lytle. Its performance is approximately 50 percent worse than the next-worst dealer in the country.³⁰⁸ Thus, whether using Volvo's sales effectiveness metric or an alternative "sales portion" or "sales

³⁰² Tr. 888 (Lytle).

³⁰³ Tr. 889-90 (Lytle).

³⁰⁴ Tr. 890-91 (Lytle); Ex. R-64 at 018-19.

³⁰⁵ Tr. 891 (Lytle).

³⁰⁶ Tr. 891-82 (Lytle); Ex. R-62 at 021.

³⁰⁷ Tr. 892 (Lytle).

³⁰⁸ Tr. 892-93 (Lytle); Ex. R-62 at 021-23.

penetration” metric, the same picture emerges of “a poor-performing dealer unable to make sales,” according to Mr. Lytle.³⁰⁹

Further, while sales effectiveness is “the ultimate measure of customer satisfaction,” according to Mr. Lytle, he said that CSI and SSI scores are another useful diagnostic tool that indicate how a dealer is performing, and whether the dealer’s customers are “happy and satisfied.”³¹⁰ Star’s CSI and SSI scores have been “consistently below average” in recent years, indicating that it has trouble satisfying its customers.³¹¹

2. Potential Causes of Poor Performance

Mr. Lytle also analyzed a number of potential causes for Star’s performance to evaluate the extent to which Star might be challenged by market conditions that were beyond its control.

First, he looked at brand acceptance for Volvo in the AOR, which is measured in terms of registration effectiveness. Similar to sales effectiveness, Mr. Lytle explained, registration effectiveness examines vehicle registration data to evaluate the brand’s performance in an area. The number of vehicles Volvo expected to register (based on the percentage of registrations in the census division) is compared to the number that were actually registered.³¹² Mr. Lytle found that in Star’s AOR, Volvo registered vehicles at about 95 percent of the rate expected, which indicates the brand is doing “relatively well” in the AOR overall, even though the dealer there (Star) is performing poorly.³¹³ Also, other dealers in the Houston area were able to achieve sales effectiveness, further showing that brand acceptance is not an issue preventing Star from achieving sales effectiveness.³¹⁴

³⁰⁹ Tr. 891, 893 (Lytle).

³¹⁰ Tr. 936, 938, 959 (Lytle).

³¹¹ Ex. R-64 at 15.

³¹² Tr. 852-53 (Lytle).

³¹³ Tr. 854 (Lytle).

³¹⁴ Tr. 859 (Lytle).

Mr. Lytle noted that the brand was doing well overall in Houston because other area dealers have been selling more cars in Star's AOR than Star has been. In 2017, for example, Star was outsold in its own AOR by three other Houston-area dealers, and it made only about 13 percent of the total sales in its AOR.³¹⁵ This shows that the Volvo brand is generally well-accepted in Star's AOR, but consumers are avoiding Star and seek out the product from less-convenient dealers.³¹⁶ According to Mr. Lytle, it is "highly unusual" for a dealer to be outsold in its own AOR, and nearly unheard of to be outsold by *three* area dealers. This shows that Star is not offering a competitive environment and is driving customers away, resulting in lost sales and harming the brand overall, according to Mr. Lytle.³¹⁷ This also shows that, contrary to Star's contention (and its expert's), Star is not adequately serving its local population. Mr. Lytle asserts that the data shows most of the customers in Star's immediate vicinity have been electing to purchase their vehicles from Volvo dealers other than Star.³¹⁸

Next, Mr. Lytle considered whether Star's AOR was defined in a way that unfairly impacted its performance. Mr. Lytle considered how sales effectiveness would change if Volvo assigned its AORs based on air distance, drive distance, or drive time, and concluded that Star's sales effectiveness would actually be worse under any of these alternative methodologies. According to Mr. Lytle, this confirms that Star's poor performance is not attributable to Volvo's method of defining AORs.³¹⁹ Then, he considered whether there was some characteristic of the AOR that might be making it more difficult for Star to perform well. Mr. Lytle noted that Star's AOR is "highly compact" and has the smallest geographic area of any Volvo AORs in the census division, an indicator that the AOR "should be easy to market to" because there is a large amount of opportunity in a very small area.³²⁰ In fact, Star has the third-highest level of sales opportunity of all 22 dealers in the census division, and the highest sales opportunity in

³¹⁵ Tr. 854-56 (Lytle); Ex. R-62 at 047.

³¹⁶ Ex. R-62 at 013.

³¹⁷ Tr. 855-57 (Lytle).

³¹⁸ Ex. R-64 at 006.

³¹⁹ Tr. 861-63 (Lytle); Ex. R-62 at 050-53.

³²⁰ Tr. 863-65 (Lytle).

Houston.³²¹ Finally, Mr. Lytle evaluated whether Star faced more competition in its AOR from other brands than other Volvo dealers, but he found that Star has only seven competitive dealers in its AOR, which is “generally on the lower end” compared to other Volvo dealers that may have more than 12 competing brand dealerships in their AORs.³²² Further, other dealers with the same number of competitors as Star averaged 125 percent sales effectiveness in 2017, compared to Star’s 21 percent.³²³ Ultimately, Mr. Lytle was unable to find any inherent characteristic of Star’s AOR that could explain its poor sales performance.

Mr. Lytle could also not identify anything in the economic or marketing conditions in Star’s AOR that would hinder sales. He asserted that Star is well-situated relative to the population density and household density in Houston, and there has been a lot of growth in Houston generally between 2012 and 2017, showing that Star is situated in a densely populated, growing area that is economically healthy and expected to continue growing.³²⁴ In fact, sitting in an area surrounded by a number of households with annual income in excess of \$100,000, Star is “particularly well positioned,” Mr. Lytle asserted.³²⁵ Thus, the local market conditions do not explain Star’s inability to attract customers. Mr. Lytle also found no indication that inventory restrictions or supply issues could explain Star’s low sales.³²⁶

Next, Mr. Lytle looked for causes that are within Star’s control that might be causing its poor performance. One major cause he identified was that Star had not made any meaningful investment in the dealership in the 2012-2017 time period he was reviewing. After reviewing Star’s financial statements submitted to Volvo during those years, Mr. Lytle found that there had been virtually no change in Star’s total fixed assets at cost, the assets have been “highly

³²¹ Tr. 865 (Lytle); Ex. R-62 at 055.

³²² Tr. 866-67 (Lytle).

³²³ Ex. R-62 at 056.

³²⁴ Tr. 871-73 (Lytle); Ex. R-62 at 060-67.

³²⁵ Tr. 872 (Lytle).

³²⁶ Tr. 874-76 (Lytle).

depreciated,” and they are currently valued at about 20-25 percent of their original cost.³²⁷ Mr. Lytle also visited Star and confirmed that, as the depreciated value suggested, it’s a “poor, outdated facility”; in fact, at first glance, “it’s difficult to tell it’s even a dealership,” according to Mr. Lytle.³²⁸ He also felt Star compares poorly to the surrounding dealerships, including Mr. Seureau’s Mercedes-Benz dealership on the same property and Land Rover and Jaguar dealerships across the street.³²⁹ In Mr. Lytle’s view, poor facilities can degrade the image of the entire brand, which can hurt other retailers, as well.³³⁰

Finally, Mr. Lytle considered the experience of other dealers who were able to improve performance without experiencing major changes outside the dealership. He pointed to a dealer in Arkansas and another dealer in Texas who were both able to vastly improve their sales effectiveness after undergoing a change in ownership and/or management.³³¹ This, Mr. Lytle asserted, underscores how a well-operating dealer can achieve sales effectiveness.³³²

Ultimately, Mr. Lytle believes that there is good cause to terminate Star’s franchise. He testified that he based this conclusion on Star’s poor sales performance (as measured by sales effectiveness); the way Star treats its customers (as measured by its low CSI and SSI scores); the way service customers seem to seek out other dealers, instead of Star, for service; and the appearance of Star’s facility, which is so poor that, in Mr. Lytle’s opinion, it “degrades the brand image of Volvo.”³³³ All of these factors together show that, in his view, Star is failing to adequately represent Volvo in its AOR.

³²⁷ Tr. 877-80 (Lytle); Ex. R-62 at 071-73.

³²⁸ Tr. 880-81 (Lytle).

³²⁹ Tr. 880-81 (Lytle).

³³⁰ Tr. 1026 (Lytle).

³³¹ Tr. 882-83 (Lytle); Ex. R-62 at 079-80.

³³² Tr. 884 (Lytle).

³³³ Tr. 992 (Lytle).

3. Bonus Programs

Mr. Lytle defended Volvo's bonus programs as a rational way for manufacturers to encourage dealers to invest in their business and provide good customer service. After Volvo has invested in developing, marketing, and supporting new products, it naturally wants to work with dealers that are likewise willing to invest in the business and try to satisfy customers, Mr. Lytle explained.³³⁴ In his opinion, Volvo's bonus programs—specifically, the FISI and Retailer Bonus Programs challenged in Star's counterclaims—fairly reward that kind of investment, benefit customers, and are of value to both Volvo and Volvo dealers as a whole.³³⁵

Mr. Lytle reviewed the terms of Volvo's Retailer Bonus Program from 2015-2019, and the FISI program for 2016-17.³³⁶ He agreed that there has been a trend, during those years, for Volvo to require dealers "to do things that benefit the brand" in order to capture incentive payments that were once given regardless of performance.³³⁷ But, he disagreed that the programs are discriminatory or unfairly penalize dealers who decline to participate. Rather, dealers are free to weigh the benefit that might come from a bonus program against the cost they will incur in earning that benefit, and then make a business decision based on the economics of their own business.³³⁸ Mr. Lytle also disagreed with Star's assertion that its poor sales performance can be attributed to its inability to earn bonuses from Volvo's bonus programs. He explained that the data shows that Star's poor performance predated any of those programs and did not become worse after the programs at issue started.³³⁹

³³⁴ Tr. 926 (Lytle).

³³⁵ Tr. 1011, 1016-17 (Lytle).

³³⁶ Tr. 1002 (Lytle).

³³⁷ Tr. 1010 (Lytle).

³³⁸ Tr. 1014-18 (Lytle).

³³⁹ Tr. 848-49 (Lytle).

The FISI program is a relatively recent initiative, and Star's poor performance predates it by years.³⁴⁰ Also, only two of the five Houston dealers qualified for FISI bonuses in the last few years, showing that several dealers did not receive the bonuses, yet Star is the only dealer in Houston that has not been sales effective.³⁴¹ Mr. Lytle also rejected Mr. Stockton's contention that the FISI program effectively reduced the wholesale price of vehicles for dealers who qualified for the payments. According to Mr. Lytle, this ignores the investment that dealers have to make in order to qualify for the FISI payments and that the FISI payments are limited to 50 percent of that investment. Rather than reducing the effective wholesale price, participating dealers are actually paying *higher* effective wholesale prices for vehicles once the cost of investment is factored in, according to Mr. Lytle.³⁴² For these reasons, Mr. Lytle concluded that the FISI program, and Star's inability to earn the associated bonuses, is not the reason for Star's poor performance.

Similarly, Mr. Lytle found no indication that the Retailer Bonus Program was hindering Star's ability to compete and opined that the components of the Retailer Bonus Program (the Volvo 360 program, Service CSI and Sales SSI, and Retailer Standards) are fair, equitable, reasonable, and voluntary.³⁴³ With respect to the Volvo 360 program, Mr. Lytle disagreed with Star's suggestion that dealers in areas with high lease rates are better able to achieve Volvo 360 goals than dealers in low-lease areas, finding no support for that proposition in the nationwide data.³⁴⁴ Further, within Texas, about half of the dealers, on average, were able to qualify for the Volvo 360 bonus in each quarter of 2016 and 2017. According to Mr. Lytle, this shows that Star is not unique in not qualifying for the bonus payments in some quarters, and therefore Star cannot show that it is impacted by the Volvo 360 program in some negative way that other dealers are not.³⁴⁵ Likewise, he opined that the Service CSI and Sales SSI bonus programs,

³⁴⁰ Tr. 884 (Lytle).

³⁴¹ Tr. 885-86 (Lytle); Ex. P-165.

³⁴² Ex. R-64 at 010.

³⁴³ Tr. 1007 (Lytle); Ex. R-64 at 011.

³⁴⁴ Tr. 897 (Lytle); Ex. R-64 at 013, 025.

³⁴⁵ Tr. 898 (Lytle); Ex. R-64 at 013-14, 026.

which reward dealers based on survey scores, are a fair and useful management tool. He defended Volvo's survey methodology as rational and consistent, and said that each dealer can make the independent choice whether it wants to invest in satisfying customers in order to earn the bonus.³⁴⁶ If anything, Mr. Lytle asserted, Star's failure to participate in these programs and earn the associated bonuses demonstrates that its poor sales performance is due to factors under Star's control.³⁴⁷

B. Testimony and Opinions of Edward Stockton

Mr. Stockton is the vice president and director of economic services at the Fontana Group, an economic consulting firm where he has worked since 1998. Mr. Stockton is an economist, and his work is concentrated in consulting and providing expert opinions for auto dealers regarding the retail automotive industry.³⁴⁸

1. Relevance of Sales Effectiveness

Mr. Stockton did not dispute the accuracy of Volvo's sales effectiveness calculations. He acknowledged that Star has the lowest sales effectiveness of all Texas Volvo dealers, and also agreed that, in terms of customer volume, Star's service department was "well below average."³⁴⁹ Mr. Stockton also did not dispute that most Volvo dealers are able to achieve sales effectiveness, and he opined that sales effectiveness is not a particularly "aggressive" way for manufacturers to measure dealer performance.³⁵⁰ Still, he contends that sales effectiveness is a poor metric for evaluating Starr's performance.

³⁴⁶ Ex. 64 at 014-15.

³⁴⁷ Ex. R-64 at 009.

³⁴⁸ Tr. 1032-35 (Stockton).

³⁴⁹ Tr. 1191-94 (Stockton).

³⁵⁰ Tr. 1192 (Stockton); Ex. P-155 at 9-10.

One reason Mr. Stockton believes sales effectiveness is imperfect is because it does not account for or explain what portion of sales in an AOR were made by dealers from outside the AOR, and therefore cannot directly assess how a dealership is cultivating the brand in its own market.³⁵¹ In Star's case, he explained, it is clear that Star is selling far fewer Volvo vehicles than are being registered in its AOR, so he believes sales effectiveness is not a good way to measure Star's performance in the AOR.³⁵²

Mr. Stockton also pointed out that Star's dealer agreement predated the time when automakers began relying on sales effectiveness as a way to measure dealer performance, so he does not view sales effectiveness as a contract requirement that applies to Star.³⁵³ In fact, when read literally, Mr. Stockton could not find anything in the dealer agreement that required Star to sell any cars at all.³⁵⁴ However, he agreed that the dealer agreement referred to an obligation to develop the "locality," which he construed to mean "some discrete assigned area"; since AOR is the only such area he had to reference with respect to Star, Mr. Stockton relied on that concept in rendering his opinions in this case, even though the concept of AORs also post-dated Star's dealer agreement by many years.³⁵⁵

2. Other Performance Considerations

Mr. Stockton characterized sales effectiveness as a way to measure what an average dealer facing average competitive conditions in an average market can be expected to sell. There are many ways Star is not "average," according to Mr. Stockton, and therefore sales effectiveness is not a fair or meaningful way to evaluate Star.³⁵⁶ In particular, he pointed to the challenges of Star's location (located downtown, yet not on a freeway) as a reason Star should

³⁵¹ Tr. 1212 (Stockton); Ex. P-155 at 11.

³⁵² Tr. 1102-04 (Stockton).

³⁵³ Tr. 1096 (Stockton).

³⁵⁴ Tr. 1186 (Stockton); Ex. P-155 at 11.

³⁵⁵ Tr. 1097, 1183 (Stockton).

³⁵⁶ Tr. 1098-99 (Stockton).

not be expected to achieve “average” performance.³⁵⁷ Mr. Stockton also argued that Star should be credited with maintaining its facility and campus in what he characterizes as “a very expensive part of Houston,” which he believes represents a significant investment by Star in the Volvo brand.³⁵⁸

Star is a “neighborhood dealership” that was built at a time when car dealerships were generally situated within densely populated portions of the community, and had lower-volume sales than dealers expect today, according to Mr. Stockton.³⁵⁹ He testified that Star’s facility pre-dated the modern preference to have groups of dealerships clustered in highway-facing complexes, and was established before the auto industry moved toward a model of “relatively cheaper new cars, abundant exposure, consolidated management, and a transfer of . . . market power from the new vehicle sales department to ancillary profit centers.”³⁶⁰ Though the larger auto market shifted, Star has remained committed to being a neighborhood dealership that serves a long-term customer base from nearby, wealthy neighborhoods.³⁶¹ As a consequence, Star has developed into a “niche dealership” that serves a highly local population, according to Mr. Stockton, and while it may not have the sales volume of newer dealerships, Mr. Stockton believes Star does a good job of serving the customers it does attract.³⁶²

Mr. Stockton conceded that Star’s showroom is “rather Spartan for a major metro market,” but he nonetheless believed the facility is technically functional for the purpose of selling and servicing cars and that its “basic sufficiency” should be deemed adequate.³⁶³ He testified that, while Star may have eschewed the kind of “brand-specific investment in images” that Volvo wants, Star has instead invested in very expensive “unconventional amenities” like indoor shopping, a helicopter landing pad, and a ballroom that are appealing to its particular

³⁵⁷ Tr. 1099-1100 (Stockton).

³⁵⁸ Tr. 1108 (Stockton).

³⁵⁹ Tr. 1104-06 (Stockton).

³⁶⁰ Tr. 1106 (Stockton).

³⁶¹ Tr. 1106 (Stockton).

³⁶² Ex. P-155 at 6.

³⁶³ Tr. 1133 (Stockton); Ex. P-155 at 10.

customers.³⁶⁴ Regarding the ballroom, Mr. Stockton conceded that the ballroom is above Star's Mercedes dealership, not part of the Volvo facility, and he was not aware of any instance when the ballroom had been used for any purpose related to Star's Volvo dealership.³⁶⁵ Likewise, the helipad was an expensive asset installed for the Star campus in general, but he was not aware of any Volvo customer who had ever used it and agreed that, at best, a "miniscule" number of car customers would ever avail themselves of this amenity.³⁶⁶

Asked whether Star is a "good and well-operated franchise," Mr. Stockton answered, "[i]n many way, yes." He recommended that Star adjust its advertising strategies to focus more on emphasizing prices that will attract customers (what Stockton called "persuasive advertising"), rather than its current strategy of promoting the brand but not prices ("informational advertising").³⁶⁷ Mr. Stockton further believes Star needs to adjust its pricing structure in the service department to increase profits.³⁶⁸

Mr. Stockton asserts that Volvo should be satisfied that the Volvo brand is performing well in Star's AOR. Volvo's market share in the AOR is essentially normal, indicating that the brand is well-served there regardless of Star's performance.³⁶⁹

3. Star's Anticipated New Facility

Mr. Stockton testified that Star probably needs to make changes to its operations, and that the anticipated new facility is a large step in the right direction, in part because the new facility Star plans to build would be "more attuned to what newer car buyers are used to seeing."³⁷⁰ Still,

³⁶⁴ Tr. 1107 (Stockton).

³⁶⁵ Tr. 1144.

³⁶⁶ Tr. 1145.

³⁶⁷ Tr. 1152-53, 1207-08 (Stockton).

³⁶⁸ Tr. 1155 (Stockton).

³⁶⁹ Tr. 1109 (Stockton); Ex. P-155 at 6, 11.

³⁷⁰ Tr. 1093, 1151-52 (Stockton).

he acknowledged that by staying in its current location, Star will never be able to sell as many vehicles as it would if it relocated to a freeway.³⁷¹ He also testified that he is aware of other auto dealers who relocated in order to protect their business from changing demographics or market conditions, and that a prudent operator in Star's particular location might consider relocating to achieve a better billboard effect.³⁷²

Mr. Stockton did not opine on whether the new facility was a wise investment for Mr. Seureau and Star.³⁷³ He emphasized that, if a new facility is built, Star will need to "staff and fund and fill that facility with variable resources that are appropriate to the size of the investment."³⁷⁴ However, his opinions are based on qualitative considerations, not quantitative analysis. He has not analyzed or offered opinions on what kind of staffing, advertising, or budgeting might be necessary to support the planned new facility, or how many vehicles Star would have to sell to support the substantial, estimated \$18 million investment Mr. Seureau proposes to make.³⁷⁵ Mr. Stockton conceded that Star's current staffing levels and sales volumes are insufficient to sustain the expanded dealership being considered.³⁷⁶ Still, in his view, the size of the facilities investment Mr. Seureau plans to make serves to protect Volvo because Mr. Seureau would necessarily have to make major operational changes to fit the facility, respond to the market pressure, and justify the investment.³⁷⁷ Otherwise, Mr. Stockton testified, Star would either see "a very disappointing commitment of capital or somebody gets a huge discount on a car dealership."³⁷⁸

³⁷¹ Tr. 1154, 1172. (Stockton).

³⁷² Tr. 1169-70 (Stockton).

³⁷³ Tr. 1145 (Stockton).

³⁷⁴ Tr. 1153 (Stockton).

³⁷⁵ Tr. 1135-37 (Stockton).

³⁷⁶ Tr. 1137, 1140 (Stockton).

³⁷⁷ Tr. 1094 (Stockton).

³⁷⁸ Tr. 1138 (Stockton).

4. Bonus Programs

Mr. Stockton characterized Volvo's dealer incentive programs as an "influence technique" that Volvo uses to incentivize dealer behavior.³⁷⁹ He contends they are proxy versions of preferential contracts that are generally not legal in most states.³⁸⁰

In his opinion, Volvo's dealer incentive programs discriminate among dealers because they effectively give participating dealers lower wholesale prices, which affects the transaction prices those dealers can offer customers.³⁸¹ Mr. Stockton testified that it would be "economically irrational" for a dealer *not* to use the bonus payments when negotiating with customers over the price of a vehicle.³⁸² The programs particularly discriminate against Star because Star has been "regularly receiving less program money per unit than most other Houston dealerships," according to Mr. Stockton.³⁸³

Mr. Stockton also does not agree with Volvo's contention that the bonus programs simply encourage and reward good business practices. He disputed that the programs are voluntary, arguing that a non-participating dealer cannot avoid the impact of the programs if its competitors are participating and earning the bonuses, and so participation becomes effectively mandatory for a dealer to be able to compete in the market.³⁸⁴ In a dealer network, the outcome for one dealer necessarily depends on what other network dealers do, according to Mr. Stockton. Thus, if one dealer is earning incentive bonuses and is enjoying a discount on wholesale prices as a

³⁷⁹ Tr. 1039-40 (Stockton); Ex. P-155 at 9.

³⁸⁰ Tr. 1040 (Stockton); Ex. P-155 at 9, 13.

³⁸¹ Tr. 1043-46 (Stockton). In concluding that other dealers were able to offer lower prices than Star, Mr. Stockton said he relied on: (a) an understanding that Star's management's frowns on "excessive discounting" and believes discounts can be "destructive to the brand" in the long run; (b) his comparison of pricing information available on the websites of Star and other Houston-area Volvo dealers, which indicated that other dealers tended to have lower prices than Star; and (c) data that indicated that other dealers tended to have a lower gross profit than Star. Tr. 1128-32 (Stockton).

³⁸² Tr. 1074 (Stockton).

³⁸³ Tr. 1078 (Stockton).

³⁸⁴ Tr. 1047, 1052, 1167 (Stockton).

result, the continued success of the other dealers depends on them also doing whatever is necessary to earn the same incentive bonuses, else they will not be able to compete.³⁸⁵

a. Retailer Bonus Program

Mr. Stockton reiterated his opinion that each component of the Retailer Bonus Program—the CSI and SSI bonuses, the Volvo 360 program, and the Retail Standards—discriminates among dealerships by effectively giving qualifying dealers lower wholesale prices on vehicles purchased from Volvo.³⁸⁶ In his opinions, Mr. Stockton focused primarily on the Volvo 360 program and the CSI and SSI bonuses.

Mr. Stockton said he generally agrees with industry critics who say customer satisfaction evaluations are “helpful as a management tool,” but should not be used in deciding whether to award or terminate a franchise.³⁸⁷ Mr. Stockton disputed that CSI and SSI scores are “really measuring [customers’] actual happiness.”³⁸⁸ He also challenged the reliability of the CSI and SSI surveys, citing: (a) the potential for sampling error; (b) the potential for nonresponse bias, or the bias that results when the people who respond to surveys are not representative of those who declined to respond; (c) what Mr. Stockton views as the inherent unfairness of Star’s “top box” scoring method; and (d) the potential for “dealer influence,” where dealer employees drive scores up by pressuring customers to respond to surveys in a certain way.³⁸⁹ Because of the limited data available to him, Mr. Stockton was not able to do any quantitative analysis of the extent to which these factors may have impacted Star’s CSI or SSI scores.³⁹⁰

³⁸⁵ Tr. 1174-75 (Stockton).

³⁸⁶ Ex. P-155 at 6, 15. Mr. Stockton did not find fault with the final component of the Retailer Bonus Program, the Factory Option Program. Tr. 1058 (Stockton).

³⁸⁷ Tr. 1089 (Stockton).

³⁸⁸ Tr. 1080 (Stockton).

³⁸⁹ Tr. 1080-86 (Stockton); Ex. P-155 at 20-27.

³⁹⁰ Tr. 1117-20 (Stockton). Volvo was apparently unable to produce such data in discovery. Tr. 1216-17 (Stockton); Ex. P-151.

According to Mr. Stockton, the CSI and SSI questions place an unfair burden on dealers like Star, who are in older facilities that will necessarily earn low marks on the questions addressing the condition of the facility itself. He believes that Star's customers are necessarily less sensitive to the facility's age and condition, as evidenced by the fact that they were willing to shop with Star in the first place. By placing such a heavy emphasis on facility condition, Mr. Stockton contends, the CSI and SSI scores are over-emphasizing qualities that are relatively less important to Star's customers, and are therefore not accurately measuring Star's customers' satisfaction.³⁹¹ Mr. Stockton also said that the large jumps seen in Star's CSI and SSI scores from month to month are an indication that the scores are not reliable because "they are so dependent and sensitive to the inputs of the surveys themselves" that the data is distorted and does reliably measure customer satisfaction.³⁹²

In the Volvo 360 program, a dealer has to acquire a target number of vehicles that are being returned at the end of their lease term and then sell a target number of those off-lease vehicles as Certified Pre-Owned vehicles. Both targets are based on the dealer's new vehicle sales history.³⁹³ Mr. Stockton contends that, contrary to Volvo's assertions, the Volvo 360 program is involuntary because a non-participating dealer "can't insulate itself against the effects of other dealers who are participating in the program and are receiving rebates against the wholesale price."³⁹⁴ Mr. Stockton also contends that dealers in "heavy leasing" markets have an easier time meeting the program's targets than dealerships in low-lease markets, where fewer leased vehicles are being returned. He considers all of Texas to be a "low-lease" market and asserts that Houston dealers are particularly disadvantaged in this program, so it costs them more to earn the Volvo 360 bonuses than dealers in high-lease markets.³⁹⁵ Mr. Stockton disagreed

³⁹¹ Tr. 1047 (Stockton).

³⁹² Tr. 1090-92 (Stockton).

³⁹³ Tr. 1054 (Stockton).

³⁹⁴ Tr. 1062-63 (Stockton).

³⁹⁵ Tr. 1055-56, 1200 (Stockton); Ex. P-155 at 15, 17-19.

with Mr. Lytle's contention that there is no relationship between lease rates and success in the Volvo 360 program.³⁹⁶

Mr. Stockton agreed that dealers will incur some costs associated with modifying their operations in order to earn the bonuses available through the various components of the Retailer Bonus Program, though the costs may vary greatly from "fairly moderate" to "particularly major."³⁹⁷ To evaluate how much it cost a dealer to earn any of the bonuses, one would have to quantify "how much they changed their operations from what they otherwise would be to comply with the program," and Mr. Stockton said he did not have access to the kind of data that would let him perform such an analysis.³⁹⁸ He agreed that some of the programs are a potential profit opportunity for Volvo dealers.³⁹⁹ Still, he said, the dealers' investment would not change his opinion that the bonuses discriminate among dealers by effectively lowering the wholesale price that qualifying dealers pay for vehicles. Mr. Stockton testified that he believes the dealer's investment is "irrelevant to what's being measured."⁴⁰⁰

Mr. Stockton agreed there was a period of several years in which all Texas Volvo retailers received the same bonus, regardless of performance. He testified that he had not assessed Star's performance during that period, except possibly beginning in 2014. He did not remember a significant difference during that time.⁴⁰¹

b. FISI Program

As with Volvo's other incentive programs, Mr. Stockton testified that he believes "FISI payments discriminate among Houston dealers on the effect of the wholesale price of a vehicle,

³⁹⁶ Tr. 1060-64 (Stockton).

³⁹⁷ Tr. 1057-58 (Stockton).

³⁹⁸ Tr. 1160-62 (Stockton).

³⁹⁹ Tr. 1197 (Stockton).

⁴⁰⁰ Tr. 1166 (Stockton).

⁴⁰¹ Tr. 1175-76 (Stockton).

affecting the transactional level, including discriminating against Star,” and impairing Star’s ability to compete at the transactional level.⁴⁰² Mr. Stockton disputes Volvo’s suggestion that, by paying FISI bonuses only twice a year, Volvo can avoid seeing the FISI bonuses affect the dealers’ transactional behavior. Instead, Mr. Stockton asserts, dealers will rationally anticipate the payout and apply the bonuses to sales transactions.⁴⁰³ There may be some economic penalty associated with receiving payment in the future as opposed to today—a penalty generally called the “discount rate”—but the discount rate would have to be “infinitely high” for dealers not to factor the anticipated FISI payments into their customer sales transactions.⁴⁰⁴

Mr. Stockton testified that the expense of earning the FISI payments can vary greatly from dealer to dealer. Some dealers may have to make only a small investment, while other dealers—for example, a dealer like Star that has not materially remodeled or upgraded in 48 years—would have to make a very expensive investment in order to earn FISI payments and remain competitive.⁴⁰⁵ Still, Mr. Stockton thinks the 4-percent margin payment tied to the revised Retailer Standards program makes building a new facility “imperative” for Star.⁴⁰⁶

V. ADEQUACY OF TERMINATION NOTICE

Code § 2301.453 provides that a manufacturer cannot terminate a franchise agreement unless written notice is sent to the dealer “stating the specific grounds for the termination or discontinuance.”⁴⁰⁷ Here, Volvo’s notice advised Star that it was terminating the dealer agreement because Star has “consistently failed to adequately represent Volvo Cars in its assigned [AOR] and has specifically failed to achieve any reasonable degree of sales penetration

⁴⁰² Tr. 1079 (Stockton); Ex. P-156 at 3, tab 2, p.9.

⁴⁰³ Ex. P-155 at 29; Ex. P-156 at 5.

⁴⁰⁴ Tr. 1072-72 (Stockton); Ex. P-155 at 29.

⁴⁰⁵ Tr. 1168 (Stockton).

⁴⁰⁶ Tr. 1095 (Stockton).

⁴⁰⁷ Code § 2301.453(c). The statute also requires that notice be sent, via registered or certified mail, at least sixty days before the effective date of the termination, and that it contain prominent information notifying the dealer of its right to file a protest. Star does not contest Volvo’s compliance with these elements.

in its assigned area.”⁴⁰⁸ The notice of termination went on to list a number of ways in which, Volvo contends, Star has failed to adequately represent the Volvo brand and has harmed Volvo. The notice stated that termination was based on Clauses 6 and 7 of the dealer agreement, which are the contractual terms addressing the grounds and procedures for terminating the dealer agreement.⁴⁰⁹

In a motion to dismiss filed prior to the hearing and again in its post-hearing briefs, Star contested the adequacy of Volvo’s notice of termination. Star contends that its dealer agreement does not require any specific level of sales performance and so Volvo’s reference to sales performance—and particularly Volvo’s reliance on sales effectiveness figures—failed to allege a breach of contract that would support termination.

As stated in the order denying Star’s motion to dismiss,⁴¹⁰ the ALJs have concluded that the notice of termination adequately set forth the grounds for termination, thereby satisfying this procedural requirement. The notice of termination alleged facts that, if established, would constitute a breach of the contract term that requires Star to “develop the locality . . . to the satisfaction of [Volvo].” The notice of termination also stated facts that are relevant to whether there is good cause for terminating the franchise agreement. Code § 2301.455 provides that good cause is determined with reference to “all existing circumstances,” and “*notwithstanding the terms of any franchise.*”⁴¹¹ Even if, as Star contends, Volvo’s termination notice alleged failures that would not constitute a breach of contract, the plain language of the statute provides that contract breach is but one of many factors the Department must consider in determining whether there is good cause to terminate Star’s franchise. For these reasons, the ALJs conclude that the notice of termination complied with Code § 2301.453.

⁴⁰⁸ Ex. P-8 at SMC000660.

⁴⁰⁹ Ex. P-5 at SMC000652. In its briefs, Star repeatedly cited Mr. Klipstein’s comment that he personally regarded this termination proceeding as “strictly a breach of contract case.” Tr. 146 (Klipstein). The ALJs do not read nearly as much into this witness’s comment as Star does, and note that Volvo’s pleadings, evidence, and argument have consistently invoked statutory factors in addition to breach of contract.

⁴¹⁰ SOAH Order No. 12.

⁴¹¹ Code § 2301.455(a) (emphasis added).

VI. ANALYSIS OF STATUTORY GOOD-CAUSE FACTORS FOR TERMINATION

Much of the testimony and argument in this case centered on what is or is not required of Star's dealer agreement, and whether Volvo can hold Star to performance standards—like sales effectiveness, customer-satisfaction ratings, and facilities standards—that have developed in the nearly half-century since the dealer agreement was executed. Star has repeatedly suggested that considering the evidence on these issues would unfairly impose extra-contractual obligations that it never bargained for in the dealer agreement. By emphasizing the contract terms to the exclusion of all else, Star seems to be trying to side-step the statutory scheme for termination proceedings like this one. The legislature has directed that Volvo bears the burden of establishing that good cause exists to terminate Star's franchise, and that good cause takes into consideration "all existing circumstances."⁴¹² A party's compliance with the contract is only one of the seven enumerated circumstances that must be considered, and it is entitled to no more or less weight than the other factors that are considered.⁴¹³ Each statutory factor is addressed in turn below.

A. Star's Sales in Relation to the Market

To show good cause to terminate Star's dealership, Volvo must address Star's "sales in relation to the sales in the market."⁴¹⁴ Citing sales effectiveness and other data, Volvo argues that Star's sales performance has been "dismal" and it is by far the worst-performing Volvo dealer compared to other dealers in the city, region, and country.⁴¹⁵

The ALJs find that, though not dispositive, sales effectiveness is relevant evidence on how Star's sales compare to the market. Star's and Volvo's experts both agreed that sales

⁴¹² Code § 2301.453(g), .455(a).

⁴¹³ Code § 2301.455(a)(6).

⁴¹⁴ Code § 2301.455(a)(1).

⁴¹⁵ Volvo's Post-Hearing Brief at 22.

effectiveness sets a relatively low benchmark for the dealers to achieve.⁴¹⁶ The fact that most dealers are able to achieve sales effectiveness, or at least approach it, is strong support for Volvo's contention that sales effectiveness is a reasonable way to set achievable sales goals for Volvo's dealers. Volvo has also shown that sales effectiveness is widely used in the industry as a way to measure sales performance, and that it has been used to evaluate dealers' sales in other termination proceedings.⁴¹⁷

Volvo's evidence established that, in terms of sales effectiveness, Star has measured substantially worse than the average Volvo retailer and has consistently had the lowest performance in Texas and the nation.⁴¹⁸ Each year from 2012 to 2017, in terms of sales effectiveness, Star was the worst-performing dealer in both the census division and nation.⁴¹⁹ For example, in 2013, Star's sales effectiveness for the year was 11 percent, or 89 percent below what was expected. That same year, dealers in the Texas South Market averaged 109 percent, and dealers in the Southern Region averaged 111 percent.⁴²⁰ In 2017, Star's sales effectiveness was -78.77 percent, or about 79 percent below what was expected, while every other Houston dealer achieved sales effectiveness that year.⁴²¹ Overall, between 2012 and 2017, Star averaged a sales effectiveness of only 13.3 percent (86.7 percent below sales effectiveness), while the average sales effectiveness in the census division was 134.4 percent.⁴²²

In 2017, again in terms of sales effectiveness, Star was by far the worst performer of the 22 dealers in its census division. It was 50 percent worse than the next-lowest-performing dealer (a dealer that has since closed), and 70 percent worse, or more, than every other dealer in the

⁴¹⁶ Tr. 821 (Lytle); Ex. P-155 at 10.

⁴¹⁷ Volvo's Post-Hearing Brief at 21; *Cecil Atkission Orange, LLC, d/b/a Cecil Atkission Chrysler Jeep Dodge v. FCA US LLC*, SOAH Docket No. 608-15-4315.LIC, MVD Docket No. 15-0015.LIC (June 17, 2016 Proposal for Decision at 67-70) (adopted in Aug. 21, 2017 Board Final Order); *see also* Tr. 909-11 (Lytle); Ex. R-62 at 008.

⁴¹⁸ Tr. 81-82 (Klipstein); Tr. 513 (DeWinne); Ex. R-11 at 1.

⁴¹⁹ Tr. 847-48 (Lytle); Ex. R-62 at 040-41.

⁴²⁰ Ex. R-11 at 1.

⁴²¹ Tr. 838-40 (Lytle); Ex. R-62 at 035, 048. At some point after 2013, the baseline score for sales effectiveness shifted from 100 percent to 0 percent. Tr. 498-99 (DeWinne).

⁴²² Ex. R-62 at 041.

census division.⁴²³ On a nationwide basis, Star's sales effectiveness ranked last among the 281 Volvo dealers in the nation, by a large margin.⁴²⁴ Overall, Star's sales are in line with what dealers in much smaller markets like Edinburg and Temple achieve, not what a dealer in a large, fast-growing, and wealthy metropolitan area achieves.⁴²⁵ With its consistently poor sales performance, the evidence shows Star is failing to capitalize on the opportunity presented by having an AOR with the largest planning volume in Houston and one of the three largest in the state of Texas.⁴²⁶ It also squandered the opportunity to increase sales between 2015 and 2018 when a neighboring dealership closed and there was "an open AOR with one of the fastest-growing markets right next door" to Star.⁴²⁷

Star's expert acknowledged that Star has the lowest sales effectiveness of all Texas Volvo dealers,⁴²⁸ and Star has not otherwise contested the accuracy of Volvo's sales effectiveness calculations. Instead, Star challenges the relevance of using sales effectiveness to evaluate its sales at all. Star's main criticism of the sales effectiveness metric is that it is not specifically referenced in or required by the dealer agreement.⁴²⁹ The extent to which sales effectiveness is relevant to showing Star's compliance or noncompliance with the dealer agreement is addressed below in § VI(F), in the discussion of that statutory factor. Here, however, the legislature has required consideration of Star's sales in relation to the market *notwithstanding the terms of any franchise*.⁴³⁰ Thus, the fact that the dealer agreement does not address sales effectiveness is irrelevant to this factor.

⁴²³ Tr. 844 (Lytle); Ex. R-62 at 038.

⁴²⁴ Tr. 846-47, 891 (Lytle); Ex. R-62 at 039.

⁴²⁵ Tr. at 357-58 (DeWinne); Ex. R-82 at 2.

⁴²⁶ Tr. 75-77, 235 (Klipstein); R. Ex. 16 at 38.

⁴²⁷ Tr. 114, 233 (Klipstein); Tr. 359-60 (DeWinne).

⁴²⁸ Tr. 1191-92 (Stockton).

⁴²⁹ Star's Post-Hearing Brief at 30-32, 54; Star's Post-Hearing Reply Brief at 50.

⁴³⁰ Code § 2301.455(a).

Star (and its expert) also argued that sales effectiveness is an imperfect way of measuring a dealer's performance in its AOR because it considers a dealer's sales "in all geographies," rather than just in its assigned AOR.⁴³¹ Even assuming this is true, it is hard to understand how this criticism inures to Star's benefit, given the vast discrepancies between the number of sales pumped in to Star's AOR by other dealers (20-25 per month) and the number of sales Star typically pumps out to other AORs (1-2).⁴³² The testimony was undisputed that, for most dealers, pump-in sales approximately equal pump-out sales.⁴³³ The imbalance between Star's pump-in and pump-out sales means that, if only Star's sales in its own AOR were considered, its sales performance would be *even worse* than the sales effectiveness figures show.⁴³⁴

In any event, Volvo offered two alternative ways of measuring Star's sales performance, both of which focus on a dealer's sales performance in its own AOR, and both of which had been employed by Star's expert in a prior (unrelated) termination proceeding. Using a "sales portion" method, Star was still the worst-selling dealer in 2017 in all 22 AORs in the census division and the worst-selling of all 281 dealers in the nation, and was worst by a wide margin.⁴³⁵ Star has also been the worst-performing Volvo dealer in the nation each year since 2012 using this same "sales portion" metric.⁴³⁶ Likewise, when using a "sales penetration" method of analysis, Star has been the worst-performing dealer in the census division and the country since at least 2012, and is approximately 50 percent worse than the next-worst dealer in the country.⁴³⁷ Notably, Star could not point to any alternative method of analyzing its sales that would have improved Star's standing relative to the market.

⁴³¹ Star's Post-Hearing Reply Brief at 50.

⁴³² Tr. 279, 314, 322-23 (DeWinne); Tr. 680 (Seidman); Tr. 1358 (Seureau).

⁴³³ Tr. 680 (Seidman).

⁴³⁴ Tr. 501, 513-14 (DeWinne).

⁴³⁵ Tr. 890-91 (Lytle); Ex. R-64 at 018-19.

⁴³⁶ Tr. 891-82 (Lytle); Ex. R-62 at 021.

⁴³⁷ Tr. 892-93 (Lytle); Ex. R-62 at 021-23.

The preponderance of the evidence clearly shows that, at least since 2012, there is no measure by which Star's sales have come close to matching the performance of other Volvo dealers in the Houston, regional, or national markets. Therefore, the ALJs conclude that Volvo has established that Star has extremely poor sales in relation to the market, and this factor weighs heavily in favor of terminating Star's franchise.

Finally, Star argues that Volvo's emphasis on sales performance in this proceeding runs afoul of Code § 2301.455(b), which provides that a manufacturer's desire for market penetration "does not by itself constitute good cause" for termination. Star insists that "this case is all about Volvo's desire for additional market share."⁴³⁸ Volvo responds that Star's poor sales performance—and its impact on Volvo's market penetration—is but one of many reasons it has moved to terminate Star's franchise at this time. Volvo also points to Star's lack of significant investment or improvements since 1970, Mr. Seureau's longstanding resistance to improvement plans or implementation of any modernizing practices, Star's low customer satisfaction scores, and Star's seeming alienation of its local customers, who are traveling inconvenient distances to shop at dealers other than Star, among other considerations.⁴³⁹ Broadly, Volvo argues that the way Star manages and operates its business is harming both the public and the Volvo brand. Volvo's various other reasons for seeking termination are discussed below, in connection with the relevant statutory good-cause factors. For purposes of Code § 2301.455(b), however, the ALJs conclude that a desire for more sales penetration is not the only reason Volvo is seeking termination of Star's franchise.

B. Star's Investment and Obligations

The second statutory factor examines the investment and obligations of Star's dealership.⁴⁴⁰

⁴³⁸ Star's Post-Hearing Reply Brief at 51.

⁴³⁹ Volvo's Post-Hearing Brief at 23.

⁴⁴⁰ Code § 2301.455(a)(2).

Star contends that its business has substantial value, claiming the land where it is located is worth approximately \$8 million and the dealership has an ongoing business value of \$2.1 million per year.⁴⁴¹ However, Star's estimation is a projected value of the dealership if and when a new facility is built, not its present value. The \$8 million land value that Mr. Seureau testified to was referring to the empty lot where he would like to build, not the tract where the current dealership is situated,⁴⁴² and his \$2.1 million business-value estimate is based on the annual revenues from sales, service, and parts he anticipates if Star is in a larger facility and selling around 500 vehicles a year.⁴⁴³ Given Mr. Seureau's admissions that he has not had his property appraised and has engaged in no business planning or break-even analysis to even determine whether his proposed new building could be profitable—to say nothing of the fact that Star has never sold anything close to 500 vehicles a year—the ALJs have given little weight to Mr. Seureau's estimations of the future value of a facility that is only in the very earliest planning stages.

The ALJs also find that the future (potential) value of Star's dealership is irrelevant to the question at hand. Code § 2301.455(a) requires analysis of “all *existing* circumstances,” not projected, future circumstances. Thus, this statutory factor requires consideration of Star's *current investment* in the dealership. On this point, the evidence is thin. Mr. Seureau testified that he purchased the Star Volvo dealership in 1970, but the purchase price is not reflected in the record. On Star's financial statements, its fixed assets have a book value of about \$1.7 million, an amount that changed little between 2012 and mid-2018, and Volvo's expert testified that the assets have been “highly depreciated” and are currently valued at about 20-25 percent of original cost.⁴⁴⁴ There was no evidence of Star's obligations, other than Mr. Seureau's testimony that Star is not obliged to pay him fair market value for its rent because he knows the dealership could not afford it.⁴⁴⁵

⁴⁴¹ Star's Post-Hearing Brief at 67.

⁴⁴² Tr. 1350 (Seureau); Tr. 1092 (Stockton).

⁴⁴³ Tr. 1307-09 (Seureau).

⁴⁴⁴ Tr. 877-80 (Lytle); Ex. R-62 at 071-73; *see also* Exs. P-184 to P-190.

⁴⁴⁵ Tr. 1314 (Seureau).

The evidence also shows that other than basic maintenance like painting, replacing worn flooring, and purchasing new furniture, Star has made very little investment in its building and operations over the years. Nearly every witness described Star's facility as old, outdated, and barely serviceable. It is not compliant with modern Volvo branding and signage standards, and it compares very poorly to other premium or luxury auto dealers. The record also reflects a longstanding reluctance of Mr. Seureau to make even modest investments in the business. He refused to pay the \$250 month it would have cost to enroll in the inventory management program favored by most other Volvo dealers, or just \$45 per month in maintenance fees for a new sign that Volvo would provide. His employees testified that they were unable to offer even basic amenities like a selection of coffees or snacks because Mr. Seureau would not approve the expense. Star's failure to make any significant investments over the years evinces a lack of commitment to its business and supports Volvo's contention that the dealership should be terminated.

In sum, Star's investments are relatively small, and apparently consist of little more than the dealership facility itself. Mr. Seureau, not Star, owns the real property the dealership sits on, and he charges Star below-market rent. There was no evidence of significant obligations owed by Star, or creditors that could be harmed if the dealer agreement is terminated. If the dealer agreement is terminated, Mr. Seureau will continue to own the real estate and Star will continue to own the building, and both can presumably be used for Star's remaining auto businesses for other brands. For these reasons, the ALJs conclude that this factor supports good cause for termination of the dealership agreement.

C. Injury or Benefit to the Public

The third statutory factor requires consideration of any "injury or benefit to the public."⁴⁴⁶

⁴⁴⁶ Code § 2301.455(a)(3).

Volvo argues that the public is being injured by having an underperforming dealer in such a large market, pointing to the undisputed evidence showing that, for whatever reason, the vast majority of Volvo customers in Star's AOR have been driving to less-convenient dealers to purchase their vehicles, rather than shopping at Star. Volvo also contends that Star's low CSI and SSI scores indicate that customers are dissatisfied with Star's facility and services, which is further evidence that the public is harmed by Star. For the same reasons, Volvo contends the public would suffer little or no harm if Star is terminated, particularly because customers are already accustomed to seeking out other dealers. And any harm the public might incur from losing a dealership in Star's AOR would be short-lived, according to Volvo, because Volvo intends to open a new dealership in that AOR.⁴⁴⁷ Ultimately, Volvo believes the public will benefit from having a new dealer in the area who can provide better service and increase inter-brand and intra-brand competition.⁴⁴⁸

Conversely, Star argues that the public would benefit by preserving Star's dealership because of the jobs it provides and the services it performs for customers.⁴⁴⁹ Star also asserted (through Mr. Stockton's testimony) that there is a public interest in restraining at-will terminations or termination actions that are based on "unsound reasons" because such terminations would create uncertainty for dealers, discouraging them from investing in their dealerships.⁴⁵⁰

After considering the arguments and evidence, the ALJs find that the public would not be harmed by the termination of Star. The majority of Star's potential customers are already driving to other Houston dealers, as well as dealers in other cities, to avoid shopping at Star.⁴⁵¹ Indeed,

⁴⁴⁷ See Code § 2301.453(h) (requiring manufacturer to establish another franchise within a reasonable time following termination, unless it is shown by a preponderance of the evidence that the community cannot support such a dealership).

⁴⁴⁸ Volvo's Post-Hearing Brief at 23-24; Volvo's Reply Brief at 14-15.

⁴⁴⁹ Star's Post-Hearing Brief at 67.

⁴⁵⁰ Tr. 111-12 (Stockton); Ex. P-166 at 6.

⁴⁵¹ Tr. 279, 314-15, 322-23, 332-33 (DeWinne); Tr. 680 (Seidman); Tr. 1358 (Seureau); Ex. R-6 at 17.

many in its own AOR are apparently unaware that Star even exists.⁴⁵² Thus, even if Star's franchise were terminated and Volvo never installed a new dealer in its place, the impact to the public would be negligible.

The evidence also failed to establish Star's contention that the public would be harmed if its employees lost their jobs from the termination. Instead, as Volvo noted, Star still owns three other dealerships in the same complex, including the much larger Mercedes dealership, and Star's service, used-car, and administrative functions could continue even if the Volvo dealership is terminated.⁴⁵³ Thus, Star has not shown that termination would necessarily mean its staff could not remain employed. If, as Volvo suggests, a new dealer would be installed, then the public would benefit from the increased employment opportunities offered by a better-performing dealer and from having a local dealer that could meet customers' needs, eliminating the inconvenience of driving to dealers in other parts of Houston and the region for sales and service.

For these reasons, the ALJs find that the statutory factor addressing injury or benefit to the public weighs in favor of termination.

D. Adequacy of Star's Service Facilities, Equipment, Parts, and Personnel

Next, the parties must address "the adequacy of the dealer's service facilities, equipment, parts, and personnel" relative to other Volvo dealers.⁴⁵⁴

Volvo has not alleged that Star's equipment, parts, or service personnel are inadequate.⁴⁵⁵ However, Volvo does contend that Star's service facilities are inadequate when compared to

⁴⁵² Tr. 1490-92 (Velasco); Ex. P-242 at 58-60, 69-70 (Velasco Add-Point testimony).

⁴⁵³ Volvo's Reply Brief at 14-15.

⁴⁵⁴ Code § 2301.455(a)(4).

⁴⁵⁵ The ALJs give little credence to the assertion by Volvo's witnesses that Star's furniture constitutes "equipment." In any event, though the furniture may be dated, the evidence did not establish that it is functionally inadequate.

other Volvo dealers.⁴⁵⁶ Specifically, Volvo asserts that Star's service facility is inadequate because it has never been significantly updated or upgraded. Volvo also points out that Star's service drive and service floor are not air conditioned, and that Star is the only dealer in Houston—where summers are typically long, hot, and humid—that does not provide an air-conditioned space where customers can speak with service writers. Volvo also contends the service facility is inadequate because the customer waiting area is small and windowless and Star refuses to provide basic amenities like a selection of drinks and snacks for customers while they wait for their vehicles.⁴⁵⁷

In response, Star principally argues that it has no contractual obligation to air condition its service area or update its service facility or waiting room, and broadly denies that the service facility is lacking.⁴⁵⁸ Star points to Mr. Seureau's testimony that he has made certain improvements to the service department, including painting the floors and some fixtures, purchasing new equipment, and installing better lighting.⁴⁵⁹ Star also claims that its service facility must be considered adequate today because it was adequate to Volvo in 1970, when Mr. Seureau acquired the dealership.⁴⁶⁰ Finally, Star argues that whatever deficiencies may exist will be cured by the new facility it intends to build.⁴⁶¹

As an initial matter, Star's contention that its dealer agreement imposes no specific standards on the service department is, once again, inapt. The Code requires an examination of the adequacy of Star's service facilities *notwithstanding* the terms of the parties' contract.⁴⁶²

⁴⁵⁶ Volvo's Post-Hearing Brief at 23.

⁴⁵⁷ Volvo's Post-Hearing Brief at 23; Volvo's Post-Hearing Reply Brief at 10-11. As another inadequacy, Volvo also alleged that Star's restrooms do not comply with the Americans with Disabilities Act (ADA). The only evidence that the bathrooms are not ADA-compliant was the bare assertion of Mr. Klipstein, and he admitted that Volvo would not terminate a dealer for that reason. Therefore, the ALJs will not address this allegation further.

⁴⁵⁸ Star's Post-Hearing Reply Brief at 52-53. In addressing this statutory factor in its opening brief, Star mainly discussed facts that are not in dispute (such as the adequacy of Star's equipment, parts, and personnel) or that are not relevant to this factor (such as the condition of Star's *sales* facility). Star's Post-Hearing Brief at 58-65.

⁴⁵⁹ Tr. 1356 (Seureau).

⁴⁶⁰ Star's Post-Hearing Reply Brief at 52.

⁴⁶¹ Star's Post-Hearing Brief at 62.

⁴⁶² Code § 2301.455(a).

Likewise, only “existing circumstances” are relevant to the good cause analysis, so Star’s reliance on future plans for the service facility is misplaced.⁴⁶³ The ALJs also find no support for Star’s contention that, having deemed the service facility adequate at one time, Volvo is somehow estopped from ever alleging inadequacy of the same facility. It is self-evident that a facility that was considered adequate in 1970 might not be adequate nearly half a century later.

Turning to the adequacy of Star’s service facility as it exists today, the preponderance of the evidence shows that Star’s service facility is technically functional and able to serve the comparatively small volume of customers that the dealership attracts. Still, the service facility compares unfavorably to other Volvo dealers. Star operates the only Volvo facility in Houston, or anywhere else, that has not had a significant upgrade or facelift in nearly fifty years, and Mr. Seureau’s minor updates and improvements have not overcome the facility’s limitations. Star’s CSI scores show that, compared to other Volvo dealers, the service department ranks far below the national average in customer satisfaction.⁴⁶⁴ Given that service customers consistently score Star poorly on the enabler question addressing their satisfaction with the waiting area, and given Volvo’s “top box” way of scoring the enabler questions, it appears that the low CSI scores are largely attributable to the condition of the facility itself, not the quality of the service provided. With its dated appearance, lack of amenities, and lack of air conditioning, Star’s own managers believe the facility is likely to repel both customers and service employees.⁴⁶⁵ The inadequacy of Star’s service facilities relative to other Volvo dealers is a factor that weighs in favor of termination.

⁴⁶³ Code § 2301.455(a). The ALJs note that, in his testimony at the hearing, Mr. Seureau pointedly refused to commit to air-conditioning the service floor in the event a new facility was approved and constructed. Tr. 1405-06 (Seureau).

⁴⁶⁴ Ex. R-78.

⁴⁶⁵ Tr. 560 (Bunch); Tr. 1496-97 (Velasco).

E. Star's Warranty Service

In demonstrating good cause for termination, the Department must consider “whether warranties are being honored by the dealer.”⁴⁶⁶

Volvo's notice of termination alleged that Star had been “provid[ing] inadequate warranty service, which further harms the consumer as well as the Volvo brand.”⁴⁶⁷ At the hearing, however, Volvo's witnesses expressly disavowed any claim that Star had ever performed improper or incorrect warranty service.⁴⁶⁸ Rather, Mr. Seidman and Mr. Klipstein testified that the allegation about “inadequate warranty service” was meant to address Volvo's concerns that Star lacks the capacity to service as many customers as it *should be* attracting if Star were selling an adequate number of cars, and that warranty service volume is low because Star's customers seek out less-convenient dealers for service rather than go to Star.⁴⁶⁹ Volvo's expert, Mr. Lytle, offered no opinion on whether or not Star was able to honor its warranties or on the quality of its warranty work, other than to broadly suggest that Star's low volume of service customers indicates that customers prefer going to other dealerships for warranty service.⁴⁷⁰

For Star's part, its service manager testified convincingly that Star's service department diligently follows Volvo's warranty guidelines and honors Volvo's warranties to its customers. In fact, Mr. Bunch said that he is so trusted by Volvo that he is authorized to extend warranty coverage in some circumstances when a vehicle's factory warranty has expired.⁴⁷¹ This

⁴⁶⁶ Code § 2301.455(a)(5).

⁴⁶⁷ Ex. P-8 at SMC000660.

⁴⁶⁸ Tr. 193, 196 (Klipstein); Tr. 703-04 (Seidman).

⁴⁶⁹ Tr. 194 (Klipstein); Tr. 703, 773 (Seidman); Volvo's Post-Hearing Brief at 24.

⁴⁷⁰ Tr. 912-13 (Lytle).

⁴⁷¹ Tr. 533-34, 572-78 (Bunch).

testimony was not disputed by Volvo, and its witnesses generally praised Mr. Bunch's competence.⁴⁷²

The preponderance of the evidence supports a finding that Star's service department is competent and satisfies the customers it currently attracts. Though the service department might be strained if Star sold more cars, and hence generated more service business, such concerns are speculative and, in any event, do not speak to the warranty service that is actually being provided to Star's current customers. The evidence shows that Star is able to provide its customers with adequate warranty service and is honoring its customers' warranties. Therefore, this factor does not weigh in favor of Volvo's decision to terminate Star's franchise.

F. Compliance with the Franchise

The next statutory factor to be considered in determining good cause for terminating a dealership is "the parties' compliance with the franchise, except to the extent that the franchise conflicts with [Code chapter 2301]."⁴⁷³

In arguing that Star has not complied with the franchise, Volvo specifically alleges that Star has violated three provisions of the 1970 dealer agreement: Clause 6(a)(5), which requires Star to "develop the locality assigned to [Star] to the satisfaction of [Volvo]"; Standard Provision 3, which requires Star to "maintain a place of business and sale room and service facilities satisfactory to [Volvo]"; and Standard Provision 14, which requires Star to "advertise and in all ways promote the sale of the vehicles in [its] locality in a satisfactory and proper manner to the satisfaction of [Volvo]."⁴⁷⁴ Arguing that each of these terms is based on Volvo's satisfaction with Star's performance, Volvo went on to list a variety of reasons it has been reasonably, objectively dissatisfied, including: Star's poor sales, as measured by sales effectiveness; the poor condition of Star's facilities; Star's chronically low CSI and SSI scores;

⁴⁷² Tr. 414 (DeWinne).

⁴⁷³ Code § 2301.455(a)(6).

⁴⁷⁴ Ex. P-5 at SMC000652, SMC000654, SMC000656.

the low volume of vehicles serviced by Star's service department; and Star's limited advertising efforts to promote sales.⁴⁷⁵

In response, Star argues that the dealer agreement does not expressly require it to achieve any specific level of sales performance or service volume, upgrade its facilities, purchase advertising, or achieve any customer-satisfaction benchmarks, and that to consider these matters would impermissibly impose extra-contractual obligations on Star. The ALJs do not agree. Volvo is not asserting that sales effectiveness, facilities standards, or CSI and SSI scores are contractually required of Star, and it is not asserting a breach on those grounds. Rather, Volvo is pointing to these subjects, among many others, as evidence showing why Volvo has been dissatisfied with Star's performance. Evidence supporting Volvo's dissatisfaction is directly relevant to the breach allegations against Star.

In construing the dealer agreement, there is a question of which state's law applies. The dealer agreement provides that it will be construed under New Jersey law, but Star argues that Texas law should apply because the Code specifies that chapter 2301 and Texas law governs all disputes involving franchise agreements.⁴⁷⁶ In its post-hearing briefs, Volvo cited to both New Jersey and Texas cases on issues of contract law. The Code specifies that franchise agreements are "subject to" chapter 2301, and that contract terms inconsistent with chapter 2301 are unenforceable.⁴⁷⁷ The Code also provides that, "notwithstanding the terms of any franchise," the law of this state applies to any action brought by a manufacturer against a dealer.⁴⁷⁸ Accordingly, the ALJs conclude that notwithstanding the New Jersey choice-of-law provision in the dealer agreement, Texas law applies to questions of contract law in this case. In Texas, satisfaction clauses like Clause 6(a)(5), Standard Provision 3, and Standard Provision 14 are enforceable; claims of breach (or dissatisfaction) are subject to an objective reasonableness test

⁴⁷⁵ Volvo's Post-Hearing Brief at 19-21.

⁴⁷⁶ Ex. P-5 at SMC000653; Code §§ 2301.003-.004. ⁴⁷⁸.

⁴⁷⁷ Code § 2301.003.

⁴⁷⁸ Code § 2301.478.

and require a showing that the party claiming breach has acted in good faith or the exercise of honest judgment.⁴⁷⁹

Here, Volvo has provided ample evidence to show that it is dissatisfied with Star's performance, and that its dissatisfaction is objectively reasonable. With respect to Clause 6(a)(5), which requires Star to "develop the locality assigned to [Star] to the satisfaction of [Volvo]," Volvo's evidence shows:

- Despite being in one of the fastest-growing, most affluent areas of Houston, and despite having the largest planning volume of all the Houston Volvo dealers and one of the top three market potentials in the state, Star has not been able to sell enough cars to meet anywhere near the potential of its AOR. Star is the lowest-selling dealer in Houston despite having the largest market opportunity.
- Star failed to capitalize on the sales opportunity presented between 2015 and 2018 when a neighboring dealership closed and Star had no competition for customers in the neighboring AOR. Star's sales performance did not meaningfully change during that period.
- In terms of sales effectiveness, Star's performance has been 80 to 85 percent worse than the average Volvo retailer each year since at least 2012. It is the worst-performing dealer, by a wide margin, in Houston, the census division, and the nation.
- In terms of sales portion, Star has been the worst-selling dealer in the nation (meaning it sold the lowest portion of the sales made in its own AOR relative to any of the other dealers) each year since 2012, by a wide margin.
- In terms of sales penetration (which excludes consideration of sales that other dealers made into Star's AOR), Star has also been the worst-selling dealer in the country since at least 2012. Its performance has been approximately 50 percent worse than the next-worst dealer in the country.

⁴⁷⁹ *Black Lake Pipe Co. v. Union Const. Co.*, 538 S.W.2d 80, 88 (Tex. 1976), *overruled on other grounds*, *Stern v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Chappell Hill Bank v. Lane Bank Equip. Co.*, 38 S.W.3d 237, 243 (Tex. App.—Texarkana 2001, pet. denied). The ALJs note that Texas law and New Jersey law are consistent on this issue, and the outcome is the same regardless of which state's law applies. See *Silvestri v. Optus Software, Inc.*, 814 A.2d 602, 606 (N.J. 2003); *Fitzmaurice v. Van Vlaanderen Mach. Co.*, 273 A.2d 561, 562 (N.J. 1971) (under New Jersey law, claims of breach of satisfaction clauses are subject to test of objective reasonableness).

- Despite receiving more leads than most Volvo dealers in the region, Star does a poor job of converting internet leads into car sales and converts a lower proportion of leads into sales than other dealers in the South Texas Market and the Southern Region.
- Star sells fewer assurance products than other dealers.
- Since at least 2012, an average of 20 to 25 vehicles have been pumped in to Star's AOR each month, while only one or two cars are being pumped out. Star is routinely outsold in its own AOR by other Volvo dealers in the Houston Market, and Volvo dealers in other cities have been able to sell nearly as many vehicles in Star's AOR as Star has.
- Other dealers could become complacent because they are able to achieve their sales goals by pumping out sales to Star's AOR, rather than developing their own AORs. A more aggressive, successful dealer in Star's AOR would lift the performance of everyone in the market.
- Star's poor sales performance has hurt Star's service business. Star's service department does not have anywhere near the volume of customers expected considering the size of the locality.
- Star has failed to develop any business strategy that would help overcome the limitations of its location in a low-traffic area that lacks visibility and proximity to other premium auto dealers or high-end retailers.
- Customers in Star's AOR are inconvenienced when they drive to shop or seek service from other Volvo dealers. This reflects poorly on the brand and ultimately may alienate those customers from the Volvo brand.
- Customers have been expressing their dissatisfaction with Star's sales and service by giving Star low CSI and SSI scores. Since at least 2012, Star's CSI and SSI scores have generally been well below average when compared to other Volvo dealers.
- Star has resisted Volvo's longstanding efforts to get Star to modernize its business practices, invest more in the business, and improve the dealership's operations. Mr. Seureau generally ignores Volvo's advice or outright refuses to make requested changes.
- Star is the only dealer in the South Texas Market that Volvo has had to place on a VRIP program to address its poor performance.
- Star does not engage in any formal business planning and has refused or been slow to implement business practices that are standard at other, more successful, dealerships, such as: paying salespeople on a commission-only

basis, paying performance bonuses to employees who earn high customer satisfaction scores, or implementing an inventory management system.

No single item on the list above is claimed to breach a term of the dealer agreement or to justify termination on its own. But taken together, these facts clearly show that Volvo has an objectively reasonable basis for being dissatisfied with the way Star has developed its assigned locality, and that Volvo is acting in good faith in asserting a breach of Clause 6(a)(5). Volvo has established a breach of this contract term.

With respect to Standard Provision 3, which requires Star to “maintain a place of business and sale room and service facilities satisfactory to [Volvo],” Volvo’s evidence shows:

- Star’s facility is small and dated, and the showroom does a poor job of showcasing vehicles. The facility not been meaningfully updated or renovated in nearly fifty years.
- Star is the only Houston Volvo dealer that has never undergone major upgrades, and it compares poorly to other Volvo dealers and other luxury dealers.
- Star’s facility, and particularly the showroom and customer waiting area, do not convey a premium experience to customers.
- For years, Mr. Seureau has told Volvo that he has no interest in upgrading Star’s facilities or participating in any incentive programs that would have rewarded Star for meeting modern facilities standards.
- The Volvo sign outside the dealership is an old “hockey stick” design that is no longer approved by Volvo, has not been manufactured since the 1970s, and is no longer in use at any other dealership in the world. The signage on the door of the dealership is so dated that Volvo is unaware of any other dealer that still uses it.
- Mr. Seureau has shown a longstanding reluctance or unwillingness to make any significant upgrades to Star’s facility, or to offer amenities that are standard at other dealerships. It requires significant prodding to coax even minor improvements and maintenance at Star.
- Even after recent improvements, Star’s waiting room is small, windowless, sparsely furnished, and does not offer customer amenities like snacks and a selection of drinks that are common at other high-end dealers.

- Star's entire service facility lacks air conditioning, and Star is the only Volvo dealer in Houston that does not have an air-conditioned service drive, or that writes up customer tickets in a space that is not air conditioned.
- Customers and employees are affected by the lack of air conditioning, and Star's managers have expressed concern that service technicians will avoid Star to work for dealers that do air condition their service departments.
- Star's website has been inadequate and poorly maintained for years and fails to attract customers.
- Customers have expressed their dissatisfaction with Star's sales facility and service waiting area on CSI and SSI questionnaires, consistently scoring Star poorly on those questions.

Again, while none of the above-listed items, standing alone, establishes a breach of the dealer agreement, collectively these facts establish that Volvo has an objectively reasonable basis for determining that Star has failed to maintain its place of business, including showroom and service facilities, to Volvo's satisfaction. The evidence establishes a breach of Standard Provision 3.

Finally, with respect to Standard Provision 14, which requires Star to "advertise and in all ways promote the sale of the vehicles in [its] locality in a satisfactory and proper manner to the satisfaction of [Volvo]," Volvo's evidence shows:

- Star's advertising has been insufficient to raise the dealership's profile and Star's local community is largely unaware of the dealership's existence.
- Though Star has advertised on television and radio, in magazines, and email, its advertising budget was reduced in 2017 and 2018.
- Star's sales manager believes a lack of advertising has been an impediment to increasing Star's sales.
- Volvo's expert believes the type of advertising Star emphasizes (informational advertising) is less effective than advertising that attracts customers by emphasizing prices (persuasive advertising).

However, there is little or no evidence addressing Star's specific advertising expenses, how advertising correlates to sales, or what level or specific type of advertising might improve Star's

overall performance or otherwise reasonably satisfy Volvo. The ALJs conclude that the evidence failed to establish Star's breach of Standard Provision 14.

In sum, Volvo has shown, by a preponderance of the evidence, that Star has breached Clause 6(a)(5) and Standard Provision 3 of the dealer agreement. Star's failure to comply with the dealer agreement is another factor that weighs heavily in favor of terminating its franchise.

G. Enforceability and Reasonableness of Star's 1970 Franchise Agreement

The final statutory factor requires the parties to address "the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power."⁴⁸⁰

Neither party addressed this factor in depth and neither party contends that the dealer agreement is unenforceable. However, Star argues that for Volvo or the Department to place any sort of sales, facilities, or performance expectations on Star would be "unreasonable and oppressive" because no such obligations are spelled out in the dealer agreement.⁴⁸¹ The ALJs believe it is Star, not Volvo, that is advocating an unreasonable construction of the contract.

Star argues that the dealer agreement imposes no obligation whatsoever to sell or service Volvo vehicles. At most, according to Mr. Seureau, the contract creates an "incentive" for Star to sell Volvos.⁴⁸² Throughout its briefs, Star has also urged that the dealer agreement somehow precludes consideration of AORs, sales effectiveness, customer satisfaction, and essentially every other modern tenet of the automotive industry that has developed in the half-century since the dealer agreement was signed. The ALJs do not agree with Star's construction and, as discussed above, the preponderance of the evidence clearly establishes Star's breach of Clause 6(a)(5) and Standard Provision 3 of the dealer agreement. However, if Star's contract

⁴⁸⁰ Code § 2301.455(a)(7).

⁴⁸¹ Star's Post-Hearing Brief at 52.

⁴⁸² Tr. 1185-87 (Lytle); Tr. 1229-31, 1474-75 (Seureau).

interpretation were accepted, then the ALJs believe that the dealer agreement would likely be unenforceable as a matter of law.

The Code specifies that that the reason auto manufacturers and dealers are regulated in this state is to advance the state's purpose of "ensur[ing] a sound system of distributing and selling motor vehicles," and that any contract term that is inconsistent with that goal is unenforceable.⁴⁸³ Similarly, a "franchised dealer" is defined as someone who is "engaged in the business of buying, selling, or exchanging new motor vehicles."⁴⁸⁴ If Star has no contractual obligation to buy or sell cars, or to adapt its business over time so it can continuing selling cars despite changing market conditions, then it is not clear why Star would be entitled to the statutory protections provided to franchised dealers in Code chapter 2301.

The ALJs conclude that, because the franchise is enforceable from a public policy standpoint and because Star is not complying with some of the core requirements of the franchise, this factor supports termination.

H. Other Relevant Circumstances

Code § 2301.455(a) directs the Department to consider "all existing circumstances," and the factors listed in that rule are not exclusive. As an additional circumstance, Star argues that its plan to build a new facility should be regarded as a circumstance that weighs against termination because the new facility will resolve Volvo's criticisms of the current facility, and because Star can be more competitive and sell more cars after building the new, larger facility.⁴⁸⁵

Though Volvo has been urging major renovations for years, Star decided to pursue a new facility only recently. It was not until last summer—more than two years after this proceeding was initiated—that Mr. Seureau first expressed interest in building a modern facility for Star. At

⁴⁸³ Code §§ 2301.001, .003.

⁴⁸⁴ Code § 2301.002(16)(B).

⁴⁸⁵ Star's Post-Hearing Brief at 73-74.

this stage, only very preliminary plans have been drawn up, and Volvo has not approved them. Whether a new facility will ever be built is speculative, despite Star's assurances.

It is equally speculative to say that a new facility would significantly improve Star's performance. Witnesses for both parties testified to many challenges and deficiencies in Star's business, and moving into a new building will not cure them all. The new facility would still have low visibility and would not be situated near other luxury car dealers or complementary high-end retail businesses. A new facility will not resolve problems like Star's failure to maintain a website, convert internet leads into sales, or follow up with customers to gauge their satisfaction with the service department. And even in a new facility, Star would still be owned and managed by Mr. Seureau, who has shown himself to be very reluctant to invest in the business or adapt his business practices as the auto market grows and changes.

Additionally, Volvo has expressed doubt that Star could ever sell enough vehicles to justify the size and expense of the facility it has proposed to build, and there is certainly nothing in Star's past years' performance that indicates Star will suddenly transform into a dealer capable of selling 500 vehicles per year, as Mr. Seureau anticipates. Because he does not believe in formal business planning, Mr. Seureau admitted that his belief that the new facility will be profitable is based on little more than a gut feeling.

In sum, at this preliminary stage, there are no assurances that a new facility will ever be built, or that Star's operations would improve once in a new building. Therefore, the ALJs conclude that Star's plan to build a new facility is not a "current circumstance" that weighs in Star's favor in this proceeding

VII. ANALYSIS OF STAR'S COUNTERCLAIMS AND DEFENSES

A. Effect of Bonus Programs on Star's Sales

Star contends that its sales have been significantly hampered by the awarding of bonus payments to Star's competitors under FIS (and its predecessors) and the Retailer Bonus

Program. Star argues that its competitors have used those payments to undersell Star, and that Star's poor sales performance is attributable at least in part to that discrepancy. The ALJs find that the evidence does not support Star's contention.

As both Mr. DeWinne and Mr. Lytle testified, Star's poor sales performance predated Volvo's imposition of performance-based bonus payments. The contact reports from 2012 to 2014,⁴⁸⁶ which Mr. DeWinne discussed, show a persistent pattern of low sales performance. During that period, Star was receiving the same margin as its competitors, although some of those competitors may have been receiving facility payments. When asked about Star's sales performance, Mr. DeWinne agreed that Star's sales effectiveness was "substantially below" that of its competitors during the time when all South Texas dealers were receiving the same margin.⁴⁸⁷

Mr. Lytle analyzed Star's sales performance from 2012-2017, which included the period when all the dealers received the same margin. He concluded that, "Since at least 2012, Star Motor Cars has had the worst sales performance of any Volvo dealership in the West South Central Census Division and in the country."⁴⁸⁸ Mr. Lytle also concluded that:

Neither the [FISI] nor the Retail Bonus Programs were the cause of Star Motor Cars poor sales performance Star Motor Cars sales performance has been consistently poor for a long period of time and in the period of time before these bonus programs were implemented There is no evidence to suggest that these or other programs had any material effect on Star Motor Cars sales performance.⁴⁸⁹

Although Mr. Stockton, Star's expert witness, testified that Volvo's tiered margin programs result in uneven competitive conditions,⁴⁹⁰ he did not examine Star's performance

⁴⁸⁶ Exs. R-2 to R-14.

⁴⁸⁷ Tr. 317-18 (DeWinne).

⁴⁸⁸ Ex. R-64 at 3.

⁴⁸⁹ Ex. R-64 at 9.

⁴⁹⁰ Ex. P-155 at 3-0.

throughout the period when all dealers were receiving the same margin. To the extent he did look at the issue, Star's performance had not changed:

Q: Did you do anything to assess Star's performance during that period of time when they were receiving the identical bonus of every other dealership in Texas?

A: No, I don't think I went that far back Maybe – actually, there would be some things in my – establishment case report that would have looked at that for 2014 and 2015 because I – I think that the differential margin started in 2016 and I did analyze Star sales in 2014 and 2015.

Q: Okay. Just sitting here now, do you know if their performance was any better in relation to their fellow Volvo dealers when they were receiving the same bonus?

A: I don't remember a significant difference.⁴⁹¹

Mr. Seureau attributed Star's earlier sales performance, at least in part, to the facility payments made to other dealers under both FISI and previous programs. The evidence shows, however, that none of Star's competitors received such payments in 2012. While three received facility payments in 2013, only one competitor received payments in 2014.⁴⁹² And while some received facility bonus payments, those dealers also incurred the significant expenses of building or renovating their dealership facilities—expenses which Star did not incur.

In addition, although Mr. Seureau discussed the facility bonus payments as a reason for Star's low new car sales versus its competitors, he really did not know why Star's sales were low. He stated the he was not certain why Star had extremely high pump-ins from 2000-2015, although facility bonus programs "could be" a reason. He had not performed any audit or study on the matter. Although he asserted that other dealers received more favorable allocations of more desirable cars, there was no substantive evidence showing those allocations occurred or in what quantities, nor did the evidence show that Star's sales difficulties were limited to those

⁴⁹¹ Tr. 1175-76 (Stockton).

⁴⁹² Ex. P-165. The exhibit also shows that two Houston-area dealers received facility bonus payments in 2016, while only one received them in 2017.

more popular models.⁴⁹³ Mr. Seureau noted that, for whatever reason, Star was never able to match other dealers' prices, regardless of the identical 14-percent margin. In response to a question on the subject, he could not explain the reason for Star's sales performance *vis-a-vis* its competitors:

Q: Why do you believe you are not price competitive with the dealers outside your AOR?

A: All I can tell you is they're willing to sell cars a lot cheaper than we are. I really would like to audit them to find out what they're doing. I'd like to know.⁴⁹⁴

Mr. Seureau also agreed that he did not have any information regarding Star's pricing on individual cars versus that of its competitors.⁴⁹⁵

The ALJs find that Star's assertion that its poor sales performance is due to bonuses paid by Volvo to other dealers is completely unsubstantiated by the evidence in the case. The evidence shows that Star's sales performance was not significantly different when all Houston-area dealers were receiving the same margin. Star's claim that facility payments were responsible for those sales discrepancies was not supported the credible evidence.

B. Star's Counterclaims

1. Summary of Statutory Claims

Star contends that the FISI and the Retailer Bonus Program violate various sections of the Code and a section of federal law. Star argues that if those programs are found to violate the law, Star's franchise should not be terminated.

⁴⁹³ Tr. 1359-64 (Seureau).

⁴⁹⁴ Tr. 1360 (Seureau).

⁴⁹⁵ Tr. 1375-76 (Seureau).

Volvo contends that the Code does not allow affirmative defenses in a termination proceeding, except to the extent that those defenses relate to Star's sales in relation to sales in the market.⁴⁹⁶ Although Volvo may be correct in that assertion, the Department does have the authority to determine whether the existing programs are in compliance with its statutes, and the issue was joined in this proceeding. Therefore, Star's counterclaims are discussed below. Even if some or all of Volvo's bonus programs are found to be in violation of the law, however, that determination would not necessarily prevent the termination of the franchise, which must be decided based on the statutory factors.

Star also contends that the FII program, the predecessor to FISI, violated sections of the Code. The ALJs do not reach any conclusion on that issue because that program has been discontinued, and the issue of the FII program's legality is moot.

Star contends that the bonus programs violate the sections of the Code, and one section of the U.S. Code, as set forth below:

<u>Volvo Program</u>	<u>Program Component(s)</u>	<u>Alleged Statutory Violations</u> ⁴⁹⁷
FISI		2301.467(a)(1) 2301.468 ⁴⁹⁸ 2301.473(2)(C) 2301.478(b) Robinson-Patman Act (15 U.S.C §13(a))

⁴⁹⁶ The alleged effect of the FISI and bonus programs on Star's sales is discussed above in this same section of the PFD.

⁴⁹⁷ The statutory sections are part of the Code unless otherwise specified. The chart is taken from Star's Post-Hearing Reply Brief at 59.

⁴⁹⁸ Although Star's brief cites to the 2003 version of this section (*see* Ex. P-136), the ALJs have determined that the 2011 version (*see* Ex. P-135) applies to these claims. Although the versions are different, the differences are not substantial.

Retailer Bonus Program	All	2301.451 2301.467(a)(1) and (2) 2301.468 2301.476(c)(2) ⁴⁹⁹ 2301.478(b) Robinson-Patman Act (15 U.S.C. §13(a))
	Volvo 360	2301.451 2301.467(a)(1) and (2) 2301.468 2301.476(c)(2) 2301.478(b)
	CSI/SSI	2301.467(a)(1) and (2) 2301.468 2301.476(c)(2) 2301.478(b)
	Factory Options	2301.451 2301.467(a)(1) and (2) 2301.468 2301.476(c)(2) 2301.478(b)
	Retailer Standards	2301.451 2301.467(a)(1) and (2) 2301.468 2301.476(c)(2) 2301.478(b)

2. Robinson-Patman Act (15 U.S.C. §13(a))

The Robinson-Patman Act is a federal law that, in general, prohibits direct or indirect discrimination in price on the sale of goods to equally-situated distributors, when the effect of such sales is to reduce competition. The Board has exclusive original jurisdiction to regulate those aspects of the distribution, sale, or lease of motor vehicles that are governed by Code chapter 2301. That jurisdiction does not extend to the determination of claims under

⁴⁹⁹ Although Star's pleadings allege violations of Code § 2301.476 in its entirety, its briefing discusses only Code § 2301.476(c)(2).

federal antitrust law. Therefore, the ALJs do not address Star's Robinson-Patman violation claims.⁵⁰⁰

3. Applicable Code Sections

Although they were summarized earlier in this PFD, the Code sections that Star alleges are violated by Volvo's bonus programs are set forth again below for ease of reference:

Sec. 2301.451. PROHIBITION: ITEMS NOT ORDERED. A manufacturer, distributor, or representative may not require or attempt to require a franchised dealer to order, accept delivery of, or pay anything of value, directly or indirectly, for a motor vehicle or an appliance, part, accessory, or any other commodity unless the dealer voluntarily ordered or contracted for the item.

Sec. 2301.467. PROHIBITIONS: SALES STANDARDS, RELOCATIONS, FACILITY CHANGES, PURCHASE OF EQUIPMENT.

- (a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not:
 - (1) require adherence to unreasonable sales or service standards; or
 - (2) unreasonably require a franchised dealer to purchase special tools or equipment.

Sec. 2301.468. INEQUITABLE TREATMENT OF DEALERS OR FRANCHISEES. Notwithstanding the terms of a franchise, a manufacturer, distributor, or representative may not treat franchised dealers of the same line-make differently as a result of the application of a formula or other computation or process intended to gauge the performance of a dealership or otherwise enforce standards or guidelines applicable to its franchised dealers in the sale of motor vehicles if, in the application of the standards or guidelines, the franchised dealers are treated unfairly or inequitably in the sale of a motor vehicle owned by the manufacturer or distributor.

Sec. 2301.473. MODELS WITHIN LINE-MAKE. A manufacturer, distributor, or representative may not:

...

- (2) require as a prerequisite to receiving a model or series of vehicles that a franchised dealer:

⁵⁰⁰ Star's discussion of those claims can be found in Star's Post-Hearing Brief at 89-90; Volvo's response can be found in its Post-Hearing Reply Brief at 19.

...

- (C) remodel, renovate, or recondition the dealer's existing facilities.

Sec. 2301.476. MANUFACTURER OR DISTRIBUTOR OWNERSHIP, OPERATION, OR CONTROL OF DEALERSHIP . . .

- (c) Except as provided by this section, a manufacturer or distributor may not directly or indirectly: . . .
 - (2) operate or control a franchised or nonfranchised dealer or dealership; . . .

Sec. 2301.478. ACTION ON FRANCHISE . . .

- (b) Each party to a franchise owes to the other party a duty of good faith and fair dealing that is actionable in tort.

4. Agency Case Law

The parties cited to certain SOAH or agency cases as authority to support their contentions regarding the legality of the FISI and Retailer Bonus Programs. Those cases are discussed briefly below:

- a. *New World Car Nissan, Inc. d/b/a World Car Hyundai v. Hyundai Motor America*, SOAH Docket No. 608-14-1208.LIC (Department Order on Rehearing Nunc Pro Tunc Aug. 17, 2017 (*World Car Hyundai*))⁵⁰¹

World Car Hyundai was a dispute over the allocation of vehicles among dealerships in San Antonio. World Car did not dispute Hyundai's allocation system, but contended that its competitor had been able to game the system to improperly receive additional allocations. The ALJ concluded that World Car had not proven any statutory violations. The Board disagreed, ruling that "with regard to allocation of the discretionary vehicle inventory, . . . Hyundai treated

⁵⁰¹ *World Car Hyundai* is appended to Star's Post-Hearing Brief as Appendix F.

franchises differently. Hyundai discriminated unreasonably between franchises in the sale of motor vehicles owned by Hyundai.”

Although Star contends in this case that FISI allows an unreasonably discriminatory allocation of vehicles to the owners of newer, brand-compliant dealerships, the evidence does not show the extent, if any, that those dealers are actually receiving additional vehicles, or that Volvo has discriminated in favor of those dealerships in the allocation of vehicles.

- b. *Star Houston, Inc. d/b/a Star Motor Cars v. Mercedes-Benz, USA, TxDOT MVD Docket No. 02.0028.LIC (PFD Mar. 6, 2008; Final Order July 10, 2008) (Star 2)***⁵⁰²

Star 2 was primarily concerned with Mercedes-Benz’s attempt to impose a new franchise agreement on Star against its wishes. The case also examined dealer bonus programs imposed by Mercedes-Benz, which explicitly required a dealer, among other requirements, to sell and deliver 65 percent of its cars into its own or contiguous Areas of Influence (the equivalent of the present AORs); use current signage; and maintain a stand-alone facility. It provided a small additional bonus to dealers for higher scores on its customer satisfaction surveys. It also paid dealers \$400 per delivered new car for investment in an elaborate Mercedes-Benz-approved client management system; compliance with Project Blueprint, a Mercedes-Benz vehicle preparation, delivery, and follow-up protocol; and compliance with Mercedes-Benz’s marketing communication guidelines.

Star argued that Mercedes-Benz’s requirements violated some of the same sections of the Code at issue in this case. The *Star 2* ALJ found that none of those aspects of the Mercedes-Benz requirements violated the Code, with the exception of the detailed and expensive 66-page client management plan, which violated Code § 2301.467(1). The ALJ recommended invalidation of the entire bonus plan, however, based on that conclusion. The Director of the Motor Vehicle Division (MVD) essentially adopted the ALJ’s findings and conclusions, with some revisions, including the addition of a finding that, because adherence to the client

⁵⁰² *Star 2* is appended to Star’s Post-Hearing Brief as Appendix M.

management plan was an “economic imperative,” it was not voluntary. The Final Order also added language to two of the proposed conclusions of law that stated that Mercedes-Benz’s bonus programs did not require adherence to unreasonable sales and service standards *in this particular instance* and that the program did not discriminate against Star *at this time*.

There is nothing complained of in this case that compares to Mercedes-Benz’s proposed client management plan. At least one of Mercedes-Benz’s practices that is similar to Volvo’s, the payment of bonuses for customer satisfaction scores, was found not to be illegal. *Star 2* did conclude that a program may not really be voluntary if participation is economically required. Ultimately, though, as the revised conclusions of law illustrate, the decision in *Star 2* was premised on its unique set of facts.

c. *In the Matter of Nissan Motor Corp. in USA*, TxDOT MVD Docket No. 97-316 (PFD July 23, 1998; Final Order Jan. 14, 1999) (*Nissan*)⁵⁰³

In *Nissan*, the MVD’s Enforcement Section alleged violations of Code §§ 2301.467 and 2301.468. Nissan’s bonus program divided dealers into four tiers based on their sales performance and combined that number with CSI ratings. The dealers who scored highest in the two categories earned incentive money before sales were made, while others received incentive money only after. In addition, the amount of incentive money per vehicle was different for different categories. The ALJ determined that Nissan’s program inherently discriminated against lower-volume dealers.⁵⁰⁴ The Board adopted the ALJ’s conclusions.

Star argues that *Nissan* establishes that incentive programs may not inherently discriminate against low-volume dealers versus high-volume dealers. Volvo points out that, unlike its own bonus program, the *Nissan* bonus program was not uniform. The *Nissan* program did not pay a bonus calculated simply on the number of vehicles sold. Instead the program was

⁵⁰³ *Nissan* is appended to Star’s Post-Hearing Brief as Appendix N.

⁵⁰⁴ *Nissan* is also summarized in the Proposal for Decision in *In the Matter of Ford Motor Company*, TxDOT MVD Docket No. 01-0211-ENF (PFD May 4, 2007), appended to Star’s Post-Hearing Brief at Appendix O, pp. 49-52.

tiered, increasing the per-unit bonus as a dealer achieved certain sales thresholds. Volvo contends that the *Nissan* decision therefore is not applicable to its bonus programs.

Because of the differences between Volvo's programs and the programs in *Nissan*, that decision neither requires nor precludes a conclusion that Volvo's programs violate the Code.

- d. ***In the Matter of Ford Motor Company, TXDOT MVD Docket No. 01-0211-ENF (PFD May 4, 2005; Dismissed by Final Order Feb. 8, 2007) (Lincoln Premiere)***⁵⁰⁵

Lincoln Premiere dealt with bonus payments based on higher customer satisfaction and image scores. Although the ALJ concluded that the program violated the Code, the case ultimately was settled and dismissed. Therefore, the case does not provide any agency precedent for this case.

- e. ***Autobahn Imports, LP v. Volvo Cars of North America, LLC, SOAH Docket No. 608-09-4053.LIC (PFD Sept. 27, 2018) (Autobahn)***⁵⁰⁶

The dealer in *Autobahn* challenged the Volvo 360 and CSI/SSI bonus programs that are at issue in this case, although *Autobahn*'s business situation was somewhat different from *Star*'s. The PFD determined that neither program violated the Code. On March 12, 2019, however, *Autobahn* gave notice that the case had settled and that it wished to dismiss the matter with prejudice. Therefore, no substantive final order will be issued by the Department and *Autobahn* does not provide any agency precedent applicable to this case.

5. FISl Counterclaims

Star contends that the FISl program violates Code §§ 2301.467(a)(1), 2310.468, 2310.473(2)(C), and 2310.478(b). The ALJs conclude that the FISl program does not violate those sections.

⁵⁰⁵ See *supra* footnote 504.

⁵⁰⁶ The *Autobahn* PFD is appended to *Star*'s Post-Hearing Brief as Appendix G.

Volvo contends that Star has admitted that the FISI program is legal by ultimately deciding to build a new facility and participating in FISI. The ALJs disagree. Whether correctly or not, Star alleges that its participation in FISI was economically coerced by the 2019 changes to the Volvo Retailer Standards. Star's decision to build a new facility cannot not be characterized as a waiver of its legal claims.

a. Code § 2301.467(a)(1)

Code § 2301.467(a)(1) prohibits a manufacturer from requiring adherence to unreasonable sales or service standards. Star contends that FISI participation is required, in a practical sense, because otherwise dealers will be at a competitive advantage. It is a sales and service standard, in Star's opinion, because a dealer must build a new facility or significantly renovate its old facility in order to participate.

The ALJs agree with Volvo that FISI is a voluntary program. Although dealers receive a bonus per new car sold, they are required to make significant investments in their facilities in order to receive those bonuses. The evidence shows that the bonus payments are capped at either 50 percent or 40 percent of that investment, and that the bonus payments will not recoup the amount of that investment. Although Star argued that the bonus payments will be used to defray the price of vehicles, that assertion was not proven. Volvo's RAB, which is composed of Volvo dealers, requested that the FISI payments be structured to discourage use of the bonuses for that purpose. Even if the bonuses are used for that purpose, however, the evidence does not show that FISI-participating dealers are at an economic advantage, because their investment is greater than the maximum bonus payments. As Volvo observed, until recently Star did not accept the program's economic burdens and therefore did not qualify for the program's benefits. The ALJs also agree with Volvo that FISI is not a sales or service standard and that is reasonable for Volvo to encourage facility improvement.

The ALJs conclude that FISI does not violate Code § 2301.467(a)(1).

b. Code § 2301.468

Code § 2301.468 essentially prohibits manufacturers from treating franchised dealers unfairly or inequitably in the sale of motor vehicles.⁵⁰⁷

Star argues that FISI is unfair because some dealers receive payments of \$750 or \$375 per vehicle while others receive none. That price discrimination is unreasonable, according to Star, because of the extensive facility modifications required to participate in the program. Although those payments are made every six months rather than immediately, Star's expert, Mr. Stockton, testified that a dealer knows, at the transactional level, that the payment will be coming in eventually.

The ALJs conclude that the FISI program does not treat non-participating dealers unfairly or inequitably. As with Code § 2310.467(a)(1), the FISI bonuses are available to all participating dealers. Until recently, Star chose not to incur the costs of the facility program and therefore did not receive the benefits. Again, those investment costs exceed the potential bonuses payable under the program.

The ALJs conclude that FISI does not violate Code § 2301.468.

c. Code § 2301.473(2)(C)

Code § 2301.473(2)(C) prohibits a manufacturer from requiring a dealer to remodel, renovate, or recondition its facilities as a prerequisite to receiving a model or series of vehicles. The current version of FISI includes an "allocation override" of 35 percent for Site Exclusive and 20 percent for Customer-Facing Exclusive Facilities.⁵⁰⁸ Mr. Klipstein described that as an "increase" to a dealer's allocation, and Mr. Seureau testified that other dealers had received

⁵⁰⁷ The 2003 version of Code § 2301.468 precludes manufacturers from treating dealers differently or discriminating between them unreasonably. Although the language is different, the ALJs' conclusion with regard to Code § 2301.468 would be the same regardless of which version the Department decides applies to Star.

⁵⁰⁸ Ex. R-66.

preferential allocations of the best-selling cars in the past.⁵⁰⁹ Otherwise, the allocation override aspect of FISI was barely discussed at the hearing. Neither the term's meaning nor its practical implication for dealers was explained any further.

The allocation override aspect of FISI does not, on its face, require any facility changes in order for a dealer to receive a certain model or series of vehicles. The evidence does not show that non-participating dealers are precluded from receiving any model or series of vehicles.

The ALJs conclude that FISI does not violate Code § 2301.473(2)(C).

d. Code § 2301.478

Code § 2301.478(b) states that each party to a franchise owes a duty of good faith and fair dealing to the other party. Star contends that Volvo's implementation of FISI violates that duty. Star's contention is based on its arguments that FISI violates other sections of the Code and competitively harms Star. As discussed above, the ALJs conclude otherwise.

The ALJs conclude that FISI does not violate Code § 2301.478.

6. Retailer Bonus Program Counterclaims

a. Volvo 360 Program

i. Code § 2301.451

Code § 2301.451 prohibits a manufacturer from requiring a dealer to purchase or accept delivery of any items which the dealer did not voluntarily order or contract for. Star argues that the Volvo 360 program requires dealers to purchase a certain number of used vehicles and pay to have them certified in order to achieve the 1-percent bonus and be competitive in the market.

⁵⁰⁹ Ex. P-233 at 121 (Klipstein depo); Tr. at 1243 (Seureau).

Although the Volvo 360 program theoretically is voluntary, Star contends that it is economically coerced into participating in the program to avoid being disadvantaged by the 1-percent bonus offered to participants.

Volvo argues to the contrary that the program is voluntary and that dealers may decline to incur the costs of participation. If they do participate, the bonus is available on equal terms.

The evidence does not establish exact costs for participation in the Volvo 360 program. It does show the type of costs associated with the program. The preponderance of the evidence shows that those costs are likely to exceed the amount of the bonus. Dealers are free to forego those costs, as Volvo contends. If they choose to incur those costs, however, they will be eligible for the 1-percent bonus. The evidence, therefore, does not establish that there is an economic penalty for failing to participate in the Volvo 360 program.

Because the program is voluntary, and there is not necessarily an economic penalty, dealers are not “required” to purchase or accept vehicles under the Volvo 360 program. The ALJs conclude that the Volvo 360 program does not violate Code § 2301.451.

ii. Code § 2301.467(a)(1) and (2)

Code § 2301.467(a) prohibits a manufacturer from requiring adherence to unreasonable sales or service standards or unreasonably requiring a franchised dealer to purchase special tools or equipment.

Again, because the Volvo 360 program is voluntary, for the reasons described above, Volvo is not requiring Star or other dealers to adhere to any particular standards or to purchase anything. Even if it were, the evidence does not show that the sales standards or the requirements to purchase whatever equipment is needed for the program are unreasonable.⁵¹⁰ The ALJs conclude that the Volvo 360 program does not violate Code § 2301.467(a)(1) or (2).

⁵¹⁰ The equipment required for the Volvo 360 program is set out in Ex. P-228 at 12-15.

iii. Code § 2301.468

The evidence does not show that the Volvo 360 program treats dealers unfairly or inequitably. The ALJs find that, despite Star's qualms about it, the program is administered uniformly and dealers are not treated unfairly or inequitably. The ALJs conclude that the Volvo 360 program does not violate Code § 2301.468.

iv. Code § 2301.476

Code § 2301.476 prohibits a manufacturer from directly or indirectly operating or controlling a dealer. Again, the evidence establishes that the Volvo 360 program is voluntary; neither Star nor any other dealer is forced to participate either overtly or by economic pressure. Even if they were, there was no showing that Volvo would be operating or controlling Star or any other dealership within the meaning of the statute under this program. The ALJs conclude that the Volvo 360 program does not violate Code § 2301.476.

v. Code § 2301.478

The record is devoid of evidence that Volvo has breached its duty of good faith and fair dealing in its implementation of the Volvo 360 program. The ALJs conclude that the Volvo 360 program does not violate Code § 2301.478.

b. CSI/SSI Bonuses

Star contends that the CSI/SSI bonus programs violate Code §§ 2301.467(a)(1) and (2), 2301.468, 2301.476, and 2301.478(b).

Although CSI and SSI scoring has been around for a while, Volvo began implementing CSI/SSI as a way for dealers to receive bonus payment beginning in July of 2016.⁵¹¹

i. Code § 2301.467(a)(1) and (2)

Code § 2301.467(a)(1) prohibits manufacturers from requiring adherence to unreasonable sales and service standards, while Code § 2301.467(a)(2) prohibits requiring a dealer to purchase special tools or equipment. The evidence does not demonstrate how the CSI/SSI bonus programs would require the purchase of special tools or equipment. Therefore, the ALJs conclude that the CSI/SSI programs do not violate Code § 2301.467(a)(2). Star presented evidence regarding the alleged unreasonableness of the CSI/SSI sales and service standards, however.

Volvo contends that participation in the CSI/SSI bonus programs does not require dealers to adhere to any sales and service standards. The ALJs disagree. Although standards are not expressly set out, the CSI/SSI bonus programs were established to determine, and reward, customer satisfaction in the areas of sales and service performance. Sales and service are not optional endeavors for a car dealership in the way that a new facility or participation in the Volvo 360 program is. Every dealer must provide, or attempt to provide, the essential functions of vehicle sales and service. Volvo measures all dealers on their alleged performance, and the standards are set by the survey results. Dealers are rewarded or not on the basis of those limited survey results.

Volvo contends that dealers have the option of meeting the CSI/SSI standards by investing, or not, in their facilities. Unlike the FISI or Volvo 360 programs, however, the amount of investment required to achieve the CSI/SSI bonuses is amorphous at best. Certainly no witness could quantify that investment.

⁵¹¹ Ex. P-207.

Star did not dispute that the four enabler questions that determine the CSI/SSI bonuses are reasonable questions for Volvo to ask its customers. Having said that, the fact that those four questions themselves are reasonable does not establish that their use in determining the CSI/SSI bonuses is reasonable. As Mr. Stockton testified, CSI/SSI survey responses to four out of 25 questions are not necessarily representative of true customer satisfaction. Moreover, small differences in averages do not necessarily imply a significant difference in customer handling performance. Under Volvo's "top-box" scoring system, a score of "9" on a question would presumably help a dealer achieve a CSI/SSI bonus, while a score of "8" would count as a zero and would seriously disadvantage a dealer. Mr. Stockton testified that the surveys, as constructed and used by Volvo, include an "inherently excessive margin for error."⁵¹²

Mr. Stockton conceded that he had done no quantitative analysis on the issues he identified with the use of the CSI/SSI survey results.⁵¹³ Mr. Lytle agreed, however, that the statistical issues identified by Mr. Stockton, such as sampling error and non-response bias, are relevant in any survey. Mr. Lytle also agreed that a below-average survey score does not necessarily indicate a failure to handle customer responsibilities. He did not directly dispute Mr. Stockton's analysis of the potential flaws in the survey process, although he found the surveys to be consistent, common in the industry, and generally fair, equitable, and reasonable. He saw no analysis that Star was being treated unfairly by the use of the surveys.⁵¹⁴

The ALJs find that Volvo does require its dealers to adhere to certain sales and service standards by rewarding dealers on the basis of the limited CSI/SSI survey results. Although there was no quantitative analysis, the evidence presented in the case shows that those standards are unreasonable because the surveys themselves and the use of four questions and top-box scoring do not necessarily measure actual customer sales and service satisfaction.

The ALJs conclude that Volvo's CSI/SSI bonus programs violate Code § 2301.467(a)(1).

⁵¹² Ex. P-236 at 80 (Stockton depo).

⁵¹³ Tr. 1117-22 (Stockton).

⁵¹⁴ Ex. R-64 at 14-15; Tr. 940-44. (Lytle).

ii. Code § 2301.468

The CSI/SSI bonus programs are a computation or process intended to gauge the performance of a dealership.⁵¹⁵ Those programs are used in the sale of motor vehicles, in that a dealer may receive a bonus or not on the basis of the survey results. The question is whether those programs treat Star or other dealerships unfairly or inequitably.

As Volvo points out, the same surveys and same process are used for each dealership. Star complains that its particular dealership has more difficulty than most because one of the four enabler questions asks customers' opinion of the facility or the waiting area, in which Star is at a disadvantage. The ALJs do not find that particular aspect of the CSI/SSI bonus programs to be unreasonable or inequitable, however. Volvo has a legitimate interest in customers' opinions about dealerships' facilities, and it is not unreasonable that Star's flaws in that area should count against it.

However, the use of only four questions and the top-box scoring of those questions is likely to discriminate against dealers on the basis of volume of sales. As Mr. Bunch phrased it, if he gets one bad review out of six or ten, his CSI score is "sunk."⁵¹⁶ Mr. Stockton also testified that lower-volume dealers are at an inherent disadvantage in the survey process.⁵¹⁷ The ALJs find that testimony persuasive.

The ALJs conclude that Volvo's CSI/SSI bonus programs violate Code § 2301.468.

⁵¹⁵ Although Mr. Lytle stated the programs instead were intended to "gauge the ability of Star to satisfy customers," the programs are designed to gauge dealerships' performance in that aspect of their business. Tr. 921 (Lytle).

⁵¹⁶ Tr. 542 (Bunch).

⁵¹⁷ Ex. P-236 at 88-93 (Stockton depo).

iii. Code § 2301.476

The evidence does not show that Volo's CSI/SSI bonus programs constitute the direct or indirect operation of Star's dealership. The ALJs conclude that Volvo's CSI/SSI programs do not violate Code § 2301.476.

iv. Code § 2301.478

Although the ALJs conclude that the CSI/SSI bonus programs violate Code §§ 2301.467(a)(1) and 2301.468, the evidence did not show that Volvo has violated its duties of good faith and fair dealing toward Star. The ALJs conclude that Volvo's CSI/SSI programs do not violate Code § 2301.478.

v. Effect of ALJs' Conclusions

For reasons discussed above, the ALJs' conclusions regarding the termination of Star's franchise are not affected by their conclusions that the CSI/SSI bonus programs violate Code §§ 2301.467(a)(1) and 2301.468. The CSI/SSI bonus programs were instituted in 2016. The evidence demonstrates that Star has had very poor sales performance since at least 2012, before the CSI/SSI bonus programs began. The evidence does not show that the failure to achieve those bonuses has had any effect on Star's sales.

c. Factory Options Bonus

In its initial post-hearing brief, Star continues to allege that the Factory Options bonus violates Code §§ 2301.451, 2301.467(a)(1) and (2), 2301.468, 2301.476, and 2301.478(b).⁵¹⁸ Star offered no substantive argument specific to that bonus, however, and its expert witness, Mr. Stockton, testified that he had no specific concerns about that bonus program.⁵¹⁹ The

⁵¹⁸ Star's Post-Hearing Brief at 120.

⁵¹⁹ Tr. 1058-59 (Stockton).

evidence does not show that that bonus program violates the Code. The ALJs conclude that the Factory Options bonus program does not violate Code §§ 2301.451, 2301.467(a)(1) and (2), 2301.468, 2301.476, or 2301.478(b).

d. Retailer Standards Bonus

Star alleges that the Retailer Standards bonus also violates Code §§ 2301.451, 2301.467(a)(1) and (2), 2301.468, 2301.476, and 2301.478(b). That program can be divided into two phases. Before 2019, the program set out seven mandates (increased from the original four) for receiving a 1-percent bonus. Effective in 2019, the brand-compliant facility component was added for receiving the additional 3-percent operational support. Star contends that both aspects of the program violate the Code.

The evidence shows that Star has had no difficulty complying with the mandates of the pre-2018 Retailer Standards Bonus. The evidence does not show that the mandates are onerous or that they result in Volvo's direct or indirect control of Star's dealership. Mr. Stockton found that the costs of complying with those mandates would be "fairly moderate."⁵²⁰ Those requirements are less onerous than some of the requirements found to be legal under *Star 2*, such as the Mercedes-Benz communications guidelines. The ALJs conclude that the Retailer Standards bonus program, before the revisions effective in 2019, did not violate Code §§ 2301.451, 2301.467(a)(1) and (2), 2301.468, 2301.476, or 2301.478(b).

The 2019 revisions require a brand-compliant facility unless the dealership's facility was built or significantly renovated within the past 15 years, an exception for which Star's current facility would not qualify. Although the bonus details differ, the ALJs' analysis for that portion of the Retailer Standards Bonus is the same as their analysis for FISL, which also pertains to facilities. The evidence shows that the bonus will not cover the cost of those facilities. Star and other dealers have the economic option to make the investment in facilities or not. The ALJs

⁵²⁰ Tr. 1058 (Stockton).

conclude that the Retailer Standards bonus program, as constituted beginning in 2019, does not violate Code §§ 2301.451, 2301.467(a)(1) and (2), 2301.468, 2301.476, or 2301.478(b).⁵²¹

VIII. CONCLUSION

As described above, Volvo has met the burden of demonstrating good cause for the termination of Star's Volvo dealership in Houston, Texas. Throughout this case, Star has over-emphasized the importance of one of the statutory good-cause factors—namely, whether Star has complied with its franchise agreement. Star has repeatedly argued that its contract with Volvo does not require Star to meet any particular standard of performance or make any particular investment in the facility or business operation; therefore, Star argues, its history of dismal sales and lack of investment are extra-contractual considerations that should not be relevant in this termination proceeding.

It may be true that the franchise agreement does not expressly address these topics. However, Mr. Seureau's insistence on strictly adhering to his original 1970 contract—one which imposed few explicit obligations on the dealer and, unlike more contemporary agreements, did not expressly address expectations of sales performance or growth—has contributed to the deterioration of Star's business over time. The ALJs have concluded that Star has not complied with the terms of that agreement, that nearly every other statutory factor weighs in favor of terminating Star's franchise, and that Volvo has met its burden of showing good cause for the termination. Accordingly, the ALJs recommend that the Department deny Star's protest of the termination.

Star's Second Amended Original Notice of Protest, Defenses, and Counterclaims asserts that the alleged bonus program Code violations are a good cause defense to termination under Code § 2301.455. The ALJs have concluded that Star's sales performance was not affected by

⁵²¹ In its initial brief, Volvo argues that the post-2019 aspect of the Retailer Standards bonus is not ripe for adjudication in this proceeding, because it did not take effect until after the hearing and Star is protected by Order No. 20. Volvo Post-Hearing Brief at 32. The ALJs disagree. The program's terms were established and adjudicated at the hearing, and Star's protection under Order No. 20 would dissipate if the new facility were not constructed.

those programs. Even though the ALJs find that the CSI/SSI programs violate two Code provisions, those violations do not affect the good cause determination. Star does not request any other action on that issue from the Department, other than the legal determination that the programs violate the Code. Therefore, the ALJs do not recommend any particular action by the Department regarding the discontinuation of the Volvo CSI/SSI bonus programs, but leave that issue to the Department's discretion. Star has not otherwise met the burden of proving its defenses and counterclaims against Volvo, and the ALJs recommend that no relief be granted on the counterclaims.

IX. FINDINGS OF FACT

Procedural Background

1. On February 8, 2016, Volvo Cars of North America, LLC (Volvo) sent a letter notifying Star Houston, Inc. d/b/a Star Motor Cars (Star) of its intent to terminate Star's dealership agreement for the Volvo dealership Star has operated since 1970 in Houston, Texas. An amended termination notice was sent on February 29, 2016.
2. On April 1, 2016, Star filed its Original Notice of Protest with the Texas Department of Motor Vehicles (Department or Board).
3. On June 16, 2016, the Department referred the protest to the State Office of Administrative Hearings (SOAH) for a contested hearing and issued a Notice of Hearing to the parties. On the same date, the Department referred to SOAH a related protest proceeding involving Star's objection to a new Volvo dealership planned for the Houston market (the Add-Point Proceeding).
4. Effective August 31, 2016, this case was abated until the Add-Point Proceeding was concluded. The abatement was lifted effective August 11, 2017.
5. Star's First Amended Original Notice of Protest, Defenses, and Counterclaims was filed on August 8, 2017. A Second Amended Original Notice of Protest, Defenses, and Counterclaims was filed on June 28, 2018.
6. On January 19, 2018, the Administrative Law Judges (ALJs) issued Order No. 12 denying Star's Motion to Dismiss and determined that Volvo's notice of termination was sufficient pursuant to Texas Occupations Code (Code) § 2301.453.
7. On September 27, 2017, the ALJs issued Order No. 10, setting the hearing date. Orders adjusting the hearing schedule were issued on September 4, 2018 (Order No. 16) and September 17, 2018 (Order No. 17).

8. The Notice of Hearing and Order Nos. 10, 16, and 17 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, or an attachment that incorporated by reference the factual matters asserted in the complaint or petition.
9. The hearing on the merits was held September 11-14 and 26-27, 2018, before ALJs Henry D. Card and Sarah Starnes. At the hearing, Star was represented by its counsel, David Coffey, III and Martin Alaniz. Volvo was represented by its counsel, Brit T. Brown and Benjamin Escobar.
10. While this case was pending, but before the hearing on the merits, Star sought permission from Volvo to build a new sales and service facility on property adjacent to the current facility.
11. On October 15, 2018, following the hearing on the merits, Star filed a Motion to Clarify and Enforce the Statutory Stay issued in this Case (Motion to Enforce) alleging that, by failing to act on Star's request, Volvo had violated the statutory stay imposed by Code § 2301.803. The ALJs convened a limited hearing on the Motion to Enforce and, on November 12, 2018, granted the Motion to Enforce and ordered Volvo to consider Star's application as it would any other application, in its regular course of business.
12. Volvo then considered the application and denied permission for the new facility.
13. The record closed on February 7, 2019, after the parties' post-hearing briefs were submitted.

The Parties & the Dealer Agreement

14. Glenn Seureau purchased Star from the dealership's previous owner in 1970.
15. The dealer agreement between Star and Volvo is dated April 1, 1970, and has never been updated. The agreement is only six pages long, has no fixed term, and provides that it will continue until terminated in accordance with the provision of the agreement.
16. In Clause 6(a)(5) of the dealer agreement, the parties agreed that Volvo could immediately terminate the agreement in the event of the:

breach by [Star] of any of the provisions of this agreement, including a failure of [Star] to develop the locality assigned to [it] to the satisfaction of [Volvo], or failure to conduct [its] business in accordance with any requirements set forth in this agreement, or the violation of any of the lawful rules, regulations, and policies of [Volvo].

17. Standard Provision 3 of the dealer agreement required Star to “maintain a place of business and sales room and service facilities satisfactory to [Volvo],” and to “sell all such vehicles and service parts therefor in such manner as to maintain and increase the good reputation of [Volvo’s] products.”
18. Standard Provision 14 of the dealer agreement required Star to “advertise and in all ways promote the sale of the vehicles in [its] locality in a satisfactory and proper manner to the satisfaction of [Volvo].”
19. Star’s dealer agreement is a form that was developed in 1958, and there is no other Volvo dealer in the United States that still operates under that form. Mr. Seureau has refused each of Volvo’s requests to update the 1970 agreement in favor of a more contemporary form.
20. In addition to the Volvo dealership at issue in this case, Mr. Seureau and Star also operate Mercedes-Benz, Lotus, and Aston Martin dealerships in the same complex.
21. Star is in Volvo’s Southern Region, a region that covers thirteen states, extending from Maryland to Florida to Texas. Within the Southern Region, Star is in Volvo’s Texas South Market, a market currently comprised of thirteen dealers (three in Louisiana and ten in Texas).
22. Volvo counts Mercedes-Benz, BMW, Audi, Lexus, Acura, and Infiniti among its competitors in the premium or luxury market segment.
23. Though the recession led to difficult economic circumstances for the Volvo brand in 2009 and 2010, sales started picking up in 2011 and Volvo has enjoyed strong sales in recent years. Nationwide, Volvo sold more cars in 2016 and 2017 than at any other point in the brand’s history and, as of the date of the hearing, Volvo was on track to have record sales in 2018, as well.
24. Since the dealer agreement was signed in 1970, Volvo has developed a system of calculating and assigning areas of responsibility (AORs) to dealers. Generally speaking, an AOR is comprised of a group of contiguous ZIP codes that are closest and most convenient to the respective Volvo dealership.
25. When the dealer agreement was signed, Star was the Volvo only dealer in Houston, and the term “locality,” as used in the dealer agreement, referred to the city at large. Today, Star is one of six Volvo dealers in Houston, and its locality is its AOR.

Star’s Facilities

26. Star’s dealership is located on Old Katy Road, a location close to but not visible from Interstate 10. It is the only Volvo dealership in Houston that is not on a major freeway. As a consequence, Star lacks the “billboard effect” of other dealers, who are readily visible to potential customers from the freeway.

27. The surrounding community is largely unaware that Star exists.
28. Star is in a low-traffic area, lacks visibility, and lacks proximity to other premium auto dealers or high-end retail.
29. Star has never considered relocating to a site with better visibility and, unlike other dealers around the country working out of less-than-ideal locations, Star has never developed business strategies to help overcome its location's deficits.
30. Since 1970, Star's facility has never relocated or undergone any significant renovation or remodeling. It is the only dealership in Houston that has not been periodically upgraded over the years.
31. The only prominent signage outside of Star's dealership is an old "hockey stick" design that is no longer approved by Volvo, has not been manufactured since the 1970s, and is no longer in use at any other dealership in the world.
32. Mr. Seureau has repeatedly refused to update the sign over the years because his dealer agreement did not require him to replace the sign, and because he objected to installation and maintenance terms that most other Volvo dealers readily agreed to.
33. In or about 2007, Volvo encouraged Star to join Volvo's then-current sign program, which provided that Volvo would own and install a new sign and lease it back to the dealer for fifteen years, with a maintenance program. Negotiations broke down when Mr. Seureau refused to agree to pay a \$45-per-month maintenance fee to Volvo.
34. Star's facility is clean, but undeniably dated. Witnesses described it as "like visiting a time capsule," "the worst physical facility presentation that I've ever been in or witnessed," and "deficient in almost every area" compared to other Volvo dealers.
35. Star's furniture is functional, but it is dated and no longer consistent with the Volvo brand's standards.
36. Star's customers have sometimes commented on how dated the dealership appears.
37. The Volvo sign on the front door of the showroom is so dated that it is not in use anywhere else.
38. Star's showroom is small and there is only room to display four to six vehicles. Vehicles are parked tightly in a row, with little room for customers to open the doors and walk around or between the vehicles.
39. Mr. Seureau has been reluctant to make any significant upgrades to the facility, or to offer amenities that are standard at other dealerships.
40. Until a few years ago, Star did not have a dedicated waiting room for customers. Now, Star has small waiting room created from a former office. To create the illusion that the waiting room has large windows, curtains have been hung in front of a painted,

cinder-block wall. The waiting room is furnished with a table; an old couch that Mr. Seureau had reupholstered; a couple of chairs; wireless internet access; a flat-screen television that Volvo provided; and a small refrigerator stocked with water.

41. At the urging of Volvo and/or his employees, Mr. Seureau has done basic maintenance like painting Star's showroom, installing tile flooring, and offering coffee and water to customers.
42. Star still does not offer amenities like snacks or a selection of drinks that are common at other high-end dealers.
43. Star shares a service facility with Mr. Seureau's Mercedes dealership, but the Mercedes entrance is easier to see and access than the Volvo entrance.
44. The service facility lacks air conditioning in the service drive (where customers arrive) and the service floor (where technicians work on vehicles). Star is the only Volvo dealer in Houston that does not have an air-conditioned service drive, or that writes up customer tickets in a space that is not air conditioned.
45. The service desk, where customers' service paperwork is done, is in the middle of the service area, a space that is un-air-conditioned and exposed to the fumes and noise from the service floor.
46. Of the six Volvo dealers in Houston, two have service floors that are already fully air conditioned, and one is in the process of adding air conditioning.
47. Star's lack of air conditioning affects employee satisfaction and productivity and is likely to impact Star's ability to attract and retain talented service technicians.
48. Some basic improvements have been made to the facility in recent years, including painting the floors and some fixtures; installing a suspended ceiling and better lighting; and upgrading an in-ground oil tank in the service department.
49. Star's website has been inadequate and poorly maintained for years. Screen shots taken during the hearing on the merits showed the website had no special vehicles advertised and made no mention of any particular models currently in stock; showed no current specials on the pages for the finance, parts, or service departments; and included profiles of several of the staffers who had died or otherwise left Star many months prior.
50. Star's website would create a negative impression of the dealership for any online shopper.
51. Star's dealership does not convey a premium or luxury appearance.
52. Volvo has had several incentive programs in recent decades that were intended to encourage dealers to update their facilities and encouraged Star to take part in them. Until very recently, Star has refused to participate in any of them.

53. On June 26, 2018—two years and four months after Volvo sent its notice of termination—Mr. Seureau signed a form to join the Volvo Retail Experience program and agreed to pay the \$12,500 program fee, indicating that he planned to build a new, brand-compliant facility for Star.
54. On August 27, 2018, Mr. Seureau signed a contract with an architect to officially begin the design process. This was first time Mr. Seureau had ever indicated any willingness to consider building a new, modern facility for Star.
55. Mr. Seureau is planning to build the new facility on an empty three-acre tract adjacent to Star's current facility that he estimates is worth roughly \$10 million. Mr. Seureau has never had the tract appraised.
56. Mr. Seureau expects to pay \$8-9 million to build the new facility, and he has the financial ability to construct a new facility.
57. Though only very preliminary plans have been drawn up, the new facility is planned to be much larger (about 47,000 square feet) and at least partially air conditioned. The service area is planned to be about three times the size of the current facility, though Mr. Seureau said he has not yet decided whether to air condition the service area.
58. Mr. Seureau believes Star can sell 500 vehicles a year in the new facility. Star has never sold anywhere near that number vehicles.
59. Volvo has expressed reservations that the planned facility is too large and that, in view of Star's past performance, it is unrealistic to think Star could ever sell enough vehicles to justify the size and expense of the planned new facility.
60. Other than running numbers in his head, Mr. Seureau has done no formal business planning, cost-benefit analysis, or break-even analysis to determine whether the new facility could be profitable.
61. Mr. Seureau generally finds business planning to be speculative and unnecessary, and he rejects the advice of outside professionals.
62. A new facility might improve customer satisfaction with the experience of shopping at Star, but it will not cure Star's other performance problems or transform Star into a well-run dealership.
63. The new facility would still have the same challenges that are presented by its current location—namely, a lack of visibility from the interstate and no proximity to other dealers or complementary businesses.

Pump-In Sales

64. A large number of sales made in Star's AOR are made by Volvo dealers from other AORs ("pump-in" sales), and Star makes comparatively few "pump-out" sales, or sales to customers from another dealer's AOR.
65. When sales are pumped in to Star's AOR, this indicates that customers who live in that AOR are driving some distance away from their closest Volvo dealer to purchase a Volvo from a dealer in another AOR.
66. Since at least 2012, an average of 20 to 25 vehicles have been being pumped in to Star's AOR each month, while only one or two cars are being pumped out.
67. At other dealerships, the number of pump-ins and pump-outs are usually roughly equivalent, so that they offset each other.
68. Star's high number of pump-in sales might lead other area dealers to become complacent, because they are able to achieve their sales targets by pumping sales out to Star's AOR, rather than working harder to find customers and sell cars in their own AOR.
69. A more aggressive, successful dealer in Star's AOR would lift the performance of everyone in the market.
70. If the pump-in sales from other dealers were not counted, Star's sales effectiveness would be dramatically lower.

Service Department & Other Concerns

71. Star's service department has a much lower-volume business than Volvo expects given the number of Volvos registered in Star's AOR.
72. Star's service department handles about 15-20 cars a day. The service department prioritizes "fix[ing] it right the first time" for customers, and there is no evidence that customers have complained to Star about the service received.
73. Star's service manager and his employees are competent, and there is no evidence that they have serviced any cars improperly or performed warranty work incorrectly.
74. Compared to other Volvo dealers, Star converts few internet leads into vehicle sales. Star's closing ratio is less than 2 percent, while dealers in the South Texas Market average about 8 percent and dealers in the Southern Region average about 12 percent.
75. Star receives the highest number of internet leads in the Houston area, but has one of the lowest conversion rates when it comes to turning those leads into sales.
76. Star sells fewer assurance products like tire and wheel warranties and prepaid maintenance warranties than other dealers. Star did not sell a single one of those

products in the first eight months of 2018, while the average dealer in the Southern Region sells about sixty assurance products per year.

77. While parts of Star's business have been profitable, overall, the dealership is not currently profitable, and Mr. Seureau could not recall whether it had ever turned a profit in the last ten years.

Customer Satisfaction Scores

78. When a customer purchases a vehicle or brings a vehicle in for service, they are asked to complete a customer-satisfaction survey. Volvo uses the survey responses to track customer satisfaction and to reward dealers who earn high marks with bonuses.
79. The sales satisfaction index (SSI) is a measurement of what consumers are saying about their experience purchasing a new vehicle at the dealership. The customer satisfaction index (CSI) measures the customer's satisfaction with the service experience. Volvo measures dealers' CSI and SSI scores to determine how they compare to each other.
80. The SSI scores are based on four "enabler questions"—one that asks about the customer's overall opinion of the facility, in terms of cleanliness and appearance; one that asks how likely the customer would be to recommend the dealership; one that asks whether the customer was satisfied with the features and controls of the vehicle purchased; and one that asks whether the customer had been contacted by the dealer since taking delivery of the vehicle.
81. The CSI scores are also based on four enabler questions—one that asks about the customer's overall opinion of the waiting area; one that asks whether the customer was satisfied with the explanation of the work done; one that asks whether the customer was satisfied with his car's condition when it was returned; and one that asks whether the customer received any follow-up contact from the dealer.
82. In scoring the enabler questions, Volvo uses a "top-box" scoring method that gives all but the highest scores a zero value.
83. Top-box scoring handicaps Star, because low scores on questions relating to its facility drag down its average score no matter how well Star scores on the remaining questions.
84. On SSI surveys between July 2017 and August 2018, sales customers rated Star far below the national average on the question asking about their overall opinion of the facility, and generally rated Star poorly on the question asking if they would recommend the dealership to others. Star scored better on the remaining two questions, but the overall SSI average was too low for Star to earn the SSI bonus in any month after October 2017.
85. On CSI surveys between July 2017 and August 2018, service customers consistently rated Star poorly on the question that asked the customers' opinion of the waiting room. The scores on the other three enabler questions were often at or above the national average, but because the overall CSI score represents an average of the four enabler

questions, the very low scores on the first question dragged down the overall average, making it so that Star did not qualify to earn the CSI bonus even once between July 2017 and August 2018.

86. For all but three months between January 2016 and July 2018, Star's SSI fell below the national average and the regional average for each geographic region in the nation. In some months, Star's SSI was only a point or two below average, but in other months, Star's SSI was nearly 30 points below that national or regional average.
87. Between January 2016 and July 2018, Star's CSI scores never once reached the national average or the average for any geographic region in the United States.
88. Star's service manager admitted that Star could do a better job of following up with customers after their vehicles have been serviced and encouraging them to answer the surveys.

Improvement Efforts

89. Volvo has regarded Star as an underperforming dealership for well over a decade and has repeatedly urged Star to modernize its business practices, invest in the business, and improve the dealership's operations. The regional Market Manager has held a disproportionately high number of meetings with Mr. Seureau and Star's managers to address Star's poor sales performance.
90. Mr. Seureau makes himself available for these meetings and listens politely to Volvo's suggestions, but he generally ignores Volvo's advice or outright states that he is unwilling to make the requested changes.
91. The Volvo Retailer Improvement Program (VRIP) is a program Volvo encourages dealers to participate in when their performance falls significantly below average, and Star had been asked to join several iterations of VRIP programs over the years. There are no other dealers in the Texas South Market on a VRIP.
92. Mr. Seureau never agreed to commit to a VRIP plan or comply with the terms Volvo recommended.
93. Whereas every other Volvo dealer in the network pays their salespeople on a commission-only basis, Mr. Seureau pays Star's salespeople a fixed salary. They have the potential to earn a commission over and above the base salary of \$2,300 per month, but salespeople rarely, if ever, sell enough vehicles to earn an extra commission.
94. Because Star's gross profit is so low, Star has to guarantee minimum salaries or it could not retain any salespeople.
95. Volvo has pushed Star for years to implement a bonus program to motivate better performance out of the sales and service employees. Mr. Seureau only recently agreed

for the first time to allow bonuses of up to \$100 per month for salespeople and service writers who are able to exceed national customer satisfaction averages.

96. Star refused to join the inventory management programs that other Volvo dealers readily adopted because Mr. Seureau balked at the \$250 monthly cost. Nearly every other Volvo dealer in the country has enrolled.

Dealer Incentive Programs

97. Volvo began the Facility Investment and Support Initiative (FISI) in 2016.
98. For dealers who conform their sales and service facilities to Volvo's brand image and exclusivity standards, FISI paid \$750 per new unit retailed for up to three years, up to a maximum of 50 percent of the dealer's facility investment. The payment dropped to \$375 for 2019.
99. Although construction has not begun on Star's proposed new facility, Star is treated as eligible for the FISI per-vehicle sold payments for 2019 and for the additional bonus provided under the revised Retailer Standards.
100. The facility bonus payments made to Star and other Houston-area dealers under FISI and its predecessors through 2017 are set out below:

Dealer	2012	2013	2014	2015	2016	2017
A	\$ 0	272	0	0	0	0
B	\$ 0	465	0	65,000	192,000	207,000
C	\$ 0	19,936	77,500	97,000	150,000	0
D	\$ 0	0	0	0	0	0
Star	\$ 0	0	0	0	0	0

101. The margin and bonuses under the Volvo Retailer Bonus Program are outlined below:

	MY15/16	MY17/18	2019
TOTAL AVAILABLE MARGIN/BONUS	14.0%	14.0%	14.0%
Fixed Front End Margin	6.0%	6.0%	6.0%
NEW CAR BONUS PROGRAM			
Non-Performance-Based			
Operations Support	5.5%	3.0%	0.0%
Performance-Based (Max. Potential)			
Volvo 360 Program	1.5%	1.0%	1.0%
Factory Option/Package Bonus/Sales Mix	1.0%	1.0%	1.0%
Service CSI	0.0%	1.0%	1.0%
Sales SSI	0.0%	1.0%	1.0%
Retailer Standards	0.0%	1.0%	4.0%
Total Performance-Based Margin Potential:	2.5%	5.0%	8.0%

102. To receive the 1-percent bonus under the current Volvo 360 program, dealers must purchase a certain number of used Volvos from off-lease returns, certify a given percentage of those as certified pre-owned (CPO), and sell 100 percent of the CPO vehicles. The dealer's "purchase objective" is based on a percentage of that dealer's new car sales.
103. Under the Volvo 360 program, the originating-lease dealer has the option, during the first 48 hours after the leased vehicle is returned, to purchase it at a "Buy It Now" price set by Volvo. After the first 48 hours, the vehicle is put into an auction accessible to franchised Volvo dealers only. For the next 24 hours, a dealer may buy the car at the "Buy It Now" price, or bid a lower amount, with the highest bid prevailing provided it meets a minimum price. The vehicle subsequently is opened up for auction to both Volvo and non-Volvo dealers.
104. Star has generally received the Factory Option/Package Bonus, which is earned through the sale of Volvo-brand options on new vehicles.
105. The Retailer Standards require dealers to submit a yearly business plan; submit monthly financial statements; achieve quarterly training certification goals; use and adhere to the Dealer.com website and communication standard; use an approved lead management system; subscribe to a particular online scheduling platform; and display online pricing for basic services.
106. Although Star considers the pre-2019 Retailer Standards to violate the law, it has met those standards in the past and received the bonus payments.
107. Starting in 2019, the Retailer Standards required that an additional 3 percent of bonus will be available only to dealers "who meet . . . brand standards." Under that change, only facility-compliant dealers, which Star currently is not, would be able to achieve the 3 percent bonus.

Statutory Good-Cause Factor: Star's Sales in Relation to the Market

108. Since at least 2016, Star has had the largest planning volume of all the Houston Volvo dealers, and is projected to have largest planning volume through at least 2021. It also has one of the top three market potentials in the state of Texas.
109. A retailer with the largest planning volume for a particular market would normally be expected to lead the market in vehicle sales, service, and parts sales. However, since at least 2002, Star has not been able to sell enough cars to meet anywhere near the potential of its AOR.
110. While Star's market potential is the highest in the Houston market, it has a lower sales objective than other Houston dealers because it sells dramatically fewer cars than they do. Therefore, it should theoretically be easier for Star to achieve its sales objectives than for its better-performing peers. Despite this seeming advantage, Star has not been able to achieve its sales objective for a number of years.

111. When the Volvo of Houston dealership immediately to Star's west closed in 2015, there was no dealer operating in that large and fast-growing AOR for approximately three years. Though Star expected its sales to explode without competition from the neighboring dealer, Star's sales changed only nominally between 2015 and 2018.
112. Star is the lowest-selling dealer in Houston despite having the largest market opportunity.
113. Volvo uses sales effectiveness as a metric to measure its dealers' success. Sales effectiveness takes the number of vehicles a dealer sells and compares that to the number of expected sales. Expected sales are calculated by looking at the number of competitive registrations (that is, registrations of all brands competing in Volvo's market segments) that are occurring in the dealer's area, then applying the brand's average penetration rate (market share) in a larger geographic area.
114. Sales effectiveness has been used in the industry for decades, and most other auto manufacturers also use some variation of sales effectiveness to evaluate dealers.
115. Compared to other manufacturers, Volvo's method of measuring its dealers' sales effectiveness sets a fairly low benchmark. Most dealers end up approximately meeting their sales expectations, with some variations for good and bad performers.
116. Sales effectiveness is a fair metric for evaluating a dealer's sales performance, and is relevant evidence on how Star's sales compare to the market.
117. In terms of sales effectiveness, Star has consistently had the lowest performance of all the Volvo retailers in the state of Texas, and quite often the lowest in the entire nation.
118. Each year from 2012 to 2017, in terms of sales effectiveness, Star was the worst-performing dealer in both the census division and nation. Between 2012 and 2017, Star averaged a sales effectiveness of only 13.3 percent (86.7 percent below sales effectiveness), while the average in the census division was 134.4 percent.
119. In 2013, Star's sales effectiveness for the year was 11 percent, or 89 percent below what was expected, while dealers in the Texas South Market averaged 109 percent and dealers in the Southern Region averaged 111 percent.
120. In 2017, Star sold only 69 vehicles, when it was expected to sell 325. Its sales effectiveness in 2017 was -78.77 percent, or about 79 percent below what the dealer expected, while every other Houston-area dealer in operation that year achieved sales effectiveness.
121. In 2017, Star was, by far, the worst performer of the twenty-two dealers in the census division in terms of sales effectiveness. It was 50 percent worse than the next-lowest-performing dealer (which has since closed), and 70 percent worse, or more, than every other dealer in the census division. On a nationwide basis, Star's sales effectiveness ranked last among the 281 Volvo dealers in the nation, and was the worst by a large margin.

122. A method for measuring a dealer's performance in only its own AOR is a "sales portion" method. This method measures the percentage of vehicles registered in an AOR that have been sold by the assigned dealer.
123. Using the "sales portion" metric, Star has been the worst-performing Volvo dealer in the nation each year since 2012.
124. Using the "sales portion" metric, in 2017 Star was the worst-selling dealer in all 22 AORs in its census division, and the worst-selling of all 281 dealers in the nation, by a wide margin. This means that Star sold the lowest portion of the sales made in its own AOR relative to any of the other dealers.
125. Another method for measuring a dealer's performance looks at sales penetration in a dealer's assigned AOR. This is very similar to sales effectiveness, except that, unlike sales effectiveness, a "sales penetration" method excludes consideration of sales that other dealers made into Star's AOR.
126. Using a "sales penetration" metric, Star is the worst-performing dealer in the census division and the country, and has been since at least 2012.
127. Using a "sales penetration" metric, Star's performance is approximately 50 percent worse than the next-worst dealer in the country.
128. There was no evidence of any alternative measure of analyzing Star's sales that would have improved Star's standing relative to the market.
129. Since at least 2012, there is no measure by which Star's sales have come close to matching the performance of other Volvo dealers in the Houston, regional, or national markets.
130. Star's sales are more comparable to those made in much smaller markets like Edinburg and Temple, than to dealers in large, fast-growing, and wealthy metropolitan areas like Houston.
131. With its consistently poor sales performance, Star is failing to capitalize on the opportunity presented by having an AOR with the largest planning volume in Houston and one of the three largest in the state of Texas.
132. This factor weighs in favor of termination.

Statutory Good-Cause Factor: Star's Investment and Obligations

133. Star's estimation that the dealership has an ongoing business value of \$2.1 million per year is speculative and unsupported by the evidence.
134. Star's investments are relatively small, and apparently consist of little more than the dealership facility itself.

135. Mr. Seureau, not Star, owns the real property the dealership sits on, and he charges Star below-market rent.
136. Mr. Seureau has demonstrated a longstanding reluctance to make even modest investments in Star's business.
137. On its financial statements, Star has assigned its fixed assets a book value of about \$1.7 million, and that amount has changed very little between 2012 and 2018.
138. Star's assets have been highly depreciated and are currently valued at about 20-25 percent of original cost.
139. There was no evidence of significant obligations owed by Star, or creditors that could be harmed if the dealer agreement is terminated.
140. Other than basic maintenance like painting, replacing worn flooring, and purchasing new furniture, Star has made very little investment in its building and operations over the years.
141. If the dealer agreement is terminated, Mr. Seureau will continue to own the real estate and Star will continue to own the building, and both can potentially be used for Star's remaining auto businesses for other brands.
142. This factor weighs in favor of termination.

Statutory Good-Cause Factor: Injury or Benefit to the Public

143. The vast majority of Volvo customers in Star's AOR have been driving to less-convenient dealers to purchase their vehicles, rather than shopping at Star.
144. Star's low CSI and SSI scores are some indication that customers are dissatisfied with Star's facility and services.
145. The public would suffer little or no harm if Star is terminated, particularly because customers are already accustomed to seeking out other dealers.
146. The public will ultimately benefit from having a new dealer in the AOR who can provide better service and increase inter-brand and intra-brand competition.
147. The public is being injured by having an underperforming dealer like Star in such a large market.
148. This factor weighs in favor of termination.

Statutory Good-Cause Factor: Adequacy of Star's Service Facilities, Equipment, Parts, and Personnel

149. Star's service facility has not been significantly updated or upgraded since 1970.

150. Star is the only Volvo facility in Houston, or anywhere else, that has not had a significant upgrade or facelift in nearly fifty years.
151. Star's service facility is technically functional and able to serve the comparatively small volume of customers that the dealership attracts.
152. Star's service drive and service floor are not air conditioned, and Star is the only dealer in Houston—where summers are typically long, hot, and humid—that does not provide an air-conditioned space where customers can speak with service writers.
153. The customer waiting area for Star's service customers is small and windowless and Star refuses to provide basic amenities like a selection of drinks and snacks for customers while they wait for their vehicles.
154. Star's CSI scores show that, compared to other Volvo dealers, the service department ranks far below the national average in customer satisfaction. The survey responses indicated that Star's low CSI scores are largely attributable to the condition of the service facility, not the quality of the service provided.
155. With its dated appearance, lack of amenities, and lack of air conditioning, Star is likely to repel both customers and service employees.
156. Star's service facility compares unfavorably to other Volvo dealers.
157. This factor weighs in favor of termination.

Statutory Good-Cause Factor: Star's Warranty Service

158. Volvo's witnesses did not claim that Star had ever performed improper or incorrect warranty service.
159. Star's service department follows Volvo's warranty guidelines and honors Volvo's warranties to its customers.
160. Volvo's service manager has been trusted by Volvo to extend warranty coverage in some circumstances when a vehicle's factory warranty has expired, without prior authorization.
161. Star's service department is competent and satisfies the customers it currently attracts.
162. Star is able to provide its customers with adequate warranty service and is honoring its customers' warranties.
163. This factor does not weigh in favor of termination.

Statutory Good-Cause Factor: Compliance with the Franchise

164. Star has not been able to sell enough cars to meet anywhere near the potential of its AOR, and it is the lowest-selling dealer in Houston despite having the largest market opportunity.
165. Star failed to capitalize on the sales opportunity presented between 2015 and 2018 when a neighboring dealership closed and Star had no competition for customers in the neighboring AOR. Star's sales performance did not meaningfully change during that period.
166. In terms of sales effectiveness, Star's performance has been 80 to 85 percent worse than the average Volvo retailer each year since at least 2012. It is the worst-performing dealer, by a wide margin, in Houston, the census division, and the nation.
167. In terms of sales portion, Star has been the worst-selling dealer in the nation (meaning it sold the lowest portion of the sales made in its own AOR relative to any of the other dealers) each year since 2012, by a wide margin.
168. In terms of sales penetration (which excludes consideration of sales that other dealers made into Star's AOR), Star has also been the worst-selling dealer in the country since at least 2012. Its performance has been approximately 50 percent worse than the next-worst dealer in the country.
169. Despite receiving more leads than most Volvo dealers in the region, Star does a poor job of converting internet leads into car sales and converts a lower proportion of leads into sales than other dealers in the South Texas Market and the Southern Region are able to convert.
170. Star sells fewer assurance products than other dealers.
171. Star has a high number of vehicles pumped into its AOR each month and is routinely outsold in its own AOR by other Volvo dealers in the Houston Market.
172. Volvo dealers in other cities have been able to sell nearly as many vehicles in Star's AOR as Star has.
173. Star's poor sales performance has hurt Star's service business. Star's service department does not have anywhere near the volume of customers expected considering the size of the locality.
174. Star has failed to develop any business strategy that would help overcome the limitations of its location in a low-traffic area that lacks visibility and proximity to other premium auto dealers or high-end retailers.

175. Customers in Star's AOR are inconvenienced when they drive to shop or seek service from other Volvo dealers. This reflects poorly on the brand and ultimately may alienate those customers from the Volvo brand.
176. Customers have been expressing their dissatisfaction with Star's sales and service by giving Star low CSI and SSI scores. Since at least 2012, Star's CSI and SSI scores have generally been well below average when compared to other Volvo dealers.
177. Star has resisted Volvo's longstanding efforts to get Star to modernize its business practices, invest more in the business, and improve the dealership's operations. Mr. Seureau generally ignores Volvo's advice or outright refuses to make requested changes.
178. Star is the only dealer in the South Texas Market that Volvo has had to place on a VRIP program to address its poor performance.
179. Star does not engage in any formal business planning and has refused or been slow to implement business practices that are standard at other, more successful, dealerships, such as: paying salespeople on a commission-only basis, paying performance bonuses to employees who earn high customer satisfaction scores, and implementing an inventory management system.
180. Volvo has an objectively reasonable basis for being dissatisfied with the way Star has developed its assigned locality and has acted in good faith in asserting a breach of Clause 6(a)(5) of the dealer agreement.
181. Star's facility is small and dated, and the showroom does a poor job of showcasing vehicles. The facility has not been meaningfully updated or renovated in nearly fifty years.
182. Star is the only Houston Volvo dealer that has never undergone major upgrades, and it compares poorly to other Volvo dealers and other luxury dealers.
183. Star's facility, and particularly the showroom and customer waiting area, do not convey a premium experience to customers.
184. For years, Mr. Seureau has told Volvo that he has no interest in upgrading Star's facilities or participating in any incentive programs that would have rewarded Star for meeting modern facilities standards.
185. The Volvo sign outside the dealership is an old "hockey stick" design that is no longer approved by Volvo, has not been manufactured since the 1970s, and is no longer in use at any other dealership in the world.
186. The signage on the door of Star's dealership is so dated that Volvo is unaware of any other dealer that still uses it.

187. Mr. Seureau has shown a longstanding reluctance or unwillingness to make any significant upgrades to Star's facility, or to offer amenities that are standard at other dealerships.
188. Even after recent improvements, Star's waiting room is small, windowless, sparsely furnished, and does not offer customer amenities that are common at other high-end dealers.
189. Star's entire service facility lacks air conditioning, and Star is the only Volvo dealer in Houston that does not have an air-conditioned service drive, or that writes up customer tickets in a space that is not air conditioned.
190. Customers and employees are affected by the lack of air conditioning, and it may impact Star's ability to attract and retain service employees.
191. Star's website has been inadequate and poorly maintained for years and fails to attract customers.
192. Customers have expressed their dissatisfaction with Star's sales facility and service waiting area on CSI and SSI questionnaires, consistently scoring Star poorly on those questions.
193. Volvo has an objectively reasonable basis for being dissatisfied with the way Star has maintained its place of business, including the showroom and service facilities, and has acted in good faith in alleging a breach of Standard Provision 3 of the dealer agreement.
194. This factor weighs in favor of termination.

Statutory Good-Cause Factor: Enforceability of the Dealer Agreement

195. Neither party contends that the dealer agreement is unenforceable.
196. The dealer agreement is enforceable from a public policy standpoint, and Star is not complying with some of the core requirements of the agreement.
197. This factor weighs in favor of termination.

Statutory Good-Cause Factor: Other Relevant Circumstances

198. Star decided to pursue a new facility only recently, more than two years after this proceeding was initiated. At this stage, only very preliminary plans have been drawn up, and Volvo has not approved them.
199. Whether a new facility will ever be built is speculative.
200. Whether Star's performance could improve in a new facility is speculative.

201. The new facility would still have low visibility and would not be situated near other luxury car dealers or complementary high-end retail businesses.
202. A new facility will not resolve problems like Star's failure to maintain a website, convert internet leads into sales, or follow up with customers to gauge their satisfaction with the service department.
203. Even in a new facility, Star would still be owned and managed by Mr. Seureau, who has shown himself to be very reluctant to invest in the business or adapt his business practices as the auto market grows and changes.
204. Star's belief that it can sell up to 500 vehicles per year in a new facility is purely speculative and based on little more than Mr. Seureau's gut feeling. There is nothing in Star's past performance that indicates it will suddenly transform into a dealer capable of selling 500 vehicles per year.
205. Star's plan to build a new facility is not a current circumstance that weighs in Star's favor against termination.

Effect of Bonus Programs on Star's Sales

206. Star's contact reports from 2012-2014 show a persistent pattern of low sales performance. During that period, Star was receiving the same margin as its competitors, although some of those competitors may have been receiving facility payments.
207. Star's sales effectiveness was substantially below that of its competitors during the time when all South Texas dealers were receiving the same margin.
208. Since at least 2012, Star has had the worst sales performance of any Volvo dealership in the West South Central Census Division and in the country.
209. Neither the FISI or its predecessor programs nor the Retail Bonus Programs were the cause of Star's poor sales performance.
210. Star's assertion that its poor sales performance is due to bonuses paid to other dealers is unsubstantiated by the evidence.

Star's Counterclaims

211. FISI is a voluntary program. Although dealers receive a bonus per new car sold, they are required to make significant investments in their facilities in order to receive those bonuses.
212. Under FISI, the bonus payments are capped at either 50 percent or 40 percent of that investment, and the bonus payments will not recoup the amount of that investment.
213. FISI is not a sales or service standard, and is reasonable for Volvo to encourage facility improvement.

214. FISI bonuses are available to all participating dealers. Until recently, Star chose not to incur the costs of the facility program and therefore did not receive the benefits.
215. The current version of FISI includes an “allocation override” of 35 percent for Site Exclusive and 20 percent for Customer-Facing Exclusive Facilities.
216. Neither the meaning of the FISI allocation override or its practical implication for dealers was explained by the evidence.
217. The allocation override aspect of FISI does not, on its face, require any facility changes in order for a dealer to receive a certain model or series of vehicles.
218. The evidence does not show that non-participating dealers are precluded by the FISI allocation override from receiving any model or series of vehicles.
219. Although the evidence does not establish exact costs for participation in the Volvo 360 program, it does show the type of costs associated with the program and that those costs are likely to exceed the amount of the bonus.
220. The evidence does not establish that there is an economic penalty for failing to participate in the Volvo 360 program.
221. Because there is not an economic penalty, and because the program is voluntary, dealers are not “required” to purchase or accept vehicles under the Volvo 360 program.
222. Because the Volvo 360 program is voluntary, Volvo is not requiring Star or other dealers to adhere to any particular standards or to purchase anything. Even if it were, the evidence does not show that the sales standards or the requirements to purchase whatever equipment is needed for the program are unreasonable.
223. The Volvo 360 program is administered uniformly, and dealers are not treated unfairly or inequitably.
224. Volvo is not operating or controlling Star or any other dealership through the Volvo 360 program.
225. Volvo has not breached its duty of good faith and fair dealing in its implementation of the Volvo 360 program.
226. Although CSI and SSI scoring has been around for a while, Volvo began implementing CSI/SSI as a way for dealers to receive bonus payment beginning in July of 2016.
227. The evidence does not demonstrate how the CSI/SSI bonus program would require the purchase of special tools or equipment.
228. Sales and service are not optional endeavors for a car dealership in the way that a new facility or participation in the Volvo 360 program is. Every dealer must provide, or attempt to provide, the essential functions of vehicle sales and service.

229. Unlike FISI or the Volvo 360 program, the amount of investment required to achieve the CSI/SSI bonus is amorphous at best.
230. Volvo requires its dealers to adhere to certain sales and service standards by rewarding dealers on the basis of the limited CSI/SSI survey results.
231. Although there was no quantitative analysis, the evidence presented in the case shows that the CSI/SSI sales and service bonus standards are unreasonable because the surveys themselves and the use of four questions and top-box scoring do not necessarily measure actual customer sales and service satisfaction.
232. The CSI/SSI bonus programs are a computation or process intended to gauge the performance of a dealership.
233. Volvo has a legitimate interest in customers' opinions about dealerships' facilities, and it is not unreasonable that Star's flaws in that area should count against it.
234. Lower-volume dealers are at an inherent disadvantage in the survey process.
235. The use of only four questions and the top-box scoring of those questions is likely to discriminate against dealers on the basis of volume of sales.
236. Volvo's CSI/SSI bonus program does not constitute the direct or indirect operation of Star's dealership.
237. Volvo has not violated its duties of good faith and fair dealing toward Star in its implementation of the CSI/SSI bonus programs.
238. Star offered no substantive argument specific to the Factory Options Bonus, and its expert witness, Mr. Stockton, testified that he had no specific concerns about that bonus program.
239. The Retailer Standards Bonus can be divided into two phases. Before 2019, the program set out seven mandates (increased from the original four) for receiving a 1-percent bonus. Effective in 2019, the brand-compliant facility component was added for receiving the additional 3-percent operational support bonus.
240. Star has had no difficulty complying with the mandates of the pre-2019 Retailer Standards Bonus.
241. The evidence does not show that the pre-2019 mandates are onerous or that they result in Volvo's direct or indirect control of Star's dealership.
242. The 2019 Retailer Standards Bonus will not cover the cost of the required facilities.
243. Star and other dealers have the economic option to make the investment in facilities or not.

X. CONCLUSIONS OF LAW

1. The Department and its governing board have jurisdiction and authority over the subject matter of this case. Tex. Occ. Code ch. 2301.
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 termination was properly provided. Tex. Occ. Code § 2301.453; 43 Tex. Admin. Code § 215.111.
4. Star timely filed its notice of protest. 43 Tex. Admin. Code § 215.111.
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. The dealer agreement is a “franchise” as defined by Code § 2301.002(15).
7. The dealer agreement must be construed under Texas law, notwithstanding the parties’ choice-of-law provision. Tex. Occ. Code §§ 2301.003, .478.
8. Under Texas law, satisfaction clauses are enforceable, and claims of breach are subject to an objective reasonableness test and require a showing that the party claiming breach has acted in good faith or the exercise of honest judgment. *Black Lake Pipe Co. v. Union Const. Co.*, 538 S.W.2d 80, 88 (Tex. 1976), *overruled on other grounds*, *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Chappell Hill Bank v. Lane Bank Equip. Co.*, 38 S.W.3d 237, 243 (Tex. App.—Texarkana 2001, pet. denied).
9. A manufacturer may not terminate or discontinue a franchise with a franchised dealer unless the manufacturer provides notice of the termination and: (1) the franchised dealer consents in writing to the termination, (2) the appropriate time for the dealer to file a protest has expired, or (3) the Board makes a determination of good cause for the termination. Tex. Occ. Code § 2301.453(a), (g).
10. Volvo has the burden of showing by a preponderance of the evidence that good cause exists for the termination of Star’s dealership. Tex. Occ. Code § 2301.453(g); 1 Tex. Admin. Code § 155.427.
11. In determining whether Volvo established by a preponderance of the evidence that there is good cause for terminating Star’s franchise, the Board is required to consider all existing circumstances, including seven statutory factors. Tex. Occ. Code § 2301.455(a).
12. Volvo met its burden of demonstrating good cause for the termination of Star’s franchise. Tex. Occ. Code § 2301.453(g).

13. Volvo has met its burden of showing that a desire for more sales penetration is not the only reason Volvo is seeking termination of Star's franchise. Tex. Occ. Code §§ 2301.453(g), .455(b).
14. Star has the burden of proving its counterclaims and affirmative defenses by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
15. Star's decision to build a new facility does not waive its claims that the FISl program violates Code §§ 2301.467(a)(1), .468, .473(2)(C), and .478(b).
16. The Board does not have jurisdiction to determine claims under the Robinson-Patman Act, 15 United States Code § 13(a).
17. The FISl program does not violate Code §§ 2301.467(a)(1), .468, .473(2)(C), or .478(b).
18. The Volvo 360 program does not violate Code §§ 2301.451, .467(a)(1) or (2), .468, .476, or .478.
19. The CSI/SSI bonus programs violate Code § 2301.467(a)(1).
20. The CSI/SSI bonus programs violate Code § 2301.468.
21. The CSI/SSI bonus programs do not violate Code §§ 2301.467(a)(2), .476, or .478(b).
22. The CSI/SSI bonus programs' violations of Code §§ 2301.467(a)(1) and .468 do not affect the conclusion that Star's franchise should be terminated.
23. Star's protest should be denied, and the termination of Star's franchise should be approved.
24. Sanctions, penalties, and further orders are not appropriate in this case, and further declaratory decisions or orders are not required. Tex. Occ. Code §§ 2301.153(a)(8), .651, .801, and .802.

SIGNED April 2, 2019.


HENRY D. CARD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS


SARAH STARNES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**SOAH DOCKET NO. 608-16-4676.LIC
MVD DOCKET NO. 16-0018 LIC**

STAR HOUSTON, INC. d/b/a	§	BEFORE THE STATE OFFICE
STAR MOTOR CARS,	§	
Complainant,	§	
	§	
v.	§	OF
	§	
VOLVO CARS OF NORTH AMERICA,	§	
LLC,	§	
Respondent.	§	ADMINISTRATIVE HEARINGS

**COMPLAINANT STAR MOTOR CARS' EXCEPTIONS TO THE
PROPOSAL FOR DECISION**

COFFEY & ALANIZ, PLLC

Wm. David Coffey, III

State Bar No. 04489700

Martin Alaniz

State Bar No. 24059367

13810 FM 1826

Austin, TX 78737

Telephone: (512) 328-6612

Facsimile: (512) 328-7523

Email: wdcoffeylaw@yahoo.com

**ATTORNEYS FOR COMPLAINANT
STAR MOTOR CARS**

TABLE OF CONTENTS

I. INTRODUCTION	1
II. APPLICABLE LAWS	2
III. SUMMARY OF THE ARGUMENT.....	2
IV. ISSUES PRESENTED – TERMINATION GOOD CAUSE ANALYSIS	5
A. The PFD is Contrary to the Public Interest Since It Terminates a Whistleblower Without Punishing the Lawbreaker	5
B. Volvo’s Violation of the Law was Knowing and Premeditated – It was No Accident	6
C. SOAH Became an Advocate for Volvo by Gratuitously Converting a Breach of Contract Case into a Statutory Factors Case Thus Attempting to Shoulder Volvo’s Good Cause Burden Improperly	8
D. Poor Sales Performance is not a Breach of Star’s Franchise – Neither do Franchises Evolve Over Time to Incorporate New Grounds for Termination	10
1. SOAH Decouples from the Franchise and Relies on § 2301.455(a)(1) as Grounds for Termination	11
2. SOAH Advances Sales in Relation to the Sales in the Market as a Sales Performance Ground for Termination	12
E. Future Ramifications of SOAH’s Actions	14
F. Star Motor Cars’ Facility Does Not Breach the Franchise Agreement – Nevertheless, SOAH Uses the Facility to Terminate Star	15
1. Why Star Had Not Yet Built a New Facility.....	17
2. Ultimately Star Offers to Build a New Facility	18
3. Volvo Rejects Star’s New Facility – SOAH Ignores Star’s Attempted Cure	19
G. SOAH’s Denial of Star Motor Cars Statutory Rights.....	19
H. SOAH Misinterpreted the Statute and Terminated Outside the Noticed Grounds for Termination	20
I. SOAH Adopts Flawed Application of Contractual Phrase “To the Satisfaction of the Dealer”	21
J. SOAH’S Flawed Application of the Facts and Construction of the Law Produces an Unmerited Termination – A Collection of Non-breaches of Contract Cannot Amount to a Breach of Contract.....	23
K. Regulatory Impact of Objectively Reasonable Satisfaction Test on Volvo’s “Satisfaction of the Distributor” Clauses	23
L. Regulatory Impact on Construction of Franchise.....	24
M. SOAH’s Misapplication of Texas’ Objectively Reasonable Satisfaction Test	24
1. Volvo Packs Star’s Market with Five Competing Dealers	25
2. No Reasonable Distributor Has a Right to Expect Dealers to Sell at a Loss	26

N. SOAH Bypasses Tex. Occ. C. § 2301.454 Thus Denying Star’s Statutory Rights to Challenge Contract Amendments Prior to Their Use to Terminate	27
O. SOAH’s Weighing of the Statutory Factors at Tex. Occ. C. § 2301.455(a)(1) – (7) Elevates the Distributor’s Interest Over the Public Interests.....	29
P. Unlawful CSI/SSI Scores Used as a Ground for Termination	30
Q. Unlawful CSI/SSI Scores Contributed Demonstratively to Star’s Sales Performance.....	31
R. PFD Alleges Star’s Advertising is Insufficient and There’s “Little or No Evidence” Addressing Star’s “Specific” Advertising Expenses	33
V. ISSUES PRESENTED – INCENTIVE PROGRAM COUNTER-COMPLAINT	34
A. Volvo’s Dealer Incentive Programs are Not Voluntary	34
B. Volvo’s Dealer Incentive Programs Discriminate and Treat Dealers Inequitably and Unfairly in the Price of a Motor Vehicle – § 2301.468	36
C. Volvo’s Dealer Incentive Programs are Unreasonable Sales and Service Standards – § 2301.467.....	38
D. Volvo’s Dealer Incentive Programs Result in Distributor Operational Control of Dealerships – § 2301.476(c)(2).....	40
E. Volvo’s Dealer Incentive Programs include Forcing Dealers to Purchase Items not Ordered – § 2301.451.....	41
F. Volvo’s Dealer Incentive Programs include Forcing Dealers to Remodel, Renovate, or Recondition Facilities – § 2301.473(2)(C).....	41
H. CSI/SSI Incentive Program Component of the Retailer Bonus Program	42
VI. CONCLUSION	43
VII. PRAYER.....	43
INDEX OF APPENDICES AND ATTACHMENTS.....	46

SOAH DOCKET NO. 608-16-4676.LIC
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STAR HOUSTON, INC. d/b/a
STAR MOTOR CARS
Complainant,

v.

VOLVO CARS OF NORTH AMERICA,
LLC,
Respondent.

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

COMPLAINANT STAR MOTOR CARS' EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE SOAH ADMINISTRATIVE LAW JUDGES AND THE BOARD MEMBERS OF
THE TxDMV:

COMES NOW, Complainant/Protestant, Star Houston, Inc. d/b/a Star Motor Cars (“Star”), pursuant to SOAH Rule § 155.507(c),¹ and respectfully submits its Exceptions to the Proposal for Decision (“PFD”), issued on April 2, 2019, and requests Oral Argument before the Board of the Texas Department of Motor Vehicles pursuant to Tex. Occ. Code § 2301.709(b).

I. INTRODUCTION

Star Motor Cars respectfully submits that the PFD's findings of fact and conclusions of law referenced should not be adopted by the Board. Instead, Star submits that the proper resolution of this proceeding would be the entry of a Final Order by the Board finding that Volvo did not meet its burden of proving good cause for termination and by adopting Complainant's "Alternate Proposed Findings of Fact and Conclusions of Law," attached in Appendix A, and "Proposed Final Order", attached in Appendix B.

¹ The deadline for submission of exceptions to the PFD was extended by SOAH Orders Nos. 24 and 25.

II. APPLICABLE LAWS

Tex. Gov't Code ("APA") § 2001.058(e) provides the three ways the department may change an ALJ's finding of fact or conclusion of law, or may modify or vacate an ALJ's order.

To make a change, the department must determine:

- (1) that the ALJ did not properly apply or interpret applicable law, agency rules, written policies provided to the ALJ, 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.²

Star will address the relevant statutes, findings of fact, and conclusions of law at issue in these Exceptions and explain why the ALJs' analysis in the PFD did not properly apply or interpret applicable law or prior administrative decisions.

III. SUMMARY OF THE ARGUMENT

The Star Volvo PFD should be a vast disappointment to the Board. One of the Board's licensees, Star Motor Cars, a dealer whose license from the Board is in impeccable standing after 48 years, and for which Volvo has not brought forward into the record a single consumer complaint about its operations in nearly 50 years,³ has become the subject of a biased and one-sided PFD which is a gross injustice to Star Motor Cars, its customers, and the public.⁴ SOAH has misinterpreted the law and the facts to create grounds for termination which do not exist. The PFD approaches the evaluation of good cause for termination with a viewpoint as to what a franchised dealer should be in the eyes of a distributor, but departs from the franchise and

² Tex. Gov't Code § 2001.058(e).

³ PFD, FF 72, p. 120, "...there is no evidence that customers have complained to Star about the service received."

⁴ For additional examples of bias, opinion, speculation, and inaccuracy, see Appendix C hereto.

statutory structure that dealers and consumers have come to rely upon. In so doing, the SOAH has elevated the interests of the distributor over that of the public which is a direct contravention of the Board's statutory mandate to protect the public contained at Tex. Occ. C. § 2301.001.⁵ While the PFD's reasoning is one-sided, the record evidence was not. The only appropriate remedy to SOAH's PFD is to reject it and issue the Proposed Final Order, attached in Appendix B hereto, which denies good cause for termination.

Star is described as a niche dealership, serving the Houston market since 1970.⁶ The SOAH notes that Star has served a limited locale within that market, the same being River Oaks, Tanglewood, and the like. Star is accused of not changing with the times because it has not moved to a freeway location and adopted a high-volume business plan like the rest of the Houston Volvo dealers.⁷ Star is being terminated largely because it has declined to do so.

There are two different business strategies that dealers might employ: higher volume at lower grosses, or lower volume at higher grosses.⁸ An underlying tension in the distributor/dealer relationship is that a distributor's interests are best served by selling more cars faster, regardless of dealer gross, while a dealer's interests may be better served by selling fewer cars, but at higher grosses.⁹ Consequently, a dealer's profit interests may be better served by selling his cars at higher grosses than the distributor would prefer.

One issue to be decided by the Board, then, is whether there is still any room left in this industry for a niche dealership which is not motivated solely by volume sales. Another issue is whether there is still room for a dealer who resists all attempts by the distributor to amend his

⁵ Tex. Occ. C. § 2301.001(2) "... enforcing this chapter as to other persons to provide for compliance with manufacturer's warranties and to prevent fraud, unfair practices, discrimination, impositions or other abuses of the people of the state."

⁶ PFD, pp. 9, 63.

⁷ PFD, pp. 13-15.

⁸ Ex. P-140 at 40:11-20 (Lytle Depo).

⁹ Tr. at 1037:14-1038:6 (Stockton).

franchise to force him into a high-volume role which is contrary to the culture of the dealership.

For 48 years, Star Motor Cars has insisted upon staying under its original franchise agreement¹⁰ with Volvo and resisted new and more onerous franchises which Volvo has offered over the years. Star had the statutory and contractual right to do so, and Mr. Seureau testified that the reason he did so was because the franchises became ever more onerous, imposing new duties never contemplated by the parties.¹¹ Volvo's defined remedy was to force an amendment to the franchise under Tex. Occ. C. § 2301.454 should it choose to do so. It did not.¹²

The SOAH has chosen to punish Star for staying under its original franchise by rewriting that franchise, by creating new obligations that were never contemplated by the parties and then finding Star to be in breach of those manufactured new obligations. This will become apparent as the full record created in these proceedings is laid bare before the Board. SOAH provided only a selective and one-sided record to support its PFD.

The Board is charged with exercising "the state's police power to ensure a sound system of distributing and selling motor vehicles through: (1) licensing and regulating manufacturers, distributors, converters, and dealers of motor vehicles..."¹³ SOAH's PFD, if adopted by the Board, can only serve to undermine the statutes committed to the Board's discretion and critical oversight role. What dealer, for example, is going to oppose an unlawful distributor incentive program if it loses its franchise in the process? What distributor is going to obey the law if Volvo is allowed to use the process of this agency to terminate Star while at the same time avoiding punishment for violations of that same law. This is what SOAH proposes for Star Volvo. Not only should the Board deny Volvo's termination of Star Motor Cars, but it should adopt Star's

¹⁰ Attachment 1, Ex. P-5, Star's April 1, 1970, Volvo franchise agreement.

¹¹ Tr. at 1221:1-10, 1221:11-15, and 1221:13-19 (Seureau).

¹² Tr. at 1223:2-18 (Seureau).

¹³ Tex. Occ. C. § 2301.001.

Proposed Final Order, attached as Appendix B, which prohibits Volvo from using its unlawful CSI/SSI methodology in future incentive programs or with which to terminate dealer franchises.

IV. ISSUES PRESENTED – TERMINATION GOOD CAUSE ANALYSIS

A. The PFD is Contrary to the Public Interest Since It Terminates a Whistleblower Without Punishing the Lawbreaker

SOAH purports to have found good cause for terminating Star's franchise while, at the same time, finding that Volvo's CSI/SSI incentive bonus program is unlawful in the state of Texas.¹⁴ In short, Volvo has violated the law. Star, however, has violated no laws. At most it has declined to perform under its franchise in the way that Volvo demands. Volvo, on the other hand, has knowingly and intentionally violated the law for years. In short, SOAH proposes to terminate the whistleblower who brought the illegality of Volvo's programs to the Board's attention while proposing no penalty for Volvo's violations of law.

SOAH proposes that Star receive the ultimate penalty – termination, while proposing that the Board itself is to decide what, if anything, to do about Volvo's knowing violations of the law. Clearly, SOAH is not upholding those duties to enforce the laws that are committed to the TxDMV's discretion or it would propose as equally drastic a penalty for Volvo that it is proposing for Star.

The Board, of course, does not have the resources to investigate every incentive program that the distributors come up with to see if they are in compliance with the law. The Board depends upon adversely affected dealers to bring these contested cases to the Board and petition the Board to judge the legality of said programs. As will be shown, SOAH proposes to elevate the interests of Volvo in selling a few more cars over the interests of the public in a level

¹⁴ PFD, FFs 231, 234, 235, p. 134; CL 19-20, p. 136.

competitive playing field. SOAH expects the Board to terminate the very dealers on whom the Board relies to enforce the Board's statutes so that Volvo might be able to sell a few more cars in Houston.

The statutes under which the termination aspect of this termination/unlawful program proceeding was brought was Tex. Occ. C. §§ 2301.453 and 2301.455. They require the Board to determine whether "good cause" for termination exists based on "all existing circumstances." One of the factors that the Board is required to consider in making this determination is "injury or benefit to the public."¹⁵ Maintaining the ability to enforce the Board's statutes is beneficial to the public. Any proposed decision out of SOAH which undermines the Board's ability to enforce the statutes runs afoul of this provision of the law. The SOAH PFD ignores the Board's statutory mandate to protect the public from unlawful competition and replaces it, instead, with Volvo's interest in tilting the competitive playing field in Volvo's favor by employing unlawful incentive programs which give it a competitive edge over other distributors.

SOAH is saying with this proposed decision that the interest of the distributor, in selling a few more cars in Houston, supersedes the interest of the public in having a level, competitive playing field in the industry. The Board should put a stop to this by issuing a final order rejecting the SOAH PFD as to Star's termination and adopt Star's Proposed Final Order, attached hereto as Appendix B, with its restrictions on Volvo's future incentive programs.

B. Volvo's Violation of the Law was Knowing and Premeditated – It was No Accident

Star accuses Volvo of a "knowing violation of the law" because the record in this case shows that Volvo had been challenged on its incentive programs before. SOAH mentioned in its PFD the fact that Star Motor Cars and other dealers brought a substantially identical proceeding

¹⁵ Tex. Occ. C. § 2301.455(a)(3).

against a substantially identical Volvo incentive program back in 2002 but gave it no weight.¹⁶

That program, like the current contested program, took back a part of a dealer's unconditional 14% "margin" and made the dealer earn it back by implementing certain operational mandates.¹⁷

When considering the dealers' complaints against Volvo's incentive programs in 1999, Director Bray stated:

We view these requirements as an unlawful intrusion into the business judgment of the franchisee. Even if the contract gives the manufacturer the right to make such demands, we believe the Code would override and they would be found to be unreasonable bases for terminating or otherwise penalizing a dealer.

...

The end result is that Volvo discriminates in favor of dealers who do comply with the exclusivity requirements over those who do not by reducing the ultimate cost of S70s and V70s. We view such discrimination as unreasonable and thus, violative of §5.02(b)(21).¹⁸

In response to Star Motor Cars' 2002 petition¹⁹ to the then, Texas Motor Vehicle Commission, Volvo withdrew its incentive program from the state of Texas so that all Texas dealers were paid the full 14% margin without having to jump through the operational hoops necessary to win that margin back. In short, Volvo recognized that its program was unlawful in the state of Texas and abandoned the program when Star Motor Cars and others challenged it. For 14 years, Volvo operated within the law except for its facility improvement programs which will be further discussed later.

¹⁶ Ex. P-34.

¹⁷ The term "margin" refers to the available profit margin on the sale of a new car. At its simplest level it means the differential between the manufacturer's suggested retail price ("MSRP") and the wholesale price of the vehicle to the dealer. With these incentive programs the distributor takes back a portion of the 14% unconditional margin earned upon the sale of a car and requires dealers to earn it back by complying with certain operational mandates such as achieving certain CSI/SSI scores or building a new image compliant facility for the distributor. Any dealer who fails to achieve the operational mandates earns less margin than the dealer who does, thus creating two different classes of dealers, those with bonus margins and those without. The bonused dealer can sell cars cheaper than unbused dealers since the bonuses effectively operate as discounts off the wholesale price to the dealer. By converting unconditional margin to conditional margin, Volvo controls the operations of dealers in order to sell more cars.

¹⁸ Ex. P-33, p. 1.

¹⁹ Ex. P-34.

Volvo then, however, brought its incentive program back in July 2016 with the full panoply of operational requirements needed to earn bonuses.²⁰ This is one of the reasons that Volvo so avidly seeks Star's franchise. Star kept Volvo lawful for 14 years against its wishes. Star is also the only dealer still standing in the way of these programs now. SOAH briefly mentioned this in its PFD, but completely ignored, Ex. P-33, the Director's informal opinion on the illegality of the programs, thus failing to give the Board proper regard to previously decided issues. As previously noted, failure to apply a prior administrative decision is a ground for modifying or vacating a SOAH Order.²¹ Mr. Bray's comments reflect the agency's position on the issue at the time.

C. SOAH Became an Advocate for Volvo by Gratuitously Converting a Breach of Contract Case into a Statutory Factors Case Thus Attempting to Shoulder Volvo's Good Cause Burden Improperly

To develop this point of error, we must go to the franchise agreement²² itself, attached hereto as Attachment 1, and the actual notice of termination,²³ attached hereto as Attachment 2, which controlled, or should have controlled, the grounds for termination and the issues for litigation.

²⁰ SOAH also failed to explain in its PFD how these unlawful incentive programs work and what makes them unlawful in the state of Texas. It's all about Volvo manipulating the competitive equation so that dealers must adopt Volvo's operational requirements in order to earn bonuses and stay price competitive. These cash bonuses are effectively reductions in the wholesale prices of vehicles purchased from the distributor. The bonused dealer can use the bonuses as "trading margin" and then sell those vehicles more cheaply than the un-bonused dealer. This gives the bonused dealer a profound competitive advantage which not only allows them to make more sales and thus more money but also allows them to take sales from the un-bonused dealers which in turn marginalizes those dealers to the point where, as in the case of Star Motor Cars, the dealer's sales performance is reduced to the point where it actually faces termination. The result of these programs is that two classes of dealers are created one which is competitively advantaged and one which is competitively disadvantaged. It is this price discrimination which makes these programs unlawful. The distributor wins in two ways. It enhances the prospects of those dealers who will operate their dealerships according to Volvo's operational mandates and it marginalizes to the point of termination those dealers who cannot or will not. The public loses because it unknowingly pays higher prices from those dealers who do not earn bonuses.

²¹ Tex. Gov't. C. § 2001.058(e).

²² See Attachment 1, Ex. P-5.

²³ See Attachment 2, Ex. P-8.

Volvo brought this termination case as a breach of contract case, the contract being the franchise agreement between the parties. The notice of termination, required by Tex. Occ. C. § 2301.453(c), was little more than garbled boilerplate. Therefore, Star's counsel directly asked Mr. Stephen Klipstein, Volvo's corporate representative, what this termination was all about, and he said it was "strictly a breach of contract" case.²⁴ He admitted that Volvo had no other grounds for terminating Star Motor Cars other than contractual. The SOAH PFD opines that this was just Mr. Klipstein's "personal opinion"²⁵ rather than the sworn testimony of Volvo's designated corporate representative, and that rather than being a breach of contract case, Volvo was simply using the allegations against Star as examples of why Volvo was dissatisfied with Star's performance²⁶. This position taken by SOAH directly contradicts Mr. Klipstein's admission that it was strictly a breach of contract case. In other words, SOAH created grounds for termination which Volvo never even advanced, then used those manufactured grounds to terminate Star Motor Cars. By doing so SOAH became an advocate for Volvo. SOAH's PFD is invalidated in every instance in which it abandoned Volvo's case theory for termination and advanced its own instead, since it is Volvo's burden to establish good cause for termination under § 2301.453(g). SOAH cannot assume that burden for Volvo.

SOAH cannot credibly claim that Volvo and SOAH are not bound by Mr. Klipstein's admission as simply his personal opinion. That is untrue. Mr. Klipstein was the designated corporate representative of Volvo.²⁷ He was charged with speaking for the Corporation and his words are binding on the Corporation. When he admitted that this was strictly a breach of

²⁴ Tr. at 146:7-15 (Klipstein).

²⁵ PFD, p. 71 fn 409, "Star repeatedly cited Mr. Klipstein's comment that *he personally regarded* this termination proceeding as 'strictly a breach of contract case.' Tr. 146 (Klipstein). The ALJs do not read nearly as much into this witness's comment as Star does, and note that Volvo's pleadings, evidence, and argument have consistently invoked statutory factors in addition to breach of contract." (emphasis added.)

²⁶ PFD, pp. 86-90.

²⁷ Ex. P-152.

contract case, the contract being, the franchise agreement, Volvo was bound by that admission and Star was entitled to craft its defense based on that admission. For SOAH to deny that admission and gratuitously change Volvo's case theory to Star's detriment is reversible error. As noted, it made SOAH an advocate in these proceedings and no longer a disinterested factfinder. Star objects to the PFD due to its improper advocacy.

D. Poor Sales Performance is not a Breach of Star's Franchise – Neither do Franchises Evolve Over Time to Incorporate New Grounds for Termination

Volvo's primary complaint in the case was that Star did not sell as many cars as Volvo wanted sold in Star's AOR as measured by several metrics including sales effectiveness ("SE").²⁸

We look then at Attachment I to see if there is a sales performance provision which Star could possibly have breached under any circumstances. It is obvious that there is nothing in the franchise agreement which could properly be construed as a sales performance provision. In recognition of this, Volvo took the position that the franchise had evolved over time so that Star was required to satisfy Volvo's latest metric for sales performance, called sales effectiveness.²⁹ Star's failure to do so, said Volvo, was a breach of the franchise. Later Volvo took the position that since more Volvo sales in Star's AOR were being made by other Volvo dealers than by Star itself that therefore Star was in breach of the franchise. There are, however, no such sales performance provisions in Star's franchise, nor could there be since Volvo drafted the contract decades before it even developed metrics such as sales effectiveness, CSI, SSI, and cross-sell analysis. Volvo's case theory was that the franchise evolved over time to incorporate these new developments as contractual obligations.³⁰ SOAH did not adopt this case theory and,

²⁸ Sales effectiveness is defined by the PFD at Section III.B.3.(b), pp. 27-28.

²⁹ *Id.*

³⁰ Tr. at 150-152 (Klipstein).

in fact, did not even acknowledge in the PFD that Volvo had advanced this theory. SOAH credited Star's evidence that no sales performance mandate appears in the contract.³¹

Instead, the provision on which SOAH ultimately relied for finding a sales performance breach was Clause 6(a)(5) which reads: "the breach by the dealer of any of the provisions of this agreement, including a failure of the dealer to develop the locality assigned to him to the satisfaction of the distributor..."³² According to Volvo's witnesses, this provision of the contract had evolved over time so that Star Motor Cars was contractually obligated to comply with every metric for performance that Volvo had developed over the past 48 years since the contract was entered into, including sales effectiveness.³³ SOAH, the advocate, however, abandoned Volvo's theory and developed its own case theory to support Star's termination.

1. SOAH Decouples from the Franchise and Relies on § 2301.455(a)(1) as Grounds for Termination

SOAH began developing its case theory at page 72 of the PFD under the heading "VI. Analysis of Statutory Good Cause Factors for Termination."

First, SOAH decoupled the termination from the breach of contract cause of action admitted to by Mr. Klipstein. To do so, SOAH postulated that Star, by emphasizing the contract terms, must be trying to sidestep the statutory scheme for termination proceedings. According to the SOAH, "the parties' compliance with the franchise" is only one of the 7 enumerated circumstances that must be considered, and it is entitled to no more or less weight than the other factors that are considered.³⁴ Under this reasoning, the SOAH elevated its own interpretation of the statute over the express admission of Volvo's corporate representative regarding strict breach

³¹ PFD, pp. 72, 74; See also PFD, pp. 62, 71.

³² Attachment 1, Ex. P-5, p. ii, Clause 6(a)(5), SMC 652.

³³ Tr. at 150-152 (Klipstein).

³⁴ PFD, p. 72; See also Tex. Occ. C. § 2301.455(a)(6)

of contract. Once again, SOAH acted as an advocate rather than a judge.

SOAH then postulated that since the statute contains the words “notwithstanding the terms of any franchise...” then SOAH is free to depart from Star’s obligations under the contract and find grounds for termination outside of the contract.

The SOAH then developed its own unique ground for termination, for sales performance, one that Volvo never advanced in these proceedings and one that the TxDMV has never before adopted. Once again, SOAH became advocate instead of judge.

2. SOAH Advances Sales in Relation to the Sales in the Market as a Sales Performance Ground for Termination

The SOAH finds its own unique ground for termination in Tex. Occ. C. § 2301.455(a)(1) which is one of the 7 statutory factors that the Board is required to consider in the determination of “good cause.” It requires a consideration of “(1) the dealer’s sales in relation to the sales in the market.”³⁵ The statute does not define what this statutory criterion means. Neither has the TxDMV ever defined it by rule. Nevertheless, SOAH analyzed Star’s performance under sales effectiveness and various other performance metrics and determined that this Code section entitles SOAH to find a sales performance ground for termination where the contract does not contain one, and where Volvo, by its own admission, is relying entirely on the contract for its right to terminate.

SOAH’s theory was that since the legislature required consideration of Star’s sales in relation to sales in the market “notwithstanding the terms of any franchise” that therefore “the fact that the dealer agreement does not address sales effectiveness is irrelevant to this factor.”³⁶ Under SOAH’s reasoning, Star was contractually bound by a sales effectiveness metric which

³⁵ Tex. Occ. C. § 2301.455(a)(1).

³⁶ PFD, p. 74.

didn't even exist at the time the franchise was entered into. Ultimately, the SOAH concluded that "Volvo had established extremely poor sales in relation to the market and this factor weighs heavily in favor of terminating Star's franchise."³⁷

It is critical for the Board to understand that Volvo purported to terminate Star for allegedly inadequate Sales Effectiveness, a very specific measurement. Volvo argued that the contract incorporated the Sales Effectiveness metric. Star's expert, in unrebutted testimony, demonstrated that Sales Effectiveness does not and cannot measure dealer sales performance in its own market. SOAH did not contradict this statement. Instead, it postulated that there would not be a metric under which Star had adequate sales in relation to the market, giving Volvo the best of the contract, its Notice of Termination, its testimony at trial, and after-the-fact analysis not disclosed by Volvo as a termination reason.

One might ask why SOAH's construction of the franchise is necessary. The answer is clear. Volvo's own allegations, the contract, and the Notice of Termination necessitated it. Likely in response to the insufficient and defective nature of Sales Effectiveness, Volvo asserted that the termination actually flowed from a market share shortage in the "Houston Market" not the AOR, the Houston Market. This assertion was meritless.

Volvo's market share in Star's AOR was normal. Volvo's expert did not dispute his firm's assertion in other cases that market share in a dealership's AOR is a direct reflection of the marketing efforts of the local dealership. Star's expert offered unrebutted testimony that in the context of the analytical tools available and other, older contracts, development of a market was consistent with a market share standard, not a sales effectiveness or sales volume standard. In short, if the market is the AOR, then the market was developed to a normal level for Volvo.

³⁷ PFD, p. 76.

The effect of this simple, powerful evidence is apparent in the PFD. SOAH makes the off-hand characterization that “Star’s expert says that Volvo should be happy with its market share.” This dismissive straw man construction is not faithful to the testimony. The testimony was that, if Volvo can claim that an area with normal market share is underserved, it leads to the opportunity for manufacturers to exercise tremendous leverage over dealerships, mandating that they raise the market share, even when their sales efforts are sufficient. If a manufacturer can assert that an AOR with normal market share is inadequate, because different AORs have lower market shares, this standard becomes ad hoc and untethered to any sound analysis. Furthermore, it could not reconcile with a contract that requires a dealership to develop its own market.

Star’s position has nothing to do with Volvo’s satisfaction. It demonstrated conclusively that, if the AOR is the market, then the market is adequately developed; if adequate market share in the AOR is not sufficient, then the mandate to raise market shares in other AORs is impracticable. If Volvo, indeed, can mandate that dealerships raise market share in other AORs, then the bargaining power of the manufacturer has ballooned out of control.

E. Future Ramifications of SOAH’s Actions

Once again, SOAH has transitioned from judge to advocate. Star objects to being judged by an advocate which distorts the statute, denies the terms of the franchise and departs radically from Volvo’s own case theory. To adopt this PFD will be to give SOAH carte blanche to terminate a dealer on amorphous statutory grounds which this Board has never before recognized and which flies in the face of the Board’s mandate to prevent unfair practices against the citizens of this state.³⁸ The Board is required by law to use SOAH to try its contested cases³⁹ but the Board is ultimately the final word on what comes out of those contested cases. SOAH’s actions

³⁸ Tex. Occ. C. § 2301.001.

³⁹ Tex. Occ. C. § 2301.704.

in this case are nothing less than an unfair practice used to terminate Star Volvo in the guise of statutory construction.

F. Star Motor Cars' Facility Does Not Breach the Franchise Agreement – Nevertheless, SOAH Uses the Facility to Terminate Star

The notice of termination, Attachment 2, stated as follows regarding Star's facility:

Star Motor Cars failure is further exacerbated by major shortcomings in its customer and service facilities, equipment and personnel, especially when compared to those of other dealers in the Volvo Cars dealer body selling and servicing the same line make.⁴⁰

The franchise agreement states the following contractual obligation regarding Star's facility:

The dealer shall maintain a place of business and sales room and service facilities satisfactory to the Distributor...⁴¹

Mr. Seureau was asked what this provision meant to the parties when the contract was entered into in 1970. He testified that it meant that before he could become a Volvo dealer, he would have to provide satisfactory sales and service facilities. In compliance with this obligation, he purchased from the prior Volvo dealer the identical facilities that that dealer had been using for several years to service the brand. The evidence showed that the distributor at the time, Volvo Southwest, had actually designed and built these facilities to be occupied by its first dealer in Houston, a Mr. Nils Sefeldt. The facility was certainly satisfactory to the distributor since the distributor had designed and built it just a few years before Mr. Seureau acquired it. The distributor then, enfranchised Star Motor Cars in reliance on that facility. There was no future obligation regarding the facility agreed to between the parties.

Volvo's witnesses were asked what was meant by this facility provision at the time the

⁴⁰ Attachment 2, Ex. P-8.

⁴¹ Attachment 1, Ex. P-5, p. 1, SMC 654, Standard Provisions § 3. Policy.

contract was entered into and they didn't know because they weren't there. Neither did Volvo attempt to provide any witnesses who were there in 1970 when the contract was negotiated and entered into.

Instead, Volvo took the position that the facility provision also miraculously evolved over time so that the dealer was obligated to adapt the facility to every new face program that Volvo should come up with over the years.⁴² When asked whether the facility was deficient in any way, other than brand image, it's witnesses stated that it was deficient in space because *if* Star Motor Cars were ever to achieve sales effectiveness there would be so many additional Volvo's operating in its AOR that there would not be enough space in the facility to accommodate all the hypothetical business.⁴³

Volvo could not, however, point to a single customer who had ever been inconvenienced by insufficient space in the facility. The SOAH ALJs even admit in the PFD that Star's facility is adequate to serving its existing customer base and that Volvo could not point to any inconvenienced customers.⁴⁴ Volvo's case theory was that Star was contractually obligated under its evolving contract theory to achieve sales effectiveness and if it ever did then the facility would be too small to accommodate all the units in operation ("UIOs") in Star's AOR.

Once again, this case theory of an evolving franchise, was apparently too silly for the SOAH to adopt so, instead, SOAH itself created a new theory for Volvo, which is discussed at pages 80-82 of the PFD. Once again the SOAH found, that in order to terminate Star for a facility deficiency, it must decouple the facility from the limitations of the franchise by using the "notwithstanding the terms of any franchise" language so that SOAH could analyze that facility

⁴² Tr. at 733:2-25 (Seidman).

⁴³ Tr. at 773:11-14 (Seidman).

⁴⁴ PFD, p. 82.

criterion without the inconvenience of being bound by the limitations of Star's franchise.

The SOAH then went forward and did precisely that. It found that the facility was grounds for termination because it compared unfavorably to other Volvo dealers in terms of upgrades and image. The SOAH arrived at this conclusion after first admitting that "Star's service facility is technically functional and able to serve the volume of customers that the dealership attracts."⁴⁵

Ironically, the SOAH based its conclusion, in part, on Star's CSI scores while admitting that "the low CSI scores are largely attributable to the condition of the facility itself, not the quality of the service provided."⁴⁶ As will be shown, SOAH later found that the program which produced these bogus CSI scores is unlawful.⁴⁷ Star submits that it is arbitrary and capricious for SOAH to use as a ground for termination in part, based on CSI/SSI scores produced by an unlawful program. That gives legitimacy to the unlawful program which produces the scores.

In short, the facility is a ground for termination, not because it is functionally inadequate, but because it is not as attractive after 48 years as some of the other dealerships in town and because it may become space deficient at some point in the future. SOAH's handling of the facility issue is an even greater imposition on Star Motor Cars than SOAH's handling of sales performance and just as much a violation of Tex. Occ. C. § 2301.001.

1. Why Star Had Not Yet Built a New Facility

Mr. Seureau was examined as to why he had not built Volvo a new facility in 48 years and his testimony was revealing. The Volvo component of the Star Motor Cars campus is landlocked, so to speak, by a Mercedes facility on one side and Lotus and Aston Martin on the

⁴⁵ PFD, p. 82.

⁴⁶ *Id.*

⁴⁷ PFD, CL 19-20, p. 136.

other side. There is nothing that can be done with the current facility to increase Volvo's square footage and improve its image without tearing down the existing facility and rebuilding from scratch. That would mean shutting down Star's Volvo operations for at least a year with all of the inconvenience to Volvo customers and to the dealership itself which that entails. Basically, it would put Star out of the Volvo business for at least one and a half years.⁴⁸ Who knows if Star Volvo could ever be able to reopen after a shutdown like that? Its employees would go elsewhere as would its customers.

2. Ultimately Star Offers to Build a New Facility

Consequently, for years, Mr. Seureau lobbied Volvo with letters⁴⁹ and phone calls asking for its help in coming up with a solution to his quandary. Volvo had no solution and largely ignored Mr. Seureau's requests, so the upgrade kept getting postponed. Finally, in May 2018, Mr. De Winne⁵⁰ alerted Mr. Seureau of Volvo's announcement that dealers who had not yet built a new Volvo facility would be put at a 3% margin disadvantage with those dealers who had done so under the latest incentive program. At this point, Star Motor Cars had to abandon attempts to coordinate with Volvo about the remodel of Star Volvo's current facility. Star agreed to build Volvo an image compliant dealership on some property owned by Mr. Seureau which was adjacent to the Mercedes component of the Star dealership.⁵¹ Star Motor Cars has committed to devoting \$16 million in property and cash to this project. The Board should not be misled by the possibly de minimis-sounding 3% figure. This three percent figure exceeds the entirety of average gross profit margins that Volvo dealerships achieve on the sales of new

⁴⁸ Tr. at 1261:1-8 (Seureau).

⁴⁹ Ex. P-88, Mr. Seureau's letter to Volvo, dated March 25, 2016, regarding the 2015 Retail Facility Survey directly asking Volvo what was "required" for Star to do to satisfy facility deficiencies; *See also* Ex. P-87, Volvo Retailer Facility Survey Results, dated January 1, 2016, stating "[a]lthough action to this year's survey is not required by VCNA at this time, retailers should review the basic facility housekeeping standards."

⁵⁰ Ex. P-218.

⁵¹ Ex. P-175.

vehicles prior to the effects of margin programs. Volvo has never questioned Mr. Seureau's ability to perform or his integrity in promising to perform his promise. Neither should SOAH.

3. Volvo Rejects Star's New Facility – SOAH Ignores Star's Attempted Cure

Attached hereto as Attachment 3 is Volvo's denial of Star's request to build a new facility.⁵² The ramifications of this denial are significant. For example, the law of the state of Texas says unequivocally that if a contracting party is alleging breach of a particular provision of the contract then, if the other party complies with the provision or otherwise cures that breach, then the breach of contract case on that provision is mooted, cured, and cannot proceed.⁵³ The SOAH does not even mention this aspect of Texas law, though much was made of it in Star's Response Brief.⁵⁴ Instead, Star's cure is ignored and SOAH finds that Star's facility is a good cause ground for termination.⁵⁵

G. SOAH's Denial of Star Motor Cars Statutory Rights

There are several ways that SOAH has denied Star Motor Cars its statutory rights by its handling of the case. The first is by abandoning the "strict breach of contract" ground for termination alleged against Star by Volvo and deciding instead that Star could be terminated entirely under a peculiar construction of the 7 statutory factors contained at § 2301.455(a)(1-7). This was error from the beginning since the statute itself makes it clear that "good cause" for termination must be established based on the "specific grounds for the termination"⁵⁶ contained in the notice of termination issued by the distributor. That is the whole purpose for the specific notice requirement to begin with. Due process requires that the dealer know why it is being terminated so that it can prepare a defense.

⁵² Attachment 4, Ex. P-250.

⁵³ *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

⁵⁴ *Star Motor Cars' Response to Respondent Volvo Car USA, LLC's Post-Hearing Brief*, dated February 7, 2019.

⁵⁵ PFD, p. 82.

⁵⁶ Tex. Occ. C. § 2301.453(c).

H. SOAH Misinterpreted the Statute and Terminated Outside the Noticed Grounds for Termination

According to the express language of Tex. Occ. C. § 2301.455(a), the 7 statutory factors are to be considered on the issue of “determining whether good cause has been established under Section 2301.453...”⁵⁷ Obviously, “good cause” has to be established under Section 2301.453 before the seven statutory factors can even be considered. The language whether “good cause” has been established contained in both Tex. Occ. C. § 2301.453(g) and 2301.455(a) clearly refers to good cause being established under the franchise agreement because the operative statutory language is preceded by the language “[n]otwithstanding the terms of any franchise...”

Tex. Occ. C. § 2301.453 implements the good cause requirement with a notice requirement contained in sections (a) and (c). This notice must state the “specific grounds for the termination.” It is these noticed grounds for termination which are up for good cause analysis. If good cause for termination cannot be found in the noticed grounds for termination, the seven statutory factors do not come into play. In short, “good cause” for termination has to be found in the grounds for terminations alleged in the notice of termination. Only in this context must the 7 statutory factors be considered. The statutory factors cannot take the place of the noticed grounds for termination.

Instead of this rational construction of the statute, SOAH uses the language “Notwithstanding the terms of any franchise...” to de-couple the good cause determination from the franchise itself and allow it to be made entirely on the 7 statutory factors and without regard to what was actually alleged against Star by Volvo in the notice of termination. SOAH’s approach ignores the express language of the statute. It also ignores the express language of the

⁵⁷ Tex. Occ. C. § 2301.455(a).

notice of termination.⁵⁸ In every case the allegations made against Star Motor Cars in the notice such as “failed to adequately represent”, “actual sales performance substantially below average”, “failing to adequately serve the consuming public”, “major shortcomings in customer and service facilities, equipment and personnel”, etc. According to Volvo’s witness, these allegations referred to alleged breaches of the franchise agreement. SOAH ignores all this and proposes that Star’s termination be based entirely on the 7 statutory factors and outside the context of the breach of contract alleged against Star in the notice of termination.

To allow SOAH to do this would give SOAH the unbridled discretion to terminate a dealer on any ground that might be imagined by juggling one or more of the statutory factors.

Star was entitled to be judged on the allegations in the notice of termination and not some novel interpretation of the statute which would allow SOAH to pursue a termination which would bypass the limitations of the notice of termination as well as the Board’s statutory mandate.

Under SOAH’s interpretation, all dealerships in Texas are constantly under a de facto Cure Notice. The manufacturer need only level one ground for termination. The dealership will then be subject to termination on a seven-factor test, where the standards for that test are not required to be disclosed, are not required to be tethered to the contract, and may not even exist until SOAH defines them as the relevant test.

I. SOAH Adopts Flawed Application of Contractual Phrase “To the Satisfaction of the Dealer”

After it’s exercise in statutory interpretation, SOAH declines to analyze the actual noticed grounds for termination and looks for a different contractual ground for termination. It thinks to have found one in the language “to the satisfaction of the distributor” contained in several

⁵⁸ Attachment 2, Ex. P-8, hereto.

performance obligations under the franchise itself.⁵⁹ SOAH construed and applied the provision “to the satisfaction of the distributor” to create several performance obligations under the franchise itself, specifically, a sales performance obligation and a facility obligation which do not exist in the franchise.

In the state of Texas these “satisfaction clauses,” as they are called, must be construed and applied under an objectively reasonable satisfaction standard. Texas’ objective satisfaction test does not seek to find the mental state of satisfaction of a party but rather whether the performance would satisfy a reasonable person.⁶⁰ “To the satisfaction of the distributor” does not mean that the distributor can whimsically be dissatisfied so that failure to satisfy the distributor’s whimsical complaints can constitute a breach of contract. A reasonable mind must agree with the distributor that the distributor has reasonable grounds to be dissatisfied.

In the PFD, SOAH examined all of Volvo’s complaints against Star over several pages,⁶¹ none of which, by SOAH’s own admission, constituted a breach of the contract⁶² and determined that cumulatively, they gave Volvo reasonable cause to be dissatisfied with Star’s performance. Therefore, Star had breached the franchise by failing to satisfy Volvo. In short, by adding up all of Volvo’s complaints, none of which constituted a breach of contract, SOAH managed to find a breach of contract over which to terminate Star.⁶³

SOAH also failed to factor into its analysis the fact that Star had proposed to build a new facility, which would satisfy all of Volvo’s complaints and had been rejected by Volvo.

⁵⁹ Attachment 1, Ex. P-5, p. ii, SMC 652, Clause (6)(a)(5) and p. 1, SMC 654, Standard Provisions § 3. Policy.

⁶⁰ *Clover Staffing, LLC v. Johnson Controls World Services, Inc.*, 465 F. Supp. 2d 670, 684 (S.D. Tex. 2006).

⁶¹ PFD, pp. 86-90.

⁶² PFD, p. 88, “No single item on the list above is claimed to breach a term of the dealer agreement or to justify termination on its own.”; and p. 89, “...again while none of the above listed items standing alone establishes a breach of the dealer contract...”

⁶³ PFD, p. 90.

J. SOAH’S Flawed Application of the Facts and Construction of the Law Produces an Unmerited Termination – A Collection of Non-breaches of Contract Cannot Amount to a Breach of Contract.

It is apparent from the record that SOAH took a collection of complaints from Volvo and attempted to convert each one of those complaints into a ground for termination by advancing the notion that while none of these complaints were actually breaches of the franchise agreement, the cumulative effect of all the complaints was a breach of contract meriting termination under the good cause requirements of the Texas Occupations Code.⁶⁴ Star submits that no amount of non-breaches of contract can cumulatively amount to a breach of contract. 0 breaches + 0 breaches + 0 breaches will always equal zero breaches. To base a termination on the notion that a lot of non-breaches constitute a breach is arbitrary and capricious no matter how dissatisfied Volvo is with the non-breaches.

A collection of complaints, none of which constitutes a breach of contract, cannot add up to a breach of contract. Nowhere in either franchise agreement or applicable statute is a distributor entitled to consider non-breaches of franchise as breaches no matter how many non-breaches there may be. Indulging this notion is just another way of circumventing the restraints of the franchise agreement just as is going beyond the noticed grounds for termination.

K. Regulatory Impact of Objectively Reasonable Satisfaction Test on Volvo’s “Satisfaction of the Distributor” Clauses

This takes us to the regulatory aspects of these satisfaction clauses. The Texas Occupations Code, as previously observed, requires consideration of the “parties’ compliance with the franchise, except to the extent that the franchise conflicts with [Chapter 2301].”⁶⁵ The Board must also consider the “enforceability” of the franchise and the “reasonableness” of the

⁶⁴ PFD, p. 86-90.

⁶⁵ Tex. Occ. C. § 2301.455(a)(6).

franchise terms.⁶⁶ Tex. Occ. C. § 2301.453, which controls terminations, begins with the language “Notwithstanding the terms of any franchise...” In other words, the statute controls over the franchise.

SOAH considered this provision of the law and opined that if it were enforced, then “the dealer agreement would likely be unenforceable as a matter of law.”⁶⁷ As has been shown, SOAH goes to great lengths to save Volvo from its poorly written contract and to saddle Star with contractual burdens to which it never agreed.

L. Regulatory Impact on Construction of Franchise

Tex. Occ. C. § 2301.455(a)(7) in pertinent part provides that... The Board shall consider all existing circumstances, including... “(7) the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise’s terms, oppression, adhesion and the parties’ relative bargaining power.” Star Motor Cars submits that any franchise agreement that attempts to impose on a dealer unreasonable and oppressive terms is unenforceable in the state of Texas. Star Motor Cars further submits that any franchise agreement which leaves the question of breach or no breach of the contract to the “satisfaction of the distributor” is unreasonable, oppressive, and unenforceable in this state. As a preliminary matter, then, Star agrees with SOAH that those provisions of the Code make the satisfaction clauses unenforceable in the state of Texas in this industry.

M. SOAH’s Misapplication of Texas’ Objectively Reasonable Satisfaction Test

Even if dissatisfaction clauses were to be found enforceable in this industry, in the state of Texas, SOAH has misapplied the reasonable satisfaction test which would be applicable to them. In its briefs, Star Motor Cars applied the Texas “objectively reasonable satisfaction test” to

⁶⁶ Tex. Occ. C. § 2301.455(a)(7).

⁶⁷ PFD, p. 91.

“the satisfaction of the distributor” criteria in the franchise agreement.⁶⁸ Star Motor Cars had put on compelling evidence to prove that despite its 48 years of successful experience as a multi-franchise dealer, Star, through little fault of its own, had been unable to achieve the kind of sales performance Star would like to achieve for its own benefits. The evidence proved by a preponderance that Star was so disadvantaged by the unlawful incentive programs challenged in this case that Star could not make an average profit on the sale of new cars.⁶⁹

Star has complained that this is because it has not been able to successfully compete in the margin competition created by the combination of the FISI program and the Retailer Bonus Programs. Unless Star should build a new image compliant facility, it could not compete with the FISI bonuses achieved by its 5 surrounding dealers.⁷⁰ Without the new facility, the bonuses attributable to operational support, SSI, CSI and retailer standards were largely unavailable to Star. This put Star in a large margin deficit compared to most other dealers in Houston. This has been demonstrated and established of record. Star has demonstrated that between 2013 and 2017 it could not sell Volvos for an average gross profit because of the unfair competitive equation created by Volvo’s programs.⁷¹

1. Volvo Packs Star’s Market with Five Competing Dealers

This margin disparity was exacerbated by Volvo’s packing of the market with dealers strategically placed to cannibalize Star’s market. Star demonstrated that over the years, Volvo

⁶⁸ Attachment 1, Ex. P-5, Clause (6)(a)(5), p. ii, SMC 652 and Standard Provisions § 3. Policy, p. 1, SMC 654.

⁶⁹ Exs. P-25 and P-197.

⁷⁰ Volvo facility programs, such as the challenged Facility Investment Support Initiative (“FISI”), pay bonus money for money expended by the dealer to build a new image compliant facility. The bonuses are paid out on a per new unit retailed basis making the bonus part of the sales transaction. The illegality is that, Volvo puts no restrictions on how the dealers use the bonus money. A dealer is free to use the bonuses as trading margin to undersell its competitors who have not yet built Volvo a new, branded facility. In summary Volvo gains in two ways. One, it gets new brand image compliant facilities from all or most of its dealers and two, it marginalizes non-image compliant dealers who are slow in building new facilities, slowly weeding them out of the network to be replaced with obedient dealers.

⁷¹ Ex. P-25, Ex. P-197, and Exs. P-166-P-168.

had placed five Volvo dealers in close proximity to the core of Star's market area.⁷² Each of these dealers had built new facilities for Volvo which allowed them to take advantage of the unlawful retail incentive bonus program as well as the facility improvement program. All of these dealers were then able to earn bonuses which allowed them to outcompete Star on price.

Volvo and SOAH relied extensively on the AOR, as if it represented a real and distinct market with real and distinct opportunity. The five surrounding dealerships with freeway access to Star's customers belie this notion. Notably, this purportedly real marketing area of Star's AOR has less representation of luxury brands than many non-metro markets in Texas. In short, other luxury brands service the territory in Star's AOR from other dealerships. Volvo knows this and appointed dealerships that could do the same. The purported in-sell which Volvo and SOAH lament is not meaningful, as it is consistent with Houston's luxury market.

2. No Reasonable Distributor Has a Right to Expect Dealers to Sell at a Loss

Volvo has made no attempt to maintain that either the franchise or Texas law requires a dealer to sell cars at a loss in order to achieve a distributor's sales performance standard, such as sales effectiveness, or face termination. Yet that is the position that Star found itself in. By not building a new facility, Star couldn't earn the facility improvement and Retailer Bonus Program bonuses so was being out traded to the point that it could either sell cars at a loss and try to achieve good sales performance or hold out for a profit and lose its franchise. Star submits that no reasonable distributor has a right to expect its dealers to sell cars at a loss in order to achieve its sales performance metrics. Volvo had no right to be dissatisfied with Star's performance where Volvo itself created the circumstances which led to that performance.

Would a reasonable person consider it reasonable to ring Star with 5 competing dealers,

⁷² Ex. P-4.

all in close proximity to Star's market, and then set up programs which made the 5 dealers more competitive if they built new facilities, a game in which Star could not readily compete because it had an older facility, with a limited footprint which could not be expanded upon without catastrophic impact to Star's Volvo business.⁷³ Is it reasonable to then set up a CSI/SSI scoring mechanism which would make it virtually impossible to achieve competitive CSI/SSI scores (worth 2% of margin) in the older facility? And then refine the program so that earning operational support (3%) and retailers standards (1%) become fully dependent on having the new facility, which Volvo was preventing Star from building. Thus, leaving Star with a *hypothetical* 6% margin with which to compete against 14% margins. Is that reasonable? Is Volvo entitled to be dissatisfied with Star's performance under the objectively reasonable satisfaction test? Clearly not. Yet, Volvo's alleged dissatisfaction under these circumstances is the contractual ground for termination relied upon by SOAH.⁷⁴

Nevertheless, at PFD, page 82, SOAH found that these non-breaches of contract cumulatively constituted a breach of contract because they reasonably allowed Volvo to be dissatisfied with Star's performance.

The fallacy of this is that multiple non-breaches of contract cannot equal a breach of contract and thus cannot establish reasonable dissatisfaction with Star's performance.

N. SOAH Bypasses Tex. Occ. C. § 2301.454 Thus Denying Star's Statutory Rights to Challenge Contract Amendments Prior to Their Use to Terminate

Tex. Occ. C. § 2301.454 provides in pertinent part as follows:

“(a) Notwithstanding the terms of any franchise, ... distributor... may not modify or replace a franchise if the modification or replacement would adversely affect to a substantial degree the dealer sales, investment, or obligations to provide service to the public, unless:... (2) if a protest is filed under this section, the Board approves the modification or replacement.... (d) After a protest is filed, the Board shall

⁷³ Tr. at 1260:4-1261:10 (Seureau).

⁷⁴ PFD, p. 82.

determine whether the... distributor... has established by a preponderance of the evidence that there is good cause for the proposed modification...⁷⁵

To summarize, a distributor may not modify a dealer's franchise agreement if the modification would adversely affect the dealer's sales, investment, or obligations. A dealer so affected may file a protest and require that good cause for the modification be shown by the distributor.

Similarly, the franchise agreement contains an entireties clause which reads in pertinent part as follows:

This agreement with...the aforementioned dealer standard provisions,... contains the entire agreement between the parties hereto and no representatives of the distributor shall have authority to waive any of its printed provisions, or change any of its printed terms, unless the same are made in writing and signed by an officer of the distributor.⁷⁶

This provision is called an "entireties clause" which basically means that the provisions of the franchise may not be modified except by, mutual, formal action of the parties. Modifications by the distributor cannot unilaterally occur. No such formal modifications had ever occurred in the 48 years of history of Star's franchise.

SOAH, however, effectively modified the terms of the franchise, by construing the statute in such a way as to create sales performance and facility obligations which do not exist in any rational construction of the contract.

As previously noted, SOAH did this in at least two ways: 1. By construing the statute to create grounds for termination outside the franchise; and 2. By construing the satisfaction clauses to incorporate contractual grounds for termination which do not exist in the contract.

By modifying the franchise provisions pursuant to an unwarranted construction of the

⁷⁵ Tex. Occ. C. § 2301.454.

⁷⁶ Attachment 1, Ex. P-5, P. SMC 653, Clause 13. No other Agreements.

applicable statute, the SOAH PFD deprived Star Motor Cars of one of the few protections afforded Star by the franchise agreement and that is the right to challenge contract amendments before they are made and applied to terminate. The SOAH has done what the distributor is contractually precluded from doing and that is modifying the contract terms in such a way as to bypass the Board's statutory mandate. SOAH's construction of the statute allows it to terminate a dealer, for almost any reason it wishes, without being tied to a breach of contract.

In doing so, SOAH has bypassed Star's statutory right to contest any modifications to its franchise before the distributor can use those modifications to terminate Star Motor Cars. In this case, Volvo modified the terms of the franchise in the midst of a termination case by making its outrageous, unnoticed, and heretofore, unheard of modifications grounds for termination.

O. SOAH's Weighing of the Statutory Factors at Tex. Occ. C. § 2301.455(a)(1) – (7) Elevates the Distributor's Interest Over the Public Interests

In proposing that good cause for termination exists, SOAH determined whether each of the 7 statutory factors weighed in favor of termination or against it.⁷⁷

When SOAH weighed the statutory factors on the "good cause" scale it gave the interests of the distributor a greater weight than the interests of the public. This was error. The TxDMV does not exist to represent the interests of the distributors or of the dealers either for that matter. It exists to represent the interests of the public.⁷⁸

For example, SOAH found that Star's warranty work which was impeccable did not weigh in favor of termination while Star's sales performance weighed "heavily" in favor of termination. Star submits that the quality of a dealer's warranty work is far more important to the public than, a dealer selling a few more cars for the distributor's benefit. Yet, Volvo weighs sales

⁷⁷ PFD, p. 113.

⁷⁸ Tex. Occ. C. § 2301.001 "[T]he distribution and sale of motor vehicles in the state vitally affects the public interest and the welfare of its citizens. This chapter shall be liberally construed to accomplish its purposes..."

performance ‘heavily’ in favor of termination and warranty compliance is weighted not at all against termination.

For another example, SOAH found that the quality of Star’s service was beyond reproach and did not support termination but that the dated image of Star’s facility did support termination. Facility image which benefits only the distributor and dealer is elevated over the quality of the service which benefits the public. Star objects to being terminated despite operations which are beneficial to the public even if facility image is less than satisfactory to the distributor. SOAH’s elevation of the interests of the distributor over the interests of the public is in direct contradiction of the Board’s statutory mandate to protect the interests of the public.

Star requests that the Board itself weigh the statutory factors in this case and determine that the weight due the public benefit factor outweighs the weight due the distributor interest factors and that this termination may, therefore, not occur.

P. Unlawful CSI/SSI Scores Used as a Ground for Termination

In one of the few redeeming aspects of this PFD, SOAH did determine that the CSI/SSI component of the retailer incentive bonus program was unreasonable and did violate Tex. Occ. C. §§ 2301.467(a)(1) and 2301.468.⁷⁹

One reason for this was that because of the way CSI/SSI was used in the incentive bonus program, it did not produce an honest portrayal of the consumer’s satisfaction or dissatisfaction with the retail experience. The reason it did not do so is because unless the dealer had a new facility the facility could not generate the “the wow factor” necessary to achieve a 9 or 10 on the facility part of the CSI/SSI survey. Unless the dealer got at least a 9 on the facility survey questions, the CSI/SSI component of the program produced a zero for incorporation into the

⁷⁹ PFD, CL 19 and 21, p. 136.

overall incentive program scores.

This had a profound negative affect on a dealer's ability to earn bonuses under the overall program unless the dealer builds a new facility. The CSI/SSI component of the program was obviously gerrymandered to disadvantage those dealers who had not built new facilities and to reward those dealers who had. In short, the CSI/SSI program used margin manipulation to create competitive advantages and disadvantages, dependent on whether a dealer built a new facility for its Volvo operations.

Despite the fact, however, that SOAH found the program violative of two statutes, SOAH continued to use Star's CSI/SSI scores as grounds for termination by finding:

Customers have been expressing their dissatisfaction with Star's sales and service by giving Star low CSI and SSI scores. Since at least 2012, Star's CSI and SSI scores have generally been well below average when compared to other Volvo dealers.⁸⁰

One can see this at PFD page 88, where those scores are included among the non-breaching "complaints" which purportedly add up to a breach of the franchise agreement.⁸¹

Star objects to being terminated, in part, for program scores produced under a program which has been found unlawful.

Q. Unlawful CSI/SSI Scores Contributed Demonstratively to Star's Sales Performance

SOAH then determined that the illegality of the CSI/SSI program should not save Star from termination because in SOAH's view the gerrymandered CSI/SSI scores did not contribute to Star Motor Cars low sales performance scores.

This is demonstrably untrue. As noted by SOAH itself, Volvo began using CSI/SSI scores to determine bonuses in July 2016. We have bonus data from July 2016 through April

⁸⁰ PFD, p. 87.

⁸¹ PFD, p. 88, "No single item on the list above is claimed to breach a term of the dealer agreement or to justify termination on its own. But taken together.... Volvo has established a breach of [the Clause 6(a)(5)] contract term."

2018. We can tell from Exhibits P-166, P-167, and P-168 that in 2016, Star earned zero dollars in CSI/SSI as compared to \$94,820, \$72,842, \$73,690 and \$10,293 for the other four Houston dealers. In 2017 the pattern was the same. Star earned \$18,746, while other Houston dealers earned \$319,359, \$258,302, \$204,188 and \$105,809 dollars. In 2018 through April, Star earned zero dollars compared to \$94,044.50, \$77,281, \$68,510 and \$51,505.50. It's apparent from Exhibits P-166 – P-168 that between July 2016 and April 2018 there was a vast disparity between what Star was able to earn under CSI/SSI and what the other Houston dealers were able to earn due to their new facilities.

SOAH, itself admits that this disparity in bonuses was largely due to Star's facility. "The scores on the other three enabler questions were often at or above the national average, but because the overall CSI score represents an average of the four enabler questions, the very low scores on the first question [the facility] dragged down the overall average, making it so that Star did not qualify to earn the CSI bonus even once between July 2017 and August 2018."⁸²

All of this bonus money can be used by the bonused dealers as trading margin which means money that can be used to lower the prices of vehicles to consumers affording the bonused dealers a tremendous competitive advantage. Almost none of this trading margin went to Star Motor Cars. This additional margin was available to the other four dealers in Houston to reduce the selling price on new cars to achieve prices with which Star could not compete.

For SOAH to deny or ignore this evidence and claim that Star was not harmed by the unlawful program is a gross mischaracterization of the facts and further demonstrates the bias exhibited by SOAH in these proceedings.

⁸² PFD, p. 34-35; *See also* PFD, p. 82.

R. PFD Alleges Star's Advertising is Insufficient and There's "Little or No Evidence" Addressing Star's "Specific" Advertising Expenses⁸³

This is possibly one of the more egregious cases of error in the PFD and related findings of fact. Various statements are made in the PFD disparaging Star's advertising efforts. Star produced 3 volumes of specific advertising expenses totaling over 600 pages for 2016, 2017, and 2018, in addition to various other exhibits, including the 2017 Houston Auto Show flyer,⁸⁴ for which Volvo declined to participate.

Further, Exs. P-171-174, Volvo's Key Performance Indicators for the Texas South market for 2015-2018 show that Star out spent every other Houston dealer by several hundred dollars per new vehicle sold. Most telling, though, is how the PFD places the burden of proof on Star for not providing a certain type of evidence:

However, there is little or no evidence addressing Star's specific advertising expenses, how advertising correlates to sales, or what level or specific type of advertising might improve Star's overall performance or otherwise reasonably satisfy Volvo.⁸⁵

Standard Provision 14 of the franchise states "[t]he Dealer shall...advertise and in all ways promote the sale of the vehicles in his locality in a satisfactory and proper manner to the satisfaction of the Distributor..."⁸⁶ Star's evidence conclusively proves Star's compliance with these obligations.

⁸³ PFD, p. 89.

⁸⁴ Ex. P-46.

⁸⁵ PFD, pp.89-90.

⁸⁶ Ex. P-5, p. 3, SMC 656, Standard Provisions 14 Advertising.

V.
ISSUES PRESENTED – INCENTIVE PROGRAM COUNTER-COMPLAINT

As outlined in Star's *Closing Brief*, filed with SOAH on December 10, 2018, and incorporated by reference, Star's counterclaims challenge the legality of Volvo's multi-tiered dealer incentive programs, styled by Volvo as the "Retailer Bonus Program" (including all iterations and changes) and the "Facility Investment Support Initiative" (collectively "Dealer Incentive Programs"). The legal grounds for Star's counterclaims are Texas Occupations Code §§ 2301.468, 2301.467, 2301.476, 2301.451, 2301.473(2)(C) and 2301.478(b).

Star's incentive program counter-complaint exceptions to the PFD include Findings of Fact 211, 213, 214, 216, 217, 219, 220, 221, 222, 223, 224, 225, 233, 236-238, 241, 243. Star also excepts to Conclusions of Law 17, 18, 21, 22, and 23.

The PFD's findings regarding Star's protest of Volvo's Dealer Incentive Programs will create legal precedent that Tex. Occ. C. § 2301.468 does not prevent manufacturers and distributors from creating multi-tiered dealer incentive programs which tie bonus payments directly to the wholesale price of vehicles, thereby, affecting the transactional price of the same vehicle sold to consumers by different Volvo dealers. The PFD allows Volvo's Dealer Incentive Programs to tie backend margin to operational mandates, thus resulting in two classes of dealers, one advantaged and the other disadvantaged and consequently, two classes of consumer, one advantaged and one disadvantaged in the transactional price of a vehicle, a practice that the Board should prohibit. The programs are effectively punishing dealers like Star who chosen to operate their Volvo franchises in their current, franchise approved, facilities.⁸⁷

A. Volvo's Dealer Incentive Programs are Not Voluntary

Both Volvo's FISI facility program and the Retailer Bonus Program are purportedly

⁸⁷ Tr. at 1232:16-20 (Seureau).

voluntary, but only at the most pretextual level since, in order to compete on a level playing field in a hyper-competitive market, dealers must participate and operate their dealerships according to Volvo's operational dictates. Volvo's FISI facility program and the Retailer Bonus Program are not contractual obligations under Star's franchise agreement, but are still not voluntary because all dealers must, by necessity, participate. When dealers wholesale a vehicle from Volvo, it is, by default, participating in the programs.

As stated in the agency's *Star 2* Final Order, "A dealer who declines to participate in the plan (i.e. BDC) does not qualify for the customer loyalty bonus (i.e., \$400) and faces a substantial competitive disadvantage," and "[s]ince it is an economic imperative that a dealer participate in the program the plan is not voluntary."⁸⁸ There is no question that Star is being harmed by the effects of the Dealer Incentive Programs. The evidence shows that Star lost sales to completing Volvo dealers for a little as \$200 and \$300 differences.⁸⁹ Therefore, under past agency precedent, these programs are not voluntary.

Star presented evidence that at its November 28, 2017, Volvo National Dealer Meeting, Volvo Car USA's President and CEO, Mr. Anders Gustafsson, stated that nationally, the average profitability for Volvo retailers in the US was 1.5-1.6%.⁹⁰ Therefore, the incentive program per vehicle payment differences don't only affect Star's competitiveness, but also Star's ability to be profitable. Simply, Volvo's Dealer Incentive Programs create a "substantial economic competitive disadvantage" for non-participating or non-achieving dealers so that in order to compete on price, dealers must comply with the program mandates.

⁸⁸ *Star 2*, Final Order, p. 4, FF 134A and 134B. *Star Houston, Inc. d/b/a Star Motor Cars v. Mercedes-Benz, USA, LLC*, MVD Docket No. 02.0028.LIC, PFD, dated March 6, 2008, and Final Order, dated July 10, 2008, ("*Star 2*").

⁸⁹ Ex. P-238 at 60:2-13, 122:5-8, 128:21-24 (Velasco Depo).

⁹⁰ Ex. P-164, p. 3, Rog # 26; That statistic is the average profit of Volvo exclusive stores calculated using the financial statements submitted by franchised dealers. *Id.*

B. Volvo's Dealer Incentive Programs Discriminate and Treat Dealers Inequitably and Unfairly in the Price of a Motor Vehicle – § 2301.468

Tex. Occ. Code § 2301.468, Inequitable Treatment of Dealers or Franchisees (2011), provides as follows:

Notwithstanding the terms of a franchise, a manufacturer, distributor, or representative may not treat franchised dealers of the same line-make differently as a result of the application of a formula or other computation or process intended to gauge the performance of a dealership **or**⁹¹

otherwise enforce standards or guidelines applicable to its franchised dealers in the sale of motor vehicles if, in the application of the standards or guidelines, the franchised dealers are treated **unfairly or inequitably**⁹² in the sale of a motor vehicle owned by the manufacturer or distributor.⁹³

The Dealer Incentive Programs margin bonus payments cross a line from being merely incentives to becoming rebates or subsidies that affect the effective wholesale price of a vehicle purchased from Volvo and the transactional price of a vehicle when sold to consumers. The incentive program bonuses effectively lower the price of new vehicles purchased wholesale by the qualifying dealers. That program framework in itself, is patently discriminatory and violates § 2301.468.

Adopting the PFD allows manufacturers and distributors to instate incentive programs that result in disproportionate wholesale prices between dealers and disproportionate retail prices between consumers.

The PFD's analysis misses the un rebutted testimony that differentiated marginal costs from fixed costs. It discusses costs that dealerships incur in program compliance, but does not, and cannot, relate those to the transactional level. The relevant point of being "similarly situated"

⁹¹ The disjunctive "or" sets out two prohibitions in the 2011 version, similar to subsections (1) and (2) in the 2003 version. To interpret § 2301.468 as one single prohibition is a misread of the statute.

⁹² Again, the disjunctive "or" means that Star must not prove both unfairness and inequity, but either one.

⁹³ Tex. Occ. C. § 2301.468 (2011) (emphasis added). Star does not except to the PFD's finding that the 2011 version of the statute applies. PFD, p. 7.

is at the transactional level. The PFD does not address this and the point is unrebutted.

At the transactional level, dealers price at the point where marginal cost equals marginal revenue. This is the driving condition of profit-maximizing behavior. The Dealer Incentive Programs alter this. The PFD disregards this significant issue.

Volvo's arguments for the fairness and reasonableness of the Dealer Incentive Programs fail for the following reasons:

First, Volvo's argument that the incentive money should be a bonus and a small part of the business where overall dealership operations should prevail. This is not true because the Volvo Dealer Incentive Program money dramatically exceeds the gross profits that dealerships earn on the balance of their operations.

Second, Volvo's argument that the incentive money does not flow to the transaction because dealerships don't know if they will get the money. This is not true. Dealers know when they sell the vehicles how much Dealer Incentive Program money is in play.

Next, Volvo's argument that dealers don't use facility money in transactions because they decided not to. This is not true, and can't be true. Dealers know they have the incentive money, and the time discount required for dealerships to not consider facility money in the transaction is impossibly high. This testimony was unrebutted in the record.

Finally, Volvo's argument that dealers have costs to comply with the programs. Volvo did not provide information, despite requests, on costs of program compliance. Volvo never even argued that the expenditures occurred at the transactional level.

C. Volvo's Dealer Incentive Programs are Unreasonable Sales and Service Standards – § 2301.467

Tex. Occ. Code § 2301.467, Prohibitions: Sales Standards, Relocations, Facility Changes, Purchase of Equipment, provides, in pertinent part, as follows:

(a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not:

- (1) require adherence to unreasonable sales or service standards; or
- (2) unreasonably require a franchised dealer to purchase special tools or equipment.⁹⁴

Volvo's Dealer Incentive Programs violate Tex. Occ. C. § 2301.467(a)(1) by requiring adherence to unreasonable sales and service standards, which includes the creation of facility standards and dealership operational standards tied to multi-margin pricing of cars to Texas dealers.

First, Star does not have a contractual obligation to participate in the dealer incentive programs. The Dealer Incentive Programs requirements are unreasonable sales and service standards because these "standards" are not included in Star's franchise, which makes them unreasonable. To allow distributors to impose a duty on a party that did not contract for that duty is an abuse that must be prohibited by the Board.

Second, the programs are a sales and service standard because it is an economic imperative for dealers to participate or they will be at a competitive disadvantage compared to participating dealers. Using wholesale price and allocation discrimination to obtain new facilities and dealership operational actions from dealers is per se unreasonable and, thus, unlawful.

The Third Court of Appeals in the *Autobahn Jaguar* case noted that "sales standard" is not defined in the statute, so the court must use its ordinary meaning.⁹⁵ A "sale" is defined as

⁹⁴ Tex. Occ. C. § 2301.467(a).

⁹⁵ *Jaguar Land Rover N. Am. v. Bd. of Texas Dep't of Motor Vehicles*, 03-16-00770-CV, 2017 WL 6756997, *8 (Tex. App.—Austin Dec. 21, 2017, no pet.) ("*Autobahn Jaguar*").

“[t]he transfer of property or title for a price.”⁹⁶ The definitions for “standard” include: when an authority accepts a model of conduct as correct, and element to determine acceptability.⁹⁷ The court explained:

The [Incentive Program] Manual and Rules establish “criteria” that must be met for a sales transaction to be eligible or “acceptable” for the Incentive Program. In fact, the Manual provided that “[a]ny sales transaction” that did not meet certain “criteria,” including the personal delivery requirement, would be “disqualified from the full [Incentive Program] payment.”⁹⁸

Therefore, under the plain and ordinary meaning of the terms, the transactions at issue were sales standards. The same is true in the instant case where Volvo is “calling for” Star to meet the “criteria” for sales set out in the Retailer Bonus Program, which is a “sales standard” “required” by Volvo “for payment under the” Retailer Bonus Program.

In 1999, in a letter to TADA, the MVD Director made the following opinions regarding Volvo’s then Retailer Standards program (Major Market Retailer MMR and Selected Market Retailer SMR).⁹⁹ Director Bray stated, “We view these requirements as an unlawful intrusion into the business judgment of the franchisee. Even if the contract gives the manufacturer the right to make such demands, we believe the Code would override and they would be found to be unreasonable bases for terminating or otherwise penalizing a dealer.”¹⁰⁰

Under Tex. Occ. C. § 2301.467(a)(1), the legislature’s intent is encapsulated by the chairman of the subcommittee who added this provision to the Code in the following certified statement:

It was the opinion of the subcommittee that it is not in the interest of either party to the transaction to allow a franchisor to require a franchisee adhere to “unreasonable sales or service standards.” An example of the kind of requirements that triggered

⁹⁶ *Id.* at *8 (citing *Sale*, Black’s Law Dictionary (10th ed. 2014)).

⁹⁷ *Id.*

⁹⁸ *Id.* at *8.

⁹⁹ Ex. P-33.

¹⁰⁰ Ex. P-33, p. 1.

this amendment is the requirement by one manufacturer that every franchisee be “above average” in certain sales categories.¹⁰¹

Therefore, Volvo’s use of averages that a dealer must be above in order to qualify for bonus payments is in direct conflict with the legislative intent of the statute.

D. Volvo’s Dealer Incentive Programs Result in Distributor Operational Control of Dealerships – § 2301.476(c)(2)

Tex. Occ. Code § 2301.476, Manufacturer or Distributor Ownership, Operation, or Control of Dealership, provides, in pertinent part, as follows:

(c) Except as provided by this section, a manufacturer or distributor may not directly or indirectly:...

(2) operate or control a franchised or nonfranchised dealer or dealership.¹⁰²

The Retailer Bonus Program puts enormous pressure on a dealer to adopt the numerous bonus program operational mandates, thus relinquishing operational control of the dealership to Volvo, in violation of Tex. Occ. C. § 2301.476. Any non-contractual action that a dealer is required to take in order to qualify for a bonus payment tied to the wholesale price of a vehicle is a form of operational control.

For example, the Retailer Standards component of the RBP violates § 2301.476 because in order to qualify for the bonus payment it requires the purchase of all the equipment listed in the program guide under Section 3.0 Equipment including, among other things, retailer personnel systems, DMS requirements, internet lead management, x-time service, VIDA Wireless Network, a VIDA network storage device, and the Technical Information Exchange application.¹⁰³

¹⁰¹ Appendix Item D to Star’s Closing Brief, Attachment 1, p. 5 to TADA Amicus Curiae Memorandum in Support of Autobahn Imports, LP’s Motion for Summary Disposition, dated September 30, 2016, in *Autobahn Imports, LP d/b/a Autobahn Volvo v. Volvo Cars of North America, LLC*, SOAH Docket No. 608-16-4053.LIC.

¹⁰² Tex. Occ. C. § 2301.476(c).

¹⁰³ Ex. P-228, pp. 12-15.

E. Volvo's Dealer Incentive Programs include Forcing Dealers to Purchase Items not Ordered – § 2301.451

Tex. Occ. Code § 2301.451, Prohibition: Items Not Ordered, provides as follows:

A manufacturer, distributor, or representative may not require or attempt to require a franchised dealer to order, accept delivery of, or pay anything of value, directly or indirectly, for a motor vehicle or an appliance, part, accessory, or any other commodity unless the dealer voluntarily ordered or contracted for the item.¹⁰⁴

The Volvo 360 Program's CPO purchase objectives for used vehicles are items not ordered.¹⁰⁵ Mr. Klipstein testified that all the bonus programs require investment by the dealers to become compliant.¹⁰⁶ The Volvo 360 program requires Star to purchase used Volvo vehicles and pay Volvo to have them certified in order to earn the bonus and be competitive in the market. The costs of the program are for "items not ordered."

F. Volvo's Dealer Incentive Programs include Forcing Dealers to Remodel, Renovate, or Recondition Facilities – § 2301.473(2)(C)

Tex. Occ. Code § 2301.473, Models Within Line-Make, provides as follows:

A manufacturer, distributor, or representative may not: ...

(2) require as a prerequisite to receiving a model or series of vehicles that a franchised dealer:...

(C) remodel, renovate, or recondition the dealer's existing facilities.¹⁰⁷

The FISI program violates Tex. Occ. C. § 2301.473(2)(C) because it allocates a series of vehicles only to dealers who remodel, renovate or recondition their facilities in accordance with the program requirements. The evidence shows that the allocation override of 35% for Site Exclusive and 20% for Customer Facing Exclusive results in additional allocation to participating dealers.¹⁰⁸ That allocation includes a mix of models or series of vehicles. Mr.

¹⁰⁴ Tex. Occ. C. § 2301.451.

¹⁰⁵ Ex. P-226, p. SMC 1475 ("must maintain an adequate inventory of Volvo CPO cars.")

¹⁰⁶ PFD, p. 47.

¹⁰⁷ Tex. Occ. C. § 2301.473(2)(C).

¹⁰⁸ Ex. R-66, p. 1.

Seureau found this allocation increase to his competitors to be a disadvantage.¹⁰⁹

In 2017, in the *World Hyundai* case, the Board found in Finding of Fact 30 that, “It was not reasonable for Hyundai to reward dealers that participated in Hyundai-sponsored programs and renovated their facilities with extra discretionary allocations.”¹¹⁰

G. Volvo’s Dealer Incentive Programs Violate the Duty of Good Faith and Fair Dealing – § 2301.478(b)

Tex. Occ. Code § 2301.478. Action on Franchise, provides, in pertinent part, as follows:

(b) Each party to a franchise owes to the other party a duty of good faith and fair dealing that is actionable in tort.¹¹¹

Volvo’s Dealer Incentive Programs violate the duty of good faith and fair dealing because instead of just paying dealers a lump sum payment untied to the sale of a vehicle to assist in building or remodeling its facility or to take desired actions, Volvo is specifically paying bonuses to dealers in a way that competitively harm non-participating dealers and consumers in the transactional price they pay for vehicles.

H. CSI/SSI Incentive Program Component of the Retailer Bonus Program

As discussed *supra*, Star agrees with the PFD’s Conclusions of Law 19 and 20 finding that the CSI/SSI component of the Retailer Bonus Program violates §§ 2301.467(a)(1) and 2301.468. Star excepts to Conclusions of Law 21 finding that the CSI/SSI component of the Retailer Bonus Program does not violate §§ 2301.467(a)(2), 2301.476, and 2301.478(b).

Star requests that the Board Order that Volvo is prohibited from using CSI/SSI as a component of its Dealer Incentive Programs.

¹⁰⁹ Tr. at 1243:11-23 (Seureau).

¹¹⁰ *World Car Hyundai* Final Order, FF 30, p. 2; *See also* CL 6, p. 3.

¹¹¹ Tex. Occ. C. § 2301.478(b).

VI. CONCLUSION

For all the above reasons, Complainant submits that the Proposal for Decision's referenced "Findings of Fact and Conclusions of Law" are in error and properly interpreting applicable law supports the finding that Volvo did not meet its burden to establish good cause for termination.

In the final analysis, the PFD reaches a completely unreasonable result when proper consideration is given to the express language of the Chapter 2301.

VII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Complainant respectfully requests that the Board of the Texas Department of Motor Vehicles grant oral argument, modify the proposed Findings of Fact and Conclusions of Law as set forth in Appendix A and that a Final Order as set forth in Appendix B be entered finding that:

1. That Star's protest of the proposed termination is granted because Volvo failed to establish good cause for termination under Tex. Occ. C. § 2301.455 and that Volvo's proposed termination of Star's Volvo franchise is denied.
2. That Volvo's Retailer Bonus Program violates Tex. Occ. C. §§ 2301.468 (2011), 2301.467(a)(1), 2301.467(a)(2), 2301.476, 2301.451, and § 2301.478(b);
3. That Volvo's 360 Program violates Tex. Occ. C. §§ 2301.451, 2301.467(a)(1), 2301.467(a)(2), 2301.468, 2301.476, and 2301.478(b).
4. That Volvo's CSI/SSI programs violate Tex. Occ. C. § 2301.467(a)(1);
5. That Volvo's CSI/SSI programs violate Tex. Occ. C. § 2301.468;
6. That Volvo's CSI/SSI programs violates Tex. Occ. C. §§ 2301.467(a)(2), 2301.476, and 2301.478(b).

7. That Volvo's Facility Investment Support Initiative violates Tex. Occ. C. § 2301.468 (2011), 2301.467(a)(1), 2301.473(2)(C), and 2301.478(b).

8. Complainant prays for such other and further relief to which it justly may be entitled.

Respectfully submitted,

COFFEY & ALANIZ, PLLC

By: 

Wm. David Coffey, III

State Bar No. 04489700

Martin Alaniz

State Bar No. 24059367

13810 FM 1826

Austin, TX 78737

Telephone: (512) 328-6612

Facsimile: (512) 328-7523

Email: wdcoffeylaw@yahoo.com

ATTORNEYS FOR COMPLAINANT
STAR MOTOR CARS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served by Email and First-Class Mail on the following attorneys of record on the 14th day of May 2019.

Mr. Brit T. Brown
Mr. Benjamin A. Escobar, Jr.
Akerman LLP
1300 Post Oak Blvd., Ste. 2500
Houston, TX 77056
brit.brown@akerman.com
benjamin.escobar@akerman.com

Attorneys for Respondent Volvo Cars of North America, LLC



Wm. David Coffey

INDEX OF APPENDICES AND ATTACHMENTS

APPENDIX A: Alternative Proposed Findings of Fact and Conclusions of Law

APPENDIX B: Proposed Final Order

APPENDIX C: Selected Examples of Bias, Inaccuracy, Speculation, and Opinion in the PFD

ATTACHMENT 1:

Exhibit P-5 04/01/70 Star Motor Cars' Sales Agreement with Volvo Southwest, Inc. ("Franchise Agreement")

ATTACHMENT 2:

Exhibit P-8 02/29/16 Volvo's Notice of Termination to Star ("Notice of Termination")

ATTACHMENT 3:

Exhibit P-250 Volvo's Facility Design Application Denial Letter to Star, dated November 28, 2018

APPENDIX A

Alternate Proposed Findings of Fact and Conclusions of Law

FINDINGS OF FACT

Star requests that the following Proposed Findings of Fact in the PFD are rejected for the reasons discussed above: Findings of Facts 19, 27-40, 42-45, 47, 49, 50, 51, 54, 58, 60-63, 67-71, 74- 77, 79, 89, 90, 95, 96, 109-112, 115, 116, 122-127, 129-134, 136, 139-142, 144-150, 152-157, 164-170, 172-183, 185-194, 196-206, 208-211, 213, 214, 216, 217, 219-225, 233, 236-238, 241 and 243.

Star proposes that the following alternative Findings of Fact be adopted:

- 19.** Star's dealer agreement is a form that was developed in 1958, and there is no other Volvo dealer in the United States that still operates under that form. The record evidence does not demonstrate that Volvo ever moved to modify or replace Star's franchise agreement under Tex. Occ. Code § 2301.454 with the required notice under § 2301.454(b)(2) to update its 1970 agreement in favor of a more contemporary form.
- 23.** Though the recession led to difficult economic circumstances for the Volvo brand in 2009 and 2010, sales started picking up in 2011 after the recession, but nowhere near the levels from 2001-2007. Nationwide, Volvo sold more cars in 2016 than its sales in 2009-2015, but well below its sales in from 2001-2007. (No expert data for 2017 and 2018) (Ex. P-1, Appendix 5 Page 1; Ex. R-42, App. 61)
- 30.** Since 1970, Star's facility has never relocated, nor was Star required to do so.
- 32.** Mr. Seureau has repeatedly refused to update the sign outside of Star's dealership over the years because he objected to installation and maintenance terms that conflicted with his dealer agreement and because the replacement sign reduced the height from 30ft to 24ft. Mr. Seureau indicated a willingness to put the new sign up, but would not agree to the lease program. Mr. Seureau wanted to buy the new sign, which would comply with the dealer agreement, but Volvo would not sell it to him. (Tr. at 659:23-24, 661:8-14 (Seidman))
- 34.** Star's facility is clean and well maintained, but dated.

- 41.** Mr. Seureau has done maintenance and improvements like painting Star's showroom, installing tile flooring, and offering coffee and water to customers.
- 54.** On August 27, 2018, Mr. Seureau signed a contract with an architect to officially begin the design process for a new brand compliant facility.
- 54A.** On November 28, 2018, Volvo unreasonably rejected Star's application for facility design services to build a new facility.
- 58.** Based on Volvo's planning volume for Star Motor Cars, Mr. Seureau believes Star can sell 500 vehicles a year in the new facility.
- 62.** A new facility might improve customer satisfaction with the experience of shopping at Star.
- 79.** The sales satisfaction index (SSI) purports to measure what consumers are saying about their experience purchasing a new vehicle at the dealership. The customer satisfaction index (CSI) purports to measure the customer's satisfaction with the service experience. Volvo measures dealers' CSI and SSI scores to attempt to determine how they compare to each other.
- 79A.** The CSI/SSI methodology employed by Volvo is flawed and does not accurately portray customer satisfaction with the retail experience.
- 113A.** Volvo's sales effectiveness metric is not a contractual standard of performance in Star's dealer agreement and is subject to change solely at Volvo's discretion.
- 132.** The Tex. Occ. Code § 2301.455(a)(1) statutory factor of "the dealer's sales in relation to the sales in the market" is undefined in the statute and does not weigh in favor of good cause for termination.
- 142.** The Tex. Occ. Code § 2301.455(a)(2) statutory factor of "the dealer's investment and obligations" does not weigh in favor of good cause for termination.
- 148.** The Tex. Occ. Code § 2301.455(a)(3) statutory factor of "injury or benefit to the public" does not weigh in favor of good cause for termination.
- 149.** Star's service facility is in compliance with Star's dealer agreement.
- 157.** The Tex. Occ. Code § 2301.455(a)(4) statutory factor of "the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make" does not weigh in favor of good cause for termination.

- 164.** In Star's AOR, Volvo's registration effectiveness was 95 percent, meaning Volvo registered vehicles at about 95 percent of the rate expected, which indicates the Volvo brand is doing "relatively well" in Star's AOR overall.
(Ex. R-62, p. 12 ¶ 36 and p. A-24 (Lytle Report))
- 164A.** 95 percent registration effectiveness in Star's AOR means that the "lost market penetration" and "lost market share" Volvo was alleging in the Notice of Termination was less than 5%.
- 164B.** According to Volvo's expert, Registration effectiveness is a direct reflection of the marketing efforts of the resident dealer.
- 194.** The Tex. Occ. Code § 2301.455(a)(6) statutory factor of "the parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter" does not weigh in favor of good cause for termination.
- 196.** Under Tex. Occ. Code § 2301.455(a)(7), the dealer agreement is enforceable from a policy standpoint, except the "satisfaction clauses" in Clause 6(a)(5) and Section 3. Policy of the Standard Provision which are unreasonable, oppressive, and unenforceable. Star is fully in compliance with its dealer agreement.
- 197.** The Tex. Occ. Code § 2301.455(a)(7) statutory factor of "the enforceability of the franchise from a public policy standpoint, including the issues of reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power" does not weigh in favor of good cause for termination.
- 198.** Star decided to pursue building a new \$8-9 million dollar Volvo facility by the submission of its June 26, 2018 form to join the Volvo Retail Experience Program and paying the \$12,500 program fee, indicating that he planned to build a new, brand-compliant facility.
- 205.** Star's plan to build a new facility is a current circumstance that weighs in Star's favor against termination.
- 205A.** Volvo rejected Star's plan to build a new facility prohibiting Volvo from using facility as a ground for termination.
- 211.** Volvo's FISI is not a voluntary program since it is an economic imperative that a dealer participate in the program.
- 213.** Volvo's FISI is a sales and service standard.

- 236.** Volvo's CSI/SSI bonus program constitutes the indirect operation of Star's dealership.
- 237.** Volvo has violated its duties of good faith and fair dealing toward Star in its implementation of the CSI/SSI bonus programs.
- 239A.** The Retailer Bonus Program is not a contractual obligation under Star's franchise agreement.
- 239B.** The Retailer Bonus Program is not a voluntary program since it is an economic imperative that a dealer participate in the program.
- 239C.** The Retailer Bonus Program bonus margin payments are actually rebates or subsidies that affect the effective wholesale price of a vehicle purchased from Volvo and the transactional price of a vehicle when sold to consumers.
- 239D.** The Retailer Bonus Program pays bonuses to dealers tied to the wholesale price of a vehicle, which effectively lowers the wholesale prices of cars to qualifying dealers at the expense of non-qualifying dealers. This is patently discriminatory on its face.
- 239E.** The Retailer Bonus Program places Star at a competitive disadvantage, vis-à-vis other Texas Volvo dealers, in the purchase price of cars from Volvo, which prejudices Star's competitive position in the Houston market and harms its consumers.
- 239F.** Star lost sales to competing Volvo dealers for a little as \$200 and \$300 differences.
- 239G.** The Retailer Bonus Program puts enormous pressure on a dealer to adopt the numerous bonus program operational mandates, thus relinquishing operational control of the dealership to Volvo.

CONCLUSIONS OF LAW

1. The Department and its governing board have jurisdiction and authority over the subject matter of this case. Tex. Occ. Code ch. 2301.
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 termination was properly provided. Tex. Occ. Code § 2301.453; 43 Tex. Admin. Code § 215.111.~~

ALT 3. Notice of termination was not properly provided by Volvo. Tex. Occ. Code § 2301.453; 43 Tex. Admin. Code § 215.111.

4. Star timely filed its notice of protest. 43 Tex. Admin. § 215.111.
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. The dealer agreement is a "franchise" as defined by § 2301.002(15).
7. The dealer agreement must be construed under Texas law, notwithstanding the parties' choice-of-law provision. Tex. Occ. Code §§ 2301.003, .478.
8. Under Texas law, satisfaction clauses are enforceable, and claims of breach are subject to an objective reasonableness test and require a showing that the party claiming breach has acted in good faith or the exercise of honest judgment. *Black Lake Pipe Co. v. Union Const. Co.*, 538 S.W.2d 80, 88 (Tex. 1976), *overruled on other grounds*, *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Chappell Hill Bank v. Lane Bank Equip. Co.*, 38 S.W.3d 237, 243 (Tex. App.—Texarkana 2001, pet. denied).
- 8A. **For satisfaction clauses in Texas, the dissatisfied party must prove that the dissatisfaction occurred “in the exercise of honest judgment” and that the decision on the question of satisfactory performance “must be made in good faith.” *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).**
- 8B. **For satisfaction clauses in Texas, if the fulfillment of the condition on which the party is dissatisfied is prevented by the act of the other party, the condition is considered fulfilled. *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).**

8C. Where the dissatisfied party created the circumstances which caused the dissatisfaction, that party has no grounds for dissatisfaction.

9. A manufacturer may not terminate or discontinue a franchise with a franchised dealer unless the manufacturer provides notice of the termination and: (1) the franchised dealer consents in writing to the termination, (2) the appropriate time for the dealer to file a protest has expired, or (3) the Board makes a determination of good cause for the termination. Tex. Occ. Code § 2301.453(a), (g).

10. Volvo has the burden of showing by a preponderance of the evidence that good cause exists for the termination of Star's dealership. Tex. Occ. Code § 2301.453(g); 1 Tex. Admin. Code § 155.427.

11. In determining whether Volvo established by a preponderance of the evidence that there is good cause for terminating Star's franchise, the Board is required to consider all existing circumstances, including seven statutory factors. Tex. Occ. Code § 2301.455(a).

~~12. Volvo met its burden of demonstrating good cause for the termination of Star's franchise. Tex. Occ. Code § 2301.453(g).~~

ALT 12. Volvo has not met its burden of demonstrating good cause for the termination of Star's franchise. Tex. Occ. Code § 2301.453(g).

~~13. Volvo has met its burden of showing that a desire for sales penetration is not the only reason Volvo is seeking termination of Star's franchise. Tex. Occ. Code §§ 2301.453(g), .455(b).~~

ALT 13. Volvo did not meet its burden of showing that a desire for sales penetration is not the only reason Volvo is seeking termination of Star's franchise. Tex. Occ. Code §§ 2301.453(g), .455(b).

14. Star has the burden of proving its counterclaims and affirmative defenses by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.

15. Star's decision to build a facility does not waive its claims that the FISI Program violates Code §§ 2301.467(a)(1), .468, .473(2)(C), and .478(b).

16. The Board does not have jurisdiction to determine claims under the Robinson-Patman Act, 15 United States Code § 13(a).

~~17. The FISI program does not violate Code §§ 2301.467(a)(1), .468, .473(2)(C), or .478(b).~~

ALT 17. The FISI program violates Code §§ 2301.467(a)(1), .468, .473(2)(C), or .478(b).

~~18. The Volvo 360 program does not violate Code §§ 2301.451, .467(a)(1) or (2), .468, .476, or .478.~~

ALT 18. The Volvo 360 program violates Code §§ 2301.451, .467(a)(1) or (2), .468, .476, or .478.

19. The CSI/SSI bonus programs violate Code § 2301.467(a)(1).

20. The CSI/SSI bonus programs violate Code § 2301.468.

~~21. The CSI/SSI bonus programs do not violate Code §§ 2301.467(a)(2), .476, or .478(b).~~

ALT 21. The CSI/SSI bonus programs violate Code §§ 2301.467(a)(2), .476, or .478(b).

~~22. The CSI/SSI bonus programs' violations of Code §§ 2301.467(a)(1) and .468 do not affect the conclusion that Star's franchise should be terminated.~~

ALT 22. The CSI/SSI bonus programs' violations of Code §§ 2301.467(a)(1) and .468 contribute to the conclusion that Star's franchise should not be terminated.

~~23. Star's protest should be denied, and the termination of Star's franchise should be approved.~~

ALT 23. Star's protest should be granted and the termination of Star's Volvo franchise should be denied.

24. Sanctions, penalties, and further orders are not appropriate in this case, and further declaratory decisions or orders are not required. Tex. Occ. Code §§ 2301.153(a)(8), .651, .801, and .802.

APPENDIX B

Proposed Recommended Final Order

TEXAS DEPARTMENT OF MOTOR VEHICLES MOTOR VEHICLE DIVISION

STAR HOUSTON, INC. d/b/a	§	
STAR MOTOR CARS,	§	
Complainant,	§	SOAH DOCKET NO. 608-16-4676.LIC
v.	§	MVD DOCKET NO. 16-0018 LIC
	§	
VOLVO CARS OF NORTH AMERICA,	§	
LLC,	§	
Respondent.	§	

PROPOSED RECOMMENDED FINAL ORDER

The Board of the Texas Department of Motor Vehicles, having duly considered the Proposal for Decision of the SOAH Administrative Law Judge, including the findings of fact, conclusions of law, and recommendations contained therein, as well as the exceptions and replies as have been filed in response thereto, does now enter a Final Order in this proceeding as follows:

IT IS ORDERED:

1. That the Proposal for Decision filed in this proceeding, including findings of fact and conclusions of law is not adopted for the reasons stated in the Exceptions filed by Complainant in this case.
2. That the following ALJ's proposed *Findings of Fact* as set out in the Proposal for Decision are ***hereby adopted***: Findings of Fact Nos. 1-18, 20-22, 24-26, 46, 48, 52, 53, 55-57, 59, 64-66, 72, 73, 78, 80-88, 91-94, 97-108, 113, 114, 117-121, 128, 135, 137, 138, 143, 151, 158-163, 171, 184, 195, 207, 212, 215, 226-232, 234-235, 239-240, 242;
3. That the following ALJ's proposed *Findings of Fact* are ***specifically rejected***: Findings of Fact Nos. 19, 23, 27-45, 47, 49-51, 54, 58, 60-63, 67-71, 74-77, 79, 89, 90, 95, 96, 109-112, 115, 116, 122-127, 129-134, 136, 139-142, 144-150, 152-157, 164-170, 172-183, 185-194, 196-206, 208-211, 213, 214, 216, 217, 219-225, 233, 236-238, 241 and 243.
4. That the following ALJ's proposed *Findings of Fact* are ***amended***: Findings of Fact Nos. 19, 23, 30, 32, 34, 41, 54, 58, 62, 79, 132, 142, 148, 149, 157, 164, 194, 196, 197, 198, and 205, 211, 213, 236, 237 and Findings of Fact 54A, 79A, 113A, 164A, 164B, 205A, 239A, 239B, 239C, 239D, 239E, 239F, and 239G are ***added*** as follows:

19. Star's dealer agreement is a form that was developed in 1958, and there is no other Volvo dealer in the United States that still operates under that form. The record evidence does not demonstrate that Volvo ever moved to modify or replace Star's franchise agreement under Tex. Occ. Code § 2301.454 with the required notice under § 2301.454(b)(2) to update its 1970 agreement in favor of a more contemporary form.
23. Though the recession led to difficult economic circumstances for the Volvo brand in 2009 and 2010, sales started picking up in 2011 after the recession, but nowhere near the levels from 2001-2007. Nationwide, Volvo sold more cars in 2016 than its sales in 2009-2015, but well below its sales in from 2001-2007. (No expert data for 2017 and 2018) (Ex. P-1, Appendix 5 Page 1; Ex. R-42, App. 61)
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- 54A. On November 28, 2018, Volvo unreasonably rejected Star's application for facility design services to build a new facility.
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- 79A.** The CSI/SSI methodology employed by Volvo is flawed and does not accurately portray customer satisfaction with the retail experience.
- 113A.** Volvo's sales effectiveness metric is not a contractual standard of performance in Star's dealer agreement and is subject to change solely at Volvo's discretion.
- 132.** The Tex. Occ. Code § 2301.455(a)(1) statutory factor of "the dealer's sales in relation to the sales in the market" is undefined in the statute and does not weigh in favor of good cause for termination.
- 142.** The Tex. Occ. Code § 2301.455(a)(2) statutory factor of "the dealer's investment and obligations" does not weigh in favor of good cause for termination.
- 148.** The Tex. Occ. Code § 2301.455(a)(3) statutory factor of "injury or benefit to the public" does not weigh in favor of good cause for termination.
- 149.** Star's service facility is in compliance with Star's dealer agreement.
- 157.** The Tex. Occ. Code § 2301.455(a)(4) statutory factor of "the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make" does not weigh in favor of good cause for termination.
- 164.** In Star's AOR, Volvo's registration effectiveness was 95 percent, meaning Volvo registered vehicles at about 95 percent of the rate expected, which indicates the Volvo brand is doing "relatively well" in Star's AOR overall.
(Ex. R-62, p. 12 ¶ 36 and p. A-24 (Lytle Report))
- 164A.** 95 percent registration effectiveness in Star's AOR means that the "lost market penetration" and "lost market share" Volvo was alleging in the Notice of Termination was less than 5%.
- 164B.** According to Volvo's expert, Registration effectiveness is a direct reflection of the marketing efforts of the resident dealer.

- 194.** The Tex. Occ. Code § 2301.455(a)(6) statutory factor of “the parties’ compliance with the franchise, except to the extent that the franchise conflicts with this chapter” does not weigh in favor of good cause for termination.
- 196.** Under Tex. Occ. Code § 2301.455(a)(7), the dealer agreement is enforceable from a policy standpoint, except the “satisfaction clauses” in Clause 6(a)(5) and Section 3. Policy of the Standard Provision which are unreasonable, oppressive, and unenforceable. Star is fully in compliance with its dealer agreement.
- 197.** The Tex. Occ. Code § 2301.455(a)(7) statutory factor of “the enforceability of the franchise from a public policy standpoint, including the issues of reasonableness of the franchise’s terms, oppression, adhesion, and the parties’ relative bargaining power” does not weigh in favor of good cause for termination.
- 198.** Star decided to pursue building a new \$8-9 million dollar Volvo facility by the submission of its June 26, 2018 form to join the Volvo Retail Experience Program and paying the \$12,500 program fee, indicating that he planned to build a new, brand-compliant facility.
- 205.** Star’s plan to build a new facility is a current circumstance that weighs in Star’s favor against termination.
- 205A.** Volvo rejected Star’s plan to build a new facility prohibiting Volvo from using facility as a ground for termination.
- 211.** Volvo’s FISI is not a voluntary program since it is an economic imperative that a dealer participate in the program.
- 213.** Volvo’s FISI is a sales and service standard.
- 236.** Volvo’s CSI/SSI bonus program constitutes the indirect operation of Star’s dealership.
- 237.** Volvo has violated its duties of good faith and fair dealing toward Star in its implementation of the CSI/SSI bonus programs.
- 239A.** The Retailer Bonus Program is not a contractual obligation under Star’s franchise agreement.
- 239B.** The Retailer Bonus Program is not a voluntary program since it is an economic imperative that a dealer participate in the program.

- 239C.** The Retailer Bonus Program bonus margin payments are actually rebates or subsidies that affect the effective wholesale price of a vehicle purchased from Volvo and the transactional price of a vehicle when sold to consumers.
- 239D.** The Retailer Bonus Program pays bonuses to dealers tied to the wholesale price of a vehicle, which effectively lowers the wholesale prices of cars to qualifying dealers at the expense of non-qualifying dealers. This is patently discriminatory on its face.
- 239E.** The Retailer Bonus Program places Star at a competitive disadvantage, vis-à-vis other Texas Volvo dealers, in the purchase price of cars from Volvo, which prejudices Star's competitive position in the Houston market and harms its consumers.
- 239F.** Star lost sales to completing Volvo dealers for a little as \$200 and \$300 differences.
- 239G.** The Retailer Bonus Program puts enormous pressure on a dealer to adopt the numerous bonus program operational mandates, thus relinquishing operational control of the dealership to Volvo.
5. That the ALJ's proposed *Conclusions of Law* Nos. 1, 2, 4-11, 14-16, 19-20, and 24 as set out in the Proposal for Decision are *hereby adopted*;
6. That the ALJ's proposed *Conclusions of Law* are *specifically rejected*: Conclusions of Law Nos. 3, 12, 13, 17, 18, 21, 22, and 23;
7. That the following *Conclusions of Law* are *amended or added* as follows:
3. Notice of termination was not properly provided by Volvo. Tex. Occ. Code § 2301.453; 43 Tex. Admin. Code § 215.111.
- 8A. For satisfaction clauses in Texas, the dissatisfied party must prove that the dissatisfaction occurred "in the exercise of honest judgment" and that the decision on the question of satisfactory performance "must be made in good faith." *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).
- 8B. For satisfaction clauses in Texas, if the fulfillment of the condition on which the party is dissatisfied is prevented by the act of the other party, the condition is considered fulfilled. *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

- 8C.** Where the dissatisfied party created the circumstances which caused the dissatisfaction, that party has no grounds for dissatisfaction.
 - 12.** Volvo has not met its burden of demonstrating good cause for the termination of Star's franchise. Tex. Occ. Code § 2301.453(g).
 - 13.** Volvo did not meet its burden of showing that a desire for sales penetration is not the only reason Volvo is seeking termination of Star's franchise. Tex. Occ. Code §§ 2301.453(g), .455(b).
 - 17.** The FISI program violates Code §§ 2301.467(a)(1), .468, .473(2)(C), or .478(b).
 - 18.** The Volvo 360 program violates Code §§ 2301.451, .467(a)(1) or (2), .468, .476, or .478.
 - 21.** The CSI/SSI bonus programs violate Code §§ 2301.467(a)(2), .476, or .478(b).
 - 22.** The CSI/SSI bonus programs' violations of Code §§ 2301.467(a)(1) and .468 contribute to the conclusion that Star's franchise should not be terminated.
 - 23.** Star's protest should be granted and the termination of Star's Volvo franchise should be denied.
- 8.** That Volvo's proposed termination against Star Motor Cars is denied;
 - 9.** That Star's protest of the proposed termination is granted because Volvo failed to establish good cause for the termination of its franchise agreement with Star;
 - 10.** That Volvo is prohibited from using CSI/SSI as a component of its Dealer Incentive Programs;
 - 11.** That Volvo is prohibited from using CSI/SSI as a ground for terminating a dealer's franchise;
 - 12.** Warranty work weighs more heavily to the benefit of the public than does adequate sales performance;
 - 13.** Excellent service work weighs more heavily to the benefit of the public than does facility image; and
 - 14.** That all remaining motions, exceptions, or objections, of any party, are hereby denied.

Date: _____

Guillermo Treviño, Chairman
Board of Texas Department of Motor Vehicles

ATTESTED:

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

APPENDIX C

Selected Examples of Bias, Inaccuracy, Speculation, and Opinion in the PFD:

- FF 19.** Mr. Seureau has refused each of Volvo's requests to update the 1970 agreement in favor of a more contemporary form.
- The record shows Volvo didn't make a single request that complied with the statutory replacement requirements of Tex. Occ. C. § 2301.454. The biased implication is that Star had some sort of implied obligation to sign a more onerous franchise agreement.
- FF 23.** Though the recession led to difficult economic circumstances for the Volvo brand in 2009 and 2010, sales started picking up in 2011 and Volvo has enjoyed strong sales in recent years. Nationwide, Volvo sold more cars in 2016 and 2017 than at any other point in the brand's history and, as of the date of the hearing, Volvo was on track to have record sales in 2018, as well.
- This finding was apparently based strictly on the lay testimony of a witnesses' recollection. The expert data in the record evidences that Volvo's sales started picking up in 2011 after the recession, but nowhere near the levels from 2001-2007. Nationwide, Volvo sold more cars in 2016 than its sales in 2009-2015, but well below its sales from 2001-2007. (No expert data for 2017 and 2018) (Ex. P-1, Appendix 5 Page 1; Ex. R-42, App. 61)
- FF 27.** The surrounding community is largely unaware that Star exists.
- This biased generalization is an opinion based a witnesses' impression, not a fact demonstrated by a survey, study or the evidence.
- FF 32.** Mr. Seureau has repeatedly refused to update the sign over the years because his dealer agreement did not require him to replace the sign, and because he objected to installation and maintenance terms that most other Volvo dealers readily agreed to.
- This finding does not mention the fact that Mr. Seureau has refused to update the sign outside of Star's dealership over the years because he objected to installation and maintenance terms that conflicted with the terms in his dealer agreement and because the replacement sign reduced the height of the sign from 30ft to 24ft. Mr. Seureau indicated a willingness to put the new sign up, but would not agree to the lease program. Mr. Seureau wanted to buy the new sign, which would comply with the dealer agreement, but Volvo would not sell it to him. (Tr. at 659:23-24, 661:8-14 (Seidman))
- FF 36.** Star's customers have sometimes commented on how dated the dealership appears.
- At best this is hearsay since no customers were witnesses in the case.

FF 43. Star shares a service facility with Mr. Seureau's Mercedes dealership, but the Mercedes entrance is easier to see and access than the Volvo entrance.

- This is not true as Star has a separate service facility for Volvo and for Mercedes. As stated in Star's closing brief, p. 21, "In 2000, Star built a new Mercedes-Benz facility next door and the Volvo facility became solely a Volvo standalone facility. (Ex. P-239 at 46:20-47:8, 52:24-53:7 (Seureau Depo).) Volvo and Mercedes have two separate service facilities and two separate service entrances assessable from the east entrance of the Star Motor Cars complex, with Mercedes to the right and Volvo to the left of the pictured drive in Ex. R-29.02-005. (Tr. at 1273:2-5 (Seureau); *See also* Exs. R-29.2-026, R-29.2-017) Star does have a dedicated lube line for oil changes in the Volvo service facility for both Volvo and Mercedes, but that does not mean that that service facility is being shared with the Mercedes dealership. This finding on Page 18 of the PFD was likely taken from a misreading of testimony from Mr. Bunch that there are two separate entrances for each dealership on Ex. R-29.2-005.

FF 47. Star's lack of air conditioning affects employee satisfaction and productivity and is likely to impact Star's ability to attract and retain talented service technicians.

- This is an opinion and the speculation of one of Volvo's witnesses and not a fact. This testimony referenced on Page 19 of the PFD is taken from Volvo's witness, Mr. Klipstein, when asked about industry norms for write-up areas. (Tr. at 252:25-253:4 (Klipstein)). When it comes to service floors, the finding does not include the context and fact that 3 of 6 of Volvo's service floors, including Star's, are non-air conditioned. (Tr. at 253:10-12 (Klipstein)) Finally, there is no evidence that Star is unable to attract and retain talented service technicians as evidenced by the finding in the PFD on Page 31 that "Volvo did not dispute the competence of Star's service department."

FF 50. Star's website would create a negative impression of the dealership for any online shopper.

- This is an opinion about the impression of online shoppers, not a fact. The finding is also biased as it removes the language, "In Volvo's view..." from Page 20 of the PFD.

FF 54. On August 27, 2018, Mr. Seureau signed a contract with an architect to officially begin the design process. This was first time Mr. Seureau had ever indicated any willingness to consider building a new, modern facility for Star.

- Based on Finding of Fact 53, this is not the first time Mr. Seureau indicated any willingness to consider building a new facility as the application to build a new facility was submitted on June 26, 2018, when Star signed and submitted the Volvo Retail Experience (VRE) Facility Design Service Agreement Form, along with the \$12,500 fee, Exhibit P-175, admitted into the evidentiary record.

FF 58. Mr. Seureau believes Star can sell 500 vehicles a year in the new facility. Star has never sold anywhere near that number vehicles.

FF 204. Star's belief that it can sell up to 500 vehicles per year in a new facility is purely speculative and based on little more than Mr. Seureau's gut feeling. There is nothing in Star's past performance that indicates it will suddenly transform into a dealer capable of selling 500 vehicles per year.

- Finding of Fact 108 states that Star has the largest planning volume in the market, which is where Mr. Seureau derived that amount. Volvo actually assigned Star a 650 unit planning volume. Ex. P-197. Consequently, Star reduced it to 500 and based his plans on that number.

FF 62. A new facility might improve customer satisfaction with the experience of shopping at Star, but it will not cure Star's other performance problems or transform Star into a well-run dealership.

- This opinion is pure speculation and implies that Star is not a well-run dealership which is the opposite of what the evidence actually shows.

FF 63. The new facility would still have the same challenges that are presented by its current location—namely, a lack of visibility from the interstate and no proximity to other dealers or complementary businesses.

FF 201. The new facility would still have low visibility and would not be situated near other luxury car dealers or complementary high-end retail businesses.

- The fact that there would be no proximity to other luxury dealers is demonstrably false, as it is clearly pointed out on Page 58 of the PFD that there are Land Rover and Jaguar dealerships across the street. Additionally, this does not include the three additional luxury dealerships Star Motor Cars sells, which are Aston Martin, Mercedes Benz, and Lotus. Finally, these findings of fact are undercut by Volvo's own expert, who, when asked how Star might perform out of a new facility at that location, testified that, "[if] Star Motor Cars upgraded its facility to what has been proposed here, based on what I have seen, I think its facilities would be very competitive in the marketplace." (Tr. at 1024:2-5 (Lytle)) Mr. Lytle did not point to the location being a problem when discussing the proposed new facility.

FF 69. A more aggressive, successful dealer in Star's AOR would lift the performance of everyone in the market.

- This finding is just the opinion of a Volvo witness. In fact, the opinion is not supported by expert evidence. Most competition is intra-brand and this opinion would contradict the PFD's other findings regarding in-sell. If Star sold more Volvo's in its AOR, that would reduce the pump-ins and decrease the performance of the other dealers selling into Star's AOR.

FF 70. If the pump-in sales from other dealers were not counted, Star's sales effectiveness would be dramatically lower.

- This is factually incorrect, pump-ins are not calculated or included in Star's sales effectiveness. Pump-in sales from other dealers do not affect Star's sales effectiveness scores since they are based on Star's sales anywhere are compared to a derived expectation based on a larger market. The language in the PFD states on Page 75, "The imbalance between Star's pump-in and pump-out sales means that, if only Star's sales in its own AOR were considered, its sales performance would be *even worse* than the sales effectiveness figures show. [Tr. 501, 513-14 (DeWinne).]" This finding is likely a misreading of this testimony, which relates to registration effectiveness.

FF 115. Compared to other manufacturers, Volvo's method of measuring its dealers' sales effectiveness sets a fairly low benchmark. Most dealers end up approximately meeting their sales expectations, with some variations for good and bad performers.

- This is an opinion from Volvo's expert, Mr. Lytle. There is no evidence in the record that supports this finding, nor what measure is being used to determine whether the benchmark is "fairly low."

FF 116. Sales effectiveness is a fair metric for evaluating a dealer's sales performance, and is relevant evidence on how Star's sales compare to the market.

- Sales effectiveness does not compare a "dealer's sales in relation to the sales in the market." This was established in the *Bates Nissan* case.

FF 122. A method for measuring a dealer's performance in only its own AOR is a "sales portion" method. This method measures the percentage of vehicles registered in an AOR that have been sold by the assigned dealer.

FF 123. Using the "sales portion" metric, Star has been the worst-performing Volvo dealer in the nation each year since 2012.

FF 124. Using the "sales portion" metric, in 2017 Star was the worst-selling dealer in all 22 AORs in its census division, and the worst-selling of all 281 dealers in the nation, by a wide margin. This means that Star sold the lowest portion of the sales made in its own AOR relative to any of the other dealers.

- The "sales portion" method used by Volvo's expert is based on Star's expert's sales analysis in the *Bates Nissan* case, which was specifically based on the obligation in that Nissan franchise agreement. Volvo did not contest that. The "sales portion" method, by definition, has nothing to do with the development of the brand. Star has no "sales portion" obligation in its Volvo franchise agreement. This entire analysis is irrelevant to this case from a statutory and contractual perspective.

FF 156. Star's service facility compares unfavorably to other Volvo dealers.

- This is an opinion, not fact and not based on Star's franchise obligations.

FF 172. Volvo dealers in other cities have been able to sell nearly as many vehicles in Star's AOR as Star has.

- This fact is based on Ex. R-6, p. 17, which is cross-sell report for April 2013. One example without specificity is being used to create a general impression.

Language in the PFD:

Page 71 – “Even if, as Star contends, Volvo's termination notice alleged failures that would not constitute a breach of contract, the plain language of the statute provides that contract breach is but one of many factors the Department must consider in determining whether there is good cause to terminate Star's franchise.”

- The PFD takes the position that even if Star did not violate its franchise agreement, that there would still be good cause for termination under the statutory factors demonstrates a bias against Star Motor Cars. A dealer who is operating its franchise in compliance with its franchise agreement should not be subject to termination.

Page 89 – “However, there is little or no evidence addressing Star's specific advertising expenses,…”

- The PFD ignores the follow evidence addressing Star's significant Volvo adverting expenses: Ex. **P-26** - Star Motor Cars Volvo 1st Quarter Advertising Expenses 2017 with Invoices, Ex. **P-46** - 2017 Star Motor Cars Advertisement re 2017 Houston Auto Show, Ex. **R-27** - 2016.09.13 Star Digital Marketing Review, Ex. **P-193R** - 2016 SMC Advertising Expense Summary w_invoices, Ex. **P-194R** - 2017 SMC Advertising Expense Summary w_invoices, Ex. **P-195R** - 2018 SMC Advertising Expense Summary w_invoices, Ex. **P-196** - 07/05/18 Sample Volvo New Vehicle Invoice re \$500 Advertising per vehicle, Ex. **P-216** - 03/28/17 Contact Report re Houston Auto Show-Star will display Volvos, Ex. **P-217** - 07/27/17 Contact Report re Advertising on Invoices.

Attachment 1

SA-1958

VOLVO SOUTHWEST, INC.

SALES AGREEMENT

THIS AGREEMENT dated 4-1 19 70, is made in triplicate by and between VOLVO SOUTHWEST, INC. with its principal place of business at 3303 West 12th Street, Houston, Texas, hereinafter called

Distributor, and Star Motor Cars

an (individual) Yes (corporation) _____ (copartnership) _____

7000 Katy Rd. Houston
Business Mailing Address City

Harris Texas
County State

WHEREAS, the Distributor has been granted by the Manufacturer, Aktiebolaget Volvo of Gothenburg, Sweden, (hereinafter called The Manufacturer), the distribution within a defined territory of motor vehicles and service parts therefore manufactured by The Manufacturer,

NOW IT IS HEREBY AGREED between the parties hereto as follows:

CLAUSE 1. DEFINITIONS

This agreement shall relate only to new passenger vehicles and/or new service parts therefore and in this agreement the word "vehicles" shall, except where the context otherwise requires, mean new passenger vehicles manufactured by The Manufacturer.

The words "service parts" shall, except where the context otherwise requires, mean new service parts or accessories or both supplied or approved by The Manufacturer for such vehicles or any of them.

The term "date of dispatch" shall mean the time at which the Distributor shall deliver products sold hereunder, to a carrier for delivery to the Dealer or its designee in accordance with the Dealer's instructions.

CLAUSE 2. DEALER FRANCHISE PROVISIONS

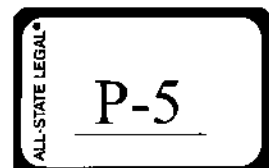
The accompanying Dealer Franchise Provisions bearing Form No. SP-1958, is hereby made a part of this agreement, with the same force and effect as if all of such terms and conditions therein contained were set forth herein at length. The Dealer hereby acknowledges the receipt of said Dealer Franchise Provisions, Form No. SP-1958, and declares that he has examined the terms and conditions therein contained and that he is fully familiar with the same.

CLAUSE 3. DURATION OF AGREEMENT

This agreement shall supersede and annul all former agreements between the parties hereto relative to the sale of the vehicles or any of them and service parts, and shall be deemed to have commenced on the

April 13, 1970 and shall continue until terminated in accordance with the provisions hereof.

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CLAUSE 4. ASSIGNMENT

The Dealer shall not assign the whole or any part of this agreement.

CLAUSE 5. SERVICE OF NOTICE

Any notice which may be required to be served by the Dealer on the Distributor, or by the Distributor, on the Dealer shall be sent by registered mail or by telegram addressed to the party for whom it is intended; in the case of the Distributor at its central office in Houston, Texas, and in the case of the Dealer at his last known address. Any notice so posted or telegraphed shall be presumed to have been received by the addressee, and in conclusively proving the service of any such notice it shall be sufficient to prove that the same was properly addressed and posted or telegraphed as aforesaid.

CLAUSE 6. TERMINATION OF AGREEMENT

This agreement shall continue in force and govern all relations and transactions between the parties hereto until cancelled or terminated in accordance with any of the following provisions:

(a) Immediate Termination. In the event of (1) death, incapacity or removal, elimination or resignation of the Dealer of any person in reliance upon whom this agreement was entered into, (2) any sale, transfer or relinquishment, voluntary or involuntary, by operation of law or otherwise of any substantial interest, in the direct or indirect ownership or management of the Dealer, (3) any dispute, disagreement or controversy between or among partners, managers, officers, or stockholders of the Dealer which in the opinion of the Distributor adversely affects the ownership, operation, management, business or interests of the Dealer or the Distributor, (4) the appointment of an assignee, referee, receiver or trustee for the Dealer or upon its adjudication in bankruptcy, voluntary or involuntary, or the liquidation of the Dealer, (5) the breach by the Dealer of any of the provisions of this agreement, including a failure of the Dealer to develop the locality assigned to him to the satisfaction of the Distributor, or failure to conduct his business in accordance with any requirements set forth in this agreement, or the violation of any of the lawful rules, regulations, and policies of The Manufacturer or the Distributor, (6) failure of the Dealer to obtain or maintain any license required by law, the Distributor may at his option cancel and terminate this agreement forthwith at any time by written or telegraphed notice in their behalf.

(b) Voluntary Termination. This agreement may be terminated by either party without assigning any reason therefore by giving to the other 60 days previous notice by telegram or letter at any time.

CLAUSE 7. PROCEDURE ON TERMINATION

(a) On termination under Clause 6 (a) all unfilled orders whether firm or not or accepted or not shall be cancelled except for orders for non-standard vehicles, which orders the Distributor may complete or at cancel its option.

(b) On termination under Clause 6 (b) the Distributor shall have the option to complete or cancel all unfilled orders pending at the date of notice, and a similar right to complete or cancel any firm orders given after notice and before termination.

(c) The Distributor may within 30 days after terminating the agreement under Clause 6 (a) serve a notice on the Dealer of its election to purchase any or all new, and unused vehicles, chassis, and service parts unsold at the date of receipt of the notice.

(d) The Distributor may within 90 days after notice has been served under Clause 6 (b) notify the Dealer in writing that the Distributor elects to repurchase any or all new, and unused vehicles, chassis, and service parts theretofore unsold.

CLAUSE 8. PRICE TO BE PAID BY DISTRIBUTOR TO DEALER IN EVENT OF REPURCHASE OF VEHICLES, ETC. BY DISTRIBUTOR

(a) In case of termination of this agreement by the Distributor, as provided for in Clause 6 (a) and 6 (b) of this agreement and the giving of the notice called for under Clause 7 (c) or 7 (d), Distributor agrees to repurchase from Dealer, and Dealer agrees to sell to Distributor, (1) all new, unused, undamaged current model Volvo vehicles which Dealer has purchased from Distributor and may own or have an interest in as of the date of termination, at the price paid by Dealer to Distributor, less any price reduction allowance credited or paid to Dealer, (net after discounts, allowances or adjustments), plus transportation charges paid by Dealer; (2) all new service parts for the then current and three preceding models, in salable condition and previously purchased from Distributor by Dealer within 6 months preceding the effective date of termination and which Dealer may own or have an interest in at the time of termination.

(b) For parts or accessories purchased under sub-paragraph (a) of this clause, Distributor will pay Dealer Volvo's current list price less Dealer's current discount or the net price at the time of repurchase (net after discounts, allowances or adjustments), less a handling charge of 10%, and less any charges which may have to be paid by Distributor for the transportation of such parts and accessories from Dealer's place of business to Distributor's place of business.

(c) Distributor's above stated obligations to repurchase shall in every instance be limited to vehicles, parts or accessories which are not later than five days after termination of this agreement delivered to Distributor with good title thereto transferred to Distributor, free of all charges, liens, encumbrances and restrictions (but Distributor may repurchase without regard to this limitation, if he so desires).

(d) In consideration of these arrangements, Dealer, if requested by Distributor during the termination notice period or within five days after termination, shall without compensation or other consideration assign to Distributor, or to any party to which Distributor may transfer this right, all sales or agreements for sales of Volvo automobiles not delivered to users by the termination date.

(e) In the event that Distributor elects or becomes obligated to repurchase any automobiles and service parts as above provided, Dealer agrees that it will promptly comply with any and all applicable laws and requirements which may be necessary or proper to transfer good title to Distributor, free of all charges, liens and encumbrances.

CLAUSE 9. TRANSACTIONS AFTER TERMINATION

After the termination of this agreement, the acceptance of orders from the Dealer by the Distributor, or the continuance of the sale by the Dealer of products herein referred to in Dealer's locality or the referring of inquiries to the Dealer by the Distributor shall not be construed as a renewal of this agreement nor a waiver of the termination. If the Distributor accepts any orders from the Dealer after termination of the agreement the pertinent provisions hereof shall, unless the contrary intention appears, apply to such orders.

CLAUSE 10. POLICY AFTER TERMINATION

The Dealer agrees that at no time after the termination of this agreement shall his conduct be such as to reflect discredit upon the Distributor or The Manufacturer or upon the vehicles and service parts sold by The Manufacturer.

CLAUSE 11. WAIVER

Failure by the Distributor to enforce at any time any of the provisions of this agreement shall not be construed as a waiver of any of the Distributor's rights nor affect the validity of this agreement nor any part thereof nor prejudice the Distributor as regards any subsequent action.

CLAUSE 12. LAW

This agreement shall be construed in all respects in accordance with the laws of the State of New Jersey and as a contract made in the State of New Jersey.

CLAUSE 13. NO OTHER AGREEMENTS

This agreement, with the current wholesale price lists, the aforementioned Dealer Standard Provisions, and the purchase orders accepted hereunder, contains the entire agreement between the parties hereto, and no representative of the Distributor shall have authority to waive any of its printed provisions or change any of its printed terms, unless the same are made in writing and signed by an officer of the Distributor.

CLAUSE 14. SIGNATURES REQUIRED

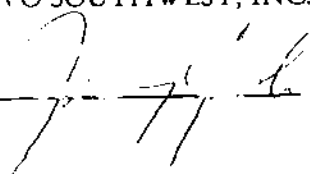
This agreement shall not be valid unless bearing the signature of an officer of the Distributor, signed at the Distributor's office in Houston, Texas.

AS WITNESS the hands of the parties hereto

For

VOLVO SOUTHWEST, INC.

By



By

Star Motor Cars

(Dealer's Trade Name)



(Authorized Signature and Title)

VOLVO SOUTHWEST, INC.**Sales Agreement
Standard Provisions**

SP-1958

VOLVO DISTRIBUTING, INC.**Sales Agreement
Standard Provisions****1. AGREEMENT OF PURCHASE AND SALE**

Subject to the terms and conditions herein expressed the Dealer, except as otherwise agreed upon in writing, shall buy from the Distributor the vehicles and service parts which are to be or may be sold or offered for sale by the Dealer.

2. DEALER'S AUTHORITY

The Dealer is in no way the legal representative or agent of the Distributor or The Manufacturer, and the Dealer is not authorized to pledge the credit of the Distributor or The Manufacturer or to assume any obligation on behalf of them or either of them or to bind them or either of them in any way or to transact business on their account or on account of either of them in any way whatsoever, nor is the Dealer authorized to make any warranty or representations on behalf of the Distributor or The Manufacturer other than those specifically authorized by this agreement.

It is agreed that the Distributor shall not be bound by the Acts or conduct of the Dealer.

3. POLICY

The Dealer shall maintain a place of business and sales room and service facilities satisfactory to the Distributor, and the Distributor shall have the right at all reasonable times during hours to inspect said place of business and sales room and service facilities and to inspect the records and accounts of the Dealer relating to the sale and servicing of new vehicles and service parts. Such examination shall be made by a person or persons either in the employ of the Distributor or acceptable to the Distributor, at such time or times as the Distributor may designate.

During the continuance of this agreement the Dealer shall conform to all rules and regulations not inconsistent with the terms and conditions of this agreement and from time to time issued by the Distributor or by The Manufacturer, and furnished to the Dealer in relation to service to owners of the vehicles, and the Dealer shall sell all such vehicles and service parts therefor in such manner as to maintain and increase the good reputation of The Manufacturer's products.

4. FIRM ORDERS

To assist the Distributor in arranging for the production of the vehicles to meet the requirements of its dealers, the Dealer shall arrange for the Distributor to receive on request each month, his firm orders for vehicles to be shipped during the month and his estimated requirements for the second and third succeeding months.

Firm orders shall be binding on the Dealer, and the Distributor may deliver the vehicles comprised in them at any time during the month in which delivery is specified and during the month immediately following, after which period any unexecuted firm orders shall continue as such (unless and until they have been cancelled by the Dealer before delivery by the Distributor). Orders for vehicles to non-standard specifications shall not be cancelled in any circumstances by the Dealer, and a deposit may be required by the Distributor before accepting such orders.

5. DELAYS IN DELIVERIES

The Distributor will endeavor as far as practicable to make deliveries to the Dealer in accordance with the Dealer's orders, but if for any cause the Distributor shall fail to make such deliveries or shall fail to make them within the time stated in the order, or shall cancel any of such orders, the Distributor shall not be liable to the Dealer for any payment whatsoever by reason of such failure to deliver, delays in making deliveries or cancellations, nor for any loss of profits resulting directly or indirectly therefrom.

6. CHANGE IN PRICES

The Distributor reserves the right to change its prices of the vehicles to the Dealer and/or discounts for service parts at any time by telegram, cable, or letter, and all goods are sold subject to prices ruling at the date of dispatch. In the event of any such change in prices or discounts the Dealer shall have the right to cancel any order or orders for vehicles and/or service parts of standard specification affected by such changes and which shall not have been dispatched at the date of such notification provided the Distributor is notified by telegram, cable, or letter within five days from receipt of notification of such change of price or discount.

7. CHANGE IN MODELS AND/OR DESIGNS

The Distributor reserves for itself and for The Manufacturer the right to discontinue the manufacture or sale of any model and to make changes in design or add improvements to the vehicles at any time without incurring any obligation to install the same on vehicles previously purchased by the Dealer.

The Dealer shall not alter except with the permission of the Distributor any vehicles furnished hereunder nor change or substitute any of its equipment nor do anything that will in any way infringe, impeach or lessen the validity of the patents or trademarks associated with the vehicles and service parts on any of them.

8. LOSS AND SHORTAGE CLAIMS

The Distributor shall not be liable to the Dealer for any loss or damage to vehicles, service parts, or other goods while in transit subsequent to the date of dispatch as the Distributor's responsibility shall cease upon the date of dispatch as defined above.

All claim for shortage must be submitted by the Dealer to the Distributor within five days after the receipt of vehicles and/or service parts on which shortages are claimed, and claims submitted after the expiration of the said five days shall not be considered or allowed.

The Distributor accepts no responsibility for damage by fire or otherwise to Dealer's cars or parts thereof or Dealer's customer cars or parts thereof while on the Distributor's premises.

9. CONDITIONS OF SALE

All vehicles and service parts are sold by the Distributor to the Dealer on the terms set out in the Manufacturer's Conditions of Sale current at the time of shipment and the Distributor shall be under no liability to the Dealer save to use its best endeavors to secure the performance by The Manufacturer of its obligations therein set out. This provision excludes all other Warranties expressed or implied and shall be accepted by the Dealer in lieu of any other rights as to the quality or fitness of the vehicles or service parts or in respect of any alleged lack of care to render them fit or safe.

In effecting the sales of vehicles or service parts to customer, the Dealer shall in every case prior to the sale, notify the purchaser of all the Conditions of Sale current at the time of sale. The Dealer shall incorporate the said Conditions of Sale as conditions of every sale by him. In the event of default by the Dealer in incorporating in any sale the said Conditions of Sale resulting in a successful claim by the ultimate purchaser against the Dealer, which claim would have been unsuccessful but for the said default, neither the Distributor nor The Manufacturer shall be under any liability whatsoever to the Dealer in respect of such claims, and the Dealer shall solely be responsible to the purchaser for any damages recovered and the Dealer shall indemnify and keep indemnified the Distributor and The Manufacturer against all actions, claims, damages, expenses, costs, out-of-pocket expenses and payments whatsoever and howsoever arising out of any sale where the Dealer has failed to observe the terms of this clause.

The Distributor shall have power by notice in writing to the Dealer from time to time to substitute other conditions for all or any of the existing conditions or to modify such existing conditions. No such substituted or modified conditions shall affect sales made to the ultimate purchaser prior to receipt of such notice in writing by the Dealer.

10. EXHIBITIONS

The Dealer shall not exhibit without the consent of the Distributor any of the vehicles at any Motor Exhibition, Agricultural Show, or the like, and furthermore, the Dealer agrees to indemnify the Distributor against any penalty, damages, or costs which it may sustain or incur in consequence of any breach of this Clause by the Dealer.

11. PRICES AND DISCOUNTS

The Distributor shall invoice the vehicles and service parts to the Dealer at the Wholesale List Prices as established by the Distributor and current at the date of delivery. Prices will be established and may be changed by the Distributor from time to time without notice.

12. TERMS OF PAYMENT

The Dealer shall pay the Distributor for all vehicles at or before the date of dispatch by cash or approved check, or by an irrevocable and confirmed banker's credit in a bank designated by the Distributor.

In each case the Dealer shall pay any and all sales, excise, or other governmental or municipal charges imposed upon or based upon the sale of the vehicles or service parts to the Dealer which have not been included in the computation of the current list prices.

13. DEALER'S INVOICES

The Dealer agrees to render purchasers itemized invoices covering the details of their purchases.

14. ADVERTISING

The Dealer shall, during the continuation of this agreement, advertise and in all ways promote the sale of the vehicles in his locality in a satisfactory and proper manner to the satisfaction of the Distributor, and shall forward the Distributor from time to time copies of all advertisements, circulars, and other local advertising matter issued. The Dealer shall solely be responsible for the cost of, and for any claims for damages of any kind arising from, such advertisements etcetera, including the signs referred to in the last paragraph of this clause, and shall indemnify the Distributor and The Manufacturer against all such claims.

The Dealer agrees to purchase, erect, and maintain at his expense an electric sign or signs outside his showrooms and/or service facilities, provided the erection thereof is not prohibited by municipal ordinances or statute; such signs shall be either standard signs which the Dealer shall purchase from the Distributor, or such other signs as the Dealer and the Distributor shall agree upon. Also, the Dealer shall provide and maintain such other signs as are necessary properly to advertise his business on a basis mutually satisfactory to the Distributor, and The Manufacturer. At all times the specifications and design of such signs shall be approved by the Distributor.

15. DEMONSTRATION VEHICLES

The Dealer shall during the continuance of this agreement keep and maintain in good running order and in clean condition current models of the vehicles as registered demonstration vehicles exclusively for the purpose of giving demonstrations and trial runs to prospective customers.

16. STOCK VEHICLES

The Dealer shall supply each month a list of vehicles in stock, including demonstration vehicles, and of new car sales on the form provided by the Distributor. The Dealer shall supply as and when requested by the Distributor, upon forms provided, the names and addresses of all persons to whom vehicles were delivered during any specified period, with the date of delivery, description and chassis numbers of the vehicles, and at all other times will promptly respond with such information as the Distributor may require.

17. SERVICE PARTS

The Distributor and the Dealer shall agree upon a minimum amount of service parts to be taken initially by the Dealer for stock. Subsequently, his stock of service parts shall be increased to enable him to give proper and efficient service in his locality, and it is a condition of this agreement that the Dealer shall at all times carry stocks of service parts adequate in the opinion of the Distributor for the efficient servicing of his locality.

18. REPAIR AND MAINTENANCE SERVICE

The Dealer will efficiently perform any repair or maintenance service which may be required on the products supplied by the Distributor at charges which are fair and reasonable.

The Dealer will perform without labor charge the schedule of free service as laid down by the Distributor for each and every new car sold.

19. PROTECTION OF THE MANUFACTURER'S TRADEMARK AND TRADE NAME

Upon the termination of this agreement the Dealer agrees to immediately discontinue the use of any trademarks or trade names made up in whole or in part of any trademark or trade name belonging to the Distributor or The Manufacturer; to remove all signs containing any such trademarks or trade names; and to certify to the Distributor that it, the Dealer, has rendered unfit for the use originally intended or that it will not use for the purpose originally intended, any stationery, printed matter, advertising and advertising containing any such trademark or trade name, and that the Dealer will not represent, and will discontinue any practices which might make it appear that it is still handling The Manufacturer's products, all without cost or expense to the Distributor.

Attachment 2



David Thomas

VP Customer Experience & Network

February 29, 2016

Star Motor Cars
ATTENTION: Glenn Seureau
7000 Katy Rd.
Houston, Texas 77007

Via Certified Mail Return Receipt Requested

RE: NOTICE OF TERMINATION OF FRANCHISE [April 1, 1970, Sales Agreement, between Star Motor Cars and Volvo Southwest, Inc.]

Dear Mr. Seureau:

This Notice of Termination is being reissued in order to have a new effective termination date sixty (60) days from your receipt. Specifically, while we have received confirmation of both your receipt and the Board's receipt of our prior Notice of Termination issued on February 8, 2016, we are reissuing this Notice with a new effective termination date of 61 days following receipt of this Notice of Termination.

Pursuant to Texas Department of Transportation Occupations Code 2301.453(d) and Clauses 6 and 7 of the Sales Agreement ("Agreement"), Volvo Cars of North America, LLC ("Volvo Cars") hereby provides this formal notice of termination of the Agreement.

NOTICE TO DEALER: YOU MAY BE ENTITLED TO FILE A PROTEST WITH THE TEXAS MOTOR VEHICLE BOARD IN AUSTIN, TEXAS, AND HAVE A HEARING IN WHICH YOU MAY PROTEST THE PROPOSED TERMINATION OR DISCONTINUANCE OF YOUR FRANCHISE UNDER THE TERMS OF CHAPTER 2301, OCCUPATIONS CODE, IF YOU OPPOSE THIS ACTION.

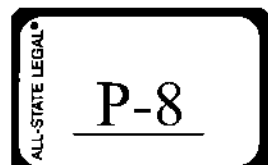
Texas Department of Transportation Occupations Code 2301.453(c) provides that a manufacturer's notice of termination must be received not later than the 60th day before the effective date of the termination. Accordingly, as noted above, and in an abundance of caution, the effective date of termination shall be 61 days following receipt of this Notice of Termination.

Telephone 1 (201) 768 2309

David.thomas@volvocars.com

VOLVO CAR USA, LLC
1 Volvo Drive
Kenilworth, NJ 07033

1(1)



Texas Department of Transportation Occupations Code 2310.453(c) also provides that the specific grounds for termination shall be provided within the notice of termination. The specific grounds for termination are provided below.

Star Motor Cars has consistently failed to adequately represent Volvo Cars in its assigned area of responsibility and has specifically failed to achieve any reasonable degree of sales penetration in its assigned area. Star Motor Cars' actual sales performance is consistently and substantially below average achieved by other dealers in the Volvo Cars' dealer body as far below that achieved by our competitors in your area of responsibility. This consistently inadequate performance has caused and is continuing to cause significant injury to Volvo Cars in the form of substantial lost sales, lost market penetration, loss of brand recognition and continued loss of market share. Additionally, Star Motor Cars is failing to adequately serve the consuming public by providing inadequate product and customer service. Star Motor Cars' failure is further exacerbated by major shortcomings in its customer and service facilities, equipment and personnel, especially when compared to those of other dealers in the Volvo Cars' dealer body selling and servicing the same line-make. Finally, Star Motor Cars' continues to provide inadequate warranty service, which further harms the consumer as well as the Volvo brand.

The reasons provided above have significantly impaired Volvo Cars' representation in the market and injured the Volvo Cars' brand loyalty and acceptance as a result of continued inadequate service to the consuming public. Star Motor Cars has also consistently refused to make an adequate investment to the dealership and the franchise resulting in no measurable improvement or expectation of improvement.

Sincerely,



David Thomas
VP Customer Experience & Network

cc: Texas Department of Motor Vehicles
4000 Jackson Ave.
Austin, Texas 78731

Via CMRRR

Mar 03 16:04:55p

Seureau

713-524-9014

p.3

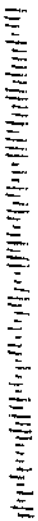
BEIRNE, MAYNARD & PARSONS, L.L.P.
ATTORNEYS AT LAW
HOUSTON, TEXAS 77056-3000



9414 7149 6900 5939 0082 59

Star Motor Cars
ATTENTION: Glenn Seureau
7000 Katy Rd.
Houston, Texas 77007

77002492189 00189



Attachment 3



November 28, 2018

Glenn Seureau
STAR MOTOR CARS
7000 Katy Road
Houston, Texas 77024

VIA CERTIFIED MAIL, HAND DELIVER & EMAIL TO COUNSEL

Re: Response to Mr. Coffey's November 19, 2018, Letter on Facility Plans

Dear Mr. Seureau:

This letter is in response to your counsel's letter dated November 19, 2018.

First, I want to reiterate that Volvo continues to strongly question whether right now is the time for you to make plans or proceed with a multi-million dollar investment in facility given (1) we are waiting for a ruling in the termination proceeding and (2) given that your sales performance has continued to decline further and significantly with only one car sale so far in November.

New car sales		October	November MTD
	2017	11	10
	2018	4	1
	V prior year	-64%	-90%

Sales effectiveness -73.4%	Ranking market	Ranking State	Ranking USA
	14 th out of 14	15 th out of 15	295 th out of 295

We would be strongly advising any retailer with this level of performance to be very cautious about proceeding with significant facility investments. This is just business common sense. As we have discussed before, while your current facility is significantly substandard, investment in facility alone will not fix your performance. Other operational investments and management changes were required also, but never implemented.

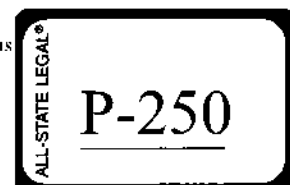
Putting the above to one side, Volvo is of course respectful of and will abide by the SOAH Order No. 20, and will process and facilitate any requests.

Volvo Car USA LLC
1 Volvo Drive
Rockleigh, NJ 07647

Telephone
201-768-7300

Facsimile
201-784-4552

Website
<http://www.volvocars.us>



We have also received Star Motor Cars' application to relocate its Volvo franchise. The relocation issue and facility construction issue are linked together in that, Star plans to build the new facility in the new location. We should note that we agree with you that Star's current Volvo facility is inadequate. Our concern, however, is that the new facility proposed by Star is too aggressive and not sustainable, especially when coupled with a less than ideal proposed location, absence of any corrective planning or operational investment and severe historic and current underperformance. By separate correspondence dated November 16, 2018, Volvo denied Star's application to relocate, expressly linked by Star to the facility plan. By way of illustration only, we believe that this denial is justified by Star's own expert testimony in the Termination Proceeding, e.g., that Star's selected location will not support a high volume dealership. Despite this testimony, however, Star's proposed facility is based upon projections of 500 new motor vehicle sales per year. While Volvo does believe that Star's Area of Responsibility (AOR) has significant potential, Volvo does not believe that a 500 annual projection is reasonable given the limitations of the proposed location, coupled with a Star's lack of planning and material changes to management and investment.

Star's historic and current performance will simply not support the facility investment you are proposing. Star's facility proposal calls for 47,000 square feet. Even forecasting a significant increase in new motor vehicle sales and service, which Volvo believes is possible with new ownership, investment and management, 47,000 square feet is excessive when examining Star's historic and current performance. Star's YTD financial statements showing a disturbing loss further heighten our sincere concerns.

Respectfully, we believe that this size of investment is far in excess of what Star's business model and location can support. Accordingly, we deny Star's current proposal.

Subject to the current termination proceeding, and without waiving any positions or rights in that proceeding, however, Volvo respectfully suggests consideration of a more manageable facility, consistent with Volvo's facility guide. Again, Volvo respectfully suggests that Star postpone any construction of a new facility until the Termination Proceeding has been resolved.

Of course, Volvo is in agreement with, and will continue to pay the bonus payments per Order No. 20.

Sincerely,



Adam Clarke
Head of Network Development, Americas
Volvo Car USA, LLC

cc: Wm. David Coffey, III
Counsel for Star Motor Cars
13810 FM 1826
Austin, Texas 78737

Via Email and Regular Mail

**SOAH DOCKET NO. 608-16-4676
MVD DOCKET NO. 16-0018.LIC**

STAR HOUSTON, INC., d/b/a STAR	§	BEFORE THE STATE OFFICE
MOTOR CARS,	§	
Protestant,	§	
	§	
	§	OF
v.	§	
	§	
VOLVO CARS OF NORTH AMERICA,	§	
LLC,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

RESPONDENT'S EXCEPTIONS TO PROPOSAL FOR DECISION

NOW COMES Respondent Volvo Cars of North America, LLC (n/k/a Volvo Car USA, LLC) ("Volvo") and pursuant to 1 TEX. ADMIN. CODE § 155.507, files these Exceptions to the Proposal for Decision entered by the Honorable Administrative Law Judges Henry D. Card and Sarah Starnes on April 2, 2019, with a copy to Daniel Avita, Director of the Texas Department of Motor Vehicles, Motor Vehicle Division, and in support thereof would respectfully show the following.

SUMMARY OF EXCEPTIONS

The purpose of this proceeding was to determine whether good cause for termination of the Volvo franchise held by Star Houston, Inc. (d/b/a Star Motor Cars) ("Star" or "Protestant" herein) existed, thereby affirming the notice of termination provided by Volvo to Star. A lengthy hearing on the merits was conducted during September 2018, and a Proposal for Decision ("PFD") was issued on April 2, 2019.

Very generally stated, the PFD finds good cause for termination of Star's Volvo franchise. Volvo is appreciative of the hard work and attention given the matter by the ALJs, and obviously has no exceptions to the core findings contained within the PFD.

Volvo does, however, except to certain findings that its CSI and SSI programs violated certain provisions of the Texas Occupations Code ("Code"), namely §§ 2301.467(a)(1) and 2301.468.

Volvo acknowledges that the ALJs expressly note that their "conclusions regarding the termination of Star's franchise are not affected by their conclusions that the CSI/SSI bonus programs violate Code §§ 2301.467(a)(1) and 2301.468." Volvo clearly, therefore, asserts no exceptions to this conclusion. Instead, Volvo's exceptions are limited only to the PFD's findings that the CSI/SSI programs in any way violate the Code.

STRUCTURE OF EXCEPTIONS

Volvo presents its exceptions to one a portion of the PFD in this filing. Because courts need only give deference to the findings of fact and conclusions of law, detailed explanations for each revision are provided for those changes. *See* TEX. OCC. CODE § 2301.805(b).

EXCEPTIONS TO FINDINGS OF FACT

Volvo respectfully excepts to the following Findings of Fact ("FOF") contained in the Proposal for Decision, suggesting the following revisions indicated in bold, underline, and italics below:

I. Exception to FOF No. 230

230. Volvo requires its dealers to adhere to certain sales and service standards by rewarding dealers on the basis of the limited CSI/SSI survey results.

Proposed Revision: **Dealers voluntarily participating in the CSI/SSI programs are uniformly eligible to receive bonus payments subject to survey results submitted by their customers.**

When voluntarily participating in the CSI/SSI programs, Dealers are not required to adhere to certain sales and service standards, but are required to obtain certain national averages in their customer surveys to earn bonus payments.

Grounds for Proposed Findings of Fact No. 230:

First, Volvo respectfully submits that it does not require dealers to do anything. To the contrary, what Volvo encourages is for dealerships to simply emphasize customer focus – what dealers should be doing anyway. The CSI / SSI programs are designed to incentivize efforts that dealers can undertake which focus on the customer experience. (See Ex. R-212 and R-213). If this conduct is required, it is not Volvo doing the requiring – the market, the consumer and the competitor requires our dealers to enhance customer focus and experience. Failure to do so means failure to succeed as a dealership. It really is that simple.

Volvo has witnessed dealerships succeed or fail based in large part on their ability to outperform competitors, based upon their ability to attract new customers and keep them not only satisfied, but happy with the dealer's focus on their needs and wants. At the risk of sounding like an overused adage, such success comes only with the commitment of high resources – time, creativity and imagination, and money.

On page 108 of the PFD, it is noted that the amount of investment required to achieve the CSI/SSI bonuses "is amorphous at best." Volvo admits that there is no hard and true formula, established by Volvo or any other manufacturer or dealer for that matter, for determining how much a dealer must invest to succeed. A formula would be impractical and possibly discriminatory. Each dealer is challenged by its own unique circumstances: AOR, location, staffing, community / consumer awareness . . . ! That is why each dealer must make its own decision on how it will conduct and manage its own business. While the amount of the investment is not subject to exact forecast or calculation, it is nevertheless huge. The dealer must continually invest in his business: location, facility, amenities, staffing and training, advertising,

customer follow up . . . All these things are part of the necessary customer focus that is necessary to compete in the premium motor vehicle space.

The amount of the bonus is trivial compared to the immense investments necessary, over the entire lifetime of the dealership, i.e., not merely a one-time investment, to perpetuate a successful dealership operation. Hence, the 1% bonus itself can never be the goal; can never by itself be sufficient motivation for dealer investment and performance. To the contrary, Volvo and its dealers know that the real motivation is success in the competitive premium marketplace.

The dealer that sits idly by always gets passed by. The longer the dealer sits idle the further behind it becomes until it reaches the point that Star had reached: operating out of an aged building erected in 1970 on a side road not even visible from the freeway and passively conducting business in the most lucrative AOR of the Houston market while its own community largely remains unaware of its existence. All Volvo wants to do is to incentivize its dealers to do what any successful business already does.

II. Exception to FOF No. 231

231. Although there was no quantitative analysis, the evidence presented in the case shows that the CSI/SSI sales and service bonus standards are unreasonable because the surveys themselves and the use of four questions and top-box scoring do not necessarily measure actual customer sales and service satisfaction.

Proposed Revision: No quantitative analysis **or other evidence was offered establishing that the** CSI/SSI sales and service bonus standards are unreasonable because the surveys themselves or the use of four questions and top-box scoring do not necessarily measure actual customer sales and service satisfaction.

Grounds for Proposed Findings of Fact No. 231:

The threshold question is whether the surveys are an embodiment of unreasonable sales and service standards. If they are not, Volvo did not violate Section 2301.467(a)(1) through a survey which measured customer satisfaction. The questions make reasonable inquiries:¹

What are the four (4) SSI Enabler Question(s)?

- | | | |
|--------|-------|---|
| • S4 | (25%) | How likely are you to recommend the dealership? |
| • S5.1 | (25%) | Overall opinion of the facility? |
| • S12 | (25%) | Explanation of features and controls? |
| • S13 | (25%) | Retailer follow-up after delivery? |

What are the four (4) CSI Enabler Question(s)?

- | | | |
|---------|-------|---|
| • AM002 | (25%) | Opinion of the waiting area? |
| • A12 | (25%) | Opinion of the explanation of work done? |
| • A28 | (25%) | Opinion of the condition of the car when it was returned? |
| • A29 | (25%) | Retailer follow-up after visit? |

“Star did not dispute that the four enabler questions that determine the CSI/SSI are reasonable questions for Volvo to ask its customers.” (PFD at p. 109).

Star’s criticism, as presented through Mr. Stockton, if the questions do not fully assess customer satisfaction. However, that is not a proper criticism under Section 2301.467(a)(1). Said differently, the statute does not render a standard unreasonable simply because a dealer or an expert can propose a different standard. The survey’s accurately track customer satisfaction and the anecdotal complaints Mr. Bunch received about Star’s facilities and amenities.

The burden on demonstrating flaws through quantitative analysis fell on Star. Star and its expert did not and could not point to any fact, study or analysis of any kind to establish that the standards, questions or scoring is in any way unreasonable or inequitable. All they could do was argue that it might be.

¹ Exhibit R-200 at p. 1.

Star's problems are not based on the fact that they do not have sufficient surveys being returned. That is merely a consequence of their true problem – they do not deliver the experience that premium customers increasingly insist upon. Mr. Bunch admitted Star is not hampered by an occasional bad survey. Star has continuing problem satisfying customers:²

18	Q	What happened from the time you joined to the
19		time now? Why have you guys fallen? We're not talking
20		about an occasional low response, are we? We're talking
21		about continued and systematically running below your
22		competitors. Isn't that right?
23	A	Yes, sir.

More to the point, the testimony aligned with the survey results. Star consistently performs below average and the surveys accurately reflect customer opinion.

The result is perfectly understandable. Star has not invested in a new facility in almost 50 years and has even failed to meaningfully renovate its existing facility. What did it expect? The rest of the competitive marketplace progressed. Customers demand and expect certain environments, amenities, experiences. They want to enjoy the experience of spending \$50-100,000!

As Mr. Rodney Bunch testified, his attempts to secure favorable customer feedback is hampered by Star's facility and also hampered by his staff's own inability to consistently follow up with the customer (all that takes is a phone!). Again, the problem is not that Star has too few survey responses; the problem is that their customers are telling them that they have fallen behind. This obvious observation is in turn the reason Star has so few sales and so few returned surveys.

² Hearing Transcript at p. 583.

III. Exception to FOF No. 232

232. The CSI/SSI bonus programs are a computation of process intended to gauge the performance of a dealership.

Proposed Revision: The CSI/SSI bonus programs are **part of a larger set of programs designed to create a heightened customer awareness and increase the premium experience of customers of Volvo products thereby improving the ability of dealers to attract and retain loyal and satisfied customers which in turn increases dealer profitability and franchise value.**

Grounds for Proposed Findings of Fact No. 232:

At most, looking at the Volvo CSI / SSI programs in isolation might give the appearance that these programs gauge the performance of a dealership. These programs, however, are part of a much larger coordinated initiative by Volvo, working with participating dealers, to emphasize heightened customer awareness in an environment where failure to do so results in continual decline measured against the competition. Put another way, the singular focus and objective of these programs is to improve the premium experience of customers of Volvo products with the specific objective of improving dealer profitability and franchise value which in turn enables the dealer to offer an even better experience to its customers. Failure to do this is tantamount to standing still while the competition advances, and is guaranteed to result in dealer financial, operational and competitive failure. **Customer focus is the intent, not the gauging of dealer performance!**³

IV. Exception to FOF No. 234

234. Lower-volume dealers are at an inherent disadvantage in the survey process.

Proposed Revision: Lower-volume dealers **are under no inherent disadvantage in the survey process, but instead experience certain advantages and disadvantages based upon their own unique business environment, opportunities and self-management.**

Grounds for Proposed Findings of Fact No. 234:

³ See Exhibits R-212 and R-213. The purpose of the CSI/SSI program is to enhance customer satisfaction and incentivize its dealers to provide service and facilities commensurate with a premium brand.

Star had the burden to demonstrate the survey process imposed a bias against it. It did not provide any evidence to show disadvantage. Mr. Bunch suggested that if Star had more survey results it might have a different result. Mr. Bunch simply did not understand the process. Volvo. If a dealer has insufficient surveys, Volvo calculates the bonus opportunity as explained in its April 18, 2016 memorandum to dealers:

- **Margins:** The lowest 2.5% of the survey count (average of the survey count for the 4 questions), for the rolling 3 month period will be dropped automatically each month from the score calculation. The higher of the Rolling 12 or the "Adjusted Rolling 3" will calculate payment eligibility, unless there are less than 5 surveys in any period. These are the 4 survey questions:

(Exhibit R-207). Star's problem is not a sampling error.

Mr. Stockton's testimony was conclusory and insufficient to support Star's complaint. He had access to Star's surveys⁴ and could have employed a variety of statistical tools to evaluate the survey for validity. Having failed to perform any analysis to demonstrate bias against Star, Mr. Stockton testified about possibilities, and it is legally no evidence.⁵

Respectfully, however, this does not fit mathematical logic. The presented evidence clearly shows that the national averages were reasonable and fair. These averages are applied to every dealer in the same manner. Having a greater sample size, *i.e.*, a larger number of survey responses, does not mathematically or logically create a higher probability that a dealer will meet or exceed the average. Whether a dealer receives 100 returned surveys each month or 10, the average will apply to both dealers equally.

If one concludes that the dealer with fewer survey returns is more vulnerable to a below average monthly score, then one would also have to conclude that the same dealer has a higher chance of obtaining an above average score. Because a dealer has a bonus opportunity each month, over the year, the dealer will earn the bonus payments it merits under the program.

⁴ See Exhibit R-200 at p. 5, explaining how a dealer can access its surveys and results.

⁵ *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004).

Perhaps more importantly, a dealer having such a small number of retail customers each month, and yet having a large sales and service staff, should find it much easier to provide its few customers with a very personalized treatment which should in turn result in a higher percentage of customers filling in surveys and providing higher scores. Contrary to what Star is arguing, they should have an advantage in customer follow up and satisfaction, not a disadvantage.

Unfortunately, however, this advantage has not produced more favorable results. The PFD correctly cites to Mr. Rodney Bunch's hearing testimony that one bad review could hurt his CSI score. One bad survey out of one? One bad survey out of five? What he forgets, however, is that same ratio would have the same impact on any dealer's CSI score. Their mere fact that a dealer might have a greater number of surveys does not make it more likely that it will have a higher number of favorable surveys. This is not a matter of chance, as if someone is rolling dice. It is a matter of taking care of customers, giving premium customers a premium experience. That's the point!

V. Exception to FOF No. 235

235. The use of only four questions and the top-box scoring of those questions is likely to discriminate against dealers on the basis of volume of sales.

Proposed Revision: The use of only four questions and the top-box scoring of those questions is uniformly applied to all dealers. High volume and low volume dealers are therefore subject to the same law of averages and not otherwise possessing of any unique advantage or disadvantages based upon their individual volumes of other circumstances. To the contrary, each dealer's individual circumstances can become an advantage or disadvantage depending upon how the dealer manages those circumstances.

Grounds for Proposed Findings of Fact No. 235:

Top box scoring causes no statistical flaws or discrimination on the basis of volume. If Star received full credit for scores below the threshold of 9, so would other dealers. While the

benchmark value might change, Star's ranking—consistently among the worst in the nation—would not change. Said differently, if other Volvo dealers receive top box scores of 9 and 10 and Star receives grades of 8 and lower, it misses the benchmark calculated on the 12-month rolling average.

Star offered no evidence to show top box scores would disfavor dealers with lower volumes. Surely, Mr. Stockton could have prepared a demonstrative or model to demonstrate the flaw if one existed. However, no flaw is demonstrable for the reasons stated above. Eliminating top box scores in favor of a full-scale score *does not change relative standing*.

EXCEPTIONS TO CONCLUSIONS OF LAW

I. Exception to Conclusion of Law ("COL") No. 19.

19. The CSI/SSI bonus programs violate Code 2301.467(a)(1).

Proposed Revision: The CSI/SSI bonus programs **do not** violate Code 2301.467(a)(1)

Grounds for Proposed Conclusions of Law No. 19:

The evidence clearly shows that Volvo does not "require adherence to unreasonable sales or service standards". First, Volvo does not require anything. If a dealer does not want to participate, it does not have to. If a dealer does not want to invest time and money to succeed, it does not have to. The fact that Star has suffered from its failure to take certain actions has nothing to do with the CSI / SSI programs⁶ – it has to do with the increasingly demanding premium market, which has passed Star by.

In *Autobahn Imports, LP v. Volvo Cars of North America, LLC*, SOAH Docket No. 608-16-4053.LIC ("Autobahn"), SOAH, considering the same evidence as present in this case, stated as follows:

⁶ As the PFD states, CSI / SSI bonuses started during 2016. Star's problems existed long before 2016.

First, the CSI and SSI surveys do not establish standards that dealers are required to "adhere" to. Volvo dealers are not contractually required to obtain a certain result on the surveys, nor do they face termination of their franchise if they fail to meet the CSI and SSI goals. Rather, dealers are rewarded with bonuses based upon their performance on the CSI and SSI surveys. Because dealers are not directly penalized based upon the survey results, or mandated to earn certain scores, the ALJs cannot find that Volvo "requires" dealers to "adhere" to certain standards in regard to the CSI or SSI results.

Second, The CSI / SSI programs are reasonably designed and implemented. They are uniformly applied and all dealers experience the same treatment. Any differences are a result of the dealers' own unique business operations. As previously noted, the fact that Star is a low (very low) volume dealer should in many ways be an advantage, *e.g.*, Star has fewer customers to take care of and therefore one might think that a hard-working dealer could keep them happy.

Additionally, the enabler questions, of which Star complains, do not constitute sales and service standards. Rather, they are measures of customer satisfaction and accurately reflect Star's financial performance, sales performance, service performance and the anecdotal evidence.

II. Exception to COL No. 20

20. The CSI/SSI bonus programs violate Code 2301.468.

Proposed Revision: The CSI/SSI bonus programs **do not** violate Code 2301.468.

Grounds for Proposed Conclusions of Law No. 20:

To show a violation of Section 2301.468, Star need to establish the intention behind the program was to gage performance, and the program treated Star unfairly or inequitably in the sale of motor vehicles. It failed on both points.

The evidence demonstrated Volvo developed the program to enhance customer satisfaction. Exhibits R-212 and R-213 set out the purpose of the integrated programs. The

point is to enhance Volvo's standing as a luxury brand. Exhibit R-212 best summarizes the purpose:

- Financially Strong, Exclusive Retailers
 - 150,000 vehicles sales by 2020
 - 3% ROS by 2020
- Enhanced Brand Image & Representation
 - Right Retailer
 - In the right location
 - VRE/VNF Compliant Facilities
- Delivering An Exceptional Customer Experience
 - Top 5 in JD Power by the end of 16'
 - Top 3 in JD Power by the end of 19'

As SOAH found in the *Autobahn* matter, the program does not discriminate:⁷

The ALJs have previously addressed the interpretation of Code§ 2301.468, so they will not do so again here. As noted previously, the ALJs conclude that this statute prohibits the application of a formula only if it also results in the unfair or inequitable treatment of a dealer. It is not enough that dealers, based upon their performance, may see different results. Rather, it must be shown that the different results are the result of unfairness or inequity from the application of the formula—either in the way it is applied or the way it is designed.

The ALJs find no such unfairness or inequity in the CSI or SSI surveys, the way they are used, or the way bonuses are given based upon them. All dealers are subject to the exact same survey questions, answer values, and measurement standard. Autobahn's general manager recognized that there is no discrimination in the implementation of the CSI and SSI standards, when he testified unequivocally that all Volvo dealers were equally subjected to the CSI and SSI program's requirements. All dealers have the opportunity to earn the bonus, as the bonus floor is tied to the dealer average responses to the CSI and SSI surveys. While using an average as a floor can at times be unfair, it is not always so. When the average is based upon a finite measurement that every dealer can achieve, it is not inherently unfair. For example, every dealer has the ability to earn a top box answer on every question on the CSI and SSI surveys. Any dealer that is able to do so on all of their surveys will always get a bonus. The dealer average only becomes relevant when dealers do not get top box scores on all survey answers.

REQUESTED RELIEF

Accordingly, Respondent requests that its exception be sustained and the PFD amended as suggested herein.

⁷ *Autobahn*, pp.26-27.

Respectfully submitted,

AKERMAN LLP

By: /s/ Brit T. Brown

Brit T. Brown

Texas Bar No. 03094550

brit.brown@akerman.com

Benjamin A. Escobar, Jr.

Texas Bar No. 00787440

benjamin.escobar@akerman.com

1300 Post Oak Blvd., Suite 2500

Houston, Texas 77056-3000

Telephone: (713) 623-0887

Facsimile: (713) 960-1527

**ATTORNEYS FOR RESPONDENT,
VOLVO CARS OF NORTH AMERICA, LLC**

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of May 2019, a true and correct copy of this instrument is being served via email on Protestant's counsel:

Wm. David Coffey, III
Martin Alaniz
COFFEY & ALANIZ, PLLC
13810 FM 1826
Austin, Texas 78737

/s/Brit T. Brown

Brit T. Brown

SOAH DOCKET NO. 608-16-4676.LIC
MVD DOCKET NO. 16-0018 LIC

**STAR HOUSTON, INC. d/b/a
STAR MOTOR CARS
Complainant,**

V.

**VOLVO CARS OF NORTH AMERICA,
LLC,**

Respondent.

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**BEFORE THE STATE OFFICE**

**OF**

## ADMINISTRATIVE HEARINGS

## **COMPLAINANT STAR MOTOR CARS' REPLY TO RESPONDENT VOLVO'S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES AND THE BOARD MEMBERS  
OF THE TxDMV:

COMES NOW, Complainant Star Houston, Inc. d/b/a Star Motor Cars (“Star”), and pursuant to 1 Tex. Admin. Code § 155.507, respectfully submits its Reply to Respondent Volvo Cars of North America, LLC’s (“Volvo”) Exceptions to the Proposal for Decision, filed on May 14, 2019, and in support thereof would show the SOAH ALJs and TxDMV Board as follows:

## I. INTRODUCTION

The Proposal for Decision (“PFD”), issued on April 2, 2019, correctly found that Volvo’s CSI/SSI bonus programs, amounting to 2% margin payments, violated Tex. Occ. Code §§ 2301.467(a)(1) and 2301.468.<sup>1</sup> As noted in Star’s Exceptions, Star maintains that the PFD did not go far enough since it contained no findings that the CSI/SSI bonus programs also violated Tex. Occ. Code §§ 2301.467(a)(2), 2301.476, and 2301.478(b).<sup>2</sup>

Volvo excepted to Findings of Fact 230, 231, 232, 234, and 235, and Conclusions of Law 19 and 20. Those excepted findings of fact and conclusions of law should be retained and adopted by the TxDMV Board for the reasons set forth below.

<sup>1</sup> Neither party excepted to the PFD's determination of the application of the current 2011 version of the statute.

<sup>2</sup> See Star's Exceptions to the Proposal for Decision, filed on May 14, 2019, pp. 34-42.



## **II. APPLICABLE LAW**

### **A. Tex. Gov't Code § 2001.058(e)**

The Texas Administrative Procedure Act (“APA”) Tex. Gov't Code § 2001.058(e) provides the three ways that an agency may change an ALJ's finding of fact or conclusion of law, or may modify or vacate an ALJ's order. None of those circumstances are presented by Volvo in its Exceptions.

Tex. Gov't Code § 2001.058(e) provides as follows:

(e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:

- (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under section (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.<sup>3</sup>

### **B. Tex. Occ. Code § 2301.467(a)(1) – Unreasonable Sales and Service Standards**

In Conclusion of Law 19, the PFD found that Volvo's CSI/SSI bonus programs violated Tex. Occ. Code § 2301.467(a)(1), Prohibitions: Sales Standards, Relocations, Facility Changes, Purchase of Equipment, which provides, in pertinent part, as follows:

(a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not:

- (1) require adherence to unreasonable sales or service standards; ....<sup>4</sup>

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<sup>3</sup> Tex. Gov't Code § 2001.058(e).

<sup>4</sup> Tex. Occ. Code § 2301.467(a).

### **C. Tex. Occ. Code § 2301.468 – Inequitable Treatment of Dealers**

In Conclusion of Law 20, the PFD found that Volvo's CSI/SSI bonus programs violated Tex. Occ. Code § 2301.468, Inequitable Treatment of Dealers or Franchisees (2011), which provides as follows:

Notwithstanding the terms of a franchise, a manufacturer, distributor, or representative may not treat franchised dealers of the same line-make differently as a result of the application of a formula or other computation or process intended to gauge the performance of a dealership **or**<sup>5</sup>

otherwise enforce standards or guidelines applicable to its franchised dealers in the sale of motor vehicles if, in the application of the standards or guidelines, the franchised dealers are treated **unfairly or inequitably** in the sale of a motor vehicle owned by the manufacturer or distributor.<sup>6</sup>

### **III. ARGUMENT**

The PFD's Findings of Fact 230, 231, 232, 234, and 235, and Conclusions of Law 19 and 20 should be adopted by the TxDMV Board because Volvo's Exceptions do not meet the standards under Tex. Gov't Code § 2001.058(e) to change a finding of fact or conclusion of law.

Complying with Volvo's "Service CSI" (Service Customer Satisfaction Index) program requirements amounts to a 1.0% margin price reduction on the cost of new Volvo vehicles purchased by the dealer. Complying with Volvo's "Sales SSI" (Sales Satisfaction Index) program requirements amounts to a 1.0% margin price reduction on the cost of new Volvo vehicles purchased by the dealer.

In order to qualify for the total 2% CSI and SSI bonus payments from Volvo, a dealer must meet certain CSI/SSI targets, or final objectives, set by Volvo. The final objectives are

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<sup>5</sup> The disjunctive "or" sets out two prohibitions in the 2011 version, similar to subsections (1) and (2) in the 2003 version.

<sup>6</sup> Tex. Occ. C. § 2301.468 (2011) (emphasis added). Star does not except to the PFD's finding that the 2011 version of the statute applies. PFD, p. 7.

based upon the National 12-month rolling averages for CSI and SSI during a prior time period.<sup>7</sup>

For the most part, these targets have continued to increase over time.<sup>8</sup> The data also demonstrates that the national Volvo dealers attempting to qualify for the 2% bonus payments are pushing up the targets that must be met in order to qualify for the bonus payments in the next period.

For Volvo dealers who comply with all aspects of the Retailer Bonus Program, the 8% backend margin bonus would amount to a \$4,000 discount on a vehicle with a \$50,000 MSRP wholesaled to dealers at \$47,000. That \$4,000 discount would result in an effective discounted wholesale price to dealers of \$43,000, with the 2% CSI/SSI margin portion equating to \$1,000 of that \$4,000 wholesale discount to qualifying dealers. With low average profitability per new vehicle retailed,<sup>9</sup> it stands to reason why the economic advantages and disadvantages of Volvo's incentive programs are essential to profitability. Therefore, the 2% CSI/SSI price discount which equals \$1,000 on a vehicle with a \$50,000 MSRP can make a substantial difference between gross profit or a loss on a vehicle sold in a competitive market.

Additionally, the 2% margin discount for CSI/SSI which is tied to the price of wholesaled vehicles is substantial considering that at its November 28, 2017, Volvo National Dealer Meeting, Volvo Car USA's President and CEO, Mr. Anders Gustafsson, stated that nationally, the average profitability for Volvo retailers in the US was 1.5-1.6%.<sup>10</sup>

Volvo's CSI/SSI bonus programs are not reliable because the customer satisfaction scores do not accurately measure a customer's true satisfaction or not with the retail experience.

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<sup>7</sup> See e.g., Ex. P-84, setting the July 2017 targets, "Final objectives were established based upon the June 2016 month-end National 12 Month Rolling averages for CSI and SSI."; See also Ex. R-64, p. 13 ¶ 34 (Lytle Rebuttal Report).

<sup>8</sup> See Ex. P-86 (2016 data), P-63 (2017 data), P-162 and P-209 (2018 data).

<sup>9</sup> Exs. P-169-P-174 (December 2013 YTD: \$392, December 2014 YTD: \$395, December 2015 YTD: \$1,454, December 2016 YTD: \$1,767, December 2017 YTD: \$1489, and March 2018 YTD: \$1584).

<sup>10</sup> Ex. P-164, p. 3, Rog # 26; That statistic is the average profit of Volvo exclusive stores calculated using the financial statements submitted by franchised dealers. *Id.*

The programs suffer from many technical challenges including, sampling error,<sup>11</sup> non-response bias,<sup>12</sup> top box scoring,<sup>13</sup> dealer influence,<sup>14</sup> and scale compression,<sup>15</sup> which were fully discussed in Star's Closing Brief.<sup>16</sup> Additionally, the fact that CSI and SSI scores were used as evidence weighing in favor of termination is an unreasonable use of the scores.

Many of Volvo's arguments defending its CSI/SSI bonus programs relate only to its arguments for justifying termination, not whether the programs are lawful or not under the Texas Occupations Code.

**A. Star is Being Terminated, In Part, As a Result of Its Performance Under an Unlawful Program**

In its Exceptions, Volvo claims that its CSI/SSI methodology is lawful and violates no statutes. Star challenges that position and urges the following:

One reason that the CSI/SSI program is unlawful is because it discriminates inequitably between dealers with new, brand compliant, facilities and those without. Volvo's witness, Mr. De Winne's testimony reveals this bias and its adverse effect on Star Motor Cars. First, Mr. De Winne testified that Mr. Klipstein used CSI to terminate Star Motor Cars.<sup>17</sup> By admission, then, Star is being terminated, in part, as a result of its performance under an unlawful program. Since we don't know how much of Volvo's decision was driven by Star's CSI/SSI scores, this alone must invalidate the termination. No dealer should be terminated based to any degree on the scores from an unlawful program.

According to Mr. De Winne, the enabler questions as reflected at Exs. R-78 and R-79

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<sup>11</sup> Ex. P-155, p. 53 ¶ 59 (Stockton Report); Tr. at 1081:17-1082:14 (Stockton).

<sup>12</sup> Ex. P-155, pp. 23-25 ¶¶ 60-62; Tr. at 1082:15-1083:17 (Stockton).

<sup>13</sup> Ex. P-155, pp. 25-26 ¶¶ 63-64; Tr. at 1083:18-1085:23 (Stockton).

<sup>14</sup> Ex. P-155, p. 26 ¶ 65; Tr. at 1085:24-1087:2 (Stockton).

<sup>15</sup> Ex. P-155, p. 27 ¶ 66; Tr. at 1087:3-1088:23 (Stockton).

<sup>16</sup> Star's Closing Brief, pp. 117-118.

<sup>17</sup> Tr. at 423:6-21 (De Winne).

drive the CSI scores.<sup>18</sup> Volvo formulates these questions and provides them to the data manager, Maritz.<sup>19</sup> There has been no showing that Volvo has the expertise to promulgate survey questions which accurately reflect the consumer's satisfaction with the retail experience.

Mr. De Winne also testified that Volvo employs a top box methodology. The top box score equals 9 or 10 (or a 5 on a 5-point scale). Anything less than 9 or 10 contribute zero to the average. Zeros, therefore, pull down the average immensely.<sup>20</sup> This in itself shows a clear intent to penalize those without a new facility and reward those with a new facility. This is the discrimination that violates Tex. Occ. Code §§ 2301.467 and 2301.468. While Mr. De Winne denies it, the scores are obviously heavily weighted towards rewarding a new facility because only a new facility gets you a 9 or 10 in the facility questions.<sup>21</sup>

If the effect of the surveys were to accurately measure the consumers' satisfaction with the service experience, for example, as opposed to the service facility, then Star should have high CSI scores because the ALJs have found the quality of Star's service to be good.<sup>22</sup> Yet, Star receives almost no CSI bonus money. This is consistent with the top box scoring methodology emphasis on facility as opposed to quality of service.

Volvo's purpose, then, is not to obtain an accurate consumer opinion of the quality of the service experience. The purpose, instead, is to create two classes of dealers. The first class builds new facilities, obtains the top enabler scores and thus the top bonuses. This class prospers. The second class does not build a new facility, does not obtain the top scores, nor the top bonuses. This class does not prosper. The result, Volvo obtains new facilities from its dealers.

Mr. De Winne opined that Star would have a "very hard time" getting a top box score on

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<sup>18</sup> Tr. at 339:25-440:19 (De Winne).

<sup>19</sup> Tr. at 439:19-24 (De Winne).

<sup>20</sup> Tr. at 441:7-442:5 (De Winne).

<sup>21</sup> Tr. at 442:6-14 (De Winne).

<sup>22</sup> PFD, FFs 72 and 73, p. 120.

its facility.<sup>23</sup> The effect of this is demonstrated in Exs. P-166 – P-168 which shows the vast disparity in CSI/SSI dollars between Star, without a new facility, and the rest of the Houston dealers with new facilities. The harm to Star from the CSI/SSI program is obvious from these exhibits.

As noted by SOAH itself, Volvo began using CSI/SSI scores to determine bonuses in July 2016.<sup>24</sup> Bonus data exists in the record from July 2016 through April 2018.

One can tell from Exhibits P-166, P-167, and P-168 that in 2016, Star earned zero dollars in CSI/SSI as compared to \$94,820, \$72,842, \$73,690 and \$10,293 for the other four Houston dealers. In 2017 the pattern was the same. Star earned \$18,746, while other Houston dealers earned \$319,359, \$258,302, \$204,188 and \$105,809 dollars. In 2018 through April, Star earned zero dollars compared to \$94,044.50, \$77,281, \$68,510 and \$51,505.50.

It's apparent from Exhibits P-166 – P-168 that between July 2016 and April 2018 there was a vast disparity between what Star was able to earn under CSI/SSI and what the other Houston dealers were able to earn under the bonus programs due to their new facilities.

SOAH, itself found that this disparity in CSI scores and thus bonuses was largely due to Star's facility.<sup>25</sup> "The scores on the other three enabler questions [not related to facility] were often at or above the national average, but because the overall CSI score represents an average of the four enabler questions, the very low scores on the first question [the facility] dragged down the overall average, making it so that Star did not qualify to earn the CSI bonus even once between July 2017 and August 2018."<sup>26</sup>

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<sup>23</sup> Tr. at 443:2-4 (De Winne).

<sup>24</sup> PFD, p. 108.

<sup>25</sup> *Id.* at p. 82.

<sup>26</sup> *Id.* at pp. 34-35.

In summary, then, Star urges the SOAH to reject Volvo's requested changes to the PFD's proposed Findings of Fact and Conclusions of Law on CSI/SSI and instead add the following Findings and Conclusions and proposed ordering paragraphs:

|                           |                                                                                                                                                                                                                                                                                                                                                   |
|---------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| FF                        | Volvo moved to terminate Star Motor Cars, in part, because of its CSI and SSI scores.                                                                                                                                                                                                                                                             |
| C/L                       | The use of Volvo's top box scoring, with its emphasis on rewarding new image compliant dealerships with bonuses and punishing non-compliant dealerships with lesser or zero bonuses, violates Tex. Occ. C. § 2301.468 by treating franchised dealers differently and inequitably via a process intended to judge the performance of a dealership. |
| FF                        | Star's termination is invalidated since some percentage of Volvo's good cause burden was purportedly satisfied by scores from an unlawful program.                                                                                                                                                                                                |
| Proposed Order Paragraphs | <p>It shall henceforth be unlawful to use CSI/SSI scores from Volvo's top box methodology as a ground for termination of a dealer's franchise.</p> <p>It shall henceforth be unlawful for Volvo to use its top box scoring methodology with which to award or deny bonuses to dealers.</p>                                                        |

#### **B. Response to Volvo's Exceptions to Conclusion of Law 19 – § 2301.467(a)(1)**

The PFD properly held in Conclusion of Law 19 that "The CSI/SSI bonus programs violate Code § 2301.467(a)(1)."<sup>27</sup> Volvo's Exceptions to Conclusion of Law 19 and the referenced Findings of Fact 230 and 231 should be rejected for the reasons discussed below.

##### **1. Finding of Fact 230**

- **FF 230.** Volvo requires its dealers to adhere to certain sales and service standards by rewarding dealers on the basis of the limited CSI/SSI survey results.

This finding of fact is accurate. Volvo argues that its CSI/SSI bonus programs do "not require dealers to do anything."<sup>28</sup> To the contrary, the PFD disagrees and states that:

<sup>27</sup> *Id.*, at p. 136.

<sup>28</sup> Volvo Exceptions, p. 3.

Although standards are not expressly set out, the CSI/SSI bonus programs were established to determine, and reward, customer satisfaction in the areas of sales and service performance. Sales and service are not optional endeavors for a car dealership...Every dealer must provide, or attempt to provide, the essential functions of vehicle sales and service. Volvo measures all dealers on their alleged performance, and the standards are set by the survey results. Dealers are rewarded or not on the basis of those limited survey results.<sup>29</sup>

Volvo also argues that “If this conduct is required, it is not Volvo doing the requiring – the market, the consumer and the competitor requires our dealers to enhance customer focus and experience.”<sup>30</sup> The program was created and implemented by Volvo, so any conduct required to comply with the program is directly Volvo’s requirement and not that of the market.

Volvo claims that it just wants to incentivize good practices and that the magnitude of the CSI/SSI bonus is small relative to the total expenditures a dealership must make.<sup>31</sup> This is an artificial standard. However, the magnitude of the bonus under the program exceeds the entirety of benefit, gross profit, that the dealership achieves on the sale of new Volvos through its other investments. Specifically, the swings in Star’s CSI and SSI scores exceed the variation that could actually exist in true customer satisfaction. Therefore, the scores do not measure customer satisfaction.

Top Box scoring, since it ignores variation in customer responses, cannot necessarily measure true customer satisfaction. While customers may place different weight upon the attractiveness of a facility, and customers may indeed consider the attractiveness in choosing a facility, the surveys are necessarily self-selected, since they must follow customers’ choices of which Volvo dealership to visit. Weighting half the survey on facility top box questions double-counts the importance, if any, of facility on customer satisfaction.

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<sup>29</sup> PFD, p. 108.

<sup>30</sup> Volvo Exceptions, p. 3.

<sup>31</sup> *Id.* at pp. 3-4.



## 2. Finding of Fact 231

- **FF 231.** Although there was no quantitative analysis, the evidence presented in the case shows that the CSI/SSI sales and service bonus standards are unreasonable because the surveys themselves and the use of four questions and top-box scoring do not necessarily measure actual customer sales and service satisfaction.

Both Service CSI and Sales SSI are computed based upon customer answers to 4 Enabler Questions in surveys designed to gauge the customer's satisfaction with the vehicle service rendered / sales experience, respectively. If the dealer meets the highest level of the responses for those 4 Enabler Questions which meet certain percentage targets set by Volvo, then Volvo will pay the 1% margin price reduction off MSRP for each component, for a total possible 2%.

Volvo states in its Exceptions that "The threshold question is whether the surveys are an embodiment of unreasonable sales and service standards."<sup>32</sup> One of Star's main disputes as to reasonableness of the requirement is that they are not mandated by the franchise agreement. A dealer should have the option to make its own business decisions as to customer service.

Volvo argued that "The survey[]s accurately track customer satisfaction..." yet provided no citation to any evidence that the surveys actually track true customer satisfaction.<sup>33</sup> Star's expert, Mr. Stockton, addressed the technical challenges to substantiating the analytical link between using Volvo's CSI/SSI scores to determine true customer satisfaction.

The record data clearly showed variation in Star's CSI/SSI scores that simply could not be explained by changes in customer satisfaction. At the hearing, Mr. Stockton discussed some egregious examples that demonstrate the unreliability of CSI and SSI scores in Ex. R-75.<sup>34</sup> The 12-month rolling CSI/SSI scores in Ex. R-75 were logically impossible. For SSI, from March

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<sup>32</sup> *Id.* at p. 5.

<sup>33</sup> *Id.*

<sup>34</sup> Tr. at 1089:20-1092:12 (Stockton).

2016 to April 2016, Star's score jumped 21 points from 56.2 to 77.5.<sup>35</sup> Mr. Stockton explained the ramification of this jump as follows:

So what we're looking at here is a 21.3 percentage point jump. So that literally could not be 1/12th of the difference between two scores. So what it's really saying is that in the prior month we say your average over this 12-month period was 56, and then the very next month the 77 supersedes the 56 that would have existed in 11 of those months. So what it means is that ... they couldn't reflect the actual yearly customer satisfaction for Star. What it means is that they are so dependent and sensitive to the inputs of the surveys themselves that there is wild sampling error, insufficient sample size, distortions. I don't have enough data to diagnose exactly what's under these scores, but one thing I do know is that they do not and can't reliably measure customer satisfaction.<sup>36</sup>

For CSI, from February 2017 to March 2017 to April 2017, Star's score jumped 12 points.<sup>37</sup> Mr. Stockton explained the ramification of this 12 point jump as follows:

[I]t's not as dramatic as a 21-point swing, but it may be more disturbing because there are a lot more service customers for a given dealership than there are sales customers. So you would expect a much more constant flow of surveys. So when you see a six-point jump, even though it looks smaller given what we just looked at, that would still imply a 72-point change between the monthly score that went into the system than the one that went out of the system. Six points would be 1/12th of 72 points, which is really just -- that would be a shock. And then to have two months changing by six points each month suggests, again, grossly inadequate sample sizes or other problems connecting the actual data to the conclusions drawn from it.

These examples alone demonstrate that the scores generated are unreliable and there was no disagreement between experts about the statistical problems enumerated. There was also no disagreement that top box scoring provides a binary score to a non-binary response. Therefore, the data itself establishes the unreliability and technical challenges to substantiating the analytical link between using customer satisfaction scores and true customer satisfaction.

The PFD discussed this testimony and stated:

As Mr. Stockton testified, CSI/SSI survey responses to four out of 25 questions are

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<sup>35</sup> Ex. R-75.

<sup>36</sup> Tr. at 1091:2-17 (Stockton).

<sup>37</sup> Ex. R-75.

not necessarily representative of true customer satisfaction. Moreover, small differences in averages do not necessarily imply a significant difference in customer handling performance. Under Volvo's "top-box" scoring system, a score of "9" on a question would presumably help a dealer achieve a CSI/SSI bonus, while a score of "8" would count as a zero and would seriously disadvantage a dealer. Mr. Stockton testified that the surveys, as constructed and used by Volvo, include an "inherently excessive margin for error."<sup>38</sup>

Volvo also argues that "Mr. Stockton's testimony was conclusory and insufficient to support Star's complaint."<sup>39</sup> But, as also pointed out in the PFD:

Mr. Lytle agreed, however, that the statistical issues identified by Mr. Stockton, such as sampling error and non-response bias, are relevant in any survey. Mr. Lytle also agreed that a below-average survey score does not necessarily indicate a failure to handle customer responsibilities."<sup>40</sup>

The PFD went on to conclude that "...the evidence presented in the case shows that those standards are unreasonable because the surveys themselves and the use of four questions and top-box scoring do not necessarily measure actual customer sales and service satisfaction."<sup>41</sup>

### 3. CL 19 – The CSI/SSI bonus programs Violate Code § 2301.467(a)(1)

In Conclusion of Law 19, the PFD found that "The CSI/SSI bonus programs violate Code § 2301.467(a)(1)."<sup>42</sup>

Volvo attempts to rely upon the dismissed *Autobahn* PFD for its exceptions for the interpretation of "adherence."<sup>43</sup> First, the PFD addressed the dismissed *Autobahn* PFD and stated:

On March 12, 2019, however, Autobahn gave notice that the case had settled and that it wished to dismiss the matter with prejudice. Therefore, no substantive final order will be issued by the Department and *Autobahn* does not provide any agency precedent applicable to this case.<sup>44</sup>

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<sup>38</sup> PFD, p. 109.

<sup>39</sup> Volvo Exceptions, p. 8.

<sup>40</sup> PFD, p. 109.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at p. 136.

<sup>43</sup> Volvo's Exceptions, pp. 10-11.

<sup>44</sup> PFD, p. 102.

Additionally, Volvo's "adherence" position is expressly refuted by Star Motor Cars' experience with the program requirements and its pending termination case. The CSI and SSI scores are being used as grounds for termination. Volvo, on one hand, purported to terminate Star based, in part, on Star's CSI/SSI scores. On the other hand, Volvo claims that the program does not require adherence to a standard.

Volvo also argues that "Volvo does not require anything."<sup>45</sup> What Volvo fails to mention is that these bonuses are tied to vehicles wholesaled from Volvo and are often used in the retail sale to a customer.

These are sales and service standards, to be sure, since in order to achieve the CSI and SSI bonuses, dealers are required to follow certain sales and service standards that they are judged upon, such as, enabler questions "S12 Explanation of features and controls," and "S13 Retailer follow-up after delivery." Those are imposed standards for every retail sale, reasonable, or not.

Volvo's CSI and SSI scoring system is based on being above a previous average.<sup>46</sup> The use of "averages" is one of the types of "unreasonable sales or service standards" cited in the legislative history by the chairman of the subcommittee which added Tex. Occ. Code § 2301.467(a)(1) to the Code as expressed in the following certified statement:

It was the opinion of the subcommittee that it is not in the interest of either party to the transaction to allow a franchisor to require a franchisee adhere to "unreasonable sales or service standards." An example of the kind of requirements that triggered this amendment is the requirement by one manufacturer that every franchisee be "above average" in certain sales categories.<sup>47</sup>

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<sup>45</sup> Volvo's Exceptions, p. 10.

<sup>46</sup> See e.g., Ex. P-84, setting the July 2017 targets, "Final objectives were established based upon the June 2016 month-end National 12 Month Rolling averages for CSI and SSI."; See also Ex. R-64, p. 13 ¶34 (Lytle Reb. Report).

<sup>47</sup> Appendix Item D to Star's Closing Brief, Attachment 1, p. 5 to TADA Amicus Curiae Memorandum in Support of Autobahn Imports, LP's Motion for Summary Disposition, dated September 30, 2016, in *Autobahn Imports, LP d/b/a Autobahn Volvo v. Volvo Cars of North America, LLC*, SOAH Docket No. 608-16-4053.LIC.

Another reason that Volvo's CSI and SSI scoring is not reasonable is due to its technical challenges including, sampling error,<sup>48</sup> non-response bias,<sup>49</sup> top box scoring,<sup>50</sup> dealer influence,<sup>51</sup> and scale compression,<sup>52</sup> which were fully discussed in Mr. Stockton's expert report and testimony.

Volvo's own documents show wild swings in Star's 12-month CSI and SSI scores, which exceed the changes, even extreme changes, that could actually occur if Volvo's system captured Star's true customer satisfaction levels.<sup>53</sup> It is patently unreasonable to tether 2% of Star's new vehicle cost, a number greater than the entire gross profit margins achieved by Volvo dealerships outside of the bonus programs, to numbers that simply cannot capture Star's true customer satisfaction performance.

### **C. Response to Volvo's Exceptions to Conclusion of Law 20 – § 2301.468**

The PFD properly held in Conclusion of Law 20 that "The CSI/SSI bonus programs violate Code § 2301.468."<sup>54</sup> Volvo's Exceptions to Conclusion of Law 20 and the referenced Findings of Fact 232, 234, and 235 should be rejected for the reasons discussed below.

#### **1. Finding of Fact 232**

- **FF 232.** The CSI/SSI bonus programs are a computation or process intended to gauge the performance of a dealership.

The CSI and SSI components qualify as "the application of a formula or other computation or process intended to gauge the performance of a dealership" under Tex. Occ. Code § 2301.468(1). Volvo argues that "Customer focus is the intent, not the gauging of dealer

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<sup>48</sup> Ex. P-155, p. 53 ¶ 59 (Stockton Report); Tr. at 1081:17-1082:14 (Stockton).

<sup>49</sup> Ex. P-155, pp. 23-25 ¶¶ 60-62; Tr. at 1082:15-1083:17 (Stockton).

<sup>50</sup> Ex. P-155, pp. 25-26 ¶¶ 63-64; Tr. at 1083:18-1085:23 (Stockton).

<sup>51</sup> Ex. P-155, p. 26 ¶ 65; Tr. at 1085:24-1087:2 (Stockton).

<sup>52</sup> Ex. P-155, p. 27 ¶ 66; Tr. at 1087:3-1088:23 (Stockton).

<sup>53</sup> See Ex. R-75; Tr. at 1089:20-1092:12 (Stockton).

<sup>54</sup> PFD, p. 136.

performance.”<sup>55</sup> Volvo’s subjective intent does not affect whether the program gauges the performance of a dealer.

The PFD’s conclusion is supported by the *Lincoln Premiere* case, where the Board held, “It is found that the use of the customer viewpoint survey, or VOC scores, by Ford amounts to the use of a formula or other standard by which the manufacturer intends to gauge the performance of Lincoln dealers.”<sup>56</sup>

The formula can be noted as “Dealer Percentage of Best Score Top-Box Answers  $\geq$  12-month Rolling National Average.” The different treatment is based on the receipt of the bonus payments for qualifying dealers.

Under Tex. Occ. Code § 2301.467(a)(1), the legislature’s intent is encapsulated by the chairman of the subcommittee who added this provision to the Code in the following certified statement:

It was the opinion of the subcommittee that it is not in the interest of either party to the transaction to allow a franchisor to require a franchisee adhere to “unreasonable sales or service standards.” An example of the kind of requirements that triggered this amendment is the requirement by one manufacturer that every franchisee be “above average” in certain sales categories.<sup>57</sup>

Volvo’s CSI and SSI scoring system is based on being above a previous average. Additionally, the fact that Volvo may be alleging that CSI and SSI are grounds for termination, are another factor to consider in Volvo’s unreasonable use of the scores.

Even Volvo agrees that, “...looking at the Volvo CSI / SSI programs in isolation might give the appearance that these programs gauge the performance of a dealership.”<sup>58</sup>

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<sup>55</sup> Volvo’s Exceptions, p. 7.

<sup>56</sup> *Lincoln Premiere* PFD, p. 57, Appendix Item O to Star’s Closing, filed on December 10, 2018.

<sup>57</sup> Appendix Item D to Star’s Closing, Attachment 1, p. 5 to TADA Amicus Curiae Memorandum in Support of Autobahn Imports, LP’s Motion for Summary Disposition, dated September 30, 2016, in *Autobahn Imports, LP d/b/a Autobahn Volvo v. Volvo Cars of North America, LLC*, SOAH Docket No. 608-16-4053.LIC.

<sup>58</sup> Volvo’s Exceptions, p. 7.

The PFD stated, “Although Mr. Lytle stated the programs instead were intended to ‘gauge the ability of Star to satisfy customers,’ the programs are designed to gauge dealerships’ performance in that aspect of their business.”<sup>59</sup>

2. Finding of Fact 234

- **FF 234.** Lower-volume dealers are at an inherent disadvantage in the survey process.

Volvo argues that “Star’s problem is not a sampling error.”<sup>60</sup> In fact, due to sample size error alone, based on Star’s sales volume, if Star gets one bad facility survey, its makes qualifying for the bonus payments are almost impossible.

The PFD pointed out that “Mr. Stockton also testified that lower-volume dealers are at an inherent disadvantage in the survey process.”<sup>61</sup> The ALJs find that testimony persuasive.<sup>62</sup>

Volvo’s proposed revision to Finding of Fact 234 stating that “lower-volume dealers are under no inherent disadvantage in the survey process...” is contradicted by the evidence. The swings identified in Star’s scores demonstrate sampling error and non-response bias showing that there is a scoring disadvantage for lower-volume dealers like Star.

Volvo also argued that “The presented evidence clearly shows that the national averages were reasonable and fair [because] [t]hese averages are applied to every dealer in the same manner.”<sup>63</sup> But Star’s surveys, as a lower-volume dealer, are not applied in the same way since Star’s scores are compared to the national average, but are subject to wild variation and disturbances in the scores. Therefore, Star is being treated differently than other dealers.

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<sup>59</sup> PFD, p. 110.

<sup>60</sup> Volvo’s Exceptions, p. 8.

<sup>61</sup> PFD, p. 110.

<sup>62</sup> *Id.*

<sup>63</sup> Volvo Exceptions, p. 8.

### 3. Finding of Fact 235

- **FF 235.** The use of only four questions and the top-box scoring of those questions is likely to discriminate against dealers on the basis of volume of sales.

Volvo argues that, “Top box scoring causes no statistical flaws or discrimination on the basis of volume.”<sup>64</sup> In fact, Star demonstrated that the Top Box scoring calculation discriminates against older facilities such as Star’s, virtually assuring that no dealer with an older facility can achieve the CSI/SSI bonus. The PFD put it best when it stated, “As Mr. Bunch phrased it, if he gets one bad review out of six or ten, his CSI score is ‘sunk.’”<sup>65</sup> Volvo agrees with this point when it stated, “The PFD correctly cites to Mr. Rodney Bunch’s hearing testimony that one bad review could hurt his CSI score.”<sup>66</sup> The fact that a dealer could have more surveys and they still be unfavorable is beside the point as discrimination has already been established.

### 4. CL 20 – The CSI/SSI bonus programs violate Code § 2301.468

In Conclusion of Law 20, the PFD found that “The CSI/SSI bonus programs violate Code § 2301.468.”<sup>67</sup> The PFD found that “the use of only four questions and the top-box scoring of those questions is likely to discriminate against dealers on the basis of volume of sales.”<sup>68</sup>

Volvo again argues that Volvo’s CSI/SSI bonus programs do not discriminate based on the dismissed PFD in *Autobahn*.<sup>69</sup> In addition to the PFD finding that the *Autobahn* PFD “does not provide any agency precedent applicable to this case,” the idea that the same incentive program applies to all dealers does not prevent the program from being discriminatory. With such a narrow definition of discrimination asserted by Volvo, it begs that question, what type of

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<sup>64</sup> *Id.* at p. 9.

<sup>65</sup> PFD, p. 110.

<sup>66</sup> Volvo’s Exceptions, p. 9.

<sup>67</sup> PFD, p. 136.

<sup>68</sup> *Id.* at p. 110.

<sup>69</sup> Volvo’s Exceptions, p. 12.



incentive program Volvo believes would constitute discrimination under this statute. The agency should not nullify the statute in a manner that makes it inapplicable to the types of unreasonable sales and service standards it was created to prevent.

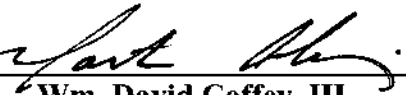
As previously discussed, Volvo has also structured its enabler questions as to make it virtually impossible for a dealer without a VRE facility to get the “truly exceptional” answers necessary to achieve the 2% CSI/SSI bonuses, making the impact of not having a new facility upwards of 6% of margin. This is also unreasonable. Volvo uses the leverage of uncompetitiveness to force dealers to build facilities which they are not contractually obligated to build. That is unreasonable, and for those dealers who are unable to build for whatever reason, it is discriminatory and, thus, unlawful. It is unreasonable on its face to measure Star’s customer interactions within its facility based upon facility-driven scores that simply cannot be changed within the time frame of the program.

#### **IV. CONCLUSION**

Accordingly, Star requests that Respondent’s Exceptions be denied, its proposed alternate Findings of Fact and Conclusions of Law be rejected, and that the Proposal for Decision’s Findings of Fact 230, 231, 232, 234, and 235, and Conclusions of Law 19 and 20 be adopted by the TxDMV Board in conjunction with the findings, conclusions, and proposed ordering paragraphs referenced herein on page 8 and the Proposed Recommended Final Order in Appendix B to Star’s Exceptions filed on May 14, 2019.

Respectfully submitted,

COFFEY & ALANIZ, PLLC

By:   
**Wm. David Coffey, III**  
State Bar No. 04489700  
**Martin Alaniz**  
State Bar No. 24059367

13810 FM 1826

Austin, TX 78737

Telephone: (512) 328-6612

Facsimile: (512) 328-7523

Email: wdcoffeylaw@yahoo.com

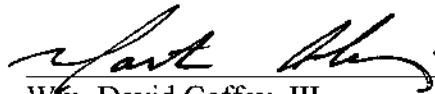
ATTORNEYS FOR COMPLAINANT  
STAR MOTOR CARS

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing document was served by Email and First-Class Mail on the following attorneys of record on the 7th day of June 2019.

Mr. Brit T. Brown  
Mr. Benjamin A. Escobar, Jr.  
Akerman LLP  
1300 Post Oak Blvd., Ste. 2500  
Houston, TX 77056  
*brit.brown@akerman.com*  
*benjamin.escobar@akerman.com*

**Attorneys for Respondent Volvo Cars of North America, LLC**

  
\_\_\_\_\_  
Wm. David Coffey, III  
Martin Alaniz

**SOAH DOCKET NO. 608-16-4676  
MVD DOCKET NO. 16-0018.LIC**

|                                       |          |                                |
|---------------------------------------|----------|--------------------------------|
| <b>STAR HOUSTON, INC., d/b/a STAR</b> | <b>§</b> | <b>BEFORE THE STATE OFFICE</b> |
| <b>MOTOR CARS,</b>                    | <b>§</b> |                                |
| <b>Protestant,</b>                    | <b>§</b> |                                |
|                                       | <b>§</b> |                                |
| <b>v.</b>                             | <b>§</b> | <b>OF</b>                      |
|                                       | <b>§</b> |                                |
| <b>VOLVO CARS OF NORTH AMERICA,</b>   | <b>§</b> |                                |
| <b>LLC,</b>                           | <b>§</b> |                                |
| <b>Respondent</b>                     | <b>§</b> | <b>ADMINISTRATIVE HEARINGS</b> |

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**RESPONDENT'S RESPONSE TO COMPLAINANT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

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**AKERMAN LLP**

Brit T. Brown  
Texas Bar No. 03094550  
[brit.brown@akerman.com](mailto:brit.brown@akerman.com)  
Benjamin A. Escobar, Jr.  
Texas Bar No. 00787440  
[benjamin.escobar@akerman.com](mailto:benjamin.escobar@akerman.com)  
1300 Post Oak Blvd., Suite 2500  
Houston, Texas 77056-3000  
Telephone: (713) 623-0887  
Facsimile: (713) 960-1527

**ATTORNEYS FOR RESPONDENT,  
VOLVO CAR USA, LLC**

## **TABLE OF CONTENTS**

|      |                                                                                                                                                                 |    |
|------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| I.   | Star’s claim of whistleblower status has no legal basis and is an equitable argument that merits no consideration under the Administrative Procedures Act. .... | 4  |
| A.   | A dealer can never have whistleblower status. ....                                                                                                              | 4  |
| B.   | The procedural record demonstrates that SOAH conducted the hearing fairly. ....                                                                                 | 5  |
| C.   | Star’s argument is equitable and an improper basis under the APA to modify the PFD. ....                                                                        | 5  |
| II.  | The franchise agreement includes a satisfaction clause, which is lawful under Texas law....                                                                     | 6  |
| A.   | SOAH’s determined that an objectively reasonable basis exists for VCUSA’s dissatisfaction is supported by substantial evidence. ....                            | 7  |
| 1.   | The supporting evidence comes from Star’s managers and objective performance measures. ....                                                                     | 7  |
| 2.   | VCUSA’s dissatisfaction with Star’s long-running substandard performance is objectively reasonable under Texas law. ....                                        | 12 |
| B.   | Star had no evidence to excuse its poor performance. ....                                                                                                       | 13 |
| 1.   | Star had no evidence showing the Houston market cannot support five dealers ....                                                                                | 13 |
| 2.   | The bonus programs did not cause Star’s problems. ....                                                                                                          | 13 |
| C.   | The Occupations Code’s “good cause” requirements prevent abuse of a satisfaction clause in franchise agreements. ....                                           | 14 |
| III. | SOAH correctly found good cause for termination. ....                                                                                                           | 15 |
| A.   | The Occupations Code provides a mandatory framework for evaluating whether a distributor has good cause to terminate a dealer. ....                             | 15 |
| B.   | Star’s challenge to the finding of good cause is a challenge to the factual sufficiency of the decision. ....                                                   | 16 |
| IV.  | The retailer bonus programs are lawful. ....                                                                                                                    | 17 |
| A.   | The programs are voluntary. ....                                                                                                                                | 17 |
| 1.   | Dealers may forego the investment required by the programs, but they also forego the bonus opportunities. ....                                                  | 18 |
| 2.   | Star provided no evidence of economic imperative depriving Star of its choice not to participate. ....                                                          | 19 |
| B.   | The programs do not unlawfully discriminate between dealers. ....                                                                                               | 19 |

Respondent, Volvo Car USA, LLC (“VCUSA”) presents this response to the Exceptions to Proposal for Decision (“Exceptions”) filed by Star Houston, Inc. (“Star”).

### **SUMMARY OF THE RESPONSE**

Star identified the standard the Board must apply to modify the Proposal for Decision (“PFD”). Under the standard, Star must show SOAH misapplied or misinterpreted the law. Instead of identifying errors of law, Star made two principal arguments: (1) the result is inequitable; and (2) the evidence was disputed, and SOAH should have made finding of fact and conclusions of law in Star’s favor.

Star’s equitable argument merits no consideration because equity is not a permitted ground to reject SOAH’s PFD. Moreover, the equitable argument is founded on baseless claims of favoritism for distributors and that SOAH found an egregious violation of the Occupations Code. The PFD cites extensive evidentiary support for finding good cause for termination and that the retailer incentive program played no role in Star’s terrible performance.

Under the Administrative Procedures Act (“APA”), the Board does not have the power to change findings to affect the parties’ rights because substantial evidence supports SOAH findings. Because reasonable minds could have made the same findings of fact and conclusions of law as the ALJs, the Board may not substitute its judgment for SOAH’s.

### **ARGUMENT**

The APA provides the legal principles that determine whether the Board may change SOAH’s findings:

A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:

(1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed;

(3) that a technical error in a finding of fact should be changed.

Tex. Gov't Code Ann. § 2001.058 (West). The standard presents an insurmountable obstacle to Star's request, which is nothing less than an appeal for a complete reversal of the PFD.

Star relies on subsection (e)(1). So, it must demonstrate SOAH misapplied or misinterpreted a law, rule, or written policy. The Exceptions, however, do not address the standard in the APA. Instead, Star complains about factual determinations in "a biased and one-sided PFD," setting up a futile factual challenge (Exceptions p. 2).

**I. Star's claim of whistleblower status has no legal basis and is an equitable argument that merits no consideration under the Administrative Procedures Act.**

Star's whistleblower claim is not a policy argument under the Occupations Code. As discussed below, the policy is protection of the distribution system for automobiles. Star's argument does not address the policy. Nor does Star have standing as a whistleblower because the Occupations Code recognizes no whistleblower claims. Star has concocted the argument to attack SOAH's integrity. Because it has no viable arguments on the merits, it attacked the decisionmaker.

**A. A dealer can never have whistleblower status.**

Texas common law does not recognize a status as a "whistleblower." *Wichita County, Tex. v. Hart*, 917 S.W.2d 779, 782 (Tex. 1996). Whistleblower status is conferred on government employees under the Government Code. *Id.*; Tex. Gov't Code Ann. § 554.002(a).<sup>1</sup> Star's whistleblower comparison is baseless. It is also illogical. Under Star's reasoning, every dealer

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<sup>1</sup> "A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." Tex. Gov't Code Ann. § 554.002(a).

alleging a violation of the Occupations Code could claim whistleblower status to immunize itself from a future adverse decision. Under Star's formulation, the party retaliating is not the distributor. Instead, it is the impartial agency charged with evaluating the claim of unlawful conduct.

**B. The procedural record demonstrates that SOAH conducted the hearing fairly.**

Star made serious accusations of impropriety with no evidence against the two ALJs who presided. The procedural record affirmatively disproves any retaliatory conduct. There is no connection between VCUSA and the ALJs. The ALJs imposed no limitation on Star's ability to present evidence or argument. Nor did Star entertain any belief the ALJs were compromising Star's right to due process.

If it had a good faith belief the ALJs were biased, Star could have moved for recusal of the ALJs under Rule 155.152. 1 Tex. Admin. Code § 155.152. The timing of the Star's allegation of bias is based solely on SOAH's PFD. Undoubtedly had the PFD favored Star, Star would have praised SOAH.

The argument of favoritism or bias has no evidentiary support. As shown by the hearing transcript, the ALJs acted professionally and impartially. They imposed no obstacles to Star's ability present evidence. They did not exclude Star's evidence or limit its ability to present its case. They discussed Star's evidence and arguments at length in the PFD, demonstrating they gave Star's position thoughtful consideration. Star's complaint is only based on its dissatisfaction with SOAH's decision.

**C. Star's argument is equitable and an improper basis under the APA to modify the PFD.**

While Star characterized its argument as consistent with public policy, it did not consider the policy stated in the Code. The relevant policy is "to ensure a sound system of distributing and selling motor vehicles." Tex. Occ. Code Ann. § 2301.001. The Exceptions do not explain how



Star's termination contravenes the policy. The Occupations Code does not exist to protect a dealer against adverse decisions. Rather, it exists to further the "general economy of the state and the public interest and welfare of its citizens." *Id.*

Contrary to Star's position, SOAH did not find an egregious violation of the Occupations Code. It concluded:

1. VCUSA has a legitimate interest in its customers' opinions of dealership facilities (PFD FOF No. 233);
2. VCUSA did not act implement the CSI/SSI program in bad faith (PDF FOF No. 237); and
3. Star did not demonstrate the CSI/SSI program affected Star's sales (PFD at p. 111).

The PFD explains how Star failed to serve its area of responsibility ("AOR") adequately. Finding Star performance adequate would contradict the Code's policy. A large portion of Volvo owners will not do business with Star, preferring to drive to other dealerships to buy and service their Volvo cars. Star's unsatisfactory performance reduces VCUSA competitive position against other premium car brands. The PFD advances the Occupations Code policy. Terminating Star will provide VCUSA with an opportunity to replace it with a dealer that will increase customer satisfaction and convenience, strengthening the vehicle distribution system in Houston.

## **II. The franchise agreement includes a satisfaction clause, which is lawful under Texas law.**

Under the Texas Supreme Court's case law, a satisfaction clauses in a contract is enforceable. *Tex. DOT v. Jones Bros. Dirt & Paving Contractors*, 92 S.W.3d 477, 480 (Tex. 2002); *Black Lake Pipeline Co. v. Union Constr. Co.*, 538 S.W.2d 80, 88 (Tex. 1976), *overruled in part on other grounds*, *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). If the contract requires a third party to evaluate whether performance is satisfactory, courts evaluate whether the decision was based on partiality, fraud, misconduct, or gross error. *Jones Bros. Dirt*

*& Paving Contractors*, 92 S.W.3d at 481. If the contract's condition allows a party to decide whether performance is satisfactory, courts evaluate whether the party's decision was reasonable. *Jones Bros.*, 92 S.W.3d at 481. SOAH applied the correct standard. Thus, Star cannot sustain its burden that SOAH misapplied or misinterpreted the law.

**A. SOAH's determined that an objectively reasonable basis exists for VCUSA's dissatisfaction is supported by substantial evidence.**

Star made a factual sufficiency challenge.<sup>2</sup> The Board may not modify the findings if supported substantial evidence. *Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 452-53 (Tex. 1984). The standard is differential to SOAH and only requires SOAH's finding to be supported by more than a scintilla of evidence. *Id.* The evidence of Star's unsatisfactory performance is compelling. No grounds exist to modify the factual findings supporting SOAH's conclusion Star did not satisfy VCUSA's requirements under the Sales Agreement.

**I. The supporting evidence comes from Star's managers and objective performance measures.**

SOAH has provided extensive factual determinations and cited the hearing transcript to support its conclusions. Rather than recite the evidence in detail, a few examples set out below provide more than a scintilla of evidence show the propriety of the findings.

**a. Star's sales and service facilities are inadequate.**

One of VCUSA concerns is the facility, both its condition and capacity of the service facility. Rodney Bunch, Star's service manager, confirmed Star cannot service the vehicles in the AOR:

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<sup>2</sup> Star must know that Section 2001.058 of the Government Code does not expressly allow it a challenge to sufficiency of the evidence. So, the Exceptions do not plainly make the challenge. The implication is clearly because Star is asking the Board to reverse and rewrite all of SOAH's critical findings.

Q · · Your strategy right now, working with what · you've got, is to sell service to the people who buy cars at your facility.

A · · Correct.

Q · · Isn't that right?

A · · Correct.

Q · · It's not so much to service everyone who has a Volvo in your AOR. · That's not really your – your business strategy. Is that correct?

A · · We would love to, but, you know -- you do the best with what you have and hopefully we can, yes. ·

Q · · You mean in the future when you get a better facility?

A · · Oh, absolutely that will certainly help.

(Tr. 642:18-643:3).

Mr. Bunch also described the service area where Star's service writers interact with customers. It is in the shop where the work is done. He described the conditions:

Q · · Okay. · · And there's -- this is an unair-conditioned area in the building?

A · · Unair-conditioned area, yes, sir.

A · · Unair-conditioned area, yes, sir.

Q · · All right. · · And any noise that's going on, you can hear it there?

A · · Absolutely.

Q · · So if people are using impact wrenches and you hear the whirling and the impact, you hear it there?

A · · Yes, sir.

(Tr. 529:23 – 530:6).

Al Velasco, the Sales Manager worked at Volvo of Houston before joining Star. He had experience with customer expectations in the premium car space. He evaluated Star's facility as off-putting:

Q. Okay. And your review was the Star Motors – again, this is and he became sales marketing manager and as you started assessing the need, so to speak – you recognized up to 75% of potential premium customers might initially be turned off by, you know, even looking at the facility.

A. I did say that, yes.

(Tr. 1496:21 – 1497:20).

b. Potential customers did not know of Star's existence.

Contrary to Star's argument that it developed the market, Mr. Velasco's testimony shows otherwise:

Q. When you were a salesperson at Volvo of Houston, the Sonic store, you regularly had to compete with other dealers to try to sell a vehicle?

A. That is correct.

Q. And you knew -- you knew about DeMontroind. Right?

A. Yes.

Q. You knew about the Momentum store?

A. Yes.

Q. And you knew about the Clear Lake or Bayway area store. Right?

A. Yes.

Q. But you -- at that time, you didn't know anything about Star. Right?

A. No.

(Tr at 1490:12 – 1491:19). Mr. Velasco sought to mitigate the consequence of his testimony by disclaiming familiarity with Houston. But, as a Volvo salesperson, he knew of every competitor in the Houston market except Star.

Most potential Volvo customers in the AOR, according to Mr. Velasco, did not know of Star's existence. The AOR's limited awareness of Star's business is one of the major impediments to its success:

Q: "And one thing you determined was that even after the dealership had been open, the Star Motors dealership had been open for, you know, 46, 48 years, people even in your local community did not even know about you." Right?

A: "Yes.

(Tr. 1492:5 – 11) (Mr. Velasco).

Although Mr. Velasco has known low visibility hinders Star's performance, he does not have the necessary advertising budget, probably the only effective remedial measure, to raise awareness. Mr. Velasco tried to raise the community's awareness of Star through an advertising campaign. However, the effort only lasted three months in 2017. (P-143 at 94:24-95:15; Tr at 1500:1-1501:23). Seureau limited Velasco's advertising budget to a range of \$8,000 to \$9,000 per month. (P-143 at 95:10-15). In the following exchange, Mr. Velasco admitted that visibility remains a problem for Star:

Q: "When were you first told that there's going to be a new facility proposed by Star?"

A: "I want to say maybe 60 to 90 days ago.

Q: "Okay." Now, even if you have a really nice facility, you still have to tell people you're there. Right?

A: "Yes.

Q: "So the problem you've already identified about people just didn't even know we're there, we have to fix that issue, too?"

A: "That is correct. Q: "And that's, I assume, advertising, signage, which I guess is a form of advertising, that sort of thing." Right?

A: "Yes.

Q: "And you're going to need an appropriate budget to do that?"

A: "Yes. "

Q: "Have you been given an increased budget to start promoting the dealership to the, you know, local community?"

A: "That hasn't been -- we haven't reached that point yet.

Q · · Okay. · · Well, that's -- visibility is already a problem. · · Right?

A · · It's getting better, but still a problem.

Q · · And we've already discussed -- I'm not going to go back through that whole testimony, but when you say you haven't received that point, you're already there at that point. · · Have you gotten any extra advertising to try to at least fix the visibility issue, pending getting a facility or not getting a facility? · · Does that -- am I asking a clear question? · · Yeah, that's a bad one.

A · · Yeah.

Q · · Well, let's leave it -- the visibility is still a problem. · · Right?

A · · Uh-huh, yes.

Q · · And you're going to have to fix that one way or another even with a new facility?

A · · Right.

(Tr. 1509:1 – 1510:16).

c.      The result is poor sales performance.

Star's managerial problems have resulted in terrible performance. By any measure, Star has the worst sales performance in the nation, a situation that pre-existed VCUSA implementation of its bonus programs. Exhibits R-62 and 64 demonstrate whether Star's performance is measured as actual sales divided by expected sales (sales effectiveness), or Star's sales in its AOR divided by Volvos' sold in the AOR (sales portion) or Star's sales in the AOR divided by Volvo's expected sales in the AOR (sales penetration), Star is the worst in the nation. The chart below summarizes the evidence in the two exhibits:

| Star's Sales Performance |                     |               |                   |
|--------------------------|---------------------|---------------|-------------------|
|                          | Sales Effectiveness | Sales Portion | Sales Penetration |
| <b>2012</b>              | 304 of 304          | 304 of 304    | 304 of 304        |
| <b>2013</b>              | 305 of 304          | 305 of 304    | 287 of 287        |
| <b>2014</b>              | 306 of 304          | 306 of 304    | 284 of 284        |
| <b>2015</b>              | 307 of 304          | 307 of 304    | 279 of 279        |
| <b>2016</b>              | 308 of 304          | 308 of 304    | 285 of 285        |
| <b>2017</b>              | 309 of 304          | 309 of 304    | 281 of 281        |

*Figure 1*

Even after the hearing during which VCUSA identified all the problems contributing to Star's poor performance, Star continues to perform poorly as showing below:

| New car sales |              | October           | November MTD      |
|---------------|--------------|-------------------|-------------------|
|               | 2017         | 11                | 10                |
|               | 2018         | 4                 | 1                 |
|               | V prior year | -64% <sup>a</sup> | -90% <sup>a</sup> |

| Sales effectiveness | Ranking market             | Ranking State              | Ranking USA                  |
|---------------------|----------------------------|----------------------------|------------------------------|
| -73.4% <sup>a</sup> | 14 <sup>th</sup> out of 14 | 15 <sup>th</sup> out of 15 | 295 <sup>th</sup> out of 295 |

*Figure 2*

(P-250). As of the close of the evidence, Star was on its way to ranking as the worst sales performing dealer in the United States for seven consecutive years. It sold four cars in October and only one in November 2018.

2. VCUSA's dissatisfaction with Star's long-running substandard performance is objectively reasonable under Texas law.

The ALJ's are the finders of fact in a contested case hearing. In evaluating compliance with the Sales Agreement for termination, they had to assess whether a reasonable person would be satisfied with Star's development of the facility and the condition of the sales and service facilities. (See P-5, Sales Agreement).

There is no reasonable argument that Star's performance and facility are satisfactory. It has been the worst performing dealer at least since 2012 in VCUSA national network of dealers.

While every other dealer in Houston has updated its facility, Star has operated in “maintenance mode” for decades. (R-08 at p. 2; Tr at 334:16-25).

**B. Star had no evidence to excuse its poor performance.**

Star cannot controvert the overwhelming evidence of its poor performance and inadequate facility. So, it focuses on excuses. It claims the market has too many Volvo dealers, and the incentive programs allow Star’s competitors to sell at lower prices.

1. Star had no evidence showing the Houston market cannot support five dealers

Star’s defense is to claim that VCUSA has caused its poor performance. It advanced no evidence to show that the Houston market cannot support five dealers. As SOAH correctly determined, when the market contracted to four dealers,<sup>3</sup> Star made no inroad. It continued as the worst performing dealer in the network. (PFD FoF No. 111). Said differently, Star’s problem is not too much competition. Its problem is poor management practices and a refusal to invest in its business

2. The bonus programs did not cause Star’s problems.

Star offered no evidence it is undersold. Instead, it presented a contrived argument claiming that because VCUSA calculates the bonus payment on the number of cars a dealer sells, dealers that successfully participate in the bonus programs have better margins. The argument is based on poor accounting concepts. Star claims that competitors have a cost advantage because they earn bonuses. However, Star ignores the cost of earning the bonuses. This raises the question if the bonuses are cost-free, why doesn’t Star upgrade its facility? Why doesn’t it pay commissions

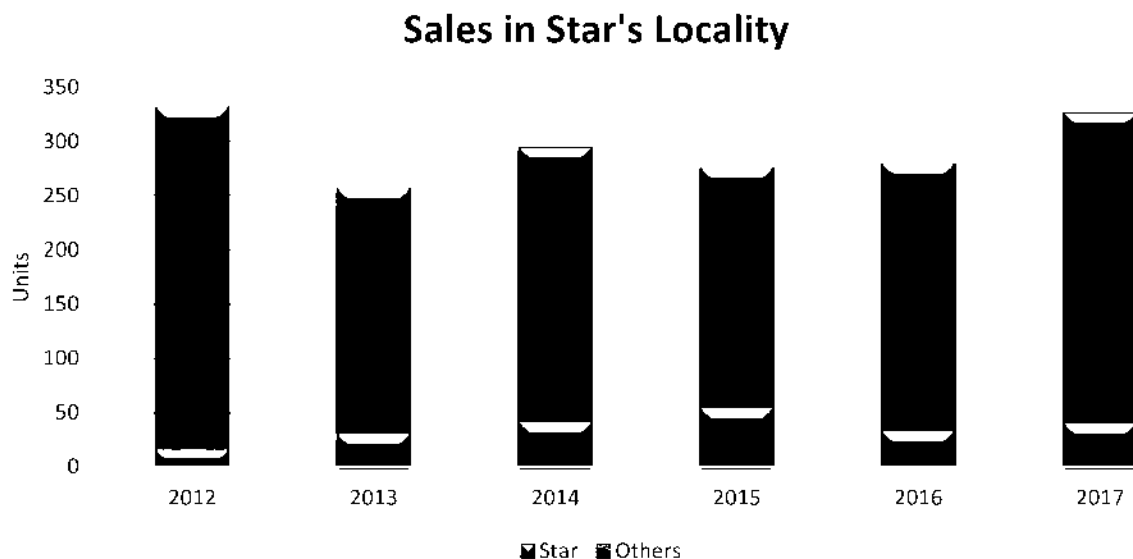
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<sup>3</sup> Volvo of Houston voluntarily terminated when its landlord financially incentivized it to surrender its lease.



to its sales and service personnel commensurate with its competition? Why doesn't it spend more to promote its dealership and enhance the amenities for its customers?

The chart below shows how Star's sales have fared relative to other Volvo dealers selling in Star's locality. No dealer in Texas received any bonus payments in the data set during the years 2012-2015 and the facility support payments in those years were modest. (R-165, R-166, R-167, R-168). Star performance was poor in all years, including 2012-2015 when bonus payments provided no advantage to its Volvo competitors. Star's argument is a poor excuse for its poor sales performance and merits no consideration.



*Figure 3*

**C. The Occupations Code's "good cause" requirements prevent abuse of a satisfaction clause in franchise agreements.**

Star wants the Board to invalidate the use of a satisfaction clause in the Sales Agreement. However, as explained above, long-standing Texas law holds these agreements are enforceable. However, more important, invalidation is superfluous. Under Section 2301.455 of the Occupations Code, SOAH and the Board must evaluate whether the distributor has a reasonable

basis for its dissatisfaction. If it does not, a satisfaction clause does not support termination. SOAH is a check on misuse of a satisfaction clause.

### **III. SOAH correctly found good cause for termination.**

Star raised procedural defenses to SOAH's good cause determination, arguing at the hearing and in the Exceptions for limiting the analysis to whether it complied with the contract. SOAH interpretation and application of the law on this point was correct. It had to evaluate whether VCUSA has good cause to terminate Star based on the Occupations Code.

#### **A. The Occupations Code provides a mandatory framework for evaluating whether a distributor has good cause to terminate a dealer.**

The Occupations Code unequivocally states it takes precedence over the franchise agreement:

*Notwithstanding the terms of any franchise*, in determining whether good cause has been established under Section 2301.453 or 2301.454, the board shall consider all existing circumstances, including:

Tex. Occ. Code Ann. § 2301.455(a) (West) (emphasis added). The Code Construction Act directs that when interpreting codified laws, the code "is construed according to the rules of grammar and common usage." Tex. Gov't Code Ann. § 311.011(a). The Board should also consider the legislative purpose behind the law. *Id.* § 311.023. The Occupations Code's purpose is stated as:

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

***(1) licensing and regulating manufacturers, distributors, converters, and dealers of motor vehicles; and***

***(2) enforcing this chapter as to other persons to provide for compliance with manufacturer's warranties and to prevent fraud, unfair practices, discrimination, impositions, or other abuse of the people of this state.***

Tex. Occ. Code Ann. § 2301.001.

SOAH correctly concluded it had no discretion to deviate from the Occupations Code framework to decide whether VCUSA has good cause to terminate Star. Star's contention that VCUSA's right to terminate is limited to whether Star complied with the contract is wrong. Star's argument directly contradicts the purpose and mandates of the Occupations Code. Consequently, Star cannot show SOAH misinterpreted or misapplied the law by applying the good cause factors to reach its PFD.

**B. Star's challenge to the finding of good cause is a challenge to the factual sufficiency of the decision.**

Star asked the Board to enter a finding that VCUSA does not have good cause to terminate Star. Star Exceptions ask the Board to reverse *every* substantive finding of fact and conclusion of law. The Board has no more authority than a reviewing court to reject an ALJ's findings, and the Austin Court of Appeals has explained the limitations:

In a contested case hearing, the ALJ is the sole judge of witness credibility and is free to accept or reject the testimony of any witness or even accept "part of the testimony of one witness and disregard the remainder." *Southern Union Gas Co. v. Railroad Comm'n*, 692 S.W.2d 137, 141–42 (Tex.App.—Austin 1985, writ ref'd n.r.e.). We are not permitted to substitute our judgment for the ALJ's regarding the credibility of witnesses. *Ford Motor Co. v. Texas Dep't of Transp.*, 936 S.W.2d 427, 429–30 (Tex.App.—Austin 1996, no writ). We must resolve evidentiary ambiguities in favor of the administrative order with a finding of substantial evidence to support the ALJ's decision. *Railroad Comm'n of Tx. v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex.1995).

*Granek v. Texas State Bd. of Med. Examiners*, 172 S.W.3d 761, 778 – 79 (Tex. App.—Austin 2005, no pet.).

Whether enough evidence exists to support SOAH's findings is determined under the substantial evidence rule. Tex. Gov't Code Ann. § 2001.174. The Texas Supreme Court has explained the standard:

The substantial evidence standard of review does not allow a court to substitute its judgment for that of the agency. See *Charter Medical*, 665 S.W.2d at 452 (citing *Gerst v. Guardian Sav. & Loan Ass'n*, 434 S.W.2d 113, 115 (Tex.1968)). The issue for the reviewing court is not whether the agency reached the correct conclusion, but rather

whether there is some reasonable basis in the record for the action taken by the agency. *See City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 185 (Tex.1994). Substantial evidence requires only more than a mere scintilla, and “the evidence on the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence.” *Charter Medical*, 665 S.W.2d at 452 (citing *Lewis v. Metropolitan Sav. & Loan Ass'n*, 550 S.W.2d 11, 13 (Tex.1977)).

*R.R. Com'n of Texas v. Torch Operating Co.*, 912 S.W.2d 790, 792–93 (Tex. 1995).

Star ignored the standard. To support its request for modification of the findings, Star had to demonstrate the evidentiary record does not support SOAH’s findings. Star cannot sustain the burden. Star admits as much in its Exceptions, arguing that SOAH should have given more weight to evidence that Star presented rather than the proof supportive of termination. (*See e.g.* Exceptions at p. 3) (“While the PFD’s reasoning is one-sided, the record evidence was not.”). Applying the correct legal standard, the Board may not make the extensive modification needed to reverse SOAH’s finding that VCUSA has good cause to terminate Star.

#### **IV. The retailer bonus programs are lawful.**

Once again Star does not address the standard the Board must apply in deciding whether to alter SOAH’s findings of fact and conclusions of law. Instead, showing legal error, Star is focused on factual determinations. Its argument is based on two recurring themes: (1) the programs are not voluntary because dealers, must participate as a matter of economic necessity, and (2) nonparticipating dealers are the objects of discrimination because they effectively have a higher wholesale price for cars.

##### **A. The programs are voluntary.**

The Occupations Code states:

Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not: (1) require adherence to unreasonable sales or service standards; ...

Tex. Occ. Code Ann. § 2301.467. The section applies to whether the programs are voluntary. SOAH concluded the programs, citing the evidence supporting its conclusion.<sup>4</sup> Notably, Star does not dispute the evidence supportive of PDF exists. Rather, Star argues the programs are not voluntary because economic necessity compels participation. Star offered no evidence to support its theory.

1. Dealers may forego the investment required by the programs, but they also forego the bonus opportunities.

The programs allow a dealer to assess the costs and profit opportunities in the context of its business model. VCUSA does not impose an economic penalty on nonparticipants. Instead, nonparticipants avoid the costs of participation presumably because they believe the costs exceed the value of bonus and the effect participation will have on their overall competitive position. Participation makes sense to a dealer if it results in providing a superior value proposition to customers relative to competitors.

The undisputed evidence showed Star decided against participating in the bonus programs. Presumably, it concluded that by avoiding the costs required to earn bonuses it would have the best cost structure in the market. However, Star has sacrificed visibility and customer

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<sup>4</sup> VCUSA has excepted to the finding that the CSI/SSI bonus program violate the Code. SOAH found a violation of Section 2301.467(a)(1) and 2301.468. The findings conflict with SOAH's analysis. First SOAH found that VCUSA has an interest in the condition of the facilities. (PFD FOF No. 233). Yet, SOAH did not identify a service or sales standard that is unreasonable, unless the standard is to perform at an average level in CSI and SSI metrics to receive a bonus. If SOAH so found, the finding of a Code violation is inconsistent with the parties agreement that the question in the survey are reasonable. With regard to Section 2301.468, made no finding that the CSI/SSI program treated Star unfairly or inequitably in the sale of motor vehicles. Apparently SOAH's concern is in the variability it believes exists with small sample sizes. However, Star offered no evidence to demonstrate unfair variability, only speculative expert testimony, which is insufficient to carry Star's burden. *See Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009); *see, e.g., Bostic v. Ga.-Pac. Corp.*, 439 S.W.3d 332, 359-60 (Tex. 2014) (expert's testimony was legally insufficient to prove that decedent's mesothelioma was caused by exposure to asbestos while employed by defendant because expert stated that decedent's exposure at another job was minimal compared to exposure from construction for defendant but did not base this testimony on any scientific studies or any attempt to scientifically measure relative exposures).

satisfaction—it cannot compete on a non-price basis, which is the competitive battleground in the luxury and premium market.

2. Star provided no evidence of economic imperative depriving Star of its choice not to participate.

*Star Houston, Inc. v. Mercedes-Benz USA, LLC*, TMVD Docket No. 02-0028-LIC (*Star 2*), involved several issues. One concerned the implantation of a Business Development Center. Star used its standard theme that the bonus programs that pay on a per unit basis are unlawful and should be deemed involuntary. The Board found that MBUSA's program presented an "economic imperative" to participate. An economic imperative, however, is not a legal requirement.

Moreover, the CSI/SSI bonus program does not require Star to adhere to unreasonable sales and service standards. The program merely rewards dealers who achieve or exceed the average CSI/SSI scores. A dealer does not have to improve its facility or take any specific actions under the program. Instead, the program offers an incentive to dealers who implemented a customer-focused strategy.

**B. The programs do not unlawfully discriminate between dealers.**

Star claims dealers who earn bonuses effectively pay a lower wholesale price for their cars. The allegation is unsupported by any evidence. To substantiate the claim Star needed to adduce evidence showing how the net effect of the programs, accounting for the costs of participation to the bonus earned by participants. Star also did not substantiate its claim that competing Volvo dealers regularly sell cars for less than Star.

The payments are bonuses which a dealer can earn only by accepting the costs of participation. Star is wrong to claim the bonus are rebates on the wholesale price. The undisputed evidence is that all dealers pay the same price for identical cars. Bonus payments are calculated on vehicle sales but paid well after the purchase. Thus, a dealer has no guarantee it will earn a

bonus when it makes its wholesale purchase or retail sale. The bonus payments are contingent on meeting the performance standards. Contingent payments are not rebates because there is no assurance the dealer will receive the payment.

Analysis of the Code provision further demonstrates that Star's legal argument is wrong.

The section states:

Notwithstanding the terms of a franchise, a manufacturer, distributor, or representative may not treat franchised dealers of the same line-make differently as a result of the application of a formula or other computation or process intended to gauge the performance of a dealership or otherwise enforce standards or guidelines applicable to its franchised dealers in the sale of motor vehicles if, in the application of the standards or guidelines, the franchised dealers are treated unfairly or inequitably in the sale of a motor vehicle owned by the manufacturer or distributor.

Tex. Occ. Code Ann. § 2301.468 (West). There is nothing unfair or inequitable in rewarding a dealer willing to invest in providing superior customer service, that is the point of the Code. *See*

Tex. Occ. Code Ann. § 2301.001. The dealer has taken actions to earn the contingent payments.

Finally, the evidence established the programs did not cause Star's subpar performance.

The evidence demonstrates VCUSA made modest payments under facility support:

**FACILITY PAYMENTS  
HOUSTON AREA RETAILERS  
2012-2017**

|           | <u>2012</u> | <u>2013</u> | <u>2014</u> | <u>2015</u> | <u>2016</u> | <u>2017</u> |
|-----------|-------------|-------------|-------------|-------------|-------------|-------------|
|           | \$ 0        | \$ 272      | \$ 0        | \$ 0        | \$ 0        | \$ 0        |
|           | \$ 0        | \$ 465      | \$ 0        | \$ 65,000   | \$ 192,000  | \$ 207,000  |
|           | \$ 0        | \$ 19,936   | \$ 77,500   | \$ 97,000   | \$ 150,000  | \$ 0        |
|           | \$ 0        | \$ 0        | \$ 0        | \$ 0        | \$ 0        | \$ 0        |
| 4287 Star | \$ 0        | \$ 0        | \$ 0        | \$ 0        | \$ 0        | \$ 0        |

(P-165). Once the costs of the facility are factored in, the evidence showed the dealers could not offset the cost of facility improvement through bonus payments. Also, VCUSA made no bonus

payments under its retailer incentive program until 2016. Figure 3 shows that Star's performance before and after implementation of the bonus program was mostly the same. Star did not sustain its burden of proving the bonus programs caused its unsatisfactory performance.

**REQUESTED RELIEF**

Accordingly, VCUSA requests that SOAH and the Board reject the modifications proposed in Star's Exceptions.

Respectfully submitted,

AKERMAN LLP

By: /s/ Brit T. Brown

Brit T. Brown

Texas Bar No. 03094550

[brit.brown@akerman.com](mailto:brit.brown@akerman.com)

Benjamin A. Escobar, Jr.

Texas Bar No. 00787440

[benjamin.escobar@akerman.com](mailto:benjamin.escobar@akerman.com)

1300 Post Oak Blvd., Suite 2500

Houston, Texas 77056-3000

Telephone: (713) 623-0887

Facsimile: (713) 960-1527

**ATTORNEYS FOR RESPONDENT,  
VOLVO CARS OF NORTH AMERICA, LLC**

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 7<sup>th</sup> day of June 2019, a true and correct copy of this instrument is being served via email on Protestant's counsel:

Wm. David Coffey, III  
Martin Alaniz  
COFFEY & ALANIZ, PLLC  
13810 FM 1826  
Austin, Texas 78737

/s/Brit T. Brown

Brit T. Brown



**AUSTIN OFFICE**  
**300 West 15th Street Suite 504**  
**Austin, Texas 78701**  
**Phone: (512) 475-4993**  
**Fax: (512) 322-2061**

DATE: 6/24/2019  
NUMBER OF PAGES INCLUDING THIS COVER SHEET: 5  
REGARDING: EXCEPTIONS LETTER (BY ALJS)  
DOCKET NUMBER: 608-16-4676.LIC  
JUDGE HENRY D CARD

**FAX TO:****FAX TO:**

BRIT T. BROWN

(713) 960-1527

WILLIAM DAVID COFFEY III (COFFEY &amp; ALANIZ PLLC)

VIA EMAIL

DANIEL AVITIA (TEXAS DEPARTMENT OF MOTOR  
VEHICLES)

(512) 465-3666

**Docket Clerk, Fax Number 512/465-4135****NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT HAINES SARAH ELIZABETH(sha) (512) 475-4993**

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# State Office of Administrative Hearings



Kristofer Monson  
Chief Administrative Law Judge

June 24, 2019

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

**VIA FACSIMILE 512/465-3666**

**RE: Docket No. 608-16-4676.LIC; MVD Docket No. 16-0018.LIC; Star Houston, Inc. d/b/a Star Motor Cars v. Volvo Cars of North America, LLC.**

Dear Mr. Avitia:

After our Proposal for Decision (PFD) was issued, both parties filed exceptions. Star Houston, Inc. d/b/a Star Motor Cars (Star) excepts to most of the holdings in the PFD, while Volvo Cars of North America, LLC (Volvo) excepts only to the portion of the PFD that held its CSI/SSI bonus program violated the Texas Occupations Code. We have reviewed the exceptions filed to the PFD in this case and the replies to the exceptions. After review, the Administrative Law Judges (ALJs) recommend minor changes to two Findings of Fact, but otherwise do not recommend any changes to the PFD, the Findings of Fact, or the Conclusions of Law. We offer the following observations regarding some of the issues raised in the exceptions and replies.

### *Star's Whistleblower Argument*

In its exceptions, Star characterizes itself as a "whistleblower" being penalized for objecting to Volvo's incentive programs. Although Star's opposition to the incentives program was discussed at the hearing, the "whistleblower" argument was not raised in Star's initial or response brief; Star raises it for the first time in its exceptions.

Although Star uses the term "whistleblower," the exceptions do not cite any statutory whistleblower provision. Instead, Star raises an equitable argument that Volvo is wrongfully attempting to terminate Star's franchise in retaliation for Star's opposition to the incentive programs, and a legal argument that both Volvo and the PFD ignored established precedent on the incentives issue. Star asserts that the PFD therefore should be modified pursuant to Texas Government Code § 2001.058(e).

From the procedural history of this case, it is clear that Volvo did not initiate termination proceedings in retaliation for Star's opposition to incentive programs. Volvo's original notice of

termination was sent to Star on February 8, 2016. Its second notice was sent February 28, 2016. Star's Original Notice of Protest was filed April 1, 2016.<sup>1</sup> None of those documents mentions Star's opposition to the incentive programs. Star's first mention of those programs in this proceeding was in its First Amended Original Notice of Protest, Defenses, and Counterclaims, filed on August 8, 2017.<sup>2</sup> Thus, Volvo's formal effort to terminate Star's franchise began approximately a year and a half before Star raised its counterclaim at SOAH regarding the incentive programs.

In its legal argument, Star characterizes Volvo as "knowingly" violating the law and the PFD as ignoring "a prior administrative decision" on the subject of dealer incentives. However, neither the Director's 1999 informal opinion nor Star's 2002 petition cited in Star's exceptions involved a contested case that led to a final agency order on the legality of dealer incentives. For that reason, the ALJs do not agree that they have failed to properly apply the applicable law. Texas Government Code § 2001.058(e) does not apply to this issue.

*The PFD's Analysis of the Texas Occupations Code § 2301.455 Factors*

Star vigorously objects to the PFD's analysis of, and reliance on, the factors set out in Texas Occupations Code § 2301.455 to determine whether Star's franchise should be terminated. Star characterizes the PFD's reliance on those factors as advocacy by SOAH on Volvo's behalf and as "improper," "unfair," and "peculiar." We disagree.

First, Texas Occupations Code § 2301.455 requires the agency to consider the factors set out in that section, "notwithstanding the terms of any franchise." Moreover, Star was well aware, and even agreed, that the factors set out in §2301.455 would be considered in this case. That section is explicitly cited in the Notice of Hearing; Star's Original Notice of Protest; the ALJs' Order No. 12 Denying Motion to Dismiss; and the Parties' Joint Stipulations of Fact. The latter document, signed by counsel for Star, states in part:

15. The termination part of this contested case will be governed by Tex. Occ. Code §§ 2301.453 and 2301.455 as well as whatever other statutes might be implicated . . . .

In addition, the § 2301.455 factors were discussed thoroughly in Star's initial and response briefs.

To the extent Star argues that the PFD addressed focused on the statutory factors *instead of* the grounds asserted in the termination notice, the ALJs do not agree. The grounds asserted in the notice of termination are clearly relevant; they overlap with the statutory factors and are discussed at length in the PFD, particularly in §VI.F, where Star's compliance (or noncompliance) with the franchise is addressed.

The PFD's evaluation of the §2301.455 factors was necessary, appropriate and within the acknowledged scope of the termination proceeding.

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<sup>1</sup> The Original Notice of Protest is attached to the Notice of Hearing in this case.

<sup>2</sup> This termination case was abated from August 31, 2016, until August 11, 2017, a few days after Star's Amended Original Protest.

*Star's Exceptions to Findings of Fact 63 and 201*

Star challenged many of the findings of fact in the PFD, and the ALJs do not agree with most of those exceptions. However, the ALJs do agree that two of the findings overstated the degree to which Star is isolated from other luxury auto dealerships. While Star is not situated on a highway "motor mile" near a row of other auto brands, it is in a complex of other small, luxury dealerships owned by Mr. Seureau, with a Jaguar and Land Rover dealership nearby. Accordingly, the ALJs recommend the following changes to Findings of Fact 63 and 201:

- 63. The new facility would still have the same challenges that are presented by its current location—namely, a lack of visibility from the interstate and no proximity to ~~other dealers or~~ complementary high-end retail businesses.
- 201. The new facility would still have low visibility and would not be situated near ~~other luxury car dealers or~~ complementary high-end retail businesses.

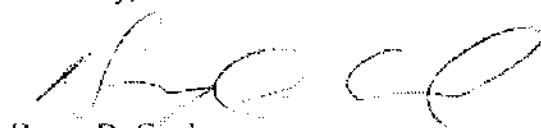
*Other Arguments*

The remainder of Star's and Volvo's exceptions appear to be disagreements with the PFD's evaluation of the evidentiary record. We stand by our initial analysis of the record.


*Conclusion*

As stated above, we do not recommend any changes to the PFD or the Findings and Conclusions included therein. The PFD is ready for consideration.

Sincerely,

  
Henry D. Card  
Administrative Law Judge

Sincerely,

  
Sarah Starnes  
Administrative Law Judge

**STATE OFFICE OF ADMINISTRATIVE HEARINGS****AUSTIN OFFICE****300 West 15th Street Suite 504****Austin, Texas 78701****Phone: (512) 475-4993****Fax: (512) 322-2061****SERVICE LIST**

**AGENCY:** Motor Vehicles, Texas Department of (TDMV)  
**STYLE/CASE:** STAR HOUSTON INC. dba STAR MOTOR CARS - Complainant  
vs. VOLVO CARS NORTH AMERICA, LLC - Respondent  
**SOAH DOCKET NUMBER:** 608-16-4676.LIC  
**REFERRING AGENCY CASE:** 16-0018

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

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**ADMINISTRATIVE LAW JUDGE  
ALJ HENRY D. CARD**

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**REPRESENTATIVE / ADDRESS****PARTIES**

WILLIAM DAVID COFFEY III  
ATTORNEY AT LAW  
COFFEY & ALANIZ PLLC  
13810 FM 1826  
AUSTIN, TX 78737  
(512) 328-6612 (PH)  
(512) 328-7523 (FAX)  
wdcoffeylaw@yahoo.com

STAR HOUSTON, INC., D/B/A STAR MOTOR CARS

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DANIEL AVITIA  
DIRECTOR  
TEXAS DEPARTMENT OF MOTOR VEHICLES  
MOTOR VEHICLE DIVISION  
4000 JACKSON AVENUE  
AUSTIN, TX 78731

(512) 465-3666 (FAX)

TEXAS DEPARTMENT OF MOTOR VEHICLES

---

BRIT T. BROWN  
AKERMAN LLP  
1300 POST OAK BLVD., SUITE 2500  
HOUSTON, TX 77056-3000  
(713) 623-0887 (PH)  
(713) 960-1527 (FAX)  
brit.brown@akerman.com

VOLVO CARS OF NORTH AMERICA, L.L.C.

**Sarah Haines**

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| Status                                   | Time Sent                                      | Pages Sent | Duration | Remote CSID | Destination | Error Code    |
|------------------------------------------|------------------------------------------------|------------|----------|-------------|-------------|---------------|
| Failure                                  | Monday, June 24, 2019 3:13:19 PM Central Dayli | 0          |          | 139         | 5124653666  | 300           |
| Error message: Cannot reach destination. |                                                |            |          |             |             |               |
| Success                                  | Monday, June 24, 2019 2:58:02 PM Central Dayli | 5          |          | 126         | Akerman     | 17139601527 0 |
| Success                                  | Monday, June 24, 2019 2:58:36 PM Central Dayli | 5          |          | 159         | 5124654135  | 5124654135 0  |

## **Contested Case Presentation Aids**

Star Houston, Inc. d/b/a Star Motor Cars

## The PFD found that Volvo's CSI/SSI Bonus Programs Violate the Texas Occupations Code

- **CL 19.** The CSI/SSI bonus programs violate Code § 2301.467(a)(1).
- **CL 20.** The CSI/SSI bonus programs violate Code § 2301.468.
- **CL 21.** The CSI/SSI bonus programs do not violate Code §§ 2301.467(a)(2), .476, or .478(b).
- **CL 22.** The CSI/SSI bonus programs' violations of Code §§ 2301.467(a)(1) and .468 do not affect the conclusion that Star's franchise should be terminated.

Record Citation: PFD, p. 136

Slide 1

SOAH Elevates Facility Image (a Volvo interest) over Impeccable Service and Warranty Work (a Public interest), thus Elevating the Interests of Volvo over that of the Public.

### No Evidence that Star's Warranty Service or Personnel was Inadequate:

- **PFD, p. 31.** Volvo did not dispute the competence of Star's service department. Mr. Klipstein acknowledged that he knew of no instance where a car was serviced improperly by any of Star's technicians, or that any warranty work was done incorrectly, while Mr. DeWinne rated Mr. Bunch as "above average" compared to other service managers in his market.
- **PFD, p. 82.** Turning to the adequacy of Star's service facility as it exists today, the preponderance of the evidence shows that Star's service facility is technically functional and able to serve the comparatively small volume of customers that the dealership attracts.... The inadequacy of Star's service facilities relative to other Volvo dealers is a factor that weighs in favor of termination.
- **PFD, p. 83.** At the hearing, however, Volvo's witnesses expressly disavowed any claim that Star had ever performed improper or incorrect warranty service.
- **FF 72.** Star's service department handles about 15-20 cars a day. The service department prioritizes "fix[ing] it right the first time" for customers, and there is no evidence that customers have complained to Star about the service received.
- **FF 73.** Star's service manager and his employees are competent, and there is no evidence that they have serviced any cars improperly or performed warranty work incorrectly.

Record Citation: PFD, pp. 31, 82-83, 120

Slide 2



## Adequacy of Star's Service Facilities, Equipment, Parts, and Personnel and Warranty Service

- **FF 151.** Star's service facility is technically functional and able to serve the comparatively small volume of customers that the dealership attracts.
- **FF 158.** Volvo's witnesses did not claim that Star had ever performed improper or incorrect warranty service.
- **FF 159.** Star's service department follows Volvo's warranty guidelines and honors Volvo's warranties to its customers.
- **FF 160.** Volvo's service manager has been trusted by Volvo to extend warranty coverage in some circumstances when a vehicle's factory warranty has expired, without prior authorization.
- **FF 161.** Star's service department is competent and satisfies the customers it currently attracts.
- **FF 162.** Star is able to provide its customers with adequate warranty service and is honoring its customers' warranties.
- **FF 163.** This factor does not weigh in favor of termination.

Record Citation: PFD, p. 128

Slide 3

## Yet...The PFD Finds Same CSI/SSI Scores Derived from Violation of Law Weighs in Favor of Termination.

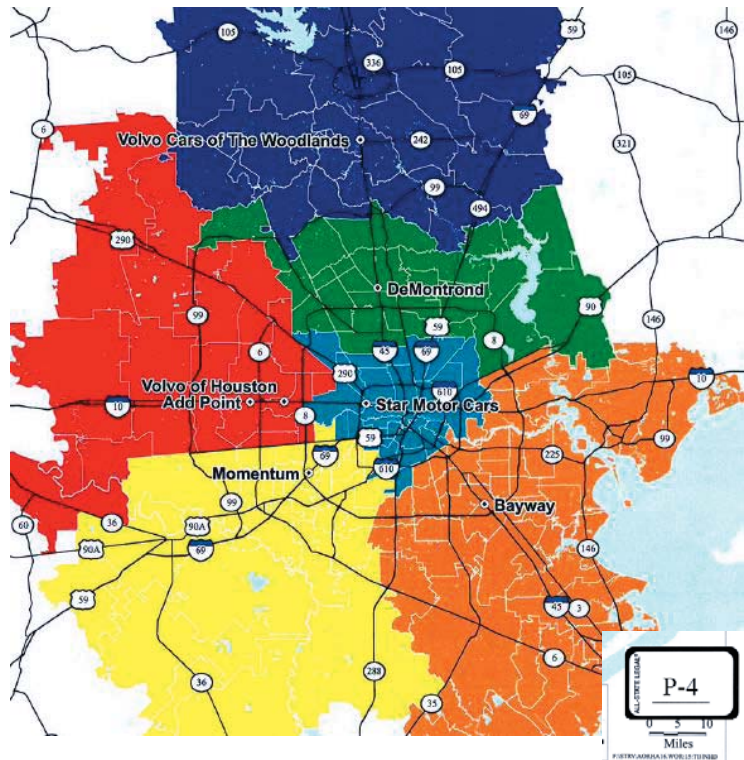
- **PFD, p. 82.** Given that service customers consistently score Star poorly on the enabler question addressing their satisfaction with the waiting area, and given Volvo's "top box" way of scoring the enabler questions, it appears that the low CSI scores are largely attributable to the condition of the facility itself, not the quality of the service provided.
- **FF 176.** Customers have been expressing their dissatisfaction with Star's sales and service by giving Star low CSI and SSI scores. Since at least 2012, Star's CSI and SSI scores have generally been well below average when compared to other Volvo dealers.
- **FF 194.** This factor weighs in favor of termination.

Record Citation: PFD, pp. 82, 130-131

Slide 4

## Volvo Dealers Houston Market Map

- Star Volvo Est. 1970
- Star's AOR is Blue Geography
- 5 Dealers Surround Star – Each of these dealers received FISI and RBP bonuses which allowed them to out compete Star and take its sales through unlawful means.



Record Citation: Ex. P-4

Tab 3 Page 4 Slide 5

## FISI Bonus Payouts – Houston Volvo Dealers

**FF 100.** The facility bonus payments made to Star and other Houston-area dealers under FISI and its predecessors through 2017 are set out below:

| Dealer | 2012 | 2013   | 2014   | 2015   | 2016    | 2017    |
|--------|------|--------|--------|--------|---------|---------|
| A      | \$ 0 | 272    | 0      | 0      | 0       | 0       |
| B      | \$ 0 | 465    | 0      | 65,000 | 192,000 | 207,000 |
| C      | \$ 0 | 19,936 | 77,500 | 97,000 | 150,000 | 0       |
| D      | \$ 0 | 0      | 0      | 0      | 0       | 0       |
| Star   | \$ 0 | 0      | 0      | 0      | 0       | 0       |

Record Citation: PFD, p. 123

Slide 6

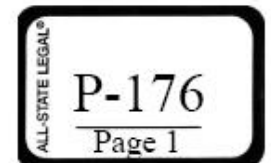
# Retailer Bonus Program Payouts – Houston Volvo Dealers

|       |                      | Ex. P-166<br>2016 RBP Payouts<br>Apr. - Dec. (9 months) |       |              | Ex. P-167<br>2017 RBP Payouts<br>Jan. - Dec. (12 months) |       |              | Ex. P-168<br>2018 RBP Payouts<br>Jan. - Apr. (4 months) |       |              |              |
|-------|----------------------|---------------------------------------------------------|-------|--------------|----------------------------------------------------------|-------|--------------|---------------------------------------------------------|-------|--------------|--------------|
|       |                      | YTD                                                     |       |              | YTD                                                      |       |              | YTD                                                     |       |              |              |
| Code  | Retailer DBA         | Bonus Program                                           | Units | \$ Paid      | Bonus Program                                            | Units | \$ Paid      | Bonus Program                                           | Units | \$ Paid      |              |
|       |                      | CSI Bonus                                               | 52    | \$25,637.50  | CSI Bonus                                                | 254   | 127,54.00    | CSI Bonus                                               | 69    | \$33,211.50  |              |
|       |                      | SSI Bonus                                               | 140   | \$69,183.50  | SSI Bonus                                                | 388   | \$191,815.50 | SSI Bonus                                               | 136   | \$65,833.00  |              |
|       |                      | Retailer Standards                                      | 204   | \$99,545.00  | Retailer Standards                                       | 482   | \$237,325.00 | Retailer Standards                                      | 168   | \$78,645.00  |              |
|       |                      | V360                                                    |       | 194,365.50   | V360                                                     |       |              | V360                                                    | 115   | \$5,351.00   |              |
|       |                      |                                                         |       | \$194,366.00 |                                                          |       | \$556,685.50 |                                                         |       | \$231,199.50 | \$982,251.00 |
|       |                      | CSI Bonus                                               | 72    | \$36,421.00  | CSI Bonus                                                | 262   | \$129,151.00 | CSI Bonus                                               | 82    | \$38,640.50  |              |
|       |                      | SSI Bonus                                               | 72    | \$36,421.00  | SSI Bonus                                                | 262   | \$129,151.00 | SSI Bonus                                               | 82    | \$38,640.50  |              |
|       |                      | Retailer Standards                                      | 141   | \$69,711.00  | Retailer Standards                                       | 321   | \$160,096.00 | Retailer Standards                                      | 106   | \$49,440.00  |              |
|       |                      | V360                                                    | 193   | \$92,835.00  | V360                                                     | 321   | \$160,196.00 | V360                                                    | 106   | \$49,441.00  |              |
|       |                      |                                                         |       | \$235,388.00 |                                                          |       | \$578,494.00 |                                                         |       | \$176,161.00 | \$990,043.00 |
|       |                      | CSI Bonus                                               | 73    | \$36,845.00  | CSI Bonus                                                | 226   | \$112,928.50 | CSI Bonus                                               | 72    | \$34,255.00  |              |
|       |                      | SSI Bonus                                               | 73    | \$36,845.00  | SSI Bonus                                                | 182   | \$91,252.50  | SSI Bonus                                               | 72    | \$34,255.00  |              |
|       |                      | Retailer Standards                                      | 134   | \$66,900.00  | Retailer Standards                                       | 293   | \$145,752.00 | Retailer Standards                                      | 37    | \$17,102.00  |              |
|       |                      | V360                                                    | 199   | \$98,246.00  | V360                                                     | 293   | \$145,752.00 | V360                                                    | 37    | \$17,102.00  |              |
|       |                      |                                                         |       | \$238,836.00 |                                                          |       | \$495,685.00 |                                                         |       | \$120,714.00 | \$855,235.00 |
|       |                      | CSI Bonus                                               | 10    | \$5,146.00   | CSI Bonus                                                | 78    | \$38,657.50  | CSI Bonus                                               | 54    | \$26,023.00  |              |
|       |                      | SSI Bonus                                               | 10    | \$5,146.00   | SSI Bonus                                                | 136   | \$67,152.50  | SSI Bonus                                               | 53    | \$25,482.50  |              |
|       |                      | Retailer Standards                                      | 72    | \$35,380.00  | Retailer Standards                                       | 209   | \$104,127.00 | Retailer Standards                                      | 67    | \$30,706.00  |              |
|       |                      | V360                                                    | 73    | \$35,751.00  | V360                                                     | 209   | \$104,127.00 | V360                                                    | 67    | \$30,706.00  |              |
|       |                      |                                                         |       | \$81,423.00  |                                                          |       | \$314,064.00 |                                                         |       | \$112,917.50 | \$508,404.50 |
| 42870 | 4287-Star Motor Cars | CSI Bonus                                               |       |              | CSI Bonus                                                | 5     | \$2,749.00   | CSI Bonus                                               |       |              |              |
|       | 4287-Star Motor Cars | SSI Bonus                                               |       |              | SSI Bonus                                                | 32    | \$15,997.50  | SSI Bonus                                               |       |              |              |
|       | 4287-Star Motor Cars | Retailer Standards                                      | 26    | \$12,743.00  | Retailer Standards                                       | 115   | \$58,509.00  | Retailer Standards                                      | 29    | \$12,892.00  |              |
|       | 4287-Star Motor Cars | V360                                                    |       |              | V360                                                     | 51    | \$24,492.00  | V360                                                    | 29    | \$12,892.00  |              |
| 42870 | Total                |                                                         |       | \$12,743.00  |                                                          |       | \$101,747.50 |                                                         |       | \$25,784.00  | \$140,274.50 |

- Star earns reduced trading margins compared to other Houston dealers due to older facility. Star at \$1,000 or more per unit disadvantage.

Record Citation: Ex. P-166, Ex. P-167, Ex. P-168

# Star Proposed New Facility Rejected by Volvo







November 16, 2018

Glenn Seureau  
STAR MOTOR CARS  
7000 Katy Road  
Houston, Texas 77024

VIA CERTIFIED MAIL &amp; HAND DELIVERY

Dear Mr. Seureau:

Re: Response to Notice of Relocation

Dear Mr. Seureau:

Please consider this letter to serve as Volvo Car USA, LLC's ("VCUSA") response to Star Houston, Inc.'s ("Star") notice of relocation dated September 17, 2018. VCUSA has considered the notice and does not consent to the relocation of the dealership because:

1. **The notice is defective.** Under Section 2301.464(a) of the Texas Occupations Code, a dealer must provide the distributor or manufacturer notice of the relocation by certified mail return receipt requested. Star sent its notice by Federal Express. Because of the procedural error, VCUSA contends Star's notice did not trigger the 60-day timeline for VCUSA to respond. However, without waiver of any right to supplement this response after receiving proper notice, VCUSA has identified additional reasons below for its refusal to consent.
2. **A relocation is premature and should await resolution of the termination proceeding.** Relocating the dealership is premature because VCUSA noticed the termination of Star's franchise. If approved by the TMVD, Star will not need a new facility to sell and service Volvo motor vehicles, and VCUSA will not need to expend the resources to evaluate and support the opening of a new facility.
3. **The location is inadequate to support the investment.** The proposed location is inadequate for Star to properly service its Area of Responsibility or to capture the business opportunities available in its Area of Responsibility. As VCUSA has repeatedly stated, Star cannot materially improve its performance without significant changes in management practices, investment, advertising and staffing. The information provided or otherwise available to VCUSA indicates that the proposed dealership facility and operations will not allow Star to sustain profitable dealer operations.
4. **Star has not provided VCUSA sufficient information to enable it to evaluate the application.** To evaluate the application, VCUSA requires Star to furnish comprehensive marketing and business plans that show (1) how Star plans to and why it believes it can sustain sufficient new and used motor vehicle sales and service to support its proposed investment at the proposed location; (2) the total investment the dealership plans to make in the

Volvo Car USA LLC  
1 Volvo Drive  
Rockleigh, NJ 07647

Telephone  
201-768-7309

Facsimile  
201-784-4352

Website  
<http://www.volvocars.us>

P-251

Record Citation: Ex. P-251, p. 2 ¶ 5

Slide 9

## Volvo Rejection Letter – Facility Relocation

- 5. Star has proposed a new facility for its dealer operations. VCUSA has long believed that a new facility is required for Star to become competitive. VCUSA believes, however, that a new facility alone will not adequately improve Star's performance.
- Star has advised that it believes it will be necessary to achieve 500 new motor vehicle sales per year to sustain operations at the proposed facility and location.
- VCUSA believes that Star's area of responsibility has the potential for this volume, but is highly concerned that the proposed location will not be able to attract this level of business, along with corresponding increases in used motor vehicle sales and service.



November 28, 2018

Glenn Seureau  
STAR MOTOR CARS  
7000 Katy Road  
Houston, Texas 77024

VIA CERTIFIED MAIL, HAND DELIVER &amp; EMAIL TO COUNSEL

Re: Response to Mr. Coffey's November 19, 2018, Letter on Facility Plans

Dear Mr. Seureau:

This letter is in response to your counsel's letter dated November 19, 2018.

First, I want to reiterate that Volvo continues to strongly question whether right now is the time for you to make plans or proceed with a multi-million dollar investment in facility given (1) we are waiting for a ruling in the termination proceeding and (2) given that your sales performance has continued to decline further and significantly with only one car sale so far in November.

| New car sales | October      |      | November MTD |
|---------------|--------------|------|--------------|
|               | 2017         | 11   | 10           |
|               | 2018         | 4    | 1            |
|               | V prior year | -64% | -90%         |

| Sales effectiveness | Ranking market | Ranking State              | Ranking USA                  |
|---------------------|----------------|----------------------------|------------------------------|
|                     | -73.4%         | 14 <sup>th</sup> out of 14 | 15 <sup>th</sup> out of 15   |
|                     |                |                            | 295 <sup>th</sup> out of 295 |

We would be strongly advising any retailer with this level of performance to be very cautious about proceeding with significant facility investments. This is just business common sense. As we have discussed before, while your current facility is significantly substandard, investment in facility alone will not fix your performance. Other operational investments and management changes were required also, but never implemented.

Putting the above to one side, Volvo is of course respectful of and will abide by the SOAH Order No. 20, and will process and facilitate any requests.

Volvo Car USA LLC  
1 Volvo Drive  
Rockleigh, NJ 07647

Telephone  
201-768-7309

Facsimile  
201-784-4352

Website  
<http://www.volvocars.us>

P-250

Record Citation: Ex. P-250, p. 2 ¶ 1

Slide 10

## Volvo Rejection Letter – Proposed Facility Plan

- By separate correspondence dated November 16, 2018, Volvo denied Star's application to relocate, expressly linked by Star to the facility plan.
- Our concern, however, is that the new facility proposed by Star is too aggressive and not sustainable....
- ... Star's selected location will not support a high volume dealership.
- ... Star's proposed facility is based upon projections of 500 new motor vehicle sales per year.
- ... Volvo does not believe that a 500 annual projection is reasonable given the limitations of the proposed location....

## **Contested Case Presentation Aids**

Volvo Cars of North America, LLC.

## Star Facility Unappealing to Potential Customers

6 A. I'm speculating at this point but my goal -- if  
7 I had everything -- all of that, I could do 20, 25 cars  
8 a month eyes closed.

R-77, (Al Velsco Dep. at 160:6-8)

4 Q. What is it that you need?

5 A. More visibility as far as the dealership is  
6 concerned.

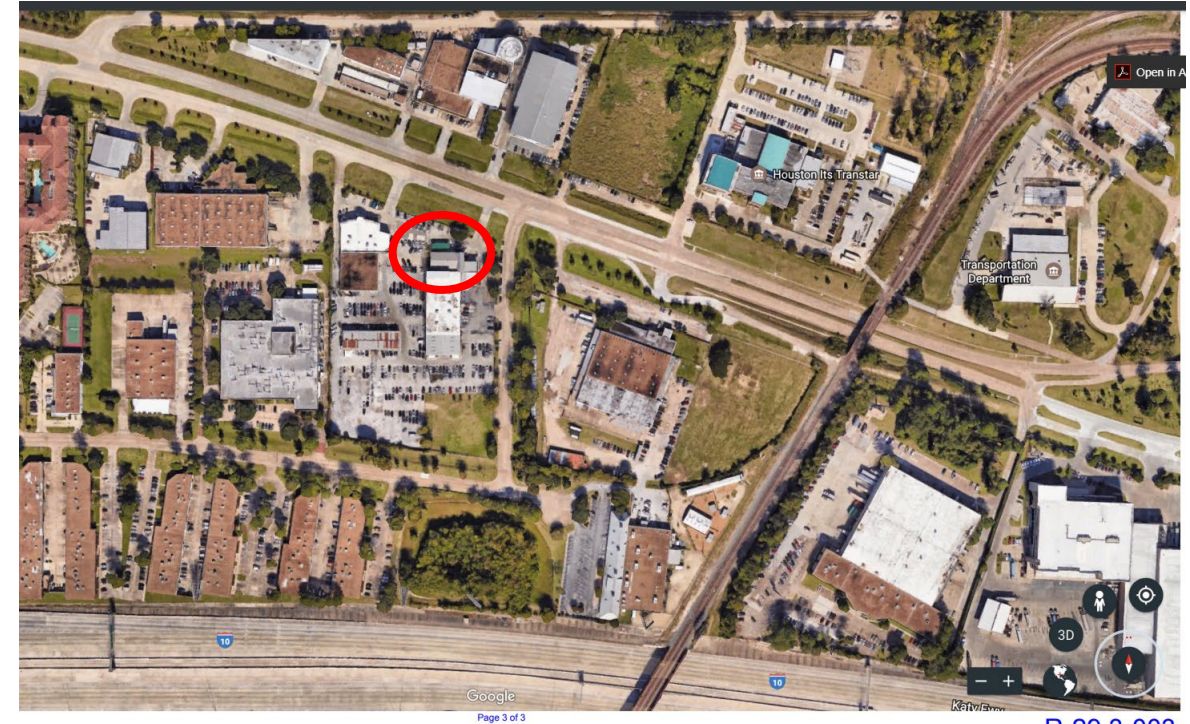
12 Q. So are you saying you don't have enough  
13 advertising -- advertising budget and you think that  
14 would generate the visibility that you think you need?

15 A. Yes, sir.

R-77, (Al Velsco Dep. at 194:4-7 and 194:12-15))



R-29.2 p. 4 (Store front)



R-29.3-003

15 Star is committed to staying in that  
16 location, so they're -- they're not going to have the  
17 billboard effect even with the new facility, but -- but  
18 the experience will be very conventional. So really  
19 facility -- it's -- when everybody around you is  
20 discounting a lot and you're not, even if you're right,  
21 it's hard to win those customers away.

Tr. 1152:15-21 (Ted Stockton, Star's Expert)



## Star Facility Unappealing to Potential Customers



R-29.2 p. 4 (Customer service desk)

21 Q Okay. And your view was the Star Motors --  
 22 again, this is as you became sales marketing manager and  
 23 as you started assessing the need, so to speak -- you  
 24 recognized up to 75 percent of potential premium  
 25 customers might initially be turned off by, you know,

1 even looking at the facility. Right?

2 A I did say that, yes.

Tr. 1496:21 – 1497:2 (Al Velasco, Star's Sales Manager).

15 Q All right. And just to be clear, this is --  
 16 this is inside the service facility?

17 A Yes, sir; it's inside the shop, yes.

23 Q Okay. And there's -- this is an  
 24 unair-conditioned area in the building?

25 A Unair-conditioned area, yes, sir.

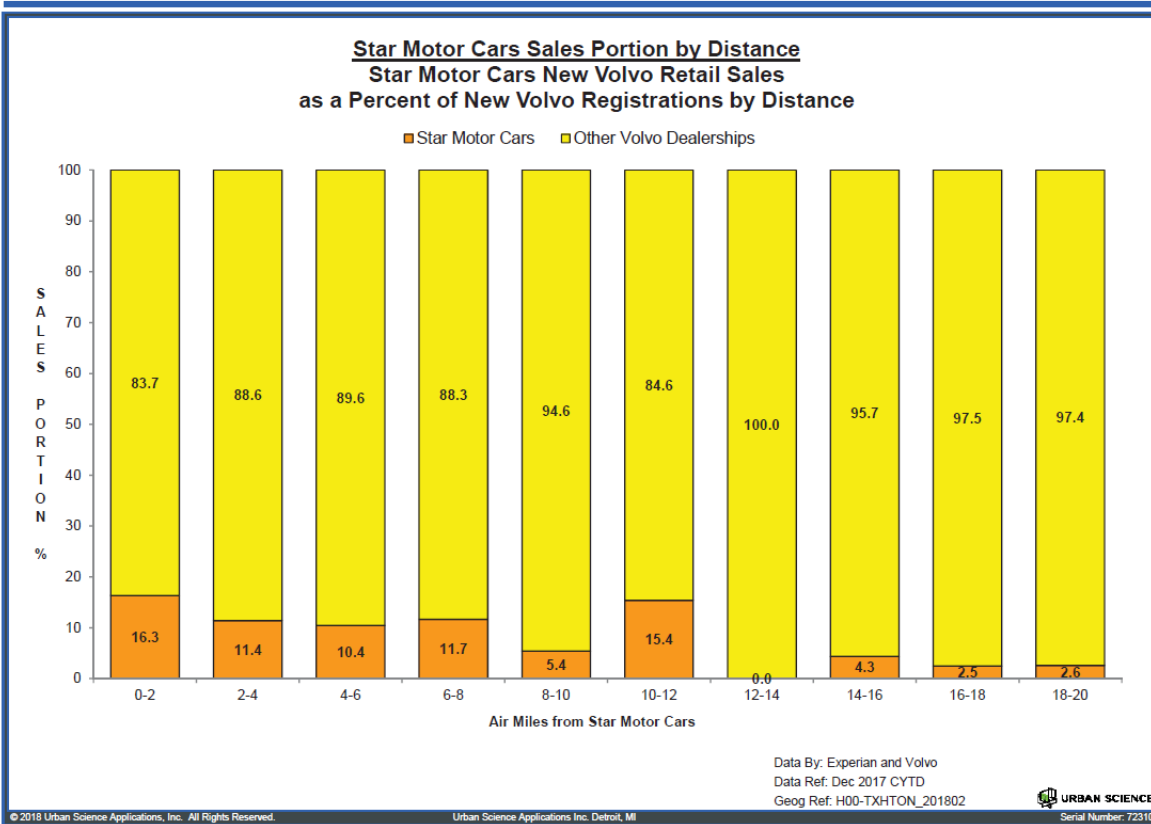
Tr. 528: 15-16 and 529: 23-24 (Rodney Bunch, Service Manager)



## Even People in its Immediate Area Do Not Know Star Exists



Volvo Cars North America



CONFIDENTIAL

R-64-024 R - 7

6 Q And one thing you determined was that even  
7 after the dealership had been open, the Star Motors  
8 dealership had been open for, you know, 46, 48 years,  
9 people even in your local community did not even know  
10 about you. Right?

11 A Yes.

Tr. 1492:6 – 11. (Al Velasco, Star's Sales Manager).

***Star Worst Performer by Any Measure*****Star's Sales Performance**

|             | <b>Sales Effectiveness</b> | <b>Sales Portion</b> | <b>Sales Penetration</b> |
|-------------|----------------------------|----------------------|--------------------------|
| <b>2012</b> | 304 of 304                 | 304 of 304           | 304 of 304               |
| <b>2013</b> | 305 of 304                 | 305 of 304           | 287 of 287               |
| <b>2014</b> | 306 of 304                 | 306 of 304           | 284 of 284               |
| <b>2015</b> | 307 of 304                 | 307 of 304           | 279 of 279               |
| <b>2016</b> | 308 of 304                 | 308 of 304           | 285 of 285               |
| <b>2017</b> | 309 of 304                 | 309 of 304           | 281 of 281               |

*R-62 at p. A-18*

*R-64 at p. R-1 through R-7*

## *Star has provided subpar customer service* Opinion of the waiting area?

| Service Enabler Rolling 12M |          |      |          |         |      |
|-----------------------------|----------|------|----------|---------|------|
| Date                        | National | N/E  | Southern | Western | Star |
| January-16                  | 67.0     | 69.0 | 65.7     | 66.0    | 48.9 |
| February-16                 | 68.2     | 70.3 | 67.0     | 66.9    | 48.2 |
| March-16                    | 69.2     | 71.3 | 67.9     | 67.9    | 51.4 |
| April-16                    | 70.4     | 72.4 | 69.2     | 69.2    | 53.0 |
| May-16                      | 71.6     | 73.5 | 70.6     | 70.0    | 59.6 |
| June-16                     | 72.7     | 74.4 | 72.0     | 71.2    | 57.3 |
| July-16                     | 73.9     | 75.4 | 73.4     | 72.4    | 62.0 |
| August-16                   | 75.1     | 76.6 | 74.6     | 73.5    | 63.9 |
| September-16                | 76.2     | 77.6 | 75.8     | 74.7    | 59.6 |
| October-16                  | 77.3     | 78.6 | 76.9     | 75.9    | 59.0 |
| November-16                 | 78.4     | 79.6 | 78.1     | 77.0    | 61.6 |
| December-16                 | 79.2     | 80.4 | 79.0     | 77.9    | 67.8 |
| January-17                  | 79.7     | 80.5 | 79.6     | 78.7    | 60.7 |
| February-17                 | 79.7     | 80.4 | 79.6     | 79.0    | 61.1 |
| March-17                    | 80.0     | 80.5 | 80.0     | 79.4    | 67.1 |
| April-17                    | 80.2     | 80.7 | 80.1     | 79.7    | 73.3 |
| May-17                      | 80.4     | 80.8 | 80.2     | 79.9    | 73.7 |
| June-17                     | 80.7     | 81.1 | 80.4     | 80.4    | 68.2 |
| July-17                     | 80.9     | 81.3 | 80.8     | 80.7    | 65.1 |
| August-17                   | 81.2     | 81.5 | 80.9     | 81.0    | 62.8 |
| September-17                | 81.4     | 81.9 | 81.0     | 81.3    | 63.2 |

R-75,  
P-200, CY18 Retailer Bonus Program  
Tr. 581:5 – 20 (Rodney Bunch, Service Manger)

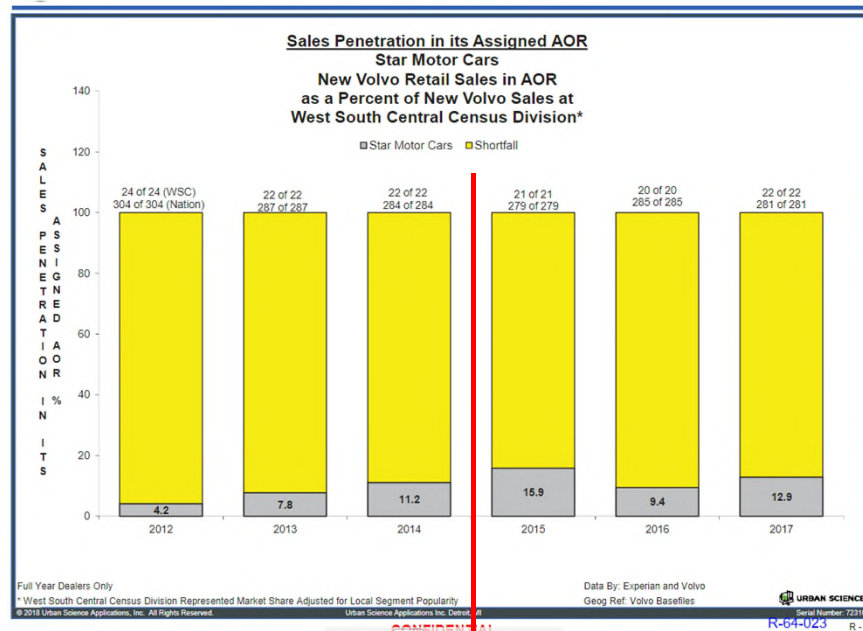
### Opinion of the explanation of work done?

### Opinion of the condition of the car when it was returned?

### Retailer follow-up after visit?

5 Q One of the things you're weak on is followup  
6 with the customer. Correct?  
7 A Yes, sir.  
8 Q All right. And that also feeds into not having  
9 a good response rate on the surveys.  
10 A The followup is after the repair -- us taking  
11 the time to call the customer to ask them how their  
12 visit was. And with the response that Volvo has, it's  
13 pretty quick. So we go two days. Then we've already  
14 missed the window because the survey, once we submit --  
15 transmit the warranty -- well, the repair for that --  
16 say today we submit it tonight, bam, the customer gets  
17 an e-mail the next day. And if we are slow to respond  
18 to it, unfortunately it does hurt us, yes.  
19 Q And you know that. That's in your control?  
20 A Yes, sir.

## *Bonus payments did not explain Star's poor performance*



R-64  
P-160.1

*No Bonus Program*

*Bonus Program*

**Texas Department of Motor Vehicles**

HELPING TEXANS GO. HELPING TEXAS GROW.

**Board Meeting Date: 10/1/2020**  
**ACTION ITEM**

**To:** Texas Department of Motor Vehicles Board

**From:** Roland Luna, Motor Vehicle Division Director

**Agenda Item:** 6

**Subject:** Chapter 211, Criminal History Offense and Action on License  
New, §§211.1 - 211.5  
Chapter 215, Motor Vehicle Distribution  
Amendment, §215.89  
Repeal, §215.88  
Chapter 221, Salvage Vehicle Dealers  
Amendments, §§221.15, 221.19, 221.111, and 221.112  
Repeal, §221.113 and §221.114  
(Relating to: Sunset Advisory Commission's recommendation, criminal history evaluations consistent with Occupations Code, Chapter 53:

- SB 604, relating to changes to salvage dealer licenses;
- HB 1342, relating to a person's eligibility for an occupational license; and
- SB 1217, prohibiting consideration of certain arrests in determining license eligibility)

**RECOMMENDATION**

Approval to publish the adopted amended sections in the *Texas Register*.

**PURPOSE AND EXECUTIVE SUMMARY**

The purpose of the new and amended sections is to implement the Sunset Advisory Commission's recommendation and ensure that the department's criminal history evaluation process is consistent across all license types and with current law. Further, the proposed new and amended sections address the Governor's October 8, 2019, letter requesting government agencies to carefully review occupational licensing requirements to ensure rules are not overly burdensome to potential license holders or consumers.

**FINANCIAL IMPACT**

None

**BACKGROUND AND DISCUSSION**

New Chapter 211 creates a single, consistent process for evaluating and making licensing decisions based on the applicant's and license holder's criminal history, regardless of license type, in compliance with the requirements of Occupations Code Chapter 53. The new chapter includes §211.3 that lists the reasons the department has determined certain offenses directly relate to the duties and responsibilities of the licensed occupations and lists specific offenses that directly relate to the duties and responsibilities of the licensed occupations. This list distinguishes between "retail license types", licensed occupations that regularly interact with the public, and licensed occupations that do not generally interact with the public.

In addition, new §211.5 implements Occupations Code §53.102, which allows a person to request a licensing authority to issue a criminal history evaluation letter regarding the person's eligibility for a license issued by that authority before

taking a licensing training course. This section applies to new applicants for certain independent motor vehicle GDNs. As authorized in Occupations Code §53.105, §211.5 also proposes a fee in the amount of \$100 to cover the cost of the review.

The amendments to §215.89 update licensing fitness requirements for persons applying for a license under Occupations Code Chapter 2301 and Transportation Code Chapter 503. The fitness requirements are amended to address applicants that may be acting on behalf of another person in seeking a license. Section 215.88, concerning criminal history evaluations, is being repealed because it is being replaced by new Chapter 211.

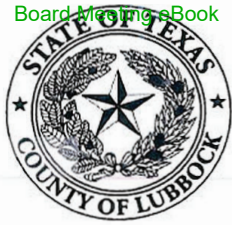
The amendments to Chapter 221 update licensing application and fitness requirements for persons applying for a for a salvage dealer license under Occupations Code Chapter 2302, as amended by SB 604. The application and fitness requirements are amended to address applicants that may be acting on behalf of another person in seeking a license. Criminal history evaluations will be conducted under new Chapter 211.

## COMMENTS

The proposed new sections and amendments were published for comment in the June 26, 2020, issue of the Texas Register. The comment period closed on July 27, 2020. The department received written comments from: the Lubbock County Tax Assessor-Collector, Tax Assessor Collectors Association of Texas, and Texas Automobile Dealers Association. All comments received were addressed in the preamble sections and rule text was clarified in response to one comment.

If the board adopts the rules during its October 1, 2020, open meeting, staff anticipates:

- Publication in the October 16, 2020, issue of the *Texas Register*; and
- An effective date of October 31, 2020.

**Ronnie Keister**

Lubbock County Tax Assessor-Collector  
916 Main Street, Suite 102  
PO Box 10536  
Lubbock, TX 79408-3536  
806.775.1344  
taxoffice@lubbockcounty.gov

July 22, 2020

Office of General Counsel  
Texas Department of Motor Vehicles  
4000 Jackson Avenue  
Austin, TX 78731

Via Email to: rules@txdmv.gov

SUBJECT: Response to TxDMV 43 TAC § 211.1-211.5 – Criminal Offense and Action on License

TxDMV Board Members and Agency Leadership:

Please accept this letter as official notice of support for proposed rule for chapter 211 relating to criminal offenses and action on licenses.

For what past time frame will the person be held responsible for a disqualifying criminal offense? Will the criminal convictions history go back over the last 5 years? 10 years? Lifetime?

Will the background check be resubmitted periodically or regularly? For example will a dealer's background be run once at the implementation of the process and then never again?

The concern listed needs to be addressed prior to the approval of this rule. Please call me if you have any additional questions.

Respectfully,

A handwritten signature in blue ink, appearing to read "R-Keister", is written over the word "Respectfully,".

Ronnie Keister

Tax Assessor-Collector



## THE TAX ASSESSOR-COLLECTORS ASSOCIATION OF TEXAS

A dynamic association of innovative and resourceful professionals whose purpose is to educate, support and advance the office of County Tax Assessor-Collectors of Texas.

[www.tacaoftexas.org](http://www.tacaoftexas.org)

### #BETHE DIFFERENCE

July 27, 2020

Office of General Counsel  
Texas Department of Motor Vehicles  
4000 Jackson Avenue  
Austin, TX 78731  
[rules@txdmv.gov](mailto:rules@txdmv.gov)

Dear TxDMV Board, Executive Director and V.T.R. Director,

On behalf of the Tax Assessor Collector Association of Texas, we would like to thank you for the opportunity to comment on the following proposed rules.

**TITLE 43. TRANSPORTATION Proposed Sections**  
**Part 10. Texas Department of Motor Vehicles**  
**Chapter 211 - Criminal Offense and Action on License**  
**Privileged and Confidential Attorney Work Product**  
**PROPOSAL OF SUBCHAPTER A. CRIMINAL OFFENSE AND**  
**ACTION ON LICENSE**  
**43 TAC §§211.1 - 211.5**

We understand that this proposed section brings conformity to the process of evaluating and issuing licenses depending on the background checks of the individuals making application. It is agreed that the department should take into consideration those factors listed in Occupations Code §53.023 including

“the person's age when the crime was committed, rehabilitative efforts, and overall criminal history”.

A factor the department may want to consider is the frequency of background checks on active licenses. Will the department check annually, upon the renewal of licenses or randomly to verify continued compliance?

#### OFFICERS

TAMMY MCRAE, PCAC  
PRESIDENT  
MONTGOMERY COUNTY  
[tammy.mcrae@mctx.org](mailto:tammy.mcrae@mctx.org)

RANDALL RIGGS, CPA, PCC  
VICE-PRESIDENT EXTERNAL  
MCLENNAN COUNTY  
[randy.riggs@co.mclennan.tx.us](mailto:randy.riggs@co.mclennan.tx.us)

BRUCE STIDHAM, PCAC  
VICE-PRESIDENT INTERNAL  
GRAYSON COUNTY  
[stidhamb@co.grayson.tx.us](mailto:stidhamb@co.grayson.tx.us)

LARRY GADDES, PCAC, CTA  
SECRETARY-TREASURER  
WILLIAMSON COUNTY  
[lgaddes@wilco.org](mailto:lgaddes@wilco.org)

CATHY TALCOTT, PCAC  
IMMEDIATE PAST PRESIDENT  
COMAL COUNTY  
[talcoc@co.comal.tx.us](mailto:talcoc@co.comal.tx.us)

#### DIRECTORS

KEVIN KIESCHNICK, PCC  
NUECES COUNTY  
[kevin.kieschnick@co.nueces.tx.us](mailto:kevin.kieschnick@co.nueces.tx.us)

DONNA WILLIS  
LYNN COUNTY  
[donna.willis@co.lynn.tx.us](mailto:donna.willis@co.lynn.tx.us)

SHAY LUEDEKE, CTOP  
BELL COUNTY  
[shay.luedeke@bellcounty.texas.gov](mailto:shay.luedeke@bellcounty.texas.gov)

ALBERT URESTI, CTOP  
BEXAR COUNTY  
[albert.uresti@bexar.org](mailto:albert.uresti@bexar.org)



*The Tax Assessor Collectors Association of Texas supports this rule.*

TITLE 43. TRANSPORTATION Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

**PROPOSAL OF SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS**

**43 TAC §§215.150-215.158**

The proposed amendments to §215.154 add golf carts and off-highway vehicles to vehicles that cannot be issued temporary tags because the vehicles are not eligible for registration by the public under Transportation Code §§502.140, 551.402, 551A.052.”

This proposed rule clarifies language on when the \$5 buyer tag fee is paid and provides the state, local, federal governmental agencies are not required to obtain a GDN. It also states that the federal, state or local government agency will pay the \$5 buyer tag fee to the county if it is collected. The proposal inserts “federal, state, or local government agency” where it speaks to the “dealer”.

*The Tax Assessor Collectors Association of Texas does not oppose this proposed rule.*

TITLE 43. TRANSPORTATION Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 221 – Salvage Vehicle Dealers

**PROPOSAL OF**

**SUBCHAPTER B. LICENSING**

**43 TAC §§221.15 and 221.19 SUBCHAPTER F. ADMINISTRATIVE SANCTIONS**

**43 TAC §§221.111 AND §221.11**

**REPEAL OF 43 TAC §221.113 AND §221.114**

This proposed rule deals with licensing of salvage vehicle dealers. It provides that TxDMV may deny an application for a license and changes the language from “shall” deny if certain conditions are not met, to “may” deny. It describes the conditions that may lead to a revocation, rescinding or denial of the license application.

*The Tax Assessor Collectors Association of Texas does not oppose this rule.*

**Chapter 217. Vehicle Titles and Registration** [§217.74](#)

Subchapter C. Registration and Title Systems

**PROPOSAL OF**

**SUBCHAPTER C. REGISTRATION AND TITLE SYSTEMS**

**43 TAC §217.74**

The proposed rules makes proposed amendments to 43 TAC §§217.74, concerning access to the department's webDEALER online system (webDEALER) to implement Transportation Code §520.005(e) as added by Senate Bill 604, 86th Legislature, Regular Session (2019).

Primarily it requires the county tax assessor collector to use and accept applications from dealers via the webdealer application on demand. If the dealer requests access to webDealer, the county tax assessor collector must allow it.

The proposed rules state: “(e) [(d)] A person authorized under subsection (b) of this section may have their authorization to use webDEALER revoked, rescinded, or cancelled at any time, with no notice, at the discretion of a county tax assessor-collector or the department.”

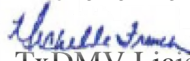
*The Tax Assessor Collectors Association of Texas reiterates that the county tax assessor collector should have full authority to rescind or revoke access if they suspect fraud, waste or abuse. The county tax assessor collector should report to the department that they have revoked, rescinded or cancelled access to webDEALER. However, the county tax assessor collector has the responsibility to protect their constituents and their office if fraud, waste or abuse is perpetrated by a user of webDEALER.*

Thank you,

Randy Riggs

V.P. External, TACA

Michelle French



TxDMV Liaison Chair



1108 Lavaca, Suite 800  
 Austin, Texas 78701  
 Phone: 512-476-2686  
[www.tada.org](http://www.tada.org)

July 24, 2020

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

Sent via email: [rules@txdmv.gov](mailto:rules@txdmv.gov)

Re: Proposed Amendments to 43 TAC §215.89. Fitness.

Dear Ms. Beaver:

On behalf of the Texas Automobile Dealers Association (TADA), please accept these comments regarding the proposed amendments to 43 TAC § 215.89. *Fitness*, as published in the June 26, 2020 *Texas Register*, 45 *TexReg* 4304-4305.

The rule provides that the board or department may determine that a person is unfit to perform the duties and discharge the license holder's responsibilities and after notice and an opportunity for a hearing, deny an applicant's license or revoke or suspend a license if the person:

...

(2) is convicted **or deemed convicted** by any local, state, federal, or foreign authority of an offense that directly relates to the duties or responsibilities of the licensed occupation as described in §211.3 [listed in §215.88(j)] of this title (relating to Criminal Offense Guidelines ~~[and Action on License]~~) or is convicted **or deemed convicted** of an offense that is independently disqualifying under Occupations Code §53.021 [containing elements that are substantially similar to the elements in the offenses in §215.88(j)]; (Emphasis added.)

...

TADA's concern is with respect to denying, revoking or suspending a person's license if the person is "deemed convicted" in addition to an actual conviction. To "deem" a conviction is to have an opinion or belief that a person will be convicted of an offense.

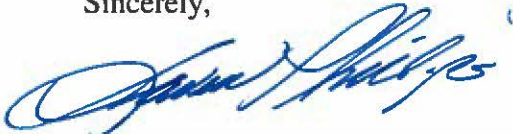
Ms. Tracey Beaver  
July 24, 2020  
page 2

As a person's livelihood and investment is at issue, TADA requests that the agency not act upon a belief or opinion that a conviction is about to occur, but only act to deny, revoke or suspend a person's license when a local, state, federal, or foreign authority has actually convicted the license holder. After conviction, the board or department then considers whether the conviction directly relates to the license holder's duties or responsibilities of their occupation and after notice and hearing, whether to deny, revoke or suspend a license.

On behalf of the Texas franchised dealers, I appreciate the opportunity to file comments regarding the proposed rules as published in the June 26, 2020 *Texas Register*.

If you have any question or would like to discuss, please feel free to contact me at your convenience.

Sincerely,



Karen Phillips  
General Counsel/EVP

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

**ADOPTION OF****SUBCHAPTER A. CRIMINAL OFFENSE AND ACTION ON LICENSE****43 TAC §§211.1-211.5**

**INTRODUCTION.** The Texas Department of Motor Vehicles (department) adopts new 43 TAC §§211.1 - 211.5, concerning the review of criminal offenses and their effect on a license. The new sections implement licensing requirements in Occupations Code Chapters 53, 2301, and 2302, and Transportation Code Chapter 503, including amendments in House Bill (HB) 1342, 86th Legislature, Regular Session (2019); Senate Bill (SB) 604, 86th Legislature, Regular Session (2019); and SB 1217, 86th Legislature, Regular Session (2019). The department adopts §§211.1 - 211.5 to be effective October 31, 2020.

The department adopts new §211.5 without changes to the proposed text as published in the June 26, 2020, issue of the *Texas Register* (45 *TexReg* 4298) and in the Notice of Correction published in the July 10, 2020, issue of the *Texas Register* (45 *TexReg* 4840). The department adopts new §§211.1 - §211.4 with changes to the proposed text as published in the June 26, 2020, issue of the *Texas Register* (45 *TexReg* 4298) and in the Notice of Correction published in the July 10, 2020 issue of the *Texas Register* (45 *TexReg* 4840). These sections will be republished.

In conjunction with this proposal, the department has adopted amendments to §215.89 and §221.15, §221.19, §221.111, and §221.112, and the repeal of §215.88, §221.113, and §221.114, concerning licenses under Occupations Code Chapter 2301 and Chapter 2302 and Transportation Code Chapter 503 in this issue of the *Texas Register*.

**EXPLANATION.** Occupations Code Chapter 53 and §2301.651, §2302.104 and §2302.108, and Transportation Code §503.034 and §503.038 authorize the department and its board to act on an application for a license, or on a license, when a person has committed a criminal offense. New Chapter 211 creates a unified process to promote consistency, efficiency, and predictability in board and

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

1 department decisions concerning the effect of a criminal offense on licensure and implements the Sunset  
2 Advisory Commission's Management Action 4.6, as stated in the Sunset Staff Report with Commission  
3 Decisions, 2018-2019, 86th Legislature (2019). The Sunset report directed the department to adopt  
4 criminal history evaluation rules consistent with Occupations Code Chapter 53, for salvage industry  
5 regulation.

6 The new sections allow the department to maintain fitness standards related to license holders  
7 with prior criminal convictions while implementing the legislature's stated statutory intent in Occupations  
8 Code §53.003 to enhance opportunities for a person to obtain gainful employment after the person has  
9 been convicted and discharged the sentence for the offense. The department has changed in this adoption  
10 the term "licensee" to "license holder" to be consistent with current department practice.

11 The department must follow the requirements of Occupations Code Chapter 53 in evaluating  
12 whether a person's past criminal history can be considered in evaluating the person's fitness for licensing.  
13 Occupations Code §53.021 provides that a licensing authority may suspend or revoke a license, disqualify  
14 a person from receiving a license, or deny a person the opportunity to take a licensing examination on the  
15 grounds that the person has been convicted of: (1) an offense that directly relates to the duties and  
16 responsibilities of the licensed occupation; (2) an offense listed in Article 42A.054, Code of Criminal  
17 Procedure; or (3) a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure. An  
18 offense's inclusion in Occupations Code §53.021(a)(2) and (3) applies to all license applications. It is the  
19 department's duty to determine those offenses that directly relate to the duties and responsibilities of a  
20 particular licensed occupation.

21 Based on a comment received concerning proposed amendments to 43 TAC §215.89, the  
22 department considers it necessary to clarify that what is considered to be a conviction results from  
23 Occupations Code §53.021(d). Occupations Code §53.021(d) provides that a licensing authority may

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

1 consider a person to have been convicted of an offense for purposes of this section regardless of whether  
2 the proceedings were dismissed and the person was discharged as described in Occupations Code  
3 §53.021(c), which is referred to in the proposal as a “deemed” conviction. To clarify this reference,  
4 §211.2(b) has been changed to substitute the word “considered” for “deemed” and add “(d)” after  
5 §53.021. The change does not affect persons not on notice of the proposal or add additional costs.

6 Occupations Code §53.022 sets out criteria for consideration in determining whether an offense  
7 directly relates to the duties and responsibilities of the licensed occupation. Based on those criteria, the  
8 department has determined that certain offenses directly relate to the duties and responsibilities of the  
9 licensed occupations. However, conviction of an offense that directly relates to the duties and  
10 responsibilities of the licensed occupations or is listed in Occupations Code §53.021(a)(2) and (3) is not an  
11 automatic bar to licensing. The department must consider the factors listed under Occupations Code  
12 §53.023 in making its fitness determination. The factors include, among other things, the person's age  
13 when the crime was committed, rehabilitative efforts, and overall criminal history.

14 New §211.1 establishes definitions for terms used in new subchapter A.

15 New §211.2(a) establishes the persons to whom the subchapter applies. The list mirrors the list  
16 of persons currently subject to criminal history review under §215.88(c), which is proposed for repeal in  
17 a separate proposal published in this issue of *the Texas Register*.

18 New §211.2(b) establishes that the convictions in this subchapter include deferred adjudications  
19 and prosecutions considered convictions under Occupations Code §53.021(d).

20 New §211.3 publishes the department's criminal history guidelines as required under Occupations  
21 Code §53.025 and addressing the requirements of Occupations Code §§53.021, 53.022, and 53.023.

22 The licenses issued by the department create positions of trust. The department has defined in  
23 §211.1 “retail license types.” These license holders interact directly with the public, and include salvage



## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

1 dealers, converters, independent mobility motor vehicle dealers, lease facilitators, and general  
2 distinguishing number holders for the following vehicle categories: all-terrain vehicle, light truck,  
3 motorcycle, motorhome, moped/motor scooter, medium duty truck, neighborhood vehicle, other,  
4 passenger auto recreational off-highway vehicle, and towable recreational vehicle. The term does not  
5 include manufacturers, distributors, and general distinguishing number holders for the following vehicle  
6 categories: ambulance, axle, bus, engine, fire truck/fire fighting vehicle, heavy duty truck, transmission,  
7 wholesale motor vehicle dealer, and wholesale motor vehicle auction, and other license types that do not  
8 usually interact directly with the public.

9 The adoption changes the definition of retail license types in §211.1(3) to add "wholesale motor  
10 vehicle dealer" and "wholesale motor vehicle auction" GDN holders to the list of types that are not  
11 included within the scope of retail license types. These two types do not usually interact directly with the  
12 public. This change does not affect persons not on notice of the proposal or add additional costs. The  
13 department has also removed the word "and" between §211.3(e)(5) and (6) as a typographical error.

14 The department has determined that retail license types, and the individuals who serve in  
15 representative capacities for them, also have as an occupation interaction with the public, and access to  
16 confidential information, conveyance, titling, and registration of private property, possession of monies  
17 belonging to or owed to private individuals, creditors, and governmental entities, and must comply with  
18 federal and state environmental and safety regulations. The department concluded that the activities  
19 these license holders engage in would involve the same categories of crimes directly related to the  
20 occupation.

21 The department has determined that other license types that do not usually interact directly with  
22 the public, including manufacturers, distributors, and general distinguishing number holders for the  
23 following vehicle categories: ambulance, axle, bus, engine, fire truck/fire fighting vehicle, heavy duty



## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

1 truck, transmission, wholesale motor vehicle dealer, and wholesale motor vehicle auction, and the  
2 individuals who serve in representative capacities for them, have as an occupation access to confidential  
3 information, conveyance, titling, and registration of private property, and must comply with federal and  
4 state environmental and safety regulations.

5 The department considers the following offenses directly relate to all license types:

6 (1) Offenses involving fraud, theft, deceit, misrepresentation, or that otherwise reflect poorly on  
7 the person's honesty or trustworthiness, including an offense defined as moral turpitude, because  
8 honesty, integrity, trustworthiness, and a willingness to comply with the law are characteristics necessary  
9 for a license holder. A person with a predisposition for crimes involving such activities would have the  
10 opportunity to engage in further similar conduct.

11 (2) Offenses involving forgery, falsification of records, or perjury, because honesty, integrity,  
12 trustworthiness, and a willingness to comply with the law are characteristics necessary for a license  
13 holder. A person with a predisposition for crimes involving such activities would have the opportunity to  
14 engage in further similar conduct.

15 (3) Offenses involving the offering, paying, or taking of bribes, kickbacks, or other illegal  
16 compensation, because they violate the trust inherent in the license and allow a person with a  
17 predisposition the opportunity to commit further offenses.

18 (4) Felony offenses against public administration, because honesty, integrity, trustworthiness, and  
19 a willingness to comply with the law are characteristics necessary for a license holder. Offenses of this  
20 nature reflect a lack of honesty, integrity, trustworthiness, and a willingness to comply with the law.  
21 Further, person involved in offenses of this nature would have an opportunity to impede investigations  
22 into unlawful or improper activities.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

1 (5) Felony offenses under a state or federal statute or regulation involving the manufacture, sale,  
2 finance, distribution, repair, salvage, or demolition, of motor vehicles, because these statutes regulate  
3 the industry that the license holder is involved in and would present a person predisposed to such  
4 violations an opportunity to commit an offense.

5 (6) Felony offenses under a state or federal statute or regulation related to emissions standards,  
6 waste disposal, water contamination, air pollution, or other environmental offenses because license  
7 holders have access to, store, use and dispose of hazardous materials and must maintain facilities in  
8 compliance with federal and state environmental and safety regulations presenting a person predisposed  
9 to such violations an opportunity to commit an offense.

10 (7) Offenses committed while engaged in a licensed activity or on a licensed premise, because the  
11 person has shown disregard for the license and a person with a predisposition for crimes involving such  
12 activities would have the opportunity to engage in further similar conduct.

13 (8) Felony offenses involving the possession, manufacture, delivery, or intent to deliver controlled  
14 substances, simulated controlled substances, dangerous drugs, or organized criminal activity; because  
15 license holders have access to unregistered vehicles and are in a unique position to receive, sell or  
16 otherwise distribute illegal goods or substances. A person with a predisposition for crimes involving such  
17 activities would have the opportunity to engage in further similar conduct.

18 The department considers the following offenses directly related to retail license types only:

19 (9) Felony offenses against real or personal property belonging to another, because license  
20 holders can affect property rights presenting a person predisposed to such violations an opportunity to  
21 commit an offense.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

1 (10) Offenses involving the sale or disposition of another person's real or personal property,  
2 because license holders can affect property rights presenting a person predisposed to such violations an  
3 opportunity to commit an offense.

4 (11) A reportable felony offense conviction under Chapter 62, Texas Code of Criminal Procedure  
5 for which the person must register as a sex offender because license holders have direct contact with  
6 members of the public often in settings with no one else present and access to an individual's motor  
7 vehicle records, including the individual's address. A person with a predisposition for crimes involving  
8 prohibited sexual conduct would have the opportunity to engage in further similar conduct.

9 (12) A felony stalking offense as described by Penal Code §42.072 because license holders have  
10 direct contact with members of the public and access to an individual's motor vehicle records, including  
11 the individual's address. A person with a predisposition for crimes involving stalking would have the  
12 opportunity to engage in further similar conduct.

13 (13) An offense against the family as described by Penal Code §§25.02, 25.07, 25.072, or 25.11,  
14 because license holders have direct contact with members of the public often in settings with no one else  
15 present and access to an individual's motor vehicle records, including the individual's address. A person  
16 with a predisposition for crimes involving prohibited sexual conduct or violence in violation of a court  
17 order would have the opportunity to engage in further similar conduct.

18 (14) Felony offenses against the person because license holders have direct contact with members  
19 of the public often in settings with no one else present and access to an individual's motor vehicle records,  
20 including the individual's address. A person with a predisposition for violence would have the opportunity  
21 to engage in further similar conduct.

22 (15) Felony offenses against public order and decency as described by Penal Code §§43.24, 43.25,  
23 43.251, 43.26, 43.261, or 43.262, because license holders have direct contact with members of the public

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

1 including and access to an individual's motor vehicle records, including the individual's address. A person  
2 with a predisposition for crimes involving prohibited sexual conduct or acts with children would have the  
3 opportunity to engage in further similar conduct.

4 (16) Offenses of attempting or conspiring to commit any of the foregoing offenses applicable to  
5 the license type, because the offense was intended.

6 New §211.3(a) - (c) list the reasons the department has determined that certain offenses directly  
7 relate to the duties and responsibilities of the licensed occupation.

8 New §211.3(d) lists offenses that directly relate to the duties and responsibilities of the licensed  
9 occupation. The list is not exclusive; the department may determine, based on the factors set forth in  
10 Occupations Code §53.022, that an unlisted offense directly relates to the duties and responsibilities of  
11 the licensed occupation.

12 New §211.3(e) lists the factors that the department must consider in making its evaluation of the  
13 applicant's fitness for licensing.

14 New §211.3(f) states the requirement in new Occupations Code §53.0231(b)(2)(B) that it is the  
15 applicant's responsibility to provide evidence concerning the factors listed in §211.3(e).

16 New §211.4 addresses imprisonment of an applicant, license holder, or person otherwise listed in  
17 §211.2(a)(2). Occupations Code §53.021(b) requires an agency to revoke a license holder's license on the  
18 license holder's imprisonment following a felony conviction, felony community supervision revocation,  
19 revocation of parole, or revocation of mandatory supervision. Because the department also licenses  
20 persons based on individuals serving in representative capacities, the department will also consider the  
21 effect of imprisonment of those persons on the license holder. Because the revocation is mandatory, the  
22 factors and determinations listed in §211.3 do not apply to a person under this section.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

1 New §211.5 implements Occupations Code §53.102 that allows a person to request that a  
2 licensing authority issue a criminal history evaluation letter regarding the person's eligibility for a license  
3 issued by that authority. As authorized in Occupations Code §53.105, §211.5 also proposes a fee in the  
4 amount of \$100 to cover the cost of the review. This provision applies to applicants for certain  
5 independent motor vehicle dealer general distinguishing number licenses.

**SUMMARY OF COMMENTS.**

6  
7  
8 The department received written comments requesting clarifications in the proposed text from:  
9 Lubbock County Tax Assessor-Collector and Tax Assessor-Collectors Association of Texas.

**Comment:**

10  
11  
12 Two commenters raised concerns about subsequent convictions and inquired as to the frequency  
13 of the criminal history background checks.

**Agency Response:**

14  
15 The department agrees with the comment that subsequent criminal history background checks  
16 are necessary. Currently, background checks are performed on all new and renewal applications, and for  
17 all license amendments that include a change in ownership or control. The additional checks are to  
18 discover new offenses, or offenses that were not previously reported as required.

**Comment:**

19  
20  
21 A commenter requested clarification as to the time frame will the person be held responsible for  
22 a disqualifying criminal offense? Will the criminal convictions history go back over the last 5 years, 10  
23 years, or a lifetime?

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

**Agency Response:**

The department disagrees with the comment that further clarification is necessary. All convictions related to the occupation being licensed are considered. The department evaluates the conviction, or pattern of convictions, based on the factors in Occupations Code §53.023 and listed in §211.3(e). The factors include consideration of the individual's age at the time of the offense and the amount of time that has elapsed since the person's last criminal activity.

**STATUTORY AUTHORITY.** The department adopts new §§211.1 - 211.5 under Occupations Code §2301.155 and §2302.051, and Transportation Code §503.002 and §1002.001.

Occupations Code §2301.155 authorizes the board to adopt rules as necessary or convenient to administer Occupations Code Chapter 2301 and to govern practice and procedure before the board.

Occupations Code §2302.051 authorizes the board to adopt rules as necessary to administer Occupations Code Chapter 2302.

Transportation Code §503.002 authorizes the board to adopt rules that are necessary to administer Transportation Code Chapter 503.

Transportation Code §1002.001, authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

**CROSS REFERENCE TO STATUTE.** Occupations Code §§53.021, 53.022-53.025, 53.102, 53.104, 2301.651; 2301.651, §2302.104 and §2302.108, and Transportation Code §503.034 and §503.038.

**TEXT.****SUBCHAPTER A. CRIMINAL OFFENSE AND ACTION ON LICENSE**

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

**43 TAC §§211.1 - 211.5****211.1 Definitions.**

When used in this chapter, the following words and terms have the following meanings, unless the context clearly indicates otherwise.

(1) "Department" means the Texas Department of Motor Vehicles.

(2) "License" means any license, registration, or authorization, issued by the department under:

(A) Transportation Code, Chapter 503;

(B) Occupations Code, Chapter 2301;

(C) Occupations Code, Chapter 2302; or

(D) any other license, registration, or authorization, that the department may deny or revoke because of a criminal offense of the applicant or license holder.

(3) "Retail license types" means those license holder types that interact directly with the public, including salvage dealers, converters, independent mobility motor vehicle dealers, lease facilitators, and general distinguishing number holders for the following vehicle categories: all-terrain vehicle, light truck, motorcycle, motorhome, moped/motor scooter, medium duty truck, neighborhood vehicle, other, passenger auto recreational off-highway vehicle, and towable recreational vehicle, but does not include other license types that do not generally interact directly with the public, including manufacturers, distributors, and general distinguishing number holders for the following vehicle categories: ambulance, axle, bus, engine, fire truck/fire fighting vehicle, heavy duty truck, transmission, wholesale motor vehicle dealer, and wholesale motor vehicle auction.

**211.2. Application of Subchapter.**

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

1           (a) This chapter applies to the following persons:

2                     (1) applicants and holders of any license; and

3                     (2) persons who are acting at the time of application, or will later act, in a representative  
4 capacity for an applicant or holder of a license, including the applicant's or holder's officers, directors,  
5 members, managers, trustees, partners, principals, or managers of business affairs.

6           (b) In this chapter a "conviction" includes a deferred adjudication that is considered ~~deemed~~ to  
7 be a conviction under Occupations Code §53.021(d).

8  
9 211.3. Criminal Offense Guidelines.

10           (a) The licenses issued by the department create positions of trust. License holders provide  
11 services to members of the public. License holder services involve access to confidential information,  
12 conveyance, titling, and registration of private property, possession of monies belonging to or owed to  
13 private individuals, creditors, and governmental entities, and compliance with federal and state  
14 environmental and safety regulations. License holders are provided with opportunities to engage in fraud,  
15 theft, money laundering, and related crimes and to engage in environmental and safety violations that  
16 endanger the public. In addition, licensure provides persons predisposed to commit assaultive or sexual  
17 crimes with greater opportunities to engage in such conduct.

18           (b) Under Occupations Code Chapter 53 the department may suspend or revoke an existing  
19 license or disqualify an applicant from receiving a license because of a person's conviction of a felony or  
20 misdemeanor if the crime directly relates to the duties and responsibilities of the licensed occupation.  
21 The department shall consider the factors listed in the Occupations Code §53.022 in determining whether  
22 a criminal conviction directly relates to the duties and responsibilities of a license holder.



## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

(c) The department has determined under the factors listed in Occupations Code §53.022 that offenses detailed in subsection (d) of this section directly relate to the duties and responsibilities of license holders, either because the offense entails a violation of the public trust; issuance of a license would provide an opportunity to engage in further criminal activity of the same type; or the offense demonstrates the person's inability to act with honesty, trustworthiness, and integrity. Such offenses include crimes under the laws of another state, the United States, or a foreign jurisdiction, if the offense contains elements that are substantially similar to the elements of an offense under the laws of this state.

The list of offenses in subsection (d) is in addition to those that are independently disqualifying under Occupations Code §53.021, including:

(1) an offense listed in Article 42A.054, Code of Criminal Procedure; or

(2) a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure.

(d) The list of offenses in this subsection is intended to provide guidance only and is not exhaustive of the offenses that may relate to a particular regulated occupation. After due consideration of the circumstances of the criminal act and its relationship to the position of trust involved in the particular licensed occupation, the department may find that an offense not described below also renders a person unfit to hold a license based on the criteria listed in Occupations Code §53.022. Paragraphs (1) - (8) apply to all license types. Paragraphs (9) - (15) apply only to retail license types. Paragraph (16) applies to offenses applicable to a license type.

(1) offenses involving fraud, theft, deceit, misrepresentation, or that otherwise reflect poorly on the person's honesty or trustworthiness, including an offense defined as moral turpitude;

(2) offenses involving forgery, falsification of records, or perjury;

(3) offenses involving the offering, paying, or taking of bribes, kickbacks, or other illegal compensation;

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

- 1                   (4) felony offenses against public administration;
- 2                   (5) felony offenses under a state or federal statute or regulation involving the
- 3 manufacture, sale, finance, distribution, repair, salvage, or demolition, of motor vehicles;
- 4                   (6) felony offenses under a state or federal statute or regulation related to emissions
- 5 standards, waste disposal, water contamination, air pollution, or other environmental offenses;
- 6                   (7) offenses committed while engaged in a licensed activity or on licensed premises;
- 7                   (8) felony offenses involving the possession, manufacture, delivery, or intent to deliver
- 8 controlled substances, simulated controlled substances, dangerous drugs, or engaging in an organized
- 9 criminal activity;
- 10                  (9) felony offenses against real or personal property belonging to another;
- 11                  (10) offenses involving the sale or disposition of another person's real or personal
- 12 property;
- 13                  (11) a reportable felony offense conviction under Chapter 62, Texas Code of Criminal
- 14 Procedure for which the person must register as a sex offender;
- 15                  (12) an offense against the family as described by Penal Code §§25.02, 25.07, 25.072, or
- 16 25.11;
- 17                  (13) felony offenses against the person;
- 18                  (14) a felony stalking offense as described by Penal Code §42.072;
- 19                  (15) a felony offense against public order and decency as described by Penal Code
- 20 §§43.24, 43.25, 43.251, 43.26, 43.261, or 43.262; and
- 21                  (16) offenses of attempting or conspiring to commit any of the foregoing offenses
- 22 applicable to the license type.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 211 - Criminal Offense and Action on License

1                   (e) When determining a person's present fitness for a license, the department shall also  
2 consider the following evidence:

- 3                   (1) the extent and nature of the person's past criminal activity;  
4                   (2) the age of the person when the crime was committed;  
5                   (3) the amount of time that has elapsed since the person's last criminal activity;  
6                   (4) the conduct and work activity of the person before and after the criminal  
7 activity;  
8                   (5) evidence of the person's rehabilitation or rehabilitative effort while  
9 incarcerated or after release;  
10                  (6) evidence of the person's compliance with any conditions of community  
11 supervision, parole, or mandatory supervision; and  
12                  (7) other evidence of the person's present fitness, including letters of  
13 recommendation.

14                  (f) It is the person's responsibility to obtain and provide to the licensing authority evidence  
15 regarding the factors listed in subsection (e) of this section.

16  
17 §211.4. Imprisonment.

18                  (a) Section 211.3 of this Chapter does not apply to persons who are imprisoned at the time the  
19 department considers the conviction.

20                  (b) The department shall revoke a license upon the imprisonment of a license holder following a  
21 felony conviction or revocation or felony community supervision, parole, or mandatory supervision.

## Adopted Sections

## Chapter 211 - Criminal Offense and Action on License

(d) A person currently imprisoned because of a felony conviction may not obtain a license, renew a previously issued license, or act in a representative capacity for an application or license holder as described by §211.2(a)(2).

(a) Pursuant to Texas Occupations Code, Chapter 53, Subchapter D, a person may request that the department evaluate the person's eligibility for a specific occupational license regulated by the department by:

(2) paying the required Criminal History Evaluation Letter fee of \$100.

(b) The department shall respond to the request not later than the 90th day after the date the request is received.

**CERTIFICATION.** The department certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on Month Day, YYYY.

**Tracey Beaver, General Counsel**

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 – Motor Vehicle Distribution

## ADOPTION OF

## SUBCHAPTER C. LICENSES, GENERALLY

## 43 TAC §215.89

## REPEAL OF

## 43 TAC §215.88

**INTRODUCTION.** The Texas Department of Motor Vehicles (department) adopts the repeal of 43 TAC §215.88 and amendments to 43 TAC §215.89 to update licensing fitness rules under Occupations Code §2301.651 and Transportation Code §503.034, including implementation of Senate Bill 604, 86th Legislature, Regular Session, (2019). The department adopts the repeal of §215.88 and amendments to §215.89 to be effective October 31, 2020.

The department adopts the repeal of §215.88 without changes to the proposed text as published in the June 26, 2020, issue of the *Texas Register* (45 *TexReg* 4303). The department adopts amendments to §215.89 with changes to the proposed text as published in the June 26, 2020, issue of the *Texas Register* (45 *TexReg* 4303). The section will be republished.

In conjunction with this proposal, the department has adopted new §§211.1 - 211.5, concerning criminal offense and action on licenses, and amendments to §§221.15, 221.19, 221.111, and 221.112, and repeal of §221.113 and §221.114, concerning salvage vehicle dealer licenses, in this issue of the *Texas Register*.

**EXPLANATION.** Occupations Code §2301.651 and Transportation Code §503.034 and §503.038 require the department and its board to review the fitness of applicants for new and renewal licenses, and license holders. The amendments to §215.89 update the requirements related to review of criminal history information, affiliations, and conform with statute. The repeal of §215.88 is necessary because the

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 – Motor Vehicle Distribution

1 determination of an offense that directly relates to the duties or responsibilities of the licensed occupation  
2 has been moved to adopted new Chapter 211.

3 The amendment to §215.89(b)(2) changes the reference from §215.88(j) to adopted new §211.3.  
4 The department has adopted new Chapter 211 in this issue of the *Texas Register*. As stated in response  
5 to a comment, the department considers it necessary to clarify that what is considered to be a conviction  
6 results from statute. Occupations Code §53.021(d) provides that a licensing authority may consider a  
7 person to have been convicted of an offense for purposes of this section regardless of whether the  
8 proceedings were dismissed and the person was discharged as described in Occupations Code §53.021(c),  
9 which is referred to in the proposal as a “deemed” conviction. To clarify this reference, §215.89(b)(2) has  
10 been changed to substitute “or considered convicted under Occupations Code §53.021(d)” for the two  
11 uses of “or deemed convicted.” The change does not affect persons not on notice of the proposal or add  
12 additional costs.

13 The amendment to §215.89(b)(3) eliminates the reference to "criminal history information." The  
14 amendment conforms the requirement to Occupations Code §2301.651(a)(2) and Transportation Code  
15 §503.038(6), which do not limit consideration of material misstatements just to statements regarding  
16 criminal history information.

17 The amendment to §215.89(b)(7) modifies the consideration to include assessments or penalties  
18 addressing the acquisition, sale, repair, rebuild, or reconstruction of a salvage motor vehicle or  
19 nonrepairable motor vehicle. The change is to conform review to the expansion of the license authority  
20 in SB 604.

21 The amendment to §215.89(b)(8) changes the reference from §215.88 to adopted new §211.2.

22 The amendments to §215.89(b)(9) and (10) clarify that the department is concerned with  
23 affiliations that allow for control of the license holder, and describe control as "the power to direct or

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 – Motor Vehicle Distribution

1 cause the direction of the management, policies, and activities, of an applicant or license holder, whether  
2 directly or indirectly."

3 **SUMMARY OF COMMENTS.**

4 The department received one written comment requesting a change in the proposed text from  
5 the Texas Automobile Dealers Association.

6 **§215.89**

7 **Comment:**

8 The commenter asserts that to "deem" a conviction is to have an opinion or belief that a person  
9 will be convicted of an offense. Because the decision affects the applicant or license holder's livelihood,  
10 the commenter requests that the agency not act upon a belief or opinion that a conviction is about to  
11 occur, but only act to deny, revoke or suspend a person's license when a local, state, federal, or foreign  
12 authority has actually convicted the applicant or license holder.

13 **Agency Response:**

14 The department agrees with the commenter and does not intend to base a decision on a possible  
15 outcome. The department considers it necessary to clarify that what is considered to be a conviction  
16 results from statute. Occupations Code §53.021(d) provides that a licensing authority may consider a  
17 person to have been convicted of an offense for purposes of this section regardless of whether the  
18 proceedings were dismissed and the person was discharged as described Occupations Code §53.021(c). It  
19 applies to cases involving deferred adjudication or deferred prosecution following a plea of guilty or nolo  
20 contendere. This is what the department referred to in the proposal as a "deemed" conviction. To clarify  
21 this reference, §215.89(b)(2) has been changed to substitute "considered convicted under Occupations  
22 Code §53.021(d)" for the two uses of "or deemed convicted." The change does not affect persons not on  
23 notice of the proposal or add additional costs.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 – Motor Vehicle Distribution

1

2 **STATUTORY AUTHORITY.** The department adopts new §215.89 under Occupations Code §2301.155. and

3 Transportation Code §503.002 and §1002.001.

4 Occupations Code §2301.155 authorizes the board of the Texas Department of Motor Vehicles to

5 adopt rules as necessary or convenient to administer this chapter and to govern practice and procedure

6 before the board.

7 Transportation Code §503.002 authorizes the board to adopt rules that are necessary to

8 administer Transportation Code Chapter 503.

9 Transportation Code §1002.001, authorizes the board to adopt rules that are necessary and

10 appropriate to implement the powers and the duties of the department.

11 **CROSS REFERENCE TO STATUTE.** Occupations Code §2301.651, and Transportation Code §503.034 and

12 §503.038.

13 **TEXT.**14 **SUBCHAPTER C. LICENSES, GENERALLY**15 **43 TAC §215.89**

16 §215.89. Fitness.

17 (a) In determining a person's fitness for a license issued or to be issued by the department under

18 Transportation Code, Chapter 503 or Occupations Code, Chapter 2301, the board or department will

19 consider:

20 (1) the requirements of Occupations Code, Chapter 53;

21 (2) the provisions of Occupations Code, §2301.651;

22 (3) any specific statutory licensing criteria or requirements;

23 (4) mitigating factors; and



## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 – Motor Vehicle Distribution

1 (5) other evidence of a person's fitness, as allowed by law, including the standards identified  
2 in subsection (b) of this section.

3 (b) The board or department may determine that a person is unfit to perform the duties and  
4 discharge the responsibilities of a license holder and may, following notice and an opportunity for hearing,  
5 deny a person's license application or revoke or suspend a license if the person:

6 (1) fails to meet or maintain the qualifications and requirements of licensure;

7 (2) is convicted, or considered convicted under Occupations Code §53.021(d), by any local,  
8 state, federal, or foreign authority of an offense that directly relates to the duties or responsibilities of the  
9 licensed occupation as described in §211.3 [listed in §215.88(j)] of this title (relating to Criminal Offense  
10 Guidelines ~~[and Action on License]~~) or is convicted, or considered convicted under Occupations Code  
11 §53.021(d), of an offense that is independently disqualifying under Occupations Code §53.021 [containing  
12 elements that are substantially similar to the elements in the offenses in §215.88(j)];

13 (3) omits information or provides false, misleading, or incomplete information ~~[regarding a~~  
14 ~~criminal conviction]~~ on an initial application, renewal application, or application attachment, for a license  
15 or other authorization issued by the department or by any local, state, or federal regulatory authority;

16 (4) is found to have violated an administrative or regulatory requirement based on action  
17 taken on a license, permit, or other authorization, including disciplinary action, revocation, suspension,  
18 denial, corrective action, cease and desist order, or assessment of a civil penalty, administrative fine, fee,  
19 or similar assessment, by the board, department, or any local, state, or federal regulatory authority;

20 (5) is insolvent or fails to obtain or maintain financial resources sufficient to meet the financial  
21 obligations of the license holder;

22 (6) is a corporation that fails to maintain its charter, certificate, registration, or other authority  
23 to conduct business in Texas;

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 – Motor Vehicle Distribution

(7) is assessed a civil penalty, administrative fine, fee, or similar assessment, by the board, department, or a local, state, or federal regulatory authority, for violation of a requirement governing or impacting the distribution or sale of a vehicle or a motor vehicle, or the acquisition, sale, repair, rebuild, reconstruction, or other dealing of a salvage motor vehicle or nonrepairable motor vehicle, and fails to comply with the terms of a final order or fails to pay the penalty pursuant to the terms of a final order;

(8) was or is a person described in §211.2 of this title (relating to Application of Subchapter) [a ~~person defined by §215.88(c) or identified in §215.88(d), or a manager or affiliate of a sole proprietorship, partnership, corporation, association, trust, estate, or other legal entity~~] whose actions or omissions could be considered unfit, who is ineligible for licensure, or whose current or previous license, permit, or other authorization issued by any local, state, or federal regulatory authority has been subject to disciplinary action including suspension, revocation, denial, corrective action, cease and desist order, or assessment of a civil penalty, administrative fine, fee, or similar assessment;

(9) has an ownership, organizational, managerial, or other business arrangement, that would allow a person the power to direct or cause the direction of the management, policies, and activities, of an applicant or license holder, whether directly or indirectly, when the [interest with a] person [whose ~~actions or omissions~~] could be considered unfit, [who is] ineligible for licensure, or whose current or previous license, permit, or other authorization issued by any local, state, or federal regulatory authority, has been subject to disciplinary action, including suspension, revocation, denial, corrective action, cease and desist order, or assessment of a civil penalty, administrative fine, fee, or similar assessment, by the board, department, or any local, state, or federal regulatory authority;

(10) ~~[is a business entity that is operated, managed, or otherwise controlled by a relative or family member and that person could be considered unfit, is ineligible for licensure, or whose current or previous license, permit, or other authorization issued by any local, state, or federal regulatory authority]~~

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 – Motor Vehicle Distribution

1 ~~has been subject to disciplinary action, including suspension, revocation, denial, corrective action, cease~~  
2 ~~and desist order, or assessment of a civil penalty, administrative fine, fee, or similar assessment; or]~~

3 [(11)] is found in an order issued through a contested case hearing to be unfit or acting in a  
4 manner detrimental to the system of distribution or sale of motor vehicles in Texas, the economy of the  
5 state, the public interest, or the welfare of Texas citizens.

**REPEAL OF****43 TAC §215.88**

9 [~~§215.88. Criminal Offense and Action on License.~~]

10 [(a) This section describes board or department action on a license application or an existing  
11 license issued by the department under Transportation Code, Chapter 503 or Occupations Code, Chapter  
12 2301, including denial, revocation, and suspension, and identifies the types of criminal offenses that  
13 directly relate to the duties and responsibilities of the occupations licensed under Transportation Code,  
14 Chapter 503 or Occupations Code, Chapter 2301.]

15 [(b) Except as provided by subsection (c) of this section, the board or department will consider  
16 denial of an application for a license or revocation or suspension of a license in accordance with the  
17 requirements of:]

18 [(1) Occupations Code, Chapter 53;]

19 [(2) Occupations Code, Chapter 2301, Subchapter N;]

20 [(3) Government Code, Chapter 2001; and]

21 [(4) board rules.]

22 [(c) The terms "applicant" or "person" as used in this section includes:]

23 [(1) an applicant for a license or other authorization issued by the department;]

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 – Motor Vehicle Distribution

1                   ~~[(2) the holder of a license or other authorization issued by the department;]~~

2                   ~~[(3) a person's spouse with a community property interest in the entity licensed or to be~~

3 ~~licensed by the department;]~~

4                   ~~[(4) a controlling shareholder of a business entity licensed by the department;]~~

5                   ~~[(5) a person holding 50% or more ownership interest in a business entity licensed by the~~

6 ~~department;]~~

7                   ~~[(6) a person acting in a representative capacity for the applicant or license holder,~~

8 ~~including an owner, president, vice-president, member of the board of directors, chief executive officer,~~

9 ~~chief financial officer, chief information officer, chief managing officer, treasurer, controller, director,~~

10 ~~principal, manager of business affairs, or similar position of a business entity; or]~~

11                   ~~[(7) any person who becomes a person described in this subsection.]~~

12                   ~~[(d) An action taken by the board or department under this section may be based on an act or~~

13 ~~omission by an officer, director, partner, trustee, or other person acting in a representative capacity for~~

14 ~~the applicant or license holder.]~~

15                   ~~[(e) Upon receipt of an order or notice regarding an applicant or license holder issued under~~

16 ~~Family Code, Chapter 232, the board or department will deny an application for issuance of a license, will~~

17 ~~not renew an existing license, or will suspend a license or other authorization issued by the department.~~

18 ~~The board's or department's action, based upon receipt of an order or notice issued under Family Code,~~

19 ~~Chapter 232, on the application for a license or existing license is not subject to the provisions of~~

20 ~~Government Code, Chapter 2001, including notice, hearing, or opportunity for hearing. Upon receipt of~~

21 ~~an order vacating or staying an order suspending a license issued under Family Code, Chapter 232, the~~

22 ~~board or department will issue the affected license to the applicant or license holder if the applicant or~~

23 ~~license holder is otherwise qualified for the license.]~~

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 – Motor Vehicle Distribution

1           ~~[(f) No person currently imprisoned for conviction of a felony under any state or federal law is~~  
2           ~~eligible for or may retain a license or authorization issued by the department.]~~

3           ~~[(g) The board or department will revoke a license issued by the department upon the license~~  
4           ~~holder's imprisonment following a felony conviction, felony community supervision revocation,~~  
5           ~~revocation of parole, or revocation of mandatory supervision.]~~

6           ~~[(h) The board or department may revoke a license issued by the department upon the license~~  
7           ~~holder's imprisonment for a felony conviction, felony community supervision revocation, revocation of~~  
8           ~~parole, or revocation of mandatory supervision, of a person defined by subsection (c) of this section or~~  
9           ~~identified in subsection (d) of this section.]~~

10           ~~[(i) The board or department may suspend a license, revoke a license, or disqualify a person from~~  
11           ~~receiving a license issued by the department if:]~~

12                   ~~[(1) a person has been convicted of an offense that directly relates to the duties and~~  
13                   ~~responsibilities of the licensed occupation. Any such action shall be made after consideration of the~~  
14                   ~~factors listed in Occupations Code, §53.022 and §53.023, and the guidelines issued by the department~~  
15                   ~~pursuant to Occupations Code, §53.025;]~~

16                   ~~[(2) a person has been convicted of an offense that does not directly relate to the duties~~  
17                   ~~and responsibilities of the licensed occupation and that was committed less than five years before the~~  
18                   ~~date the person applies for the license;]~~

19                   ~~[(3) a person has been convicted of an offense listed in Code of Criminal Procedure,~~  
20                   ~~Article 42.12, Section 3g; or]~~

21                   ~~[(4) a person has been convicted of a sexually violent offense, as defined by Code of~~  
22                   ~~Criminal Procedure, Article 62.001.]~~

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 – Motor Vehicle Distribution

1           ~~[(j) For purposes of Occupations Code, §53.021, the following criminal offenses directly relate to~~  
2 ~~the duties and responsibilities of the occupations licensed by the department:]~~

3                   ~~[(1) Penal Code, Chapter 15, Preparatory Offenses;]~~

4                   ~~[(2) Penal Code, Chapter 16, Criminal Instruments, Interception of Wire or Oral~~  
5 ~~Communication, and Installation of Tracking Device;]~~

6                   ~~[(3) Penal Code, Chapter 19, Criminal Homicide;]~~

7                   ~~[(4) Penal Code, Chapter 20, Kidnapping, Unlawful Restraint, and Smuggling of Persons;]~~

8                   ~~[(5) Penal Code, Chapter 20A, Trafficking of Persons;]~~

9                   ~~[(6) Penal Code, Chapter 21, Sexual Offenses;]~~

10                  ~~[(7) Penal Code, Chapter 22, Assaultive Offenses;]~~

11                  ~~[(8) Penal Code, Chapter 25, Offenses Against the Family;]~~

12                  ~~[(9) Penal Code, Chapter 28, Arson, Criminal Mischief, and Other Property Damage or~~  
13 ~~Destruction;]~~

14                  ~~[(10) Penal Code, Chapter 29, Robbery;]~~

15                  ~~[(11) Penal Code, Chapter 30, Burglary and Criminal Trespass;]~~

16                  ~~[(12) Penal Code, Chapter 31, Theft;]~~

17                  ~~[(13) Penal Code, Chapter 32, Fraud;]~~

18                  ~~[(14) Penal Code, Chapter 33, Computer Crimes;]~~

19                  ~~[(15) Penal Code, Chapter 33A, Telecommunications Crimes;]~~

20                  ~~[(16) Penal Code, Chapter 34, Money Laundering;]~~

21                  ~~[(17) Penal Code, Chapter 35, Insurance Fraud;]~~

22                  ~~[(18) Penal Code, Chapter 36, Bribery and Corrupt Influence;]~~

23                  ~~[(19) Penal Code, Chapter 37, Perjury and Other Falsification;]~~

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 – Motor Vehicle Distribution

- 1                   ~~[(20) Penal Code, Chapter 38, Obstructing Governmental Operation;]~~
- 2                   ~~[(21) Penal Code, Chapter 71, Organized Crime;]~~
- 3                   ~~[(22) Code of Criminal Procedure, Chapter 62, Sex Offender Registration Program,~~
- 4 ~~involving an offense for which the person has been required to register as a sex offender;]~~
- 5                   ~~[(23) Transportation Code, Chapter 501, Certificate of Title Act;]~~
- 6                   ~~[(24) Transportation Code, Chapter 502, Registration of Vehicles;]~~
- 7                   ~~[(25) Transportation Code, Chapter 503, Dealer's and Manufacturer's Vehicle License~~
- 8 ~~Plates;]~~
- 9                   ~~[(26) Transportation Code, Chapter 504, License Plates;]~~
- 10                  ~~[(27) Transportation Code, Chapter 520, Miscellaneous Provisions;]~~
- 11                  ~~[(28) Transportation Code, Chapter 547, Vehicle Equipment;]~~
- 12                  ~~[(29) Transportation Code, Chapter 548, Compulsory Inspection of Vehicles;]~~
- 13                  ~~[(30) Transportation Code, Chapter 727, Modification of, Tampering with, and Equipment~~
- 14 ~~of Motor Vehicles;~~
- 15                  ~~[(31) Transportation Code, Chapter 728, Subchapter B, Sale of Master Key for Motor~~
- 16 ~~Vehicle Ignitions;]~~
- 17                  ~~[(32) Occupations Code, Chapter 2301, Subchapter R, Regulation of Certain Commercial~~
- 18 ~~Uses of Motor Vehicles;]~~
- 19                  ~~[(33) Tax Code, Chapter 23, Appraisal Methods and Procedures;]~~
- 20                  ~~[(34) Tax Code, Chapter 152, Taxes on Sale, Rental, and Use of Motor Vehicles;]~~
- 21                  ~~[(35) Business and Commerce Code, Chapter 17, Deceptive Trade Practices;]~~
- 22                  ~~[(36) Health and Safety Code, Chapter 365, Litter;]~~
- 23                  ~~[(37) Health and Safety Code, Chapter 481, Texas Controlled Substances Act;]~~

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 – Motor Vehicle Distribution

- 1                   ~~[(38) Health and Safety Code, Chapter 482, Simulated Controlled Substances;]~~
- 2                   ~~[(39) Health and Safety Code, Chapter 483, Dangerous Drugs;]~~
- 3                   ~~[(40) Water Code, Chapter 7, Enforcement;]~~
- 4                   ~~[(41) United States Code, Title 15, Chapter 28, Disclosure of Automobile Information,~~
- 5 ~~especially 15 U.S.C. §1233, Violations and Penalties;]~~
- 6                   ~~[(42) United States Code, Title 18, Chapter 63, Mail Fraud and Other Fraud Offenses;]~~
- 7                   ~~[(43) United States Code, Title 49, Chapter 301, Motor Vehicle Safety, especially 49 U.S.C.~~
- 8 ~~§30170, Criminal Penalties; or]~~
- 9                   ~~[(44) United States Code, Title 49, Chapter 327, Odometers, especially 49 U.S.C. §32709,~~
- 10 ~~Penalties and Enforcement.]~~

11 **CERTIFICATION.** The department certifies that legal counsel has reviewed the adoption and found it to

12 be a valid exercise of the agency's legal authority.

13                   Issued at Austin, Texas, on Month Day, YYYY.

14 \_\_\_\_\_

15 **Tracey Beaver, General Counsel**

16



## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

## ADOPTION OF

## SUBCHAPTER C. LICENSING

## 43 TAC §221.15 and 221.19

## SUBCHAPTER F. ADMINISTRATIVE SANCTIONS

## 43 TAC §221.111 AND §221.112

## REPEAL OF

## 43 TAC §221.113 AND §221.114

**INTRODUCTION.** The Texas Department of Motor Vehicles (department) adopts amendments to Transportation Code §221.15 relating to required license application information; §221.19 related to change of a license holder's name or ownership; §221.111 related to denial of license; and §221.112 related to license suspension, revocation and administrative penalties. The department also adopts the repeal §221.113 and §221.114. The changes update licensing application, fitness, denial, suspension, revocation, and penalty rules under Occupations Code Chapter 2302, and remove references to salvage vehicle agents and salvage vehicle dealer endorsements to implement Senate Bill (SB) 604, 86th Legislature, Regular Session, (2019). The department adopts amendments to §§221.15, 221.19, 221.111, and 221.112 and repeal §221.113 and §221.114 to be effective October 31, 2020.

The department adopts the amendments to §221.15 and §221.19; and the repeal of §221.113 and §221.114 without changes to the proposed text as published in the June 26, 2020, issue of the *Texas Register* (45 *TexReg* 4311). The department adopts amendments to §221.111 and §221.112 with changes to the proposed text as published in the June 26, 2020, issue of the *Texas Register* (45 *TexReg* 4311). These sections will be republished.

In conjunction with this adoption, the department has adopted new §§211.1 - 211.5 concerning criminal offense and action on licenses, and amendments to §215.89 and repeal of §215.88 concerning

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1 licenses under Occupations Code Chapter 2301 and Transportation Code Chapter 503, in this issue of the  
2 *Texas Register*.

3 **EXPLANATION.** The amendments to §§221.15, 221.19, 221.111, and 221.112 update and clarify  
4 requirements, and establish references concerning the review of criminal history information under new  
5 Chapter 211 that has been adopted in accordance with Occupations Code Chapter 53 and the Sunset  
6 Advisory Commission's Management Action 4.6, as stated in the Sunset Staff Report with Commission  
7 Decisions, 2018-2019, 86th Legislature (2019).

8 The Sunset report directs the department to adopt criminal history evaluation rules consistent  
9 with Occupations Code Chapter 53, for salvage industry regulation. Occupations Code, §53.021,  
10 authorizes a licensing authority to suspend or revoke a license, or disqualify a person from receiving a  
11 license, if the person has been convicted of a felony or misdemeanor that directly relates to the duties  
12 and occupations of the licensed occupation. New Chapter 211 addresses the requirements under  
13 Occupations Code Chapter 53 for licenses issued under Chapter 215 and 221.

14 Under Occupations Code §2302.104, an application for a salvage dealer license must include a  
15 statement of the previous history, record, and associations of the applicant to the extent sufficient to  
16 establish, to the satisfaction of the department, the business reputation and character of the applicant.  
17 Under Occupations Code §2302.105, the department may not issue a license until the department  
18 completes an investigation of the applicant's qualifications.

19 The amendment to §221.15(2) eliminate references to salvage vehicle dealer license  
20 endorsements and salvage vehicle agents to conform with changes in SB 604. The paragraphs are  
21 renumbered accordingly.

22 The amendments to §221.15(9) revise the statement to conform with the requirements of  
23 Occupations Code §2302.104.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1           The amendments to §221.15(12) identify the persons who will be considered in the license review  
2           under Occupations Code §2302.104.

3           The amendments to §221.15(13) clarify that the department is concerned with affiliations that  
4           allow for control of the license holder, and describe control as "the power to direct or cause the direction  
5           of the management, policies, and activities, of an applicant or license holder, whether directly or  
6           indirectly."

7           The amendment to §221.15(14) clarifies which persons are required to submit criminal history  
8           information. Criminal history information will be evaluated under new Chapter 211, as addressed in  
9           amendments §221.111(a)(3) and §221.112(16).

10          The amendment to §221.15(15) clarifies that the department collects professional history  
11          information to determine business reputation as required in Occupations Code §2302.104.

12          Section 221.19 requires license holders to keep certain information current with the department.  
13          Amendments to §221.19 clarify what types of organizational changes require notice to the department.  
14          These changes include a change in entity type, addition of a new person for whom criminal and  
15          professional history information would be required, or a business arrangement that extends control of  
16          the license holder to other persons for whom criminal and professional history information would be  
17          required.

18          The amendment to §221.19(c) establishes that the license holder is not required to submit a new  
19          application, but just the information that is necessary to address the change. The amendment to  
20          §221.19(c) also removes requirements related to a 50% change of ownership, because that is unnecessary  
21          based on the amendment to §221.19(b). Finally, the amendment to §221.19 extends the period for  
22          compliance to 30 days after the event.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1           The amendment to §221.111(a) clarifies that the section applies to the board or department's  
2 review of an application for issuance or renewal of a license. The amendment to §221.111(a) also replaces  
3 "shall" with "may" to clarify that the department's action is discretionary. A license may be denied based  
4 on an applicant's prior criminal history after weighing the factors in Occupations Code Chapter 53 and  
5 new §211.3, or for reasons authorized in Occupations Code Chapter 2302 and this chapter.

6           The amendments to §221.111(a)(2) clarify the persons the department will consider in making its  
7 evaluation, and in what actions.

8           The amendments to §221.111(a)(3) clarify the persons who will be subject to criminal history  
9 review and the offenses that will be reviewed. Based on a comment received concerning proposed  
10 amendments to 43 TAC §215.89, the department considers it necessary to clarify that what is considered  
11 to be a conviction results from Occupations Code §53.021(d). Occupations Code §53.021(d) provides that  
12 a licensing authority may consider a person to have been convicted of an offense for purposes of this  
13 section regardless of whether the proceedings were dismissed and the person was discharged as  
14 described Occupations Code §53.021(c), which is referred to in proposal as a "deemed" conviction. To  
15 clarify this reference, §221.111(a)(3) has been changed to substitute "or considered convicted under  
16 Occupations Code §53.021(d)" for "or deemed convicted." The change does not affect persons not on  
17 notice of the proposal or add additional costs.

18           The amendment to §221.111(a)(4) clarifies that the department will consider the circumstances  
19 related to the revocation of a prior license in its evaluation of fitness for a license under this chapter. The  
20 amendment also deletes language addressing the prohibition on applying for a license within one year  
21 following revocation of the license under Occupations Code §2302.108. That provision is addressed in new  
22 §221.111(c).

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1           The amendment to §221.111(a)(5) focuses the review on control, specifically an ownership,  
2           organizational, managerial, or other business arrangement, that would "allow a person the power to  
3           direct, management, policies, or activities, of the applicant or license holder, whether directly or  
4           indirectly." The references to family members are removed. While a family member could be a person  
5           described in the amendment, the person would not be included on the basis that they were a family  
6           member.

7           The amendment to §221.111(a)(6) focuses the review on prior disciplinary activity against  
8           specified persons with prior administrative action against a license. The amendment deletes language  
9           referencing applicants with a child support payment delinquency, which would be handled as required  
10          under Family Code Chapter 232.

11          The amendment to §221.111(b) clarifies that an applicant may request an administrative hearing  
12          when the department pursues denial of an application.

13          The amendment to §221.111(c) addresses Occupations Code §2302.108, which expressly  
14          prohibits a person whose license is revoked from applying for a new license before the first anniversary  
15          of the date of the revocation. The department will reject such an application.

16          The amendment to §221.112 clarifies that either the board or the department may take action on  
17          a license that has been issued by the Motor Vehicle Division for certain acts or omissions. The amendment  
18          to §221.112(1) clarifies that action on a license may be made for failing to meet qualifications and  
19          requirements.

20          The amendment to §221.112(2) clarifies that the board or department may take action on a  
21          person's license if the person violates laws relating to other sectors of the industry for which a license  
22          issued by the Motor Vehicle Division is required.

23          The amendment to §221.112(3) corrects the spelling of "willfully."

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1           The amendment to §221.112(6) clarifies that a person may not engage in business without the  
2 required license and eliminates a reference to salvage vehicle dealer license endorsements.

3           The amendments to §§221.112(12), 221.112(15), and 221.112(20) correct the spelling of  
4 "nonrepairable."

5           The amendment to §221.112(8) clarifies specific information that must be reported by a license  
6 holder to the department within 30 days of a change.

7           The amendment to §221.112(9) clarifies that any changes made under §221.19(b) must be  
8 reported to the department within 30 days.

9           The amendment to §221.112(10) removes the requirement to notify the department that a  
10 salvage vehicle agent has been terminated. The following paragraphs are renumbered accordingly.

11           The amendments to §§221.112(13) - 221.112(15) correct punctuation and grammatical errors,  
12 and clarify that action may be taken on a license for a person's violation of law or board rules relating to  
13 the motor vehicle industry for which the board has jurisdictional authority.

14           The amendment to §221.112(16) clarifies the persons who will be subject to criminal history  
15 review and the offenses that will be reviewed. Based on a comment received concerning proposed  
16 amendments to 43 TAC §215.89, the department considers it necessary to clarify that what is considered  
17 to be a conviction results from Occupations Code §53.021(d). Occupations Code §53.021(d) provides that  
18 a licensing authority may consider a person to have been convicted of an offense for purposes of this  
19 section regardless of whether the proceedings were dismissed and the person was discharged as  
20 described in Occupations Code §53.021(c), which is referred to in the proposal as a "deemed" conviction.  
21 To clarify this reference, §221.112(16) has been changed to substitute "or considered convicted under  
22 Occupations Code §53.021(d)" for "or deemed convicted." The change does not affect persons not on  
23 notice of the proposal or add additional costs.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1           The amendment to §221.112(19) clarifies that a license holder must pay all administrative  
2 penalties imposed by the department, not just those imposed under Occupations Code Chapter 2302.

3           The amendment to §221.112(20) clarifies that the board or department may take action on a  
4 license if a person is engaging in business without a license that is required under Occupations Code  
5 Chapter 2301 or Chapter 2302 or Transportation Code Chapter 503. Additionally, the amendment  
6 corrects a punctuation error.

7           Repeal of §221.113, Suspension or Refusal to Renew Due to Failure to Pay Court Ordered Child  
8 Support, is required under Family Code Chapter 232.

9           Repeal of §221.114, Re-application after Revocation of License, is adopted because the subject  
10 matter is now found in §221.111(b).

11 **SUMMARY OF COMMENTS.**

12           The department received one comment not opposing the proposal from the Tax Assessor  
13 Collector Association of Texas, on behalf of its members.

14 **STATUTORY AUTHORITY.** The department adopts amendments to §§221.15, 221.19, 221.111, and  
15 221.112, and the repeal of §221.113 and §221.114, under Occupations Code §2301.155 and §2302.051,  
16 and Transportation Code and §1002.001.

17           Occupations Code §2301.155 authorizes the board of the Texas Department of Motor Vehicles to  
18 adopt rules as necessary or convenient to administer Occupations Code Chapter 2301 and to govern  
19 practice and procedure before the board.

20           Occupations Code §2302.051 authorizes the board to adopt rules as necessary to administer  
21 Occupations Code Chapter 2302.

22           Transportation Code §1002.001, authorizes the board to adopt rules that are necessary and  
23 appropriate to implement the powers and the duties of the department.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1

2 **CROSS REFERENCE TO STATUTE.** Occupations Code §2302.104 and §2302.108.

3 **TEXT.**

4

**SUBCHAPTER C. LICENSING**

5

**43 TAC §221.15 and 221.19**

6 §221.15. Required License Application Information.

7 The following information must be provided on each salvage vehicle dealer application:

8 (1) the full legal name of the applicant;

9 ~~[(2) the endorsement or endorsements that are being applied for;]~~

10 (2) ~~[(3)]~~ the full business address, including number, street, municipality, county, and zip  
11 code for each location where the applicant will conduct business under the license if each location is in  
12 the same county;

13 (3) ~~[(4)]~~ the business telephone number and email address;

14 (4) ~~[(5)]~~ the mailing address;

15 (5) ~~[(6)]~~ a statement acknowledging that the department will consider the applicant's  
16 designated mailing address the applicant's last known address for ~~all~~ department communication,  
17 including service of process under Subchapter E of this chapter (relating to Administrative Procedures).  
18 The designated mailing address will be considered applicant's last known address until such time that the  
19 mailing address is changed in the licensing records of the department after the license holder submits an  
20 amendment to change the license holder's mailing address;

21 (6) ~~[(7)]~~ all assumed names as registered with the secretary of state or county clerk, as  
22 applicable;

23 (7) ~~[(8)]~~ if applying as a sole proprietor, the social security number, address and telephone



## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1 number for the sole proprietor;

2 (8) ~~[(9)]~~ if applying as a general partnership, the social security number, address and  
3 telephone number for each of the general partners;

4 (9) ~~[(10)]~~ if applying as a limited partnership, limited liability company, or corporation, the  
5 full name, social security number, address and telephone number for each officer or director of the  
6 corporation, each member, officer, or manager of the limited liability company, each partner, and each  
7 officer of the limited partnership, including the information for the general partner based on the type of  
8 entity ~~[or limited liability company]~~;

9 (10) ~~[(11)]~~ the state sales tax number;

10 (11) ~~[(12)]~~ the National Motor Vehicle Title Information System (NMVTIS) number  
11 evidencing that the applicant is registered with NMVTIS;

12 (12) ~~[(13)]~~ a statement indicating whether the applicant or any person described in §211.2  
13 has previously applied for a license under this chapter or the salvage vehicle dealer licensing laws of  
14 another jurisdiction, the result of the previous application, and whether the applicant, including a person  
15 described in §211.2 of this Chapter, has ever been the holder of a license issued by the department or  
16 another jurisdiction that was revoked, suspended, or subject of an order issued by the board or by another  
17 jurisdiction to pay an administrative penalty that remains unpaid;

18 (13) ~~[(14)]~~ a statement indicating whether the applicant has an ownership, organizational,  
19 affiliation, or other business arrangement that would allow a person to direct the management, policies,  
20 or activities of an applicant or license holder, whether directly or indirectly, who ~~[is owned, operated,~~  
21 ~~managed, or otherwise controlled by or affiliated with a person, including a family member, corporate~~  
22 ~~officer, entity or shareholder that]~~ was the holder of a license issued by the department or by another  
23 jurisdiction that was revoked, suspended, or subject of an order issued by the board or by another

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1 jurisdiction to pay an administrative penalty that remains unpaid;

2 (14) [(15)] details of the criminal history of the applicant and any person described in

3 §211.2 of this Chapter [a statement indicating whether the applicant, any owner, corporate officer,

4 partner or director has ever been convicted of a felony, and, if so, whether it has been at least three years

5 since the termination of the sentence, parole, mandatory supervision, or probation for the felony

6 conviction];

7 (15) details of the professional information of the applicant and any person described in

8 §211.2 of this Chapter;

9 (16) a statement that the applicant at the time of submitting the application is in

10 compliance, and, after issuance of a license, will remain in compliance, with all ordinances and rules of

11 the municipality or county of each location where the applicant will conduct business; and

12 (17) an acknowledgement that the applicant understands, ~~and~~ is, and will remain in

13 compliance with all state and federal laws relating to the licensed activity.

14

15 §221.19. Change of License Holder's Name, ~~or~~ Ownership, or Control.

16 (a) A license holder shall notify the department to amend its license within 30 ~~10~~ days of a

17 change in the license holder's business name. Upon submission of an amendment to change the business

18 name, the department shall reflect the new business name in the department's records. The dealer shall

19 retain the same salvage vehicle dealer license number except if the business name change is the result of

20 a change in the type of entity being licensed, such as a sole proprietorship becoming a corporation, or if

21 the ownership of the business changes as discussed in subsection (b) ~~[(c)]~~ of this section.

22 (b) A salvage vehicle dealer shall notify the department by submitting a request for license

23 amendment within 30 ~~10~~ days of ~~[prior to]~~ a change to ~~[of]~~:

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1                   (1) the entity type of the applicant or license holder;

2                   (2) the departure or addition of any person reported to the department in the original

3 license application or most recent renewal application, including any person described in §211.2 of this

4 Chapter;

5                   (3) an ownership, organizational, managerial, or other business arrangement that would

6 allow the power to direct or cause the direction of the management and policies and activities of an

7 applicant or license holder, whether directly or indirectly, to be established in or with a person not

8 described in paragraph (1) or (2) of this subsection [of ownership].

9                   (c) The license holder must submit to the department a notice of change and all information  
10 needed for that specific license modification.

11 ~~[Upon notification of a change of more than 50% of the ownership, the department shall:~~

12 ~~(1) cancel the existing license; and any salvage dealer agent licenses authorized by the~~  
13 ~~salvage vehicle dealer; and~~

14 ~~(2) require that an original application and required fees be submitted by the new~~  
15 ~~owner(s). Any of the new owners' salvage vehicle agents must also apply for a new license and submit the~~  
16 ~~applicable fees.]~~

17  
18                   **SUBCHAPTER F. ADMINISTRATIVE SANCTIONS**

19                   **43 TAC §§ 221.111 AND 221.112**

20                   §221.111. Denial of License.

21                   (a) The board or department may [shall] deny an application for [issuance of] a license or a  
22 renewal of a license under Occupations Code Chapter 53 or Chapter 2302, and §211.3 of this title (relating  
23 to Criminal Offense Guidelines) or this chapter [salvage vehicle dealer license or a salvage vehicle agent

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1 ~~license~~], if:

2 (1) all the information required on the application is not complete;

3 (2) the applicant or any owner, officer, director, or other person described in §211.2 of  
4 this title (relating to Application of Subchapter) ~~[of its owners, officers, or directors]~~ made a false  
5 statement, ~~or~~ material misrepresentation, or a material omission, on the application to issue, renew, or  
6 amend a license;

7 (3) the applicant, or any owner, officer, director, or other person described in §211.2 of  
8 this Chapter, has been ~~[of its owners, officers, or directors have been]~~ convicted, or considered convicted  
9 under Occupations Code §53.021(d), by any local, state, federal, or foreign authority, of an offense that  
10 directly relates to the duties or responsibilities of the licensed occupation as described in §211.3 of this  
11 title or is convicted of an offense that that is independently disqualifying under Occupations Code §53.021  
12 ~~[of a felony for which less than three (3) years have elapsed since the termination of the sentence, parole,~~  
13 ~~mandatory supervision, or probation]~~;

14 (4) the applicant's or any owner's, officer's, director's, or other person described in §211.2  
15 of this Chapter, [of its owners', officers', or directors'] previous ~~[salvage vehicle dealer or salvage vehicle~~  
16 ~~agent]~~ license was revoked ~~[and the first anniversary of the date of revocation has not occurred]~~;

17 (5) the applicant or license holder has an ownership, organizational, managerial, or other  
18 business arrangement that would allow a person the power to direct, management, policies, or activities,  
19 of the applicant or license holder, whether directly or indirectly, who is unfit, ineligible for license, or has  
20 been subject to disciplinary action, including suspension, revocation, denial, corrective action, cease and  
21 desist order, or assessment of a civil penalty, administrative fine, or similar assessment for a current or  
22 previous license, permit, or other authorization issued by any local, state, or federal regulatory authority  
23 ~~[is an immediate family member, such as a spouse, child, parent, grandparent, niece, nephew, uncle, or~~

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1 ~~aunt, of a previously licensed salvage vehicle dealer whose license has been revoked, and the business~~  
2 ~~location is the same as the location of the revoked salvage vehicle dealer]; or~~

3 (6) the applicant, or any owner, officer, or director, or other person described in §211.2  
4 of this Chapter is unfit to hold the license, is ineligible for licensure, or whose current or previous license,  
5 permit, or other authorization issued by any local, state, or federal regulatory authority has been subject  
6 to disciplinary action, including suspension, revocation, denial, corrective action, cease and desist order,  
7 or assessment of a civil penalty, administrative fine, fee, or similar assessment. ~~[is delinquent in any court~~  
8 ~~ordered obligation to pay child support.]~~

9 (b) If the department denies an application for a license to be issued under the authority of  
10 Occupations Code Chapter 2302 ~~[application is denied]~~, the applicant may request an administrative  
11 hearing in the manner specified in §221.91 of this title (relating to Notice of Department Decision).

12 (c) In accordance with Occupations Code §2302.108, the board or department shall reject any  
13 application for issuance of a new license under Occupations Code Chapter 2302 filed by a person whose  
14 license is revoked before the first anniversary of the date of revocation.

15  
16 §221.112. Suspension, Revocation and Administrative Penalties.

17 The board or department may suspend or revoke a license or impose an administrative penalty if the  
18 license holder:

19 (1) fails to meet or maintain the qualifications and requirements for a license;

20 (2) violates any law relating to the purchase, sale, exchange, storage, or distribution of  
21 motor vehicles, including salvage motor vehicles and nonrepairable ~~[and non-repairable]~~ motor vehicles;

22 (3) willfully ~~[wilfully]~~ defrauds a purchaser;

23 (4) fails to maintain purchase, sales, and inventory records as required by Occupations

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

- 1 Code, Chapter 2302, or this chapter;
- 2 (5) refuses to permit, or fails to comply with a request by the department to examine,
- 3 during normal business hours, the license holder's records as required by Occupations Code, Chapter
- 4 2302, or this chapter;
- 5 (6) engages in motor vehicle or salvage business without the required license
- 6 [endorsement];
- 7 (7) engages in business as a salvage vehicle dealer at a location for which a license has not
- 8 been issued by the department;
- 9 (8) fails to notify the department of a change of the salvage vehicle dealer's legal business
- 10 entity name, assumed name, mailing address, email address, physical address or location within 30 [40]
- 11 days of such change by submitting [requesting and obtaining from the department] an amendment to the
- 12 [salvage vehicle dealer's] license;
- 13 (9) fails to notify the department of a change described in §221.19(b) of this chapter
- 14 (relating to Change of License Holder's Name, Ownership, or Control) as required in that section [of the
- 15 salvage vehicle dealer's name or salvage vehicle dealer's ownership within 10 days of such change by
- 16 requesting and obtaining from the department an amendment to the salvage vehicle dealer's license];
- 17 (10) ~~[fails to notify the department of the termination of a salvage vehicle agent within~~
- 18 ~~10 days after such termination];~~
- 19 [(11)] fails to remain regularly and actively engaged in the business for which the salvage
- 20 vehicle dealer license is issued;
- 21 (11) [(12)] sells more than five (5) nonrepairable ~~[non-repairable]~~ motor vehicles or
- 22 salvage motor vehicles to the same person in a casual sale during a calendar year;
- 23 (12) [(13)] violates any ~~[of the]~~ provision of Occupations Code Chapters 2301 or [, Chapter]

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

2302, Transportation Code[, Chapters 501, 502, or 503, or any board rule or order promulgated under those statutes;

(13) [(14)] uses or allows use of the salvage vehicle dealer's [~~or salvage vehicle agent's~~] license or business location for the purpose of avoiding the requirements of [~~the license holder or another person avoiding~~] Occupations Code Chapters 2301 or [~~Chapter~~] 2302, Transportation Code, Chapters 501, 502 or 503, or any board rule or order promulgated under those statutes;

(14) [(15)] violates any law, ordinance, rule or regulation governing the purchase, sale, exchange, or storage, of salvage motor vehicles or nonrepairable [~~and non-repairable~~] motor vehicles;

(15) [(16)] sells or offers for sale a nonrepairable [~~non-repairable~~] motor vehicle [~~vehicles~~] or a salvage motor vehicle [~~vehicles~~] from any location other than the [~~a licensed~~] salvage vehicle dealer's licensed business location [~~that has been approved by the department~~];

(16) [(17)] is, or any owner, officer, director, or other person described in §211.2, is convicted, or considered convicted under Occupations Code §53.021(d), by any local, state, federal, or foreign authority, of an offense that directly relates to the duties or responsibilities of the licensed occupation as described in §211.3 of this title (relating to Criminal Offense Guidelines) or an offense that that is independently disqualifying under Occupations Code §53.021 [~~of any a felony~~] after initial issuance or renewal of the salvage vehicle dealer license, or that has not been reported to the department as required [~~or salvage vehicle agent license, or less than three (3) years have elapsed since the termination of the sentence, parole, mandatory supervision, or probation for a felony conviction of the license holder~~];

(17) [(18)] makes a false statement, material misrepresentation, or material omission in any application or other information filed with the department;

(18) [(19)] fails to timely remit payment for administrative penalties imposed by the department [~~under Occupations Code, §2302.354 and this section~~];

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

(19) [(20)] engages in business without a license required under Occupations Code[(7)] Chapters 2301 or 2302, or Transportation Code [(7)] Chapter 503;

(20) [(21)] operates a salvage motor vehicle or a nonrepairable [non-repairable] motor vehicle on the public highways or allows another person to operate a salvage motor vehicle or a nonrepairable [non-repairable] motor vehicle on public highways;

(21) [(22)] dismantles a salvage motor vehicle or non-repairable motor vehicle; or

(22) [(23)] deals in used automotive parts as more than an incidental part of the salvage vehicle dealer's primary business.

**REPEAL OF****SUBCHAPTER F. ADMINISTRATIVE SANCTIONS****43 TAC §221.113 AND §221.114**

~~[\$221.113. Suspension or Refusal to Renew Due to Failure to Pay Court-ordered Child Support.]~~

~~[(a) On receipt of a final order suspending a license, issued under Family Code, §232.008, the department will suspend or refuse to renew a salvage vehicle dealer's or salvage vehicle agent's license issued under this chapter.]~~

~~[(b) The department will charge an administrative fee of \$10 to reinstate the salvage vehicle dealer's or salvage vehicle agent's license who was the subject of an order suspending the license under this section.]~~

~~[\$221.114. Re-application after Revocation of License.]~~

~~[A person whose license is revoked may not apply for a new license before the first anniversary of the date of the revocation.]~~



## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 221 – Salvage Vehicle Dealers

1

2 **CERTIFICATION.** The department certifies that legal counsel has reviewed the adoption and found it to

3 be a valid exercise of the agency's legal authority.

4 Issued at Austin, Texas, on Month Day, YYYY.

5

6

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Tracey Beaver, General Counsel

**To:** Texas Department of Motor Vehicles Board  
**From:** Roland Luna, Motor Vehicle Division Director  
**Agenda Item:** 7  
**Subject:** Chapter 217, Vehicle Titles and Registration  
Amendments, §217.74  
(Relating to SB 604, requirement of each county tax assessor-collector to make webDEALER available to any licensed motor vehicle dealer requesting access)

#### **RECOMMENDATION**

Approval to publish the adopted amended sections in the *Texas Register*.

#### **PURPOSE AND EXECUTIVE SUMMARY**

The purpose of the amended section is to implement Transportation Code §520.005(e) as added by Senate Bill (SB) 604, 86th Legislature, Regular Session (2019) concerning dealer access to the department's webDEALER online system.

#### **FINANCIAL IMPACT**

None

#### **BACKGROUND AND DISCUSSION**

Senate Bill 604 enacted Transportation Code §520.005(e) that requires each county assessor-collector to make available to motor vehicle dealers the electronic system designed by the department that allows a motor vehicle dealer to submit a title and registration application online. Senate Bill 604, requires that access be made available not later than September 1, 2020. The requirement was also included within the Sunset Advisory Commission's Change in Statute Recommendation 5.2.

To conform §217.74 with Transportation Code §520.005(e), it is necessary to amend §217.74, including changing county tax assessor-collector's use of webDEALER and requiring each county tax assessor-collector to grant motor vehicle dealers access to webDEALER. In addition, the department is implementing enhancements to webDEALER to support the expansion required by Transportation Code §520.005(e), which include efficiencies and throughput improvements.

#### **COMMENTS**

The proposed amendments were published for comment in the June 26, 2020, issue of the *Texas Register*. The comment period closed on July 27, 2020. The department received written comments from: Bexar County Tax-Assessor Collector, Lubbock County Tax Assessor-Collector, and Tax Assessor-Collectors Association of Texas.

If the board adopts the rules during its October 1, 2020, open meeting, staff anticipates:

- Publication in the October 16, 2020, issue of the *Texas Register*; and
- An effective date of October 21, 2020.



**Albert Uresti, MPA, PCC**  
**Office of the Tax Assessor - Collector**

July 27, 2020

Board of Texas Department of Motor Vehicles  
C/o Tracey Beaver, Office of General Counsel  
4000 Jackson Avenue  
Austin, Texas 78731

Re: TITLE 43. Transportation Code, Part 10. Texas Department of Motor Vehicles (“department”) proposed new section **43 TAC §217.74** as it pertains to “*access to the department’s webDEALER online system* (webDEALER) as enacted by Senate Bill 604 of the 86<sup>th</sup> Legislature, Regular Session (2019).

Dear Chairman Trevino and TxDMV Board Members:

We believe the proposed rule requires amendments to comply with the Legislature’s intent regarding “grant” language of webDEALER online access and/or termination rules; which was meant to be in coordination with county tax assessor-collectors.

The department’s new rule, as written, will in essence require the county assessor-collector to accept any and all types of motor vehicle dealers’ request for full access to the department’s electronic titling system, without any proper security screening or fiscal accounting or application requirements established by a county assessor-collector.

It should be pointed out that the department has made no analysis or study as to the direct or indirect cost to local counties or county assessor-collector offices by requiring un-restricted access to the webDEALER system.

**Rule Change Recommendations:**

- In order to mitigate concerns and the potential abuse, waste or fraud, necessary amendments to the rules should be implemented to determine provisional access to webDEALER and background application information by the county assessor-collector; including having a motor vehicle dealer to be in compliance with vehicle inventory tax.

The changes would more closely comply with Legislative intent regarding statutory and charged duties by a county assessor-collector, to process all Registration and Titling transactions in conjunction with the department’s online system.

In addition, the recommended changes would mitigate any potential negative effects from potential fraud and waste likely to be anticipated; and assist the department and Texas counties in curbing such abuses.

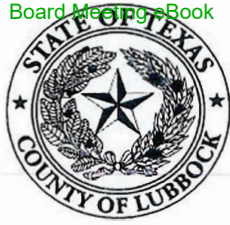
Our Tax Office desires to continue working with the TxDMV in providing continued excellent service and protecting all Texas motorists from fraud, waste, and abuse.

You are welcome to contact my tax office for any questions at **(210) 335-6585** or by email at [taxoffice@bexar.org](mailto:taxoffice@bexar.org).

Sincerely,

A handwritten signature in blue ink, appearing to read "David DeLeon".

David DeLeon  
Director of Motor Vehicles  
Office of Albert Uresti, MPA, PCC  
Bexar County Tax Assessor-Collector  
DD/rvs



**Ronnie Keister**  
Lubbock County Tax Assessor-Collector  
916 Main Street, Suite 102  
PO Box 10536  
Lubbock, TX 79408-3536  
806.775.1344  
taxoffice@lubbockcounty.gov

July 22, 2020

Office of General Counsel  
Texas Department of Motor Vehicles  
4000 Jackson Avenue  
Austin, TX 78731

Via Email to: rules@txdmv.gov

SUBJECT: Response to TxDMV 43 TAC § 217.74 – Registration and Title Systems

TxDMV Board Members and Agency Leadership:

Please accept this letter as official notice of support for proposed rule for chapter 217 relating to registration and title systems.

**TITLE 43. TRANSPORTATION**  
**Part 10. Texas Department of Motor Vehicles**  
**Chapter 217 - Vehicle Titles and Registration**

**Proposed Sections**  
**Page 6 of 6**

- 1 (e) ~~(d)~~ A person authorized under subsection (b) of this section may have their authorization to
- 2 use webDEALER revoked, rescinded, or cancelled at any time, with no notice, at the discretion of a county
- 3 tax assessor-collector or the department.

I recommend the word “suspend” be added to this section of the proposed rule to give Tax Assessor-Collectors more flexibility to work with local dealers.

The concern listed needs to be addressed prior to the approval of this rule. Please call me if you have any additional questions.

Respectfully,

A handwritten signature in blue ink, appearing to be "Ronnie Keister", is written over the word "Respectfully,".

Ronnie Keister

Tax Assessor-Collector





## THE TAX ASSESSOR-COLLECTORS ASSOCIATION OF TEXAS

A dynamic association of innovative and resourceful professionals whose purpose is to educate, support and advance the office of County Tax Assessor-Collectors of Texas.

[www.tacaoftexas.org](http://www.tacaoftexas.org)

### #BETHEDIFFERENCE

July 27, 2020

Office of General Counsel  
Texas Department of Motor Vehicles  
4000 Jackson Avenue  
Austin, TX 78731  
[rules@txdmv.gov](mailto:rules@txdmv.gov)

Dear TxDMV Board, Executive Director and V.T.R. Director,

On behalf of the Tax Assessor Collector Association of Texas, we would like to thank you for the opportunity to comment on the following proposed rules.

**TITLE 43. TRANSPORTATION Proposed Sections**  
**Part 10. Texas Department of Motor Vehicles**  
**Chapter 211 - Criminal Offense and Action on License**  
**Privileged and Confidential Attorney Work Product**  
**PROPOSAL OF SUBCHAPTER A. CRIMINAL OFFENSE AND**  
**ACTION ON LICENSE**  
**43 TAC §§211.1 - 211.5**

We understand that this proposed section brings conformity to the process of evaluating and issuing licenses depending on the background checks of the individuals making application. It is agreed that the department should take into consideration those factors listed in Occupations Code §53.023 including

“the person's age when the crime was committed, rehabilitative efforts, and overall criminal history”.

A factor the department may want to consider is the frequency of background checks on active licenses. Will the department check annually, upon the renewal of licenses or randomly to verify continued compliance?

#### OFFICERS

TAMMY MCRAE, PCAC  
PRESIDENT  
MONTGOMERY COUNTY  
[tammy.mcrae@mctx.org](mailto:tammy.mcrae@mctx.org)

RANDALL RIGGS, CPA, PCC  
VICE-PRESIDENT EXTERNAL  
MCLENNAN COUNTY  
[randy.riggs@co.mclennan.tx.us](mailto:randy.riggs@co.mclennan.tx.us)

BRUCE STIDHAM, PCAC  
VICE-PRESIDENT INTERNAL  
GRAYSON COUNTY  
[stidhamb@co.grayson.tx.us](mailto:stidhamb@co.grayson.tx.us)

LARRY GADDES, PCAC, CTA  
SECRETARY-TREASURER  
WILLIAMSON COUNTY  
[lgaddes@wilco.org](mailto:lgaddes@wilco.org)

CATHY TALCOTT, PCAC  
IMMEDIATE PAST PRESIDENT  
COMAL COUNTY  
[talcoc@co.comal.tx.us](mailto:talcoc@co.comal.tx.us)

#### DIRECTORS

KEVIN KIESCHNICK, PCC  
NUECES COUNTY  
[kevin.kieschnick@co.nueces.tx.us](mailto:kevin.kieschnick@co.nueces.tx.us)

DONNA WILLIS  
LYNN COUNTY  
[donna.willis@co.lynn.tx.us](mailto:donna.willis@co.lynn.tx.us)

SHAY LUEDEKE, CTOP  
BELL COUNTY  
[shay.luedeke@bellcounty.texas.gov](mailto:shay.luedeke@bellcounty.texas.gov)

ALBERT URESTI, CTOP  
BEXAR COUNTY  
[albert.uresti@bexar.org](mailto:albert.uresti@bexar.org)

*The Tax Assessor Collectors Association of Texas supports this rule.*

TITLE 43. TRANSPORTATION Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

**PROPOSAL OF SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS**

**43 TAC §§215.150-215.158**

The proposed amendments to §215.154 add golf carts and off-highway vehicles to vehicles that cannot be issued temporary tags because the vehicles are not eligible for registration by the public under Transportation Code §§502.140, 551.402, 551A.052.”

This proposed rule clarifies language on when the \$5 buyer tag fee is paid and provides the state, local, federal governmental agencies are not required to obtain a GDN. It also states that the federal, state or local government agency will pay the \$5 buyer tag fee to the county if it is collected. The proposal inserts “federal, state, or local government agency” where it speaks to the “dealer”.

*The Tax Assessor Collectors Association of Texas does not oppose this proposed rule.*

TITLE 43. TRANSPORTATION Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 221 – Salvage Vehicle Dealers

**PROPOSAL OF**

**SUBCHAPTER B. LICENSING**

**43 TAC §§221.15 and 221.19 SUBCHAPTER F. ADMINISTRATIVE SANCTIONS**

**43 TAC §§221.111 AND §221.11**

**REPEAL OF 43 TAC §221.113 AND §221.114**

This proposed rule deals with licensing of salvage vehicle dealers. It provides that TxDMV may deny an application for a license and changes the language from “shall” deny if certain conditions are not met, to “may” deny. It describes the conditions that may lead to a revocation, rescinding or denial of the license application.

*The Tax Assessor Collectors Association of Texas does not oppose this rule.*

**Chapter 217. Vehicle Titles and Registration** [§217.74](#)

Subchapter C. Registration and Title Systems

**PROPOSAL OF**

**SUBCHAPTER C. REGISTRATION AND TITLE SYSTEMS**

**43 TAC §217.74**

The proposed rules makes proposed amendments to 43 TAC §§217.74, concerning access to the department's webDEALER online system (webDEALER) to implement Transportation Code §520.005(e) as added by Senate Bill 604, 86th Legislature, Regular Session (2019).

Primarily it requires the county tax assessor collector to use and accept applications from dealers via the webdealer application on demand. If the dealer requests access to webDealer, the county tax assessor collector must allow it.

The proposed rules state: “(e) [(d)] A person authorized under subsection (b) of this section may have their authorization to use webDEALER revoked, rescinded, or cancelled at any time, with no notice, at the discretion of a county tax assessor-collector or the department.”

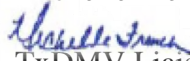
*The Tax Assessor Collectors Association of Texas reiterates that the county tax assessor collector should have full authority to rescind or revoke access if they suspect fraud, waste or abuse. The county tax assessor collector should report to the department that they have revoked, rescinded or cancelled access to webDEALER. However, the county tax assessor collector has the responsibility to protect their constituents and their office if fraud, waste or abuse is perpetrated by a user of webDEALER.*

Thank you,

Randy Riggs

V.P. External, TACA

Michelle French



TxDMV Liaison Chair



## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 - Vehicle Titles and Registration

## ADOPTION OF

## SUBCHAPTER C. REGISTRATION AND TITLE SYSTEMS

## 43 TAC §217.74

**INTRODUCTION.** The Texas Department of Motor Vehicles (department) adopts amendments to 43 TAC §217.74, concerning access to the department's webDEALER online system (webDEALER). The department adopts the amendments to §217.74 without changes to the proposed text as published in the June 26, 2020, issue of the *Texas Register* (45 *TexReg* 4310). The rules will not be republished.

**EXPLANATION.** The amendments are necessary to conform the existing rules to Transportation Code §520.005(e) as added by Senate Bill 604, 86th Legislature, Regular Session (2019). Transportation Code §520.005(e) requires each county assessor-collector, not later than September 1, 2020, under §4.08 of SB 604, to make available to motor vehicle dealers the electronic system designed by the department that allows a motor vehicle dealer to submit a title and registration application online in the name of the purchaser of a motor vehicle. The requirement is included within the Sunset Advisory Commission's Change in Statute Recommendation 5.2, as stated in the Sunset Staff Report with Commission Decisions, 2018-2019, 86th Legislature (2019), which directly refers to webDEALER.

To conform §217.74 with Transportation Code §520.005(e), it is necessary to amend §217.74, including changing county tax assessor-collector's use of webDEALER and requiring each county tax assessor-collector to grant motor vehicle dealers access to webDEALER. In addition, the department is implementing enhancements to webDEALER to support the expansion required by Transportation Code §520.005(e), which include efficiencies and throughput improvements. The amendments to §217.74 do not add fees or change processing requirements for county tax assessor-collectors or users, or change the process for users that are not motor vehicle dealers.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 - Vehicle Titles and Registration

1           The amendments to §217.74(a) change the requirement for a county tax assessor-collector to  
2           make webDEALER available to motor vehicle dealers from permissive to mandatory. The amendment is  
3           necessary to implement the requirement that each county tax assessor-collector must allow motor vehicle  
4           dealers access to webDEALER.

5           The amendment to §217.74(b) creates a reference to new §217.74(c), which addresses motor  
6           vehicle dealer access to webDEALER. The amendment does not change access to webDEALER by persons  
7           who are not motor vehicle dealers or the ability of county tax assessor-collectors to authorize that access.

8           The new §217.74(c) states the requirement that a county tax assessor-collector must allow motor  
9           vehicle dealers to access webDEALER. To clarify the term motor vehicle dealer as used in Transportation  
10          Code §520.005(e), the subsection refers to "a holder of a general distinguishing number."

11          This does not remove the requirement for county tax assessor-collectors to ensure title  
12          applications comply with Transportation Code Chapter 501, nor does it require county tax assessor-  
13          collectors to approve non-complaint or fraudulent title applications. A county tax assessor-collector who  
14          suspects possible fraud, waste, or abuse by a motor vehicle dealer may submit a request to the  
15          department for review and possible investigation under the Red Flag process. The department will pursue  
16          action as necessary.

**SUMMARY OF COMMENTS.**

17          The department received written comments requesting clarifications or changes in the proposed  
18          text from: Bexar County Tax-Assessor Collector, Lubbock County Tax Assessor-Collector, and Tax Assessor-  
19          Collectors Association of Texas.

**Comment**

20          A commenter stated that county tax assessor-collectors should have full authority to rescind or  
21          revoke access if they suspect fraud, waste or abuse.  
22  
23

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 - Vehicle Titles and Registration

**1 Agency Response**

2           The department disagrees with the comment. As added by Senate Bill 604, Transportation Code  
3   §520.005(e) requires each county assessor-collector to make available to motor vehicle dealers the  
4   electronic system designed by the department that allows a motor vehicle dealer to submit a title and  
5   registration application online in the name of the purchaser of a motor vehicle. Transportation Code  
6   §520.005(e) creates no criteria other than being a motor vehicle dealer. As stated in Transportation Code  
7   §503.021, a person may not engage in business as a dealer without a general distinguishing number  
8   (GDN). The department issues GDNs and is charged with taking regulatory action against GDN holders.

9           The statute and amendments do not require a county tax assessor-collector to approve title  
10   applications in webDEALER that do not comply with Transportation Code Chapter 501. The amendments  
11   also do not change the county tax assessor collector's ability to revoke, rescind, or cancel the webDEALER  
12   access of persons other than dealers.

**13 Comment**

14           A commenter states that the county tax assessor collector should report to the department that  
15   they have revoked, rescinded or cancelled access to webDEALER.

**16 Agency response**

17           The department agrees that county tax assessor collectors can and should take action to report  
18   any dealer engaging in fraud, waste, or abuse of the webDEALER system. The process is the Red Flag  
19   process outlined in §223.3 of this title. The department does not agree with the assertion that  
20   Transportation Code §520.005(e) authorizes a county tax assessor-collector to suspend or revoke a motor  
21   vehicle dealer's webDEALER access.

**22 Comment**

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 - Vehicle Titles and Registration

1 A commenter states that a county tax assessor collector has the responsibility to protect their  
2 constituents and their office if fraud, waste or abuse is perpetrated by a user of webDEALER.

**3 Agency Response**

4 The department agrees with the comment. The statute and amendments do not require a county  
5 tax assessor-collector to approve title applications in webDEALER that do not comply with Transportation  
6 Code Chapter 501. The amendments also do not change the county tax assessor collector's ability to  
7 revoke, rescind, or cancel the webDEALER access of persons other than dealers. In addition, a county tax  
8 assessor-collector can report fraud, waste or abuse using the Red Flag process.

**9 Comment**

10 A commenter states that the proposed rule requires amendments to comply with the Legislature's  
11 intent regarding "grant" language of webDEALER online access and/or termination rules; which was  
12 meant to be in coordination with county tax assessor-collectors.

**13 Agency Response**

14 The department disagrees with the comment. Transportation Code §520.005(e) and Senate Bill  
15 604 do not reference termination by the county. In SB 604 the legislature addresses the RTS system in  
16 section 4.04 (Transportation Code Chapter 520, Subchapter C, §§520.021-520.023) and the online system  
17 (webDEALER) in §4.02. The coordination provision to create clear criteria for the suspension or denial of  
18 access to the department's automated registration and titling system in Senate Bill 604 §4.07 applies to  
19 implementing Transportation Code Chapter 520, Subchapter C.

**20 Comment**

21 A commenter states that the department's new rule, as written, will in essence require the county  
22 assessor-collector to accept any and all types of motor vehicle dealers' request for full access to the

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 - Vehicle Titles and Registration

department's electronic titling system, without any proper security screening or fiscal accounting or application requirements established by a county assessor-collector.

**Agency Response**

The department agrees with the comment. The proposal conforms the existing rule to the statutory requirement in Transportation Code §520.005(e), which states that counties shall provide access and creates no criteria for access other than being a motor vehicle dealer. Motor vehicle dealers must hold a GDN and will be screened for that purpose by the department. Further, the legislature granted access to the state's webDEALER system, not the state's RTS system. Additionally, neither statute or rule require a county tax assessor-collector to approve title applications in webDEALER that do not comply with Transportation Code Chapter 501.

**Comment**

A commenter states that the department has made no analysis or study as to the direct or indirect cost to local counties or county assessor-collector offices by requiring un-restricted access to the webDEALER system.

**Agency Response**

The department agrees with the comment. The proposal conforms the existing rule to the statutory requirement in Transportation Code §520.005(e), which states that counties shall provide access to motor vehicle dealers. Costs related to that requirement are a result of statute and do not result from the adoption of this rule. County tax assessor-collectors would have the same requirements and costs if no rule existed.

**Comment**

A commenter proposes that in order to mitigate concerns and the potential abuse, waste or fraud, the section should be amended to determine provisional access to webDEALER and background

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 - Vehicle Titles and Registration

- 1 application information by the county assessor-collector; including having a motor vehicle dealer to be in
- 2 compliance with vehicle inventory tax.

**3 Agency Response**

- 4 The department disagrees with the comment. As addressed in other comment responses
- 5 Transportation Code §520.005(e) requires county tax assessor-collector's counties to provide access and
- 6 creates no criteria for access other than being a motor vehicle dealer. Motor vehicle dealers must hold a
- 7 GDN and will be screened for that purpose by the department. The statute and rule do not require a
- 8 county tax assessor-collector to approve title applications in webDEALER that do not comply with
- 9 Transportation Code Chapter 501.

**10 Comment**

- 11 A commenter suggests that a county tax assessor collector be allowed flexibility to also "suspend"
- 12 a motor vehicle dealer under §217.74(e). Currently the subsection only allows the county tax assessor
- 13 collector to revoke, rescind, or cancel the person's webDEALER access.

**14 Agency response**

- 15 The department disagrees with the comment because motor vehicle dealer access is addressed
- 16 in §217.74(c). Section 217.74(e) only applies to persons who are not motor vehicle dealers and are
- 17 accessing the system under §217.74(b). The department declines to make the change because persons
- 18 affected by the change were not on notice that the change to other relationships would be considered.

- 19 **STATUTORY AUTHORITY.** The department adopts amendments to §217.74 under Transportation Code
- 20 §§501.0041, 502.0021, 520.003, and §1002.001.

- 21 Transportation Code §501.0041 authorizes the department to adopt rules to administer
- 22 Transportation Code Chapter 501.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 - Vehicle Titles and Registration

1 Transportation Code §502.0021 authorizes the department to adopt rules to administer  
2 Transportation Code Chapter 502.

3 Transportation Code §520.003 authorizes the department to adopt rules to administer  
4 Transportation Code Chapter 520.

5 Transportation Code §1002.001, authorizes the board to adopt rules that are necessary and  
6 appropriate to implement the powers and the duties of the department.

7 **CROSS REFERENCE TO STATUTE.** Transportation Code §§501.022, 501.023, 501.0234, and 520.005.

8  
9 **TEXT.**

10 **SUBCHAPTER C. REGISTRATION AND TITLE SYSTEMS**

11 **43 TAC §217.74**

12 §217.74. Access to and Use of webDEALER

13 (a) Each ~~[At the discretion of a]~~ county tax assessor-collector shall ~~[, the county may]~~ request  
14 access to, and accept title applications submitted through, webDEALER. A county tax assessor-collector  
15 must utilize webDEALER in order to accept a title application in the county as provided by subsections (b)  
16 and (c) of this section.

17 (b) Except as provided in subsection (c) of this section, a [A] person who wishes to become a user  
18 of webDEALER must contact each entity to whom they submit title applications for authorization to utilize  
19 webDEALER. A user must receive authorization from each entity, including each county tax assessor-  
20 collector, to whom the user submits title applications. Title applications submitted to the department  
21 require the authorization by the department.

22 (c) A holder of a general distinguishing number (holder) who wishes to become a user of  
23 webDEALER must contact each county tax assessor-collector to whom they submit title applications for

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 - Vehicle Titles and Registration

1 webDEALER access. The county must provide the holder access. A holder must obtain access from each  
2 county tax assessor-collector, to whom the user submits title applications.

3 (d) [(e)] A county tax assessor-collector may authorize a deputy appointed by the county tax  
4 assessor-collector in accordance with Subchapter H of this chapter (relating to Deputies) to utilize  
5 webDEALER.

6 (e) [(d)] A person authorized under subsection (b) of this section may have their authorization to  
7 use webDEALER revoked, rescinded, or cancelled at any time, with no notice, at the discretion of a county  
8 tax assessor-collector or the department.

9 (f) [(e)] When submitting a title application through webDEALER, a user must:

10 (1) stamp the word "SURRENDERED" across the front, face and the next open assignment  
11 or reassignment space of any secure title document or other acceptable ownership evidence as  
12 determined by the department in:

13 (A) arial font;

14 (B) black ink; and

15 (C) a size of 1/4" height x 2 1/4" length;

16 (2) retain the physical document described in paragraph (1) of this subsection for a  
17 minimum of four calendar years from the date of submitting a scanned copy of the stamped title  
18 document using the webDEALER system; and

19 (3) submit any documents required to be submitted with the title application with a  
20 scanned resolution of at least 200 dots per inch (DPI).



## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 - Vehicle Titles and Registration

- 1   **CERTIFICATION.** The department certifies that legal counsel has reviewed the adoption and found it to  
2   be a valid exercise of the agency's legal authority.

- 3           Issued at Austin, Texas, on Month Day, YYYY.

- 4  
5

\_\_\_\_\_  
Tracey Beaver, General Counsel

DRAFT



**To:** Texas Department of Motor Vehicles Board  
**From:** Jeremiah Kuntz, Vehicle Titles & Registration Division Director  
**Agenda Item:** 8  
**Subject:** Chapter 215, Motor Vehicle Distribution - Jeremiah Kuntz  
Amendments, §§215.150 - 215.158  
(Relating to HB 3760, issuance of buyer's tags for vehicles sold by governmental agencies)

---

**RECOMMENDATION**

Approval to publish the adopted amended sections in the *Texas Register*.

**PURPOSE AND EXECUTIVE SUMMARY**

The purpose of the amended sections is to implement House Bill (HB) 3760 concerning buyer's temporary tags issued by a federal, state, or local governmental agency. House Bill 3760 amended Transportation Code §503.063(h) to authorize a federal, state, or local governmental agency, that is exempt from the requirement to obtain a dealer general distinguishing number to issue one temporary buyer's tag for a vehicle sold or otherwise disposed of by the governmental agency under state law. The proposal also amends the temporary tag templates adopted in §215.153 to be consistent with those currently in use.

**FINANCIAL IMPACT**

None

**BACKGROUND AND DISCUSSION**

The amendments are necessary to implement Transportation Code §503.063(h), as added by HB, 86th Legislature, Regular Session (2019), update forms in §215.153, and update §215.154 to conform with Transportation Code Chapter 551 and Chapter 551A related to golf carts and off-highway vehicles. Transportation Code §503.063(h) authorizes a federal, state, or local governmental agency that is exempt from the requirement to obtain a dealer general distinguishing number to issue one temporary buyer's tag for a vehicle sold or otherwise disposed of by the governmental agency under state law. Transportation Code §503.063(h)(1) establishes that a governmental agency that issues such a temporary buyer's tag is subject to statutory provisions applicable to a dealer relating to the buyer's temporary tag database and the unauthorized reproduction, purchase, use, or sale of temporary tags. Transportation Code §503.063(h)(2) exempts the governmental agency from collecting the \$5 registration fee for the tag.

**COMMENTS**

The amendments were published for comment in the June 26, 2020, issue of the *Texas Register*. The comment period closed on July 27, 2020. The department received a written comment from: Tax Assessor-Collectors Association of Texas.

If the board adopts the rules during its October 1, 2020, open meeting, staff anticipates:

- Publication in the October 16, 2020, issue of the *Texas Register*; and
- An effective date of October 21, 2020.



## THE TAX ASSESSOR-COLLECTORS ASSOCIATION OF TEXAS

A dynamic association of innovative and resourceful professionals whose purpose is to educate, support and advance the office of County Tax Assessor-Collectors of Texas.

[www.tacaoftexas.org](http://www.tacaoftexas.org)

### #BETHEDIFFERENCE

July 27, 2020

Office of General Counsel  
Texas Department of Motor Vehicles  
4000 Jackson Avenue  
Austin, TX 78731  
[rules@txdmv.gov](mailto:rules@txdmv.gov)

Dear TxDMV Board, Executive Director and V.T.R. Director,

On behalf of the Tax Assessor Collector Association of Texas, we would like to thank you for the opportunity to comment on the following proposed rules.

**TITLE 43. TRANSPORTATION Proposed Sections**  
**Part 10. Texas Department of Motor Vehicles**  
**Chapter 211 - Criminal Offense and Action on License**  
**Privileged and Confidential Attorney Work Product**  
**PROPOSAL OF SUBCHAPTER A. CRIMINAL OFFENSE AND**  
**ACTION ON LICENSE**  
**43 TAC §§211.1 - 211.5**

We understand that this proposed section brings conformity to the process of evaluating and issuing licenses depending on the background checks of the individuals making application. It is agreed that the department should take into consideration those factors listed in Occupations Code §53.023 including

“the person's age when the crime was committed, rehabilitative efforts, and overall criminal history”.

A factor the department may want to consider is the frequency of background checks on active licenses. Will the department check annually, upon the renewal of licenses or randomly to verify continued compliance?

#### OFFICERS

TAMMY MCRAE, PCAC  
PRESIDENT  
MONTGOMERY COUNTY  
[tammy.mcrae@mctx.org](mailto:tammy.mcrae@mctx.org)

RANDALL RIGGS, CPA, PCC  
VICE-PRESIDENT EXTERNAL  
MCLENNAN COUNTY  
[randy.riggs@co.mclennan.tx.us](mailto:randy.riggs@co.mclennan.tx.us)

BRUCE STIDHAM, PCAC  
VICE-PRESIDENT INTERNAL  
GRAYSON COUNTY  
[stidhamb@co.grayson.tx.us](mailto:stidhamb@co.grayson.tx.us)

LARRY GADDES, PCAC, CTA  
SECRETARY-TREASURER  
WILLIAMSON COUNTY  
[lgaddes@wilco.org](mailto:lgaddes@wilco.org)

CATHY TALCOTT, PCAC  
IMMEDIATE PAST PRESIDENT  
COMAL COUNTY  
[talcoc@co.comal.tx.us](mailto:talcoc@co.comal.tx.us)

#### DIRECTORS

KEVIN KIESCHNICK, PCC  
NUECES COUNTY  
[kevin.kieschnick@co.nueces.tx.us](mailto:kevin.kieschnick@co.nueces.tx.us)

DONNA WILLIS  
LYNN COUNTY  
[donna.willis@co.lynn.tx.us](mailto:donna.willis@co.lynn.tx.us)

SHAY LUEDEKE, CTOP  
BELL COUNTY  
[shay.luedeke@bellcounty.texas.gov](mailto:shay.luedeke@bellcounty.texas.gov)

ALBERT URESTI, CTOP  
BEXAR COUNTY  
[albert.uresti@bexar.org](mailto:albert.uresti@bexar.org)

*The Tax Assessor Collectors Association of Texas supports this rule.*

TITLE 43. TRANSPORTATION Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

**PROPOSAL OF SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS**

**43 TAC §§215.150-215.158**

The proposed amendments to §215.154 add golf carts and off-highway vehicles to vehicles that cannot be issued temporary tags because the vehicles are not eligible for registration by the public under Transportation Code §§502.140, 551.402, 551A.052.”

This proposed rule clarifies language on when the \$5 buyer tag fee is paid and provides the state, local, federal governmental agencies are not required to obtain a GDN. It also states that the federal, state or local government agency will pay the \$5 buyer tag fee to the county if it is collected. The proposal inserts “federal, state, or local government agency” where it speaks to the “dealer”.

*The Tax Assessor Collectors Association of Texas does not oppose this proposed rule.*

TITLE 43. TRANSPORTATION Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 221 – Salvage Vehicle Dealers

**PROPOSAL OF**

**SUBCHAPTER B. LICENSING**

**43 TAC §§221.15 and 221.19 SUBCHAPTER F. ADMINISTRATIVE SANCTIONS**

**43 TAC §§221.111 AND §221.11**

**REPEAL OF 43 TAC §221.113 AND §221.114**

This proposed rule deals with licensing of salvage vehicle dealers. It provides that TxDMV may deny an application for a license and changes the language from “shall” deny if certain conditions are not met, to “may” deny. It describes the conditions that may lead to a revocation, rescinding or denial of the license application.

*The Tax Assessor Collectors Association of Texas does not oppose this rule.*

**Chapter 217. Vehicle Titles and Registration** [§217.74](#)

Subchapter C. Registration and Title Systems

**PROPOSAL OF**

**SUBCHAPTER C. REGISTRATION AND TITLE SYSTEMS**

**43 TAC §217.74**

The proposed rules makes proposed amendments to 43 TAC §§217.74, concerning access to the department's webDEALER online system (webDEALER) to implement Transportation Code §520.005(e) as added by Senate Bill 604, 86th Legislature, Regular Session (2019).

Primarily it requires the county tax assessor collector to use and accept applications from dealers via the webdealer application on demand. If the dealer requests access to webDealer, the county tax assessor collector must allow it.

The proposed rules state: “(e) [(d)] A person authorized under subsection (b) of this section may have their authorization to use webDEALER revoked, rescinded, or cancelled at any time, with no notice, at the discretion of a county tax assessor-collector or the department.”

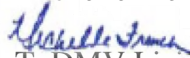
*The Tax Assessor Collectors Association of Texas reiterates that the county tax assessor collector should have full authority to rescind or revoke access if they suspect fraud, waste or abuse. The county tax assessor collector should report to the department that they have revoked, rescinded or cancelled access to webDEALER. However, the county tax assessor collector has the responsibility to protect their constituents and their office if fraud, waste or abuse is perpetrated by a user of webDEALER.*

Thank you,

Randy Riggs

V.P. External, TACA

Michelle French



TxDMV Liaison Chair

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

## ADOPTION OF

## SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS

## 43 TAC §§215.150-215.158

**INTRODUCTION.** The Texas Department of Motor Vehicles (department) adopts amendments to 43 TAC §§215.150-215.158, concerning buyer's temporary tags issued by a federal, state, or local governmental agency. The department adopts the amendments to §§215.150-215.158 without changes to the proposed text as published in the June 26, 2020 issue of the *Texas Register* (45 TexReg 4305). The rules will not be republished.

**EXPLANATION.** The amendments are necessary to implement Transportation Code §503.063(h), as added by House Bill 3760, 86th Legislature, Regular Session (2019), update forms in §215.153, and update §215.154 to conform with Transportation Code Chapter 551 and Chapter 551A related to golf carts and off-highway vehicles. Transportation Code §503.063(h) authorizes a federal, state, or local governmental agency that is exempt from the requirement to obtain a dealer general distinguishing number to issue one temporary buyer's tag for a vehicle sold or otherwise disposed of by the governmental agency under state law. Transportation Code §503.063(h)(1) establishes that a governmental agency that issues such a temporary buyer's tag is subject to statutory provisions applicable to a dealer relating to the buyer's temporary tag database and the unauthorized reproduction, purchase, use, or sale of temporary tags. Transportation Code §503.063(h)(2) exempts the governmental agency from collecting the \$5 registration fee for the tag.

Amendments to §215.150 state the requirements of Transportation Code §503.063(h).

Amendments to §215.151 require a federal, state, or local governmental agency to secure a temporary buyer's tag or preprinted Internet-down temporary tag issued under §215.150(c) in the same manner as a dealer.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

1 Amendments to §215.152 extend the requirements placed on dealers under that section to a  
2 federal, state, or local governmental agency.

3 Amendments to §215.153 remove outdated requirements that do not apply to temporary tags  
4 created on-demand with the department's web-based application and available for printing at time of  
5 creation. The department also adopts updated tag forms in the attached graphics to reflect current online  
6 forms.

7 Amendments to §215.154 add golf carts and off-highway vehicles to vehicles that cannot be  
8 issued temporary tags because the vehicles are not eligible for registration by the public under  
9 Transportation Code §§502.140, 551.402, 551A.052.

10 Amendments to §215.155 extend the requirements placed on dealers issuing buyer's temporary  
11 tags under that section to a federal, state, or local governmental agency. The amendments also provide a  
12 federal, state, or local governmental agency, is not required to collect the \$5 fee that dealers must collect  
13 under Transportation Code §503.063(g). The amendments also clarify that the \$5 fee must be paid to the  
14 county tax assessor collector. A dealer selling a vehicle to a Texas resident would submit the fee with the  
15 title transfer documents. A dealer selling the vehicle to a non-Texas resident must also submit the fee to  
16 the county tax assessor collector even though title transfer documents are not submitted. A federal, state,  
17 or local governmental agency selling to any person must also submit the fee, if collected, to the county  
18 tax assessor collector even though title transfer documents are not submitted by the agency on behalf of  
19 the buyer.

20 Amendments to §215.156 extend the requirements placed on dealers to provide buyer's  
21 temporary tag receipts under that section to a federal, state, or local governmental agency.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

Amendments to §215.157 extend the requirements placed on dealers concerning preprinted Internet-down temporary tags with specific numbers and buyer's temporary tag receipts under that section to a federal, state, or local governmental agency.

Proposed amendments to §215.158 extend the requirements placed on dealers concerning the allocation and safekeeping of preprinted Internet-down temporary tags under that section to a federal, state, or local governmental agency.

**SUMMARY OF COMMENTS.**

The department received one comment not opposing the proposal from the Tax Assessor Collector Association of Texas, on behalf of its members.

**General.****Comments**

The proposal inserts "federal, state, or local government agency" where it speaks to the "dealer."

**Agency Response.**

The department agrees that the adopted amendments extend requirements and authorizations applicable to dealers to a "federal, state, or local government agency" as stated in the adopted sections. The sections do not expand the definition of the term "dealer" to include a "federal, state, or local government agency" in any use of the term dealer.

**§215.154.****Comment.**

A commenter states "The proposed amendments to §215.154 add golf carts and off-highway vehicles to vehicles that cannot be issued temporary tags because the vehicles are not eligible for registration by the public under Transportation Code §§502.140, 551.402, 551A.052."



## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

1 **Agency Response.**

2 The department agrees with the statement as stated in the adoption.

3 **§215.155.**4 **Comment.**

5 A commenter states "This proposed rule clarifies language on when the \$5 buyer tag fee is paid  
6 and provides the state, local, federal governmental agencies are not required to obtain a general  
7 distinguishing number. It also states that the federal, state or local government agency will pay the \$5  
8 buyer tag fee to the county if it is collected."

9 **Agency Response.**

10 The department agrees with the statement as stated in the adoption.

11 **STATUTORY AUTHORITY.** The department adopts amendments to §§215.150 - 215.158 under  
12 Transportation Code §§503.002, 503.0626, 503.631, 503.069 and §1002.001.

13 Transportation Code §503.002 authorizes the Texas Department of Motor Vehicles Board (board)  
14 to adopt rules for the administration of Transportation Code Chapter 503.

15 Transportation Code §503.0626 authorizes the department to adopt rules and prescribe  
16 procedures as necessary to implement §503.0626.

17 Transportation Code §503.0631 authorizes the department to adopt rules and prescribe  
18 procedures as necessary to implement this §503.0631.

19 Transportation Code §503.069 provides that a license plate, other than an in-transit license plate,  
20 or a temporary tag issued under this chapter shall be displayed in accordance with department rules.

21 Transportation Code §1002.001, authorizes the board to adopt rules that are necessary and  
22 appropriate to implement the powers and the duties of the department.

23 **CROSS REFERENCE TO STATUTE.** Transportation Code, §503.063.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

## 1 TEXT.

## 2 SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS

## 3 43 TAC §§215.150-§215.158

## 4 §215.150. Authorization to Issue Temporary Tags.

5 (a) A dealer that holds a GDN may issue a dealer's temporary tag, buyer's temporary tag, or a  
6 preprinted Internet-down temporary tag for each type of vehicle the dealer is licensed to sell. A converter  
7 that holds a converter's license under Occupations Code, Chapter 2301 may issue a converter's temporary  
8 tag.

9 (b) A license holder may issue an applicable dealer's temporary tag, buyer's temporary tag, or  
10 converter's temporary tag until the license is canceled, revoked, or suspended.

11 (c) A federal, state, or local governmental agency that is exempt under Section 503.024 from the  
12 requirement to obtain a dealer general distinguishing number may issue one temporary buyer's tag, or  
13 one preprinted Internet-down temporary tag, in accordance with Transportation Code §503.063. A  
14 governmental agency that issues a temporary buyer's tag, or preprinted Internet-down temporary tag,  
15 under this subsection:

16 (1) is subject to the provisions of Transportation Code §503.0631 and §503.067 applicable  
17 to a dealer; and

18 (2) is not required to charge the registration fee under Transportation Code §503.063(g).

19  
20 §215.151. Temporary Tags, General Use Requirements, and Prohibitions.

21 (a) A dealer shall secure a temporary tag to a vehicle in the license plate display area located at  
22 the rear of the vehicle, so that the entire temporary tag is visible and legible at all times, including when  
23 the vehicle is being operated.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

1        (b) A federal, state, or local governmental agency shall secure a temporary buyer's tag or  
2        preprinted Internet-down temporary tag issued under 215.150(c) to a vehicle in the license plate display  
3        area located at the rear of the vehicle, so that the entire temporary tag is visible and legible at all times,  
4        regardless of whether the vehicle is being operated.

5        (c) [(b)] All printed information on a temporary tag must be visible and may not be covered or  
6        obstructed by any plate holder or other device or material.

7        (d) [(c)] A motor vehicle that is being transported using the full mount method, the saddle mount  
8        method, the tow bar method, or any combination of those methods in accordance with Transportation  
9        Code, §503.068(d), must have a dealer's temporary tag, a converter's temporary tag, or a buyer's  
10       temporary tag, whichever is applicable, affixed to the motor vehicle being transported.

11  
12       §215.152. Obtaining Numbers for Issuance of Temporary Tags

13       (a) A dealer, a federal, state, or local governmental agency, or a converter is required to have  
14       internet access to connect to the temporary tag databases maintained by the department.

15       (b) Except as provided by §215.157 of this title (relating to Advance Numbers, Preprinted Internet-  
16       down Temporary Tags), before a temporary tag may be issued and displayed on a vehicle, a dealer, a  
17       federal, state, or local governmental agency, or converter must:

18                (1) enter in the temporary tag database information about the vehicle, dealer, converter,  
19       or buyer, as appropriate; and

20                (2) obtain a specific number for the temporary tag.

21  
22       §215.153. Specifications for All Temporary Tags.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

(a) Information printed or completed on a temporary tag must be in black ink on a white background. Other than for a motorcycle, a completed buyer's, dealer's, converter's, or preprinted Internet-down temporary tag shall be six inches high and at least eleven inches wide. For a motorcycle, the completed buyer's, dealer's, converter's, or preprinted Internet-down temporary tag shall be four inches high and at least seven inches wide.

(b) A temporary tag must be:

(1) composed of plastic or other durable, weather-resistant material; or

(2) sealed in a two mil clear poly bag that encloses the entire temporary tag.

(c) ~~[A dealer or converter may manually copy the information from the temporary tag database to a preprinted temporary tag template.]~~ A temporary tag ~~[completed in this manner]~~ must ~~[:]~~

~~[(1) display the information drawn in letters and numerals with a permanent, thick, black marking pen; and]~~

~~[(2)]~~ comply with the specifications of the applicable temporary tag identified by the following appendices:

(1) Appendix A-1 - Dealer's Temporary Tag - Assigned to Specific Vehicle;

Attached Graphic

(2) Appendix A-2 - Dealer's Temporary Tag - Assigned to Agent;

Attached Graphic

(3) Appendix B-1 - Buyer's Temporary Tag;

Attached Graphic

(4) Appendix B-2 - Preprinted Internet-down Temporary Tag; and

Attached Graphic

(5) Appendix C-1 - Converter's Temporary Tag.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

1 Attached Graphic

## 3 §215.154. Dealer's Temporary Tags.

4 (a) A dealer's temporary tag may be displayed only on the type of vehicle for which the GDN is  
5 issued and for which the dealer is licensed by the department to sell.

6 (b) A wholesale motor vehicle auction license holder that also holds a dealer GDN may display a  
7 dealer's temporary tag on a vehicle that is being transported to or from the licensed auction location.

8 (c) When an unregistered vehicle is sold to another dealer, the selling dealer shall remove the  
9 selling dealer's temporary tag. The purchasing dealer may display its dealer temporary tag or its metal  
10 dealer's license plate on the vehicle.

11 (d) A dealer's temporary tag may not be displayed on:

12 (1) a laden commercial vehicle being operated or moved on the public streets or  
13 highways; ~~or~~

14 (2) on the dealer's service or work vehicles;

15 (3) a golf cart as defined under Transportation Code Chapter 551; or

16 (4) an all-terrain vehicle, recreational off-highway vehicle, or a utility vehicle as defined  
17 under Transportation Code Chapter 551A.

18 (e) For purposes of this section, a dealer's service or work vehicle includes:

19 (1) a vehicle used for towing or transporting other vehicles;

20 (2) a vehicle, including a light truck, used in connection with the operation of the dealer's  
21 shops or parts department;

22 (3) a courtesy car;

23 (4) a rental or lease vehicle; and

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

1 (5) any boat trailer owned by a dealer or manufacturer that is used to transport more  
2 than one boat.

3 (f) For purposes of subsection (d) of this section, a vehicle bearing a dealer's temporary tag is not  
4 considered a laden commercial vehicle when the vehicle is:

5 (1) towing another vehicle bearing the same dealer's temporary tags; and

6 (2) both vehicles are being conveyed from the dealer's place of business to a licensed  
7 wholesale motor vehicle auction or from a licensed wholesale motor vehicle auction to the dealer's place  
8 of business.

9 (g) As used in this section, "light truck" has the meaning assigned by Transportation Code,  
10 §541.201.

11 (h) A dealer's temporary tag may not be used to operate a vehicle for the personal use of a dealer  
12 or a dealer's employee.

13 (i) A dealer's temporary tag must show its expiration date, which must not exceed 60 days after  
14 the date the temporary tag was issued.

15 (j) A dealer's temporary tag may be issued by a dealer to a specific motor vehicle in the dealer's  
16 inventory or to a dealer's agent who is authorized to operate a motor vehicle owned by the dealer.

17 (k) A dealer that issues a dealer's temporary tag to a specific vehicle must ensure that the  
18 following information is placed on the temporary tag:

19 (1) the vehicle-specific number from the temporary tag database;

20 (2) the year and make of the vehicle;

21 (3) the VIN of the vehicle;

22 (4) the month, day, and year of the temporary tag's expiration; and

23 (5) the name of the dealer.

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

(l) A dealer that issues a dealer's temporary tag to an agent must ensure that the following information is placed on the temporary tag:

- (1) the specific number from the temporary tag database;
- (2) the month, day, and year of the temporary tag's expiration; and
- (3) the name of the dealer.

#### §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 on 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, or federal, state, or local governmental agency, 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;

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

(4) the month, day, and year of the expiration of the buyer's temporary tag; and

(5) the name of the dealer or federal, state, or local governmental agency.

(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]~~. A federal, state, or local governmental agency may 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 is a vehicle described in §215.15(d)(3) or (4) of this chapter (relating to Dealer's Temporary Tags). The fee shall be remitted by a dealer to the county in conjunction with the title transfer, and, if collected, by a federal, state, or local government agency, to the county, for deposit to the credit of the Texas Department of Motor Vehicles fund, unless the vehicle is sold by a dealer 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.

§215.156. Buyer's Temporary Tag Receipt.

A dealer, or federal, state, or local government agency, must provide a buyer's temporary tag receipt to the buyer of each vehicle for which a buyer's temporary tag is issued, regardless of whether the buyer's temporary tag is issued using the temporary tag database or if the tag is a preprinted Internet-down



## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

1 temporary tag. The dealer, or federal, state, or local governmental agency, may print the image of the  
2 buyer's temporary tag receipt issued from the temporary tag database or create the form using the same  
3 information. The dealer, or federal, state, or local governmental agency, shall instruct the buyer to keep  
4 a copy of the buyer's temporary tag receipt in the vehicle until the vehicle is registered in the buyer's  
5 name and until metal plates are affixed to the vehicle. The buyer's temporary tag receipt must include the  
6 following information:

- 7 (1) the issue date of the buyer's temporary tag;
- 8 (2) the year, make, model, body style, color, and VIN of the vehicle sold;
- 9 (3) the vehicle-specific temporary tag number;
- 10 (4) the expiration date of the temporary tag;
- 11 (5) the date of the sale;
- 12 (6) the name of the issuing dealer and the dealer's license number or the name of the  
13 issuing federal, state, or local governmental agency; and
- 14 (7) the buyer's name and mailing address.

15  
16 §215.157. Advance Numbers, Preprinted Internet-down Temporary Tags.

17 (a) In accordance with Transportation Code, §503.0631(d), a dealer, or a federal, state, or local  
18 government agency, may obtain an advance supply of preprinted Internet-down temporary tags with  
19 specific numbers and buyer's temporary tag receipts to issue in lieu of buyer's temporary tags if the dealer  
20 is unable to access the internet.

21 (b) If a dealer, or a federal, state, or local governmental agency, is unable to access the internet at  
22 the time of a sale, the dealer, or a federal, state, or local governmental agency, must complete the  
23 preprinted Internet-down temporary buyer's tag and buyer's temporary tag receipt by providing details

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

1 of the sale, signing the buyer's temporary tag receipt, and retaining a copy. The dealer, or a federal, state,  
2 or local government agency, must enter the required information regarding the sale in the temporary tag  
3 database not later than the close of the next business day that the dealer has access to the internet. The  
4 buyer's temporary tag receipt must include a statement that the dealer, or a federal, state, or local  
5 government agency, has internet access but, at the time of the sale, the dealer, or a federal, state, or local  
6 government agency, was unable to access the internet or the temporary tag database.

7  
8 §215.158. General Requirements and Allocation of Preprinted Internet-down Temporary Tag Numbers.

9 (a) The dealer, or a federal, state, or local government agency, is responsible for the safekeeping  
10 of preprinted Internet-down temporary tags and shall store them in a secure place. The dealer, or a  
11 federal, state, or local government agency, shall report any loss, theft, or destruction of preprinted  
12 Internet-down temporary tags to the department within 24 hours of discovering the loss, theft, or  
13 destruction.

14 (b) A dealer, or a federal, state, or local government agency, may use a preprinted Internet-down  
15 temporary tag up to 12 months after the date the preprinted Internet-down temporary tag is created. A  
16 dealer, or a federal, state, or local government agency, may create replacement preprinted Internet-down  
17 temporary tags up to the maximum allowed, when:

18 (1) a dealer, or a federal, state, or local government agency, uses one or more preprinted  
19 Internet-down temporary tags and then enters the required information in the temporary tag database  
20 after access to the temporary tag database is again available; or

21 (2) a preprinted Internet-down temporary tag expires.

22 (c) The number of preprinted Internet-down temporary tags that a dealer, or federal, state, or  
23 local government agency, may create is equal to the greater of:

## TITLE 43. TRANSPORTATION

## Adopted Sections

## Part 10. Texas Department of Motor Vehicles

## Chapter 215 - Motor Vehicle Distribution

1 (1) the number of preprinted Internet-down temporary tags previously allotted by the  
2 department to the dealer or a federal, state, or local government agency;

3 (2) 30; or

4 (3)  $1/52$  of the dealer's, or federal, state, or local government agency's, total annual sales.

5 (d) For good cause shown, a dealer, or a federal, state, or local government agency, may obtain  
6 more than the number of preprinted Internet-down temporary tags described in subsection (c) of this  
7 section. The director of the Vehicle Titles and Registration Division of the department or that director's  
8 delegate may approve, in accordance with this subsection, an additional allotment of preprinted Internet-  
9 down temporary tags for a dealer, or a federal, state, or local government agency, if the additional  
10 allotment is essential for the continuation of the dealer's, or a federal, state, or local government agency's,  
11 business. The director of the Vehicle Titles and Registration Division of the department, or a federal, state,  
12 or local government agency, or that director's delegate will base the determination of the additional  
13 allotment of preprinted Internet-down temporary tags on the dealer's, or a federal, state, or local  
14 government agency's, past sales, inventory, and any other factors that the director of the Vehicle Titles  
15 and Registration Division of the department or that director's delegate determines pertinent, such as an  
16 emergency. A request for additional preprinted Internet-down temporary tags must specifically state why  
17 the additional preprinted Internet-down temporary tags are necessary for the continuation of the  
18 applicant's business.

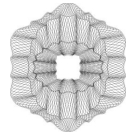
19 CERTIFICATION. The department certifies that legal counsel has reviewed the adoption and found it to be  
20 a valid exercise of the agency's legal authority.

21 Issued at Austin, Texas, on M DD, YYYY.

22  
23  
24 \_\_\_\_\_  
Tracey Beaver, General Counsel

TEXAS DEALER

THE VEHICLE TEMPORARILY REGISTERED WITH TxDMV UNDER TAG #



00001E7

2018 ACUR

Expires **APR 21, 2018**

VIN: VEHICLESPECIFICTAG

Owned by: ABC DEALERSHIP



**DEALER TAG - ASSIGNED TO VEHICLE**

---

Tag Number: 00001E7      Expiration Date: APR 21, 2018

You may want to place this page in a tag record file and keep a copy in the vehicle.

Issue Date: Apr 20, 2018

VIN: VEHICLESPECIFICTAG

Year: 2018

Body Style: 4D

Make: ACUR

Model: QQQ

Major Color: YELLOW

Minor Color:

Issuing Dealer:

ABC DEALERSHIP

Dealer Number:

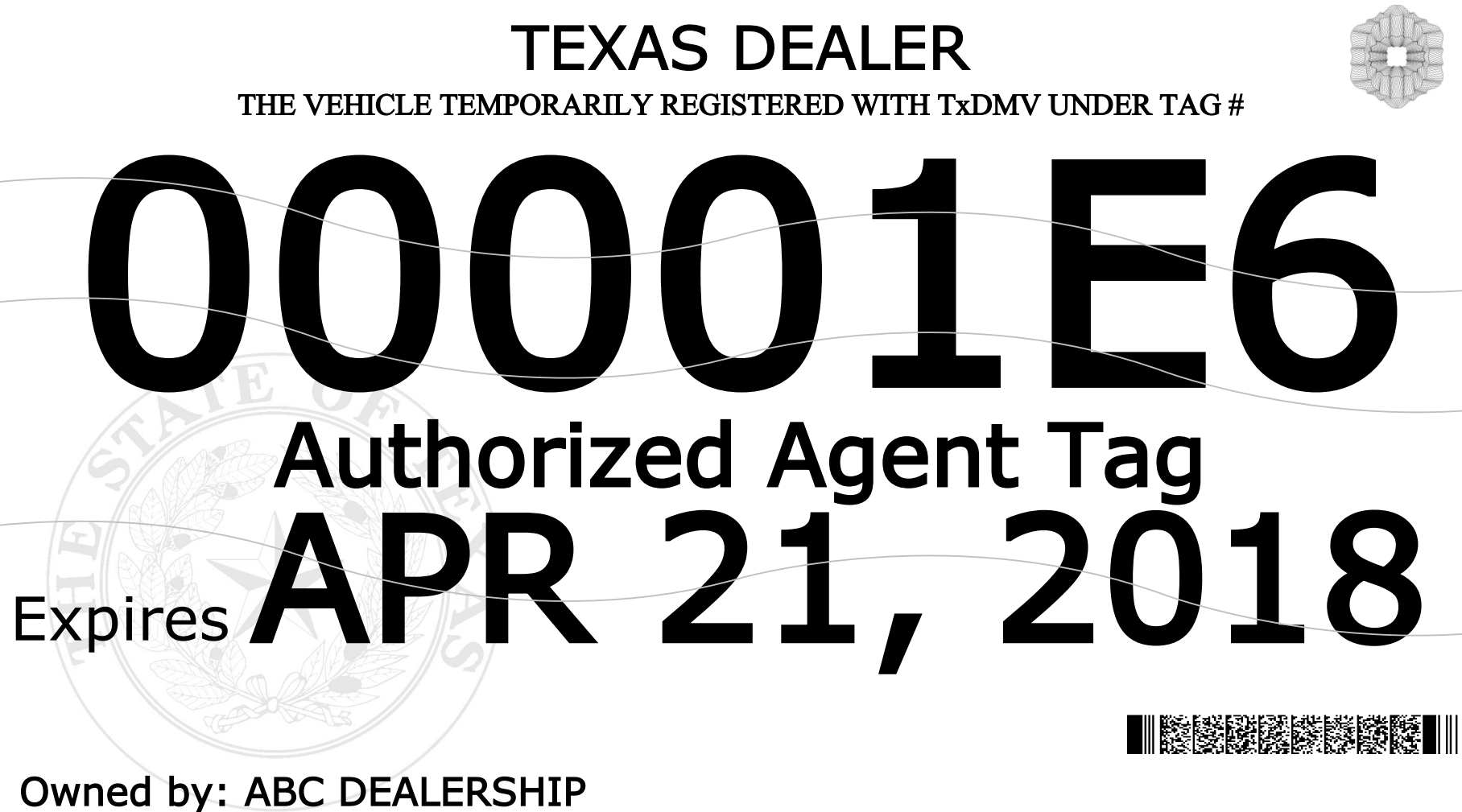
P51769

**DO NOT ISSUE DEALER TAGS TO RETAIL BUYERS.**

When this tag expires, you may request another tag.

**DEALER TAG - ASSIGNED TO VEHICLE**

Figure 2: 43 TAC §215.153 - Appendix A-2



**DEALER TAG - ASSIGNED TO AGENT**

---

Tag Number: 00001E6      Expiration Date: APR 21, 2018

You may want to place this page in a tag record file  
and have the agent keep a copy with them.

Issue Date: Apr 20, 2018

Issuing Dealer: ABC DEALERSHIP  
Dealer Number: P51769  
Agent Name: AGENT FIRST NAME AGENT  
LAST NAME

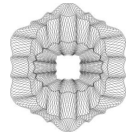
DO NOT ISSUE DEALER TAGS TO RETAIL BUYERS.

BE SURE TO VOID THIS TAG SHOULD THE AGENT  
TERMINATE THEIR RELATIONSHIP WITH YOUR DEALERSHIP.  
YOU WILL BE HELD RESPONSIBLE FOR THIS TAG.

**DEALER TAG - ASSIGNED TO AGENT**

**TEXAS BUYER**

THE VEHICLE TEMPORARILY REGISTERED WITH TxDMV UNDER TAG #



**00001B7**

**2018 ACUR**

**Expires JUN 19, 2018**

**VIN: BUYERTAGVEH1CLE1**

**Seller: ABC DEALERSHIP**





**BUYER'S TAG RECEIPT - DEALER'S COPY**

---

|             |         |                  |              |
|-------------|---------|------------------|--------------|
| Tag Number: | 00001B7 | Date of Sale:    | APR 20, 2018 |
|             |         | Expiration Date: | JUN 19, 2018 |

Give buyer's receipt to buyer. PLACE THIS DEALER'S COPY IN SALES FILE.  
It is part of the sales records required to be kept and subject to inspection by TxDMV. Verify this information before distributing copies:

|              |                  |              |     |
|--------------|------------------|--------------|-----|
| Issue Date:  | Apr 20, 2018     |              |     |
| VIN:         | BUYERTAGVEH1CLE1 |              |     |
| Year:        | 2018             | Body Style:  | 4D  |
| Make:        | ACUR             | Model:       | QQQ |
| Major Color: | WHITE            | Minor Color: |     |

|                 |                |
|-----------------|----------------|
| Issuing Dealer: | ABC DEALERSHIP |
| Dealer Number:  | P51769         |

|           |                  |
|-----------|------------------|
| Purchaser |                  |
| Name 1:   | BUYER FIRST NAME |
| Address:  | BUYER STREET 1   |
|           | BUYER CITY, TX   |
|           | 00000            |

**DEALER'S COPY**

**BUYER'S TAG RECEIPT - BUYER'S COPY**

---

Tag Number: 00001B7 Date of Sale: APR 20, 2018  
Expiration Date: JUN 19, 2018  
Issue Date: Apr 20, 2018  
VIN: BUYERTAGVEH1CLE1  
Year: 2018 Body Style: 4D  
Make: ACUR Model: QQQ  
Major Color: WHITE Minor Color:

Issuing Dealer: ABC DEALERSHIP  
Dealer Number: P51769

Purchaser  
Name 1: BUYER FIRST NAME  
Address: BUYER STREET 1  
BUYER CITY, TX  
00000

BUYER is required to keep this receipt in the vehicle until vehicle is registered and metal plates are placed on the vehicle.

**BUYER'S COPY**

**INTERNET DOWN - BUYER'S TAG RECEIPT - DEALER'S COPY**

Tag Number: 00001B9 Date of Sale: \_\_\_\_\_  
Expiration Date: \_\_\_\_\_

Give buyer's receipt to buyer. PLACE THIS DEALER'S COPY IN SALES FILE.  
It is part of the sales records required to be kept and subject to inspection by TxDMV.  
Verify this information before distributing copies:

Issue Date: \_\_\_\_\_  
VIN: \_\_\_\_\_  
Year: \_\_\_\_\_ Body Style: \_\_\_\_\_  
Make: \_\_\_\_\_ Model: \_\_\_\_\_  
Major Color: \_\_\_\_\_ Minor Color: \_\_\_\_\_

Issuing Dealer: ABC DEALERSHIP  
Dealer Number: P51769

Purchaser  
Name 1: \_\_\_\_\_  
Name 2: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, \_\_\_\_\_  
\_\_\_\_\_

**DEALER'S COPY**

**INTERNET DOWN - BUYER'S TAG RECEIPT - BUYER'S COPY**

Tag Number: 00001B9 Date of Sale: \_\_\_\_\_  
Expiration Date: \_\_\_\_\_

Issue Date: \_\_\_\_\_  
VIN: \_\_\_\_\_  
Year: \_\_\_\_\_ Body Style: \_\_\_\_\_  
Make: \_\_\_\_\_ Model: \_\_\_\_\_  
Major Color: \_\_\_\_\_ Minor Color: \_\_\_\_\_

Issuing Dealer: ABC DEALERSHIP  
Dealer Number: P51769

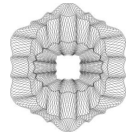
Purchaser  
Name 1: \_\_\_\_\_  
Name 2: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ / \_\_\_\_\_  
\_\_\_\_\_

BUYER is required to keep this receipt in the vehicle until  
vehicle is registered and metal plates are placed on the vehicle.

**BUYER'S COPY**

# TEXAS BUYER - INTERNET DOWN

THE VEHICLE TEMPORARILY REGISTERED WITH TxDMV UNDER TAG #



# 00001B9

Expires

|  |  |  |  |  |  |  |  |  |
|--|--|--|--|--|--|--|--|--|
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Year :

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Make:

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VIN :

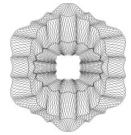
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Seller: ABC DEALERSHIP



# TEXAS CONVERTER

THE VEHICLE TEMPORARILY REGISTERED WITH TxDMV UNDER TAG #



# 00001E8

## 2018 ACUR

Expires **APR 21, 2018**

VIN: CONVERTERTAG

Converter: FRAZER LTD





## CONVERTER TAG

---

Tag Number: 00001E8      Expiration Date: APR 21, 2018

You may want to place this page in a tag record file and keep a copy in the vehicle.

Issue Date: Apr 20, 2018

VIN: CONVERTERTAG

Year: 2018

Body Style: CM

Make: ACUR

Model: QQQ

Major Color: SILVER

Minor Color:

Issuing Converter:

FRAZER LTD

License Number:

0184

DO NOT ISSUE CONVERTER TAGS TO RETAIL  
BUYERS.

When this tag expires, you may request another tag.

**CONVERTER TAG**



Board Meeting Date: 10/1/2020

ACTION ITEM

**To:** Texas Department of Motor Vehicles Board  
**From:** Jeremiah Kuntz, Vehicle Titles & Registration Division Director  
**Agenda Item:** 9  
**Subject:** Chapter 217, Vehicle Titles and Registration  
Amendments, §217.3  
(Relating to motor vehicle titling for mopeds)

**RECOMMENDATION**

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

**PURPOSE AND EXECUTIVE SUMMARY**

The proposed amendments remove references to the list of certified mopeds published by the Texas Department of Public Safety (DPS) because that list will no longer be maintained. DPS is no longer maintaining the list in response to House Bill (HB) 3171, 86th Legislature, Regular Session (2019), which repealed Transportation Code §521.255, which required DPS to maintain the list.

**FINANCIAL IMPACT**

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

**BACKGROUND AND DISCUSSION**

The proposed amendments to §217.3(1)(B) eliminate references to the list of certified mopeds published by DPS and clarify that determinations on whether a motor vehicle may be titled as a moped will be based on the definition of moped in Transportation Code §541.201. Previously, DPS provided a list of certified mopeds that was referenced when county tax assessor-collector offices processed title applications. Transportation Code §521.255, which required that the list be maintained, was repealed by HB 3171. Because that list is no longer maintained, determinations will be based on the statutory definition of moped.



## TITLE 43. TRANSPORTATION

## Proposed Section

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 – Motor Vehicle Titles

**PROPOSAL OF****SUBCHAPTER A. MOTOR VEHICLE TITLES****43 TAC §217.3**

**INTRODUCTION.** The Texas Department of Motor Vehicles (department) proposes to amend Title 43 of the Texas Administrative Code §217.3 relating to motor vehicle titles. The changes remove references to the list of certified mopeds published by the Texas Department of Public Safety (DPS) because that list will no longer be maintained. DPS is no longer maintaining the list in response to House Bill (HB) 3171, 86th Legislature, Regular Session (2019), which repealed Transportation Code §521.255, which required DPS to maintain the list.

**EXPLANATION.** The proposed amendments to §217.3(1)(B) eliminate references to the list of certified mopeds published by DPS and clarify that determinations on whether a motor vehicle may be titled as a moped will be based on the definition of moped in Transportation Code §541.201. Previously, DPS provided a list of certified mopeds that was referenced when county tax assessor-collector offices processed title applications. Transportation Code §521.255, which required that the list be maintained, was repealed by HB 3171. Because that list is no longer maintained, determinations will be based on the statutory definition of moped. Transportation Code §541.201(8) defines moped as, “a motor vehicle that is equipped with a rider's saddle and designed to have when propelled not more than three wheels on the ground, that cannot attain a speed in one mile of more than 30 miles per hour, and the engine of which cannot produce more than five-brake horsepower; and if an internal combustion engine, has a piston displacement of 50 cubic centimeters or less and connects to a power drive system that does not require the operator to shift gears.” If the vehicle meets the definition, it will be titled as a moped. The amendments are not changing or adding requirements for the definition of moped, but are removing the requirement that a motor vehicle be listed on the certified moped list before titling as a moped.

## TITLE 43. TRANSPORTATION

## Proposed Section

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 – Motor Vehicle Titles

1 **FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT.** Linda M. Flores, Chief Financial Officer,  
2 has determined that for each year of the first five years the proposed new section will be in effect, there  
3 will be no fiscal impact to state or local governments as a result of the enforcement or administration of  
4 the proposal. Jeremiah Kuntz, Director of the Vehicle Title and Registration Division, has determined that  
5 there will be no measurable effect on local employment or the local economy as a result of the proposal.

6 **PUBLIC BENEFIT AND COST NOTE.** Mr. Kuntz has also determined that, for each year of the first five years  
7 the proposed new section is in effect, the public benefits include removing outdated procedures from  
8 department rules, removing the requirement that mopeds must be on a list of certified mopeds to be  
9 titled, and clarifying the existing criteria for titling a motor vehicle as a moped.

10 Mr. Kuntz anticipates that there will be no additional costs on regulated persons to comply with  
11 these rules, because the rules do not establish any additional requirements or costs for the regulated  
12 person.

13 **ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.** As required by Government  
14 Code, §2006.002, the department has determined that the amendment will not have an adverse  
15 economic effect on small businesses, micro-businesses, or rural communities because the proposal  
16 imposes no additional requirements, and has no additional financial effect, on any small businesses,  
17 micro-businesses, or rural communities. Therefore, the department is not required to prepare a  
18 regulatory flexibility analysis under Government Code, §2006.002.

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

## TITLE 43. TRANSPORTATION

## Proposed Section

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 – Motor Vehicle Titles

**1 GOVERNMENT GROWTH IMPACT STATEMENT.** The department has determined that during the first five  
2 years the proposed amendments are in effect, no government program would be created or eliminated.  
3 Implementation of the proposed amendments would not require the creation of new employee positions  
4 or elimination of existing employee positions. Implementation would not require an increase or decrease  
5 in future legislative appropriations to the department or an increase or decrease of fees paid to the  
6 department. The proposed amendments do not create a new regulation, or expand, or limit, an existing  
7 regulation. The proposed amendments remove an existing regulation. Lastly, the proposed amendments  
8 do not affect the number of individuals subject to the rule's applicability and will not affect this state's  
9 economy. The proposed amendments do not change the definition of moped; instead the proposed  
10 amendments remove the requirement that mopeds must be on a list of certified mopeds to be titled.

**11 REQUEST FOR PUBLIC COMMENT.**

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

**17 STATUTORY AUTHORITY.** The department proposes amendments to §217.3 under Transportation Code  
18 §501.0041 and §1002.001.

19 Transportation Code §501.0041 authorizes the department to adopt rules to administer Chapter  
20 501.

21 Transportation Code §1002.001, authorizes the board to adopt rules that are necessary and  
22 appropriate to implement the powers and the duties of the department.

**23 CROSS REFERENCE TO STATUTE.** Transportation Code §501.021 and §501.022.

## TITLE 43. TRANSPORTATION

## Proposed Section

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 – Motor Vehicle Titles

## 1 TEXT.

## 2 SUBCHAPTER A. MOTOR VEHICLE TITLES

## 3 43 TAC §217.3

## 4 §217.3. Motor Vehicle Titles.

5 Unless otherwise exempted by law or this chapter, the owner of any motor vehicle that is required  
6 to be titled, including any motor vehicle required to be registered in accordance with Transportation Code  
7 Chapter 502, shall apply for a Texas title in accordance with Transportation Code Chapter 501 or 731.

## 8 (1) Motorcycles, autocycles, and mopeds.

9 (A) The title requirements for a motorcycle, autocycle, and moped are the same  
10 requirements prescribed for any motor vehicle.

11 (B) A vehicle that meets the criteria for a moped under Transportation Code  
12 §541.201(8) ~~[and has been certified as a moped by the Department of Public Safety]~~ will be registered and  
13 titled as a moped. ~~[If the vehicle does not appear on the list of certified mopeds published by that agency,~~  
14 ~~the vehicle will be treated as a motorcycle for title and registration purposes.]~~

## 15 (2) Farm vehicles.

16 (A) The term "motor vehicle" does not apply to implements of husbandry, which  
17 may not be titled.

18 (B) Farm tractors owned by agencies exempt from registration fees in accordance  
19 with Transportation Code §502.453, are required to be titled and registered with "Exempt" license plates  
20 issued in accordance with Transportation Code §502.451.

21 (C) Farm tractors used as road tractors to mow rights of way or used to move  
22 commodities over the highway for hire are required to be registered and titled.

23 (D) Owners of farm trailers and farm semitrailers with a gross weight of 34,000

## TITLE 43. TRANSPORTATION

## Proposed Section

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 – Motor Vehicle Titles

1 pounds or less may apply for a Texas title. Owners of farm trailers and farm semitrailers with a gross  
2 weight in excess of 34,000 pounds shall apply for a Texas title. If a farm trailer or farm semitrailer with a  
3 gross weight of 34,000 pounds or less has been titled previously, any subsequent owner shall apply for a  
4 Texas title for the farm trailer or farm semitrailer.

5 (3) Neighborhood electric vehicles. The title requirements of a neighborhood electric  
6 vehicle (NEV) are the same requirements prescribed for any motor vehicle.

7 (4) Trailers, semitrailers, and house trailers. Owners of trailers and semitrailers shall apply  
8 for a Texas title for any trailer or semitrailer with a gross weight in excess of 4,000 pounds. Owners of  
9 trailers and semitrailers with a gross weight of 4,000 pounds or less may apply for a Texas title. If a trailer  
10 or semitrailer with a gross weight of 4,000 pounds or less has been titled previously, any subsequent  
11 owner shall apply for a Texas title for the trailer or semitrailer. House trailer-type vehicles must meet the  
12 criteria outlined in subparagraph (C) of this paragraph to be titled:

13 (A) The rated carrying capacity will not be less than one-third of its empty weight.

14 (B) Mobile office trailers, mobile oil field laboratories, and mobile oil field  
15 bunkhouses are not designed as dwellings, but are classified as commercial semitrailers and must be  
16 registered and titled as commercial semitrailers if operated on the public streets and highways.

17 (C) House trailer-type vehicles and camper trailers must meet the following  
18 criteria in order to be titled.

19 (i) A house trailer-type vehicle that is less than eight feet six inches in  
20 width or less than 45 feet in length is classified as a travel trailer and shall be registered and titled.

21 (ii) A camper trailer shall be titled as a house trailer and shall be registered  
22 with travel trailer license plates.

23 (iii) A recreational park model type trailer that is primarily designed as

## TITLE 43. TRANSPORTATION

## Proposed Section

## Part 10. Texas Department of Motor Vehicles

## Chapter 217 – Motor Vehicle Titles

temporary living quarters for recreational, camping or seasonal use, is built on a single chassis, and is 400 square feet or less when measured at the largest horizontal projection when in the set up mode shall be titled as a house trailer and may be issued travel trailer license plates.

(5) Assembled vehicles. The title requirements for assembled vehicles are prescribed in Subchapter L of this title (relating to Assembled Vehicles).

(6) Not Eligible for Title. The following are not eligible for a Texas title regardless of the vehicle's previous title or registration in this or any other jurisdiction:

(A) vehicles that are missing or are stripped of their motor, frame, or body, to the extent that the vehicle loses its original identity or makes the vehicle unsafe for on-road operation as determined by the department;

(B) vehicles designed by the manufacturer for on-track racing only;

(C) vehicles designed or determined by the department to be for off-highway use only, unless specifically defined as a "motor vehicle" in Transportation Code Chapter 501; or

(D) vehicles assembled, built, constructed, rebuilt, or reconstructed in any manner with:

(i) a body or frame from a vehicle which is a "nonrepairable motor vehicle" as that term is defined in Transportation Code §501.091(9); or

(ii) a motor or engine from a vehicle which is flood damaged, water damaged, or any other term which may reasonably establish the vehicle from which the motor or engine was obtained is a loss due to a water related event.

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

Issued at Austin, Texas, on Month Day, YYYY.

TITLE 43. TRANSPORTATION

Proposed Section

Part 10. Texas Department of Motor Vehicles

Chapter 217 – Motor Vehicle Titles

1  
2

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Tracey Beaver, General Counsel

DRAFT



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**To:** Texas Department of Motor Vehicles Board  
**From:** Caroline Love, Government & Strategic Communications Division Director  
**Agenda Item:** 10.A  
**Subject:** Sunset Implementation Status Update

---

#### RECOMMENDATION

Briefing Only.

#### PURPOSE AND EXECUTIVE SUMMARY

Legislative and Public Affairs Committee Chairman Paul Scott will provide an update on the department's implementation of recommendations from the Sunset review process. The Sunset Advisory Commission reviewed TxDMV during the last legislative cycle, resulting in several management recommendations and statutory recommendations. This update will outline the status of the department's implementation efforts on all recommendations.

#### FINANCIAL IMPACT

None.

#### BACKGROUND AND DISCUSSION

Before the 87th Legislature begins, Sunset staff will review implementation efforts for those statutory recommendations included in SB 604, 86th Legislature, the TxDMV continuing legislation. The State Auditor's Office has requested a status of management recommendations from the Sunset review, which was provided on September 21, 2020. This item will provide the committee with a briefing on the status of those implementation efforts.



**Implementation Chart**  
**Texas Department of Motor Vehicles**

**S.B. 604 Buckingham (Paddie)****Staff Report with Final Results**

| <b>Bill Reference</b>                                                    | <b>Recommendation Number</b> | <b>Bill Provision</b>                                                                                                                                                                                                                                                                                                                                          | <b>Implementation Status</b>                                                                                                                                                                                                                                                    |
|--------------------------------------------------------------------------|------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Page 3, Line 27 to Page 4, Line 18                                       | Added by Commission          | Update the Sunset across-the-board requirement that requires agencies to adopt policies clearly delineating the policymaking functions of the board from the day-to-day administration of the agency, to clarify the division of responsibilities between the DMV board and its executive director.                                                            | TxDMV already complies with this amendment: 1) 43 TAC Sections 206.1 and 206.2; 2) TxDMV Board Governance Policy; 3) TxDMV Strategic Planning Policy; 4) TxDMV Goals and Objectives; and 4) Agency Operational Boundaries as Defined by Department Policies of the TxDMV Board. |
| Page 1, Line 9–12                                                        | 5.1                          | Continue the DMV until September 1, 2031.                                                                                                                                                                                                                                                                                                                      | Implemented on 9/1/2019                                                                                                                                                                                                                                                         |
| Page 1, Line 15 to Page 3, Line 24;<br>Page 6, Line 16 to Page 7, Line 4 | 1.4                          | Updates and modifies the standard Sunset across-the-board requirement related to board member training, including an annual attestation that the board member receives training that includes information and guidance about the board's rulemaking authority. Requires training to include information on the board's authority and limits on PFDs from SOAH. | Implemented on 1/22/2020                                                                                                                                                                                                                                                        |
| Page 2, Lines 7–22                                                       | Added by Legislature         | Updates anti-competitive board member training requirements.                                                                                                                                                                                                                                                                                                   | Implemented on 9/1/2019, board member trainings are complete.                                                                                                                                                                                                                   |
| Page 3, Lines 21–24                                                      | Added by Legislature         | Requires annual attestation of reception and review of board member training manual.                                                                                                                                                                                                                                                                           | Implemented on 11/2019, board member trainings are complete.                                                                                                                                                                                                                    |
| Page 4, Line 21 to Page 5, Line 6                                        | 5.3                          | Adds standard Sunset language requiring DMV to maintain information on all complaints and notify the parties about policies for and status of complaints.                                                                                                                                                                                                      | Implemented on 9/1/2019                                                                                                                                                                                                                                                         |

**Implementation Chart**  
**Texas Department of Motor Vehicles**

**S.B. 604 Buckingham (Paddie)**

**Staff Report with Final Results**

| Bill Reference                                                                                                 | Recommendation Number | Bill Provision                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Implementation Status                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
|----------------------------------------------------------------------------------------------------------------|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Page 5, Line 7 to<br>Page 6, Line 1                                                                            | 1.6                   | Adds standard Sunset language requiring the policymaking body to develop a policy that encourages the use of negotiated rulemaking and alternative dispute resolution.                                                                                                                                                                                                                                                                                                                                                    | <p>Completed 6/11/20 Board Meeting: the board adopted a policy for board adoption encouraging the use of negotiated rulemaking procedures under Government Code Chapter 2008.</p> <p>Completed 6/11/20 Board Meeting: the board adopted a policy for board adoption encouraging the use of appropriate alternative dispute resolution procedures that conform, to the extent possible, to model guidelines issued by SOAH for internal and external disputes – obtained a copy of the SOAH model guidelines.</p> <p>Ongoing: Provide training as needed to implement the procedures for negotiated rulemaking and alternative dispute resolution.</p> <p>Collect data on the effectiveness of those procedures.</p> <p>Policy saved at <a href="T:\DMV\OGC\Policies &amp; Procedures\Policy\Rulemaking">T:\DMV\OGC\Policies &amp; Procedures\Policy\Rulemaking</a></p> |
| Page 6, Lines 4–11;<br>Page 6, Line 14                                                                         | Added by Legislature  | Provides that complaint investigations related to the sale or lease of automobile, salvage vehicle dealers, dealer's and manufacturer's vehicle license plates, and motor carrier registrations are confidential until the investigation is dismissed or finally resolved but only if the disclosure of the information would interfere with or jeopardize the investigation. Repeals existing confidentiality provisions related to investigations related to the sale of an automobile under Occupations Code 2301.612. | Implemented on 9/1/2019                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Page 6, Lines 13 and 15                                                                                        | 1.5                   | Removes the board's exemption from providing balanced representation on its advisory committees.                                                                                                                                                                                                                                                                                                                                                                                                                          | Implemented: Effective date: 8/29/2019;<br>Rules approved for adoption at 8/8/19 board meeting                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| Page 7, Line 8 to<br>Page 9, Line 27;<br>Page 13, Lines 15–17;<br>Page 14, Lines 26–27;<br>Page 15, Lines 1–23 | 4.2                   | Eliminates the motor vehicle representative and salvage agent licenses.                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Implemented: Effective date: 1/2/2020; Rules approved for adoption at 12/5/2019 board meeting                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |

**Implementation Chart**  
**Texas Department of Motor Vehicles**

**S.B. 604 Buckingham (Paddie)**

**Staff Report with Final Results**

| Bill Reference                                                                       | Recommendation Number | Bill Provision                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Implementation Status                                                                                                                                                                    |
|--------------------------------------------------------------------------------------|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Page 10, Lines 1–14                                                                  | Added by Legislature  | Reinstates the department's shows and exhibition notice and approval process for all vehicle types, but does not require TxDMV to grant written approval.                                                                                                                                                                                                                                                                                                                                               | Implemented on 9/1/2019, updated information/form available on the department's website                                                                                                  |
| Page 10, Line 18 to Page 11, Line 8                                                  | 1.3                   | Requires the board to adopt rules and policies to establish clear standards for conduct and handling of contested cases coming before the board for final decisions. Requires the adopted rules and policies to specify the role of DMV personnel in managing contested protest cases before the board, limit arguments and discussion to evidence in the record from SOAH, address ex parte communications, and distinguish between industry expertise and representing or advocating for an industry. | Partially implemented. Rules were approved for proposal at the August 2020 board meeting.                                                                                                |
| Page 11, Lines 11–16;<br>Page 14, Lines 21–25                                        | 3.2                   | Authorizes DMV to order a motor vehicle licensee to pay a refund to a buyer or lessee. Authorizes DMV to order a motor carrier licensee to pay a refund to a consumer who paid the licensee to transport household goods.                                                                                                                                                                                                                                                                               | Partially implemented.<br>Rule proposal approved at 8/6/2020 board meeting.<br><br>Consumer Protection Advisory Committee (CPAC) recommendations adopted by board 8/6/2020.              |
| Page 11, Line 19 to Page 13, Line 2;<br>Page 14, Lines 26–27;<br>Page 15, Lines 1–11 | 4.3                   | Eliminates the salvage license endorsements and establish a single, streamlined salvage license.                                                                                                                                                                                                                                                                                                                                                                                                        | Partially implemented. Rule proposal approved at 6/11/2020 board meeting.                                                                                                                |
| Page 12, Lines 1–10                                                                  | Added by Legislature  | Specifies that a salvage vehicle dealer license allows the license holder to buy or sell salvage motor vehicles and non-repairable motor vehicles that have been issued a salvage vehicle title or non-repairable vehicle title.                                                                                                                                                                                                                                                                        | Implemented 9/1/2019.                                                                                                                                                                    |
| Page 13, Lines 6–12                                                                  | 4.4                   | Authorizes the department to set salvage license terms in rule.                                                                                                                                                                                                                                                                                                                                                                                                                                         | Implemented January 2, 2020                                                                                                                                                              |
| Page 13, Line 24 to Page 14, Line 2                                                  | 3.3                   | Authorizes DMV to issue a cease and desist order for unlicensed salvage activity.                                                                                                                                                                                                                                                                                                                                                                                                                       | Partially implemented. Rule proposal approved at 8/6/2020 board meeting.                                                                                                                 |
| Page 14, Lines 5–18;<br>Page 15, Line 24 to Page 16, Line 5                          | Added by Legislature  | Requires training before licensure for independent auto dealers.                                                                                                                                                                                                                                                                                                                                                                                                                                        | Implemented: Effective date: 3/1/2020; Rule approved at 2/6/2020 board meeting. Training has started for those needing it for licensure.                                                 |
| Page 16, Line 9 to Page 21, Line 16                                                  | Added by Legislature  | Requires the department to adopt rules to issue and regulate the use of digital license plates.                                                                                                                                                                                                                                                                                                                                                                                                         | Rules were implemented July 2020, technological interface with provider anticipated to be available by December 31, 2020. Effective on 7/12/20; Rule adopted at 6/11/2020 board meeting. |

**Implementation Chart**  
**Texas Department of Motor Vehicles**

**S.B. 604 Buckingham (Paddie)**

**Staff Report with Final Results**

| Bill Reference                                            | Recommendation Number | Bill Provision                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Implementation Status                                                                                                                                                                                                 |
|-----------------------------------------------------------|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Page 21, Line 20 to Page 22, Line 7                       | 2.4                   | Requires DMV to create a risk-based system of monitoring and preventing fraud related to vehicle registration and titling.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Partially implemented. Rules were proposed at the August 2020 board meeting.<br><br>The Management action to share best practice protocol with county tax-assessor-collectors was implemented on 3/5/2019.            |
| Page 22, Lines 10–14;<br>Page 26, Lines 3–6               | 5.2                   | Requires county tax assessor-collectors to ensure webDEALER is available online to dealers in all Texas counties. Requires webDEALER to be available online to dealers in all Texas counties by September 1, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Process implemented on 9/1/2020, guidance shared with counties. Accompanying rules anticipated to be brought to the board for adoption at 10/1/2020 at board meeting; rules were proposed at 6/11/2020 board meeting. |
| Page 22, Lines 18–21                                      | Added by Legislature  | Specifies that contracting standards apply only to full service deputies.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Implemented. The Policy Review Routing Document for State Contracting Guidelines for tax assessor-collectors was completed 11/8/2019. Guidance was sent to counties on 11/13/2019 via GovDelivery Notice.             |
| Page 22, Line 22 to Page 23, Line 18; Page 25, Lines 6–10 | 2.1                   | Requires counties to follow standard contracting practices when outsourcing state services to full-service deputies. Requires standard best practices to include purchase methods and competitive bidding, determining the best value for a county, contracting standards and oversight, and contract management. Requires a county tax-assessor collector to monitor and evaluate the performance of a deputy awarded a contract and use that information when determining whether to renew or extend the contract. Requires each county tax assessor-collector entered into a contract before the effective date of the act to rebid the contract before December 1, 2019. | Implemented. The Policy Review Routing Document for State Contracting Guidelines for tax assessor-collectors was completed 11/8/2019. Guidance was sent to counties on 11/13/2019 via GovDelivery Notice.             |
| Page 23, Line 19 to Page 24, Line 8                       | 2.5                   | Authorizes DMV to audit or perform a compliance review of anyone performing registration or titling services, investigate, and access any records to conduct such activity. Authorizes a county tax assessor collector audit or perform a compliance review of anyone performing registration or titling services in their county and access any records needed to conduct such activity.                                                                                                                                                                                                                                                                                    | Implemented. Effective on 3/1/2020;                                                                                                                                                                                   |

**Implementation Chart**  
**Texas Department of Motor Vehicles**

**S.B. 604 Buckingham (Paddie)****Staff Report with Final Results**

| <b>Bill Reference</b>                                                     | <b>Recommendation Number</b> | <b>Bill Provision</b>                                                                                                                                                                                                                                                                                                                                                                 | <b>Implementation Status</b>                                                                                                                                                                              |
|---------------------------------------------------------------------------|------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Page 24, Lines 17–23;<br>Page 25, Line 20 to Page 26, Line 2              | 2.2                          | Authorizes DMV to adopt rules and policies for the maintenance and use of the RTS system and specifies that DMV has the sole authority to determine access to the system. Directs the department to adopt rules in coordination with county tax assessor-collectors regarding criteria to suspend access to the registration and title system by March 1, 2020.                       | Implemented on 03/01/2020                                                                                                                                                                                 |
| Page 24, Lines 9–14                                                       | NR                           | Authorizes DMV to coordinate with the comptroller of public accounts and authorizes the comptroller of public accounts to include, at the comptroller's discretion and as part of its ongoing audits of state revenue collections by county tax assessor-collector offices, a review of processes relating to a county's collection and remittance of revenues included in the audit. | Implemented 9/1/2019                                                                                                                                                                                      |
| Page 24, Lines 24 to Page 25, Line 5;<br>Page 25, Lines 16–19             | 2.3                          | Requires DMV to implement mandatory fraud training for anyone performing registration or titling services. Requires DMV to implement rules for the training program by December 1, 2019.                                                                                                                                                                                              | Implemented on 12/16/2019                                                                                                                                                                                 |
| Page 25, Line 11–15                                                       | Added by Legislature         | Requires DMV to assist with contract rebidding.                                                                                                                                                                                                                                                                                                                                       | Implemented. The Policy Review Routing Document for State Contracting Guidelines for tax assessor-collectors was completed 11/8/2019. Guidance was sent to counties on 11/13/2019 via GovDelivery Notice. |
| Page 25, Line 10                                                          | Added by Legislature         | Extends deadline for contract rebidding to March 31, 2020.                                                                                                                                                                                                                                                                                                                            | Implemented 11/13/2019 via GovDelivery notice to impacted stakeholders.                                                                                                                                   |
| Page 26, Line 11 to Page 43, Line 16; Page 46, Line 5 to Page 47, Line 17 | 2.6                          | Authorizes ABTPA grant recipients to use funds to combat a broader range of crimes, such as title and odometer fraud, beyond just automobile burglary and theft. Codifies ABTPA laws and make corresponding clarifying changes.                                                                                                                                                       | Implemented 9/1/2019                                                                                                                                                                                      |
| Page 46, Line 18                                                          | Added by Legislature         | Removes board member from ABTPA member description.                                                                                                                                                                                                                                                                                                                                   | Implemented 9/1/2019                                                                                                                                                                                      |
| Page 46, Line 20                                                          | Added by Legislature         | Changes reference from board to authority.                                                                                                                                                                                                                                                                                                                                            | Implemented 9/1/2019                                                                                                                                                                                      |
| Page 47, Line 18 to Page 49, Line 27                                      | Added by Legislature         | Requires DMV to conduct a study on fee collection for alternatively fueled vehicles.                                                                                                                                                                                                                                                                                                  | Due to the Legislature December 1, 2020, internal draft will be available for review by 9/30/20.                                                                                                          |

## Implementation Chart Texas Department of Motor Vehicles

### Management Action Recommendations

| Recommendation Number | Management Actions                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Implementation Status                                                             |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|
| 1.1                   | Direct the Sunset Commission to request that the Legislature examine all state boards, including the Texas Department of Motor Vehicles board, for any legislation needed to mitigate the potential liability of boards controlled by active market participants.                                                                                                                                                                                                                               | Not Applicable as the action was directed to the Sunset Commission.               |
| 1.7                   | Direct the board to establish advisory committees to provide expertise for rulemaking and other issues and adopt rules regarding standard committee structure and operating criteria.                                                                                                                                                                                                                                                                                                           | Implemented on 08/23/2019                                                         |
| 2.2                   | Direct the department to adopt rules to formalize its current 'red flag' fraud warning system further developing and implementing a clear and efficient path for county tax assessor-collectors to report suspected fraud, waste, or abuse of the registration and title system by employees, dealers, and full-service deputies and provide an option for a county to request action for suspected fraud or abuse, such as immediately suspending access to the registration and title system. | Implemented on 03/01/2020                                                         |
| 3.4                   | Direct the department to identify and implement methods to reduce its complaint resolution timeframes.                                                                                                                                                                                                                                                                                                                                                                                          | Implemented on 11/29/2018                                                         |
| 3.5                   | Direct the department to develop clear guidance and criteria for prioritizing investigations and inspections.                                                                                                                                                                                                                                                                                                                                                                                   | Implemented on 11/29/2018                                                         |
| 3.6                   | Direct the department to improve enforcement data tracking in its existing systems.                                                                                                                                                                                                                                                                                                                                                                                                             | In Progress.                                                                      |
| 3.7                   | Direct the department to revise and expand key performance indicators and annual enforcement reports to better assess effectiveness and efficiency and provide more visibility of its enforcement program.                                                                                                                                                                                                                                                                                      | Implemented on 03/26/2020                                                         |
| 3.8                   | Direct the department to publish penalty matrices                                                                                                                                                                                                                                                                                                                                                                                                                                               | Implemented on 5/22/2018                                                          |
| 3.9                   | Direct the department to publish more detailed enforcement histories of regulated motor vehicle and motor carrier businesses.                                                                                                                                                                                                                                                                                                                                                                   | Implemented on 03/26/2020                                                         |
| 4.5                   | Direct the department to conduct criminal history checks for all motor vehicle license renewals.                                                                                                                                                                                                                                                                                                                                                                                                | Implemented on 05/22/2018                                                         |
| 4.6                   | Direct the department to adopt criminal history evaluation rules and guidelines consistent with Chapter 53, Texas Occupations Code for salvage industry regulation.                                                                                                                                                                                                                                                                                                                             | Partially implemented. Rules approved for proposal at June 11, 2020 board meeting |
| 4.7                   | Remove unnecessary application requirements for salvage licenses.                                                                                                                                                                                                                                                                                                                                                                                                                               | Implemented on 5/24/2018                                                          |
| 5.4                   | Direct the department to develop a comprehensive approach to developing, maintaining, and updating its IT infrastructure.                                                                                                                                                                                                                                                                                                                                                                       | Mostly implemented.                                                               |
| 5.5                   | Direct the department to evaluate and identify further opportunities to consolidate and modernize its customer service functions to improve efficiency and customer experience.                                                                                                                                                                                                                                                                                                                 | Implemented on 4/20/2020                                                          |

**Implementation Chart**  
**Texas Department of Motor Vehicles**

**Management Action Recommendations**

| Recommendation Number | Management Actions                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Implementation Status     |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------|
| Added by Commission   | Direct the department to conduct the existing contracted study to identify and assess alternative technologies for registering commercial vehicles to replace license plates, permits, and other documentation and registration methods currently in use by the state, and evaluate the safety and suitability for identified technologies for use on roadways, as required under House Bill 1959 (85th Legislature, Regular Session) by March 31, 2019 instead of December 1, 2021. Also, direct the department to include an analysis of any statutory impediments to conducting a pilot program as described in H.B. 1959 as part of this study. | Implemented on 03/01/2019 |
| Added by Commission   | As part of the license application process for a salvage vehicle dealer, direct the department to consider the criminal background of an applicant's partner, company principal, officer, or general manager as a qualifying factor when determining whether to issue a license.                                                                                                                                                                                                                                                                                                                                                                    | Implemented on 10/1/2019  |
| Added by Commission   | Direct the department to establish a risk-based approach to its salvage vehicle dealer inspections. As part of the risk-based inspections, the department should consider factors including inspection history, complaint history, and any other factors determined by department rule.                                                                                                                                                                                                                                                                                                                                                             | Implemented on 10/31/2019 |

**Texas Department of Motor Vehicles**

HELPING TEXANS GO. HELPING TEXAS GROW.

**Board Meeting Date: 10/1/2020  
BRIEFING**

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**To:** Texas Department of Motor Vehicles Board  
**From:** Caroline Love, Government & Strategic Communications Division Director  
**Agenda Item:** 10.B  
**Subject:** Driver Licensing Study Update

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**RECOMMENDATION**

Briefing Only.

**PURPOSE AND EXECUTIVE SUMMARY**

Legislative and Public Affairs Committee Chairman will provide an update on a study examining the challenges of the driver license program. The Sunset Advisory Commission reviewed the Texas Department of Public Safety (DPS) in the last legislative cycle. The continuing legislation for DPS, SB 616 (86R), included a provision for a third party to make recommendations on the management and operating structure of the DPS Driver License program, including the opportunities and challenges of transferring the program. The General Appropriations Act further defined the study was to be completed by an institution of higher education.

**FINANCIAL IMPACT**

None.

**BACKGROUND AND DISCUSSION**

The University of Texas at Austin Center for Transportation Research conducted the study for DPS, and it was delivered to the legislature by the September 1, 2020 deadline outlined in SB 616 (86R). The legislation stated a transfer of the driver license program to TxDMV would occur automatically as of September 1, 2021 if the above study was not delivered by the September 1, 2020 deadline. This briefing will provide a summary and update on the study.





# EXECUTIVE SUMMARY

The University of Texas at Austin

Prepared for the Texas Department of Public Safety  
at the direction of the Texas Legislature

## Management, Operating Structure, Efficiencies, and Opportunities and Challenges of Transferring the Driver License Program

### Background

In 2019, the 86th Texas State Legislature passed Senate Bill 616 and a similar provision in the General Appropriations Act requiring a study to evaluate the Driver's License Program operated by the Department of Public Safety's (DPS) Driver License Division (DLD). DPS contracted with the Study Team to investigate three options for optimal operation of the Driver License Program:

1. leave DLD at DPS,
2. move DLD to the Department of Motor Vehicles (DMV), or
3. create a new stand-alone state agency for DLD.

### Recommendations

After conducting a thorough investigation of management, operating structure, efficiencies, and opportunities and challenges of transferring the Driver License Program, the Study Team provides the following recommendations:

- DLD should form a new stand-alone state agency. The Study Team created a 12-year timeline to facilitate a smooth transition.
- Regardless of where DLD ultimately resides, certain mission-critical practices and enhancement should be implemented to meet the needs of the growing Texas population.

### Study Methodology

The Study Team developed tasks to logically guide the work and address the following objectives:

- Perform a comprehensive literature review and gather information to document DLD practices in Texas and in other states and countries.
- Conduct a thorough study of the management and operating structure of the DPS DLD.
- Assemble expert working groups and conduct fact-finding through workshops, interviews, and surveys.
- Obtain data and prepare summaries of fiscal analyses for three options: leaving the function at DPS, moving it to the Department of Motor Vehicles (DMV), or moving it to a new stand-alone state agency.
- Evaluate benefits, challenges, and costs for each of the three options.
- Develop proposed timelines associated with transferring DLD to either DMV or a stand-alone agency.
- Investigate methods to enhance operations in general, such as incentivizing online renewal for eligible individuals.
- Make a recommendation as to whether to leave the DLD at DPS, move it to DMV, or move it to a new stand-alone state agency.

Please see the full report for all study details, available at this link: [www.dps.texas.gov](http://www.dps.texas.gov).

## Key Findings

To address the study objectives, the Study Team performed a literature search; analyzed data provided by DPS, DLD, DMV, and others; conducted multiple surveys for multiple audiences; organized focus groups; interviewed subject matter experts; and performed fiscal analyses to develop the following findings.

- Driver license programs and other vehicle services are housed in a variety of organizational structures in other states, as Figure E.1 shows. Given the diversity of states' needs, there is no one-size-fits-all standard and the driver license function should be located where it makes the most sense in a state.
- In Texas, vehicle services are provided by DLD and DMV.
  - DLD issues new and renewal driver licenses; identification cards; Election Identification Certificates; and suspensions and reinstatements of driver licenses.
  - DMV regulates vehicle manufacturers, dealers, moving companies, and other motor vehicle-related businesses; issues oversize and overweight permits for the trucking industry; administers the state's Lemon Law; and issues motor vehicle titles, registration, and license plates.
- To address staffing and customer wait time issues, DPS submitted a "Driver License Plan—Exceptional Item and Statutory Change Requests" to the 86th Legislature. The budget portion included funding for more staff, additional salary for frontline staff, and opening additional DLD offices. The request totaled \$420 million. The legislature approved increasing the driver license terms to eight years and increased funding of \$212.4 million to increase salaries, hire additional staff, and open two more driver license offices (DLOs).
- DLD has hired staff and increased the salary of frontline staff. Wait times have decreased some and turnover, as measured by voluntary resignations, has decreased.
- Wait times, which have been a focus of the legislature and complaints from the public, are being addressed by DLD with several newly initiated changes. Besides added FTEs, a new appointment system allowing appointments up to six months in advance and new IT equipment have been deployed in DLOs. Since these changes are only now being implemented, their effect on wait times cannot be evaluated yet. For example, the appointment system was scheduled for implementation just as COVID-19 spurred closure of DLOs; the system is only now being used by the public in DLD's phased re-opening of DLOs.
- Customers in focus groups and surveys pointed out a need for website improvements. They want information that guides them to the method of renewal best for their situation, improved guidance on required documents to take to the DLO, and easier site navigation.
- Increasing the rate of transactions conducted online can help the state save money and improve customer satisfaction. The Study Team estimates up to an additional 27 percent of in-person renewals could have been conducted online; only 25 percent of the eligible 52 percent currently renew online.
- The DLD call center can answer only about 10 percent of calls because of the high volume (7 million calls received annually) and the number of staff dedicated to this task.
- In evaluating the fiscal funding for a transfer of DLD to DMV or a stand-alone agency, the Study Team found that:
  - Based on how the legislature historically has funded agency transfers, transferring the program to DMV would be cost-neutral to the state budget overall. The \$594.4 million currently appropriated to DPS to support the program would transfer to DMV.
  - Creating a new stand-alone agency would cost an estimated additional \$12.7 million to the state, for a total biennial cost of \$607.1 million.
- The legislature has directed, and state agencies have accomplished, numerous program transfers with limited problems and, often, improvements.

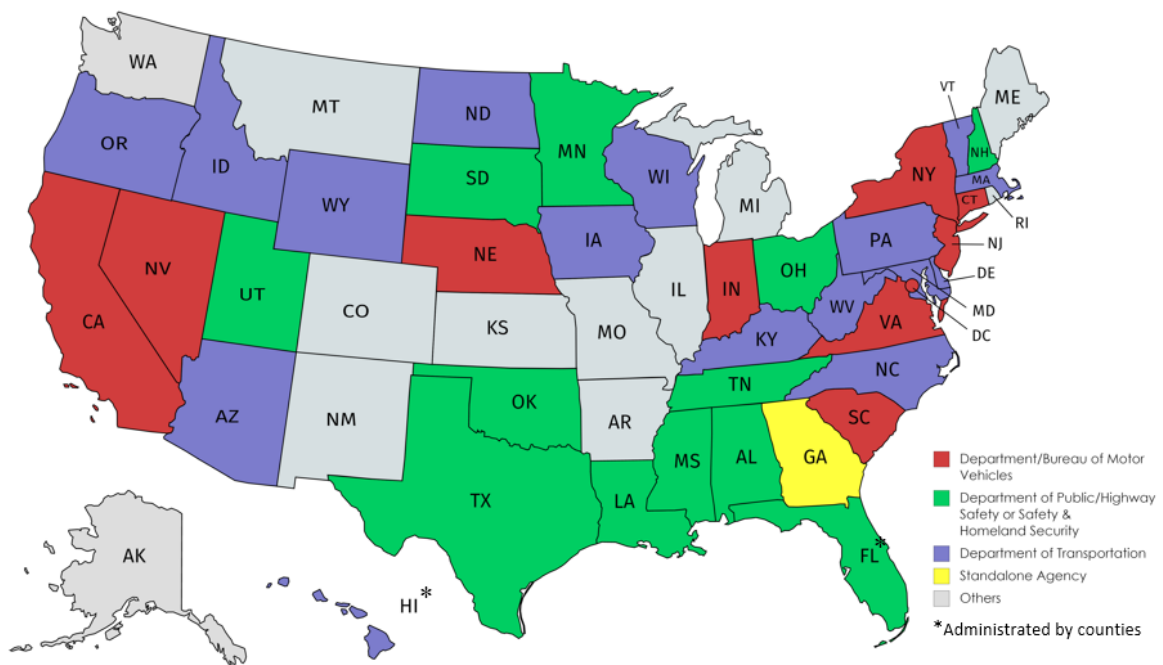


Figure E.1 Driver License Programs by State

## Key Recommendations

The Study Team provides the following recommendations in two areas. Some recommendations may require additional resources in funding, staffing, and technology.

### Management and Operating Structure Recommendations

The Study Team developed the matrix shown in Table E.1 using a five-point Likert scale to aid in determining the optimal location of the Driver License Program. Following a rigorous investigation, the Study Team recommends that DLD form a new stand-alone state agency.

Table E.1 Decision Matrix.

| Criteria             | DPS – Baseline | DPS – Future | Transfer to DMV | Create stand-alone agency |
|----------------------|----------------|--------------|-----------------|---------------------------|
| Customer Service     | Very Poor      | Average      | Good            | Good                      |
| Compliance/Security  | Good           | Good         | Average         | Good                      |
| Accountability/Trust | Very Poor      | Poor         | Good            | Very Good                 |
| Efficiency/Cost      | Very Poor      | Average      | Good            | Good                      |
| Culture/Staffing     | Poor           | Average      | Average         | Good                      |
| Disruption           | N/A            | Good         | Very Poor       | Poor                      |

For each criterion, current or projected performance is defined as:

|           |      |         |      |           |
|-----------|------|---------|------|-----------|
| Very Poor | Poor | Average | Good | Very Good |
|-----------|------|---------|------|-----------|

This matrix shows rankings for each of the three options: keep DLD at DPS, move it to DMV, or create a stand-alone agency. Rankings for each of the three options are split into six categories: Customer Service, Compliance/Security, Accountability/Trust, Efficiency/Cost, Culture/Staffing, and Disruption. The Study Team did not assign numeric weights to these six criteria. The legislature may choose to evaluate the three options based on specific subsets of criteria or by weighting each of the six criteria as preferred.

Additionally, a DPS Baseline ranking is included for comparison purposes. The 86th Legislature required this study because of the legislature's perception of DLD's poor performance at DPS. The DPS Baseline rankings, therefore, attempt to quantify DLD's performance issues as of June

2019, which is when the legislature formally required this study. Note that improvements made to DLD during the 86th Legislative Session are not included in DPS Baseline because data is not yet available to quantify the impact of these changes. For example, DPS Baseline does not include the \$212.4 million additional funds earmarked for DLD enhancements in FY 2020–21.

In refining recommendations for DLD's transition to a new agency, the Study Team developed a multi-year transition timeline. The first several years comprise the bulk of the transition activity. The following years afford the legislature check-in points to address any oversight and provide course corrections, with the timeline extending to encompass the first full Sunset and LBB reviews.

## Operational Recommendations

The Study Team developed a set of recommendations that do not depend on where the Driver License Program resides; these recommendations are critical to the program's success in general, with the most critical shown here. The rest appear in the full report.

- Redesign the website using a modern, user-friendly, fully functional design that displays well on mobile devices and supports multiple languages. Well-defined navigation should guide the user, with prominent placement of the documents needed for in-person visits and a clear explanation of whether a user is eligible to renew online.
- Reduce limitations to renewing online.
- Incentivize online transactions by offering discount instead of charging convenience fee.
- Create a dedicated Public Information Office (PIO) with an active staff providing education on and awareness of DLD programs and activities.
- Ensure that the PIO uses all social media available to distribute agency information in multiple languages.
- Develop a modern contact center to boost call center deflections by strategically opening up less expensive digital channels to customers.
- Review salary levels at least every two years for competitiveness.
- Review all operations at least every two years for optimum number and placement of FTEs in all areas of DLD. Adjust staffing where needed and ask the legislature for additional FTEs where warranted to meet performance measures.

### Research Performed by:

Center for Transportation Research

### Research Supervisor:

Dr. Mike Murphy, CTR  
(512) 232-3134  
[michael.murphy@engr.utexas.edu](mailto:michael.murphy@engr.utexas.edu)

### Report Date:

August 27, 2020

Center for Transportation Research

The University of Texas at Austin

3925 W. Braker Lane

Austin, TX 78759

(512) 232.3100

<http://ctr.utexas.edu/>



## Texas Department of Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

**Board Meeting Date: 10/1/2020**  
**BRIEFING**

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**To:** Texas Department of Motor Vehicles Board  
**From:** Caroline Love, Government & Strategic Communications Division Director  
**Agenda Item:** 10.C  
**Subject:** Agency Process for Legislative Session

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### RECOMMENDATION

Briefing Only.

### PURPOSE AND EXECUTIVE SUMMARY

This briefing will cover the key dates for the 87th Legislative Session, as well as the responsibilities of the Government & Strategic Communications Division as it relates to the department's review and analysis of legislation, coordination of the department in legislative hearings and meetings, and providing updates to department leadership and the TxDMV Board.

### FINANCIAL IMPACT

None.

### BACKGROUND AND DISCUSSION

The Government & Strategic Communications Division will be providing regular updates throughout the session on the status of legislation impacting the department.

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**To:** Texas Department of Motor Vehicles Board  
**From:** Caroline Love, Government & Strategic Communications Division Director  
**Agenda Item:** 10.D  
**Subject:** Recommended Legislation to the 87th Legislature Pursuant to Transportation Code, §1001.025

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#### RECOMMENDATION

Section 1 of the document includes recommendations for adoption. Section 2 of the document includes recommendations for further consideration and future adoption.

#### PURPOSE AND EXECUTIVE SUMMARY

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.

Upon adoption, recommendations shall be submitted to the Governor, Lieutenant Governor, Speaker of the House, and the presiding officers of relevant legislative committees for further potential handling in during the 87th Legislative Session.

#### FINANCIAL IMPACT

None.

#### BACKGROUND AND DISCUSSION

Earlier this year TxDMV's Government and Strategic Communications Division worked with all the department's divisions and offices and external stakeholders to begin identifying potential statutory changes to bring for the board to consider.

Additionally, the TxDMV Board established advisory committees comprised of members from the public and stakeholder groups. It is noted where these committees have provided recommendations through this process.

The following recommendations are presented to the Legislative & Public Affairs Committee on September 30, 2020 for discussion. Those recommendations adopted by the committee will be presented to the TxDMV Board on October 1, 2020 for further consideration of adoption.

Section 1 of the potential statutory changes for the board to consider includes only those recommendations that have been fully developed by the department in consultation with stakeholders and advisory committees that are recommended for adoption. Section 2 of the potential statutory changes for the board to consider includes those recommendations that are in initial phases of development with department staff, external stakeholders, and the public.

When fully developed, the recommendations in Section 2 will be brought before the board again at a future board meeting for consideration before adoption.

#### Timeline of Events

- September 30:** TxDMV staff will present legislative recommendations for the committee to consider adopting as an action item. TxDMV staff will also give a briefing update on those legislative recommendations that are still under initial development and discussion at the department that may be brought for the board to consider at a future board meeting. Those items adopted by the Legislative and Public Affairs Committee will be considered by the TxDMV Board at the October 1, 2020 meeting for further consideration.
- October 1:** The TxDMV Board will consider recommendations adopted by the Legislative and Public Affairs Committee for adoption. The TxDMV Board will receive an update on the items not adopted and the department's plan to obtain additional feedback.
- October - November:** Department staff will more fully develop the recommendations and solicit input from stakeholders and the public on potential recommendations to bring to the board for consideration at a future board meeting.
- December 3:** The TxDMV Board may consider any additional recommendations for adoption.



## 87<sup>th</sup> Legislature - Recommendations for Statute Changes

### Section 1: Items Recommended for Adoption

#### Enforcement (ENF) Related

- **Tax appraiser optional reporting of dealers not filing vehicle inventory**
  - **Stakeholders:** Chief Appraisers, Tax Assessor Collectors, Motor Vehicle Dealers
  - **Quick Summary:** Clarifies how appraisers report dealers on property tax inventory declarations and provide more flexibility with the process. Streamlines efficiencies within TxDMV.
  - **Additional Detail:** Current law requires tax appraisers to report vehicles to TxDMV in two instances: 1) when a dealer does not file the motor vehicle inventory declaration; and 2) when the declaration to the appraiser shows the dealer sold fewer than five vehicles in the prior year. The proposed change still requires appraisers to report to TxDMV when a dealer sells fewer than five vehicles but makes reporting optional in cases when a dealer does not file the declaration. This will provide more flexibility to appraisers. Rather than requiring reports for all non-filing dealers to TxDMV, the change would allow appraisers to work with their local dealers to obtain any missing declarations filed and ensure their dealers know what is expected when reporting. An appraiser may optionally report a non-filing dealer to TxDMV.
- **Hearing Procedures: Statutory Cleanup**
  - **Stakeholders:** N/A
  - **Quick Summary:** During the 84<sup>th</sup> Legislative Session in 2013, HB 2741 and HB 1692 both passed and amended the same subsection differently. This change replaces the differing subsections with language reflecting current practice of hearings under Transportation Code Chapter 503 (GDNs, dealer plates, & temp tags) following the same procedures used in Occupations Code Chapter 2301 (dealer licensing) and the Administrative Procedures Act, *see HB 2701 (84R)*.

#### Motor Carrier (MCD) Related

- **Remove outdated oversize and overweight permit bond requirements and align notice requirements with current processes**
  - **Stakeholders:** Motor Carrier Industry, the Texas Department of Transportation (TxDOT), Counties
  - **Quick Summary:** Certain oversize and overweight (OS/OW) permits require a bond. In practice the bonds are of little value to the state and counties but create extra processes and costs for motor carriers. This proposal will streamline department processes and help carriers with obtaining OS/OW permits.
  - **Additional Detail:** Eliminate the unnecessary OS/OW permit bonds because TxDMV is not aware of any cases in which TxDOT and counties have recovered losses from an accident by suing for the bond amount. Because liability is not limited to the bond, losses have been recovered through other means. Therefore, the OS/OW permit bonds increase stakeholder costs and time. Eliminating these bonds would also save TxDMV the time needed to review and maintain bond files. However, OS/OW permit bonds for certain permits would continue for operators not required to register as a motor carrier. This recommendation would also align statute with practice for permit notice requirements being done through online posting of relevant information. Before TxDMV was created in 2009, it was agreed a web page would provide each county with information on certain permits issued for use in that county, rather than providing actual copies of all the permits to the counties which would be labor intensive and expensive. In practice, counties contact TxDMV to obtain a copy of any requested permits.



## 87<sup>th</sup> Legislature - Recommendations for Statute Changes

- **Remove requirement for motor transportation brokers to file a bond with TxDMV**
  - **Stakeholders:** Motor Transportation Brokers
  - **Quick Summary:** Motor transportation brokers must file a \$10,000 bond with the department. Only four brokers are currently filing with the department. To help streamline department operations and eliminate an unnecessary regulation, repeal the chapter of code requiring motor transportation brokers file a small bond with the department.
- **Clarify provisions for motor carriers previously approved by the TxDMV Board and included in HB 2701 (84R)**
  - **Stakeholders:** Motor Carrier Industry, TxDOT
  - **Quick Summary:** Adds truck tractor to the exclusions from the two-plate requirement since they only display one plate. Updates the definition of “weight tolerance permit” to match TxDOT’s grant program language. Clarifies the carrying of registration receipts for certain token trailer plates. Aligns ready-mix concrete truck permit axle counts with legal limits.
- **Align Texas size and weight statutes with federal standards and current practice, previously approved by the TxDMV Board and included in HB 1789 (85R)**
  - **Stakeholders:** Motor Carrier Industry, TxDOT, Commercial Vehicle Law Enforcement
  - **Quick Summary:** Updates statutes to federal standards for the following: increases idle reduction technology weight allowances (changing to not greater than 500 pounds, instead of current 400 pounds); matches federal standards for the annual overlength permit being only for non-divisible loads, emergency vehicle weights, automobile transporter lengths and towaway trailer transporter combination lengths. Conforming state statutes to federal standards will reduce the risk of the potential loss of federal highway funds or a federal lawsuit. Update statute to match the current practice of allowing both OS/OW equipment and loads under certain permits.

### Motor Vehicle Crime Prevention Authority (MVCPA) Related

- **Remove MVCPA grants from outdated TxDOT reporting requirement**
  - **Stakeholders:** TxDOT
  - **Quick Summary:** TxDOT provides a Districts and Counties Statistics (DISCOS) report that includes MVCPA information from when that program was part of TxDOT. MVCPA provides similar reporting under its own statutes, therefore the DISCOS reporting requirement is no longer necessary; *see HB 3915 (85R)*.
- **Allow for recovery of costs and clarify statutes**
  - **Stakeholders:** Texas Comptroller of Public Accounts, Insurance Companies
  - **Quick Summary:** Align the statute with long-standing rules allowing for recovery of costs related to denied refunds. Align the statute with the Comptroller’s statutory authority to collect penalties and interest on late fee payments and reporting. Excludes salary costs related to fee collections from the administrative expense limit (aligns with the department’s exceptional item request for three new employees for a new fee collection unit).

### Motor Vehicle (MVD) Related

- **Statutory corrections for references to the Motor Vehicle Board**
  - **Stakeholders:** N/A
  - **Quick Summary:** Updates references to Motor Vehicle Board to Texas Department of Motor Vehicles Board.

## 87<sup>th</sup> Legislature - Recommendations for Statute Changes

### Office of Administrative Hearings (OAH) Related

- **Provide more efficiency in Lemon Law/warranty performance cases**
  - **Stakeholders:** Manufacturers, Motor Vehicle Dealers
  - **Quick Summary:** Reinstates the Public Information Act exception that was repealed in SB 604 (86R). Clarifies who issues final orders. Provides for fee reimbursement by statute. Allows rehearing motions to be decided by someone other than chief hearings examiner.
  - **Additional Detail:** For Lemon Law/warranty performance cases, this recommendation reinstates the inadvertently repealed (in SB 604 (86R)) public information act exception, which states information is exempt from release until there is a final order. This recommendation also clarifies that hearings examiners issue final orders in Lemon Law/warranty performance cases and makes the reimbursement of the filing fee a requirement directly in statute as opposed to a requirement of a final order. This allows for a streamlined process within TxDMV. This recommendation also allows rehearing motions to be decided by someone other than chief hearings examiner, which was recommended through an internal TxDMV Lemon Law Investigation & Resolution Audit from January 2019. Some of these recommendations were included in *HB 2701 (84R)* & *HB 3988 (86R)*.

### Registration Related

- **Align effective date of local fee changes with registration expiration month**
  - **Stakeholders:** Tax Assessor-Collectors, Comptroller of Public Accounts
  - **Quick Summary:** Local option fees assessed at the county level take effect January 1 of any given year. This recommendation changes statute for the fee be effective for a registration with an expiration month in the year the fee takes effect. This will reduce confusion about when a fee is due for customers, TACs, and the department.
- **Provide clean-up language for various license plate references.**
  - **Stakeholders:** Tax Assessor-Collectors
  - **Quick Summary:** Aligns the Legion of Merit license plates with other military plates to be charged no registration fee for the first set of plates. Allows all military license plate emblem options to be on a disabled veteran license plate. Strikes statutes for specialty license plates that did not receive a request for manufacture before the 5-year statutory deadline expired.

### Title Related

- **Clarifying that holds are placed on titles during lawsuits and that salvage and non-repairable motor vehicles are not eligible for title hearings or bonds**
  - **Stakeholders:** Salvage Dealers, Select Customers, Tax Assessor-Collectors
  - **Quick Summary:** Clarify in statute that salvage and non-repairable motor vehicles are not eligible for hearings or bonded titles. This recommendation would also clarify that holds are placed on titles during lawsuits. Both align with long-standing practice.

## 87<sup>th</sup> Legislature - Recommendations for Statute Changes

### Section 2: Items in initial stages of development - Need further discussion before staff recommend for adoption at a future board meeting

- **Evaluate methods to help stop temporary tag abuse. Clarify the display of temporary permits methods to assist with tag identification. Evaluate feedback from the Consumer Protection Advisory Committee (CPAC).**
  - **Stakeholders:** Motor Vehicle Dealers, Law Enforcement, public
- **Identify statutory changes that would help consumers with title, financial, and other issues when a franchise or independent dealer goes out of business, including options for requiring dealer insurance or increased mandatory surety bond amounts. Evaluate CPAC recommendations.**
  - **Stakeholders:** Motor Vehicle Dealers, public
- **Recommendations for managing data privacy and external access to confidential motor vehicle records at TxDMV, CPAC recommendation**
  - **Stakeholders:** Organizations purchasing/using motor vehicle records, public
- **Evaluate methods to help consumers efficiently receive refunds by allowing Tax Assessor-Collectors (TACs) to directly issue refunds to customers for all motor vehicle related fees and taxes**
  - **Stakeholders:** Tax Assessor-Collectors, Comptroller of Public Accounts, public
- **Evaluate statutory changes to clarify out-of-state titled salvage vehicles can directly receive a rebuilt title**
  - **Stakeholders:** Salvage Dealers, Tax Assessor-Collectors, public
- **Clarify that electronic titles and printed titles have the same value**
  - **Stakeholders:** Tax Assessor-Collectors, Motor Vehicle Dealers, Motor Vehicle Auctions, public
- **Clarify that insurance companies can use the deficient ownership document process for vehicles on a Manufacturer Certificate of Origin (MCO)**
  - **Stakeholders:** Insurance Companies
- **Review options to deposit MVCPA appropriation to the TxDMV Fund, allowing for all TxDMV programs to be appropriated out of the same fund**
  - **Stakeholders:** Texas Comptroller of Public Accounts, public

**To:** Texas Department of Motor Vehicles Board  
**From:** Jeremiah Kuntz, Vehicle Titles & Registration Division Director  
**Agenda Item:** 11  
**Subject:** Special Plate Designs

#### RECOMMENDATION

The Vehicle Titles and Registration Division (VTR) seeks board approval or denial of three plate designs submitted for your consideration. One plate design is from the marketing vendor, My Plates and the remaining two plate designs are from nonprofit organizations (non-vendor).

The Zeta Phi Beta plate is a new My Plates plate design and has never been sold before. The Texas is Home and Texas Master Naturalist license plates are sponsored by nonprofit organizations, through the TxDMV.

#### PURPOSE AND EXECUTIVE SUMMARY

Statutory authority for the board to approve vendor specialty license plates and invite the public's comment on proposed vendor plate designs are in Texas Transportation Code Section 504.851 (g) and (g-1) (1) and non-profit organizations are in Texas Transportation Code Section 504.801. The board's approval criteria are clarified in Administrative Codes §217.45 *Specialty License Plates, Symbols, Tabs, and Other Devices* and §217.52 *Marketing of Specialty License Plates through a Private Vendor*.

The renewed vendor contract (Statement of Work paragraph #2, *Marketing Services*) specifies that following the board's contingent approval of a plate, the vendor must get at least 200 commitments within six months of the approval for a plate to be produced. (Equally, existing plates must maintain 200 registered to stay in the program.) My Plates' procedure is to first offer a plate to the public to register their interest. Following the board's contingent approval, My Plates then offers a plate online for prepaid orders. My Plates confirms when 200 prepaid orders are achieved. Since March 2014, the board has contingently approved 32 vendor plates. Of the 32, nine did not achieve the required 200 commitments and were not produced.

TxDMV's procedure is to invite comments on all proposed plates ahead of the board's review. The department's intent is to determine if there are any unforeseen public concerns about a plate design. The department publishes a 10-day "like/dislike/comment-by-email" survey, called an eView, on its website. Although the survey counts the public's "likes" and "dislikes," it is unscientific and not used as an indicator of a plate's popularity. The vendor's OU plate, for example, received thousands of eView "dislikes" in 2010 (presumably because of college football rivalry) and has since sold 931 plates.

The plate designs were presented to the public in the July 2020 and August 2020 eView. No negative comments were received. The count of the public's "like/dislikes" are below with the design.

### Zeta Phi Beta

New

348 people liked this design and 124 did not



### Texas Is Home

New

585 people liked this design and 211 did not



### Texas Master Naturalist

New

402 people liked this design and 153 did not







## Zeta Phi Beta (New)



## Texas Is Home (New)







## Texas Master Naturalist (New)



9/21/2020

# TEXAS SPECIALTY PLATE BUSINESS

Vehicle and Titles and  
Registration Division  
Special Plates Unit (5FTEs) 9/20



Division Director  
Jeremiah Kuntz

## OCT. 2020

444



Texas Department  
of Motor Vehicles



RELEASED  
SEPTEMBER  
2020

## Spooktacular TOP TEN SPECIALTY PLATES



TOP  
10  
CHARITY

1. ANIMAL FRIENDLY
2. CONSERVATION: HORNER LIZARD
3. STATE OF THE ARTS
4. CONSERVATION: BLUEBONNET
5. CONSERVATION: WHITE-TAILED DEER
6. TEXAS A & M UNIVERSITY
7. BIG BEND
8. NATIVE TEXAN
9. TEXAS TECH UNIVERSITY
10. CONSERVATION: LARGE MOUTH BASS

| LINKED | UNLINKED | TOTAL |
|--------|----------|-------|
| 8,504  | 412      | 8,916 |
| 6,834  | 298      | 7,132 |
| 5,534  | 195      | 5,729 |
| 4,491  | 242      | 4,733 |
| 3,267  | 176      | 3,443 |
| 2,707  | 75       | 2,782 |
| 2,006  | 135      | 2,141 |
| 1,977  | 93       | 2,070 |
| 1,950  | 85       | 2,035 |
| 1,837  | 119      | 1,956 |



TOP  
10  
VENDOR

1. LARGE STAR WHITE/BLACK
2. CLASSIC BLACK
3. TEXAS BLACK 1845
4. LONE STAR BLACK
5. CARBON FIBER
6. LONE STAR BLK/SILV
7. T FOR TEXAS BLACK
8. TEXAS VINTAGE BLACK
9. TEXAS A&M (MAROON)
10. WHITE

|        |       |        |
|--------|-------|--------|
| 37,555 | 8,289 | 45,844 |
| 33,093 | 7,177 | 40,270 |
| 15,932 | 4,209 | 20,141 |
| 9,880  | 3,218 | 13,098 |
| 5,274  | 1,098 | 6,372  |
| 4,045  | 1,198 | 5,243  |
| 3,901  | 1,595 | 5,496  |
| 3,761  | 1,054 | 4,815  |
| 3,496  | 607   | 4,103  |
| 3,127  | 927   | 4,054  |



TOP  
10  
MILITARY

1. DISABLED VETERAN
2. DV U.S. ARMY
3. DV U.S. MARINE CORPS
4. DV U.S. AIR FORCE
5. DV U.S. NAVY
6. PURPLE HEART
7. DV BRONZE STAR MEDAL
8. U.S. MARINE CORPS
9. MERITORIOUS SERVICE MEDAL
10. U.S. ARMY

|         |       |         |
|---------|-------|---------|
| 199,133 | 4,689 | 203,822 |
| 41,820  | 1,049 | 42,869  |
| 20,627  | 485   | 21,112  |
| 18,266  | 412   | 18,678  |
| 15,320  | 329   | 15,649  |
| 14,954  | 438   | 15,392  |
| 12,203  | 250   | 12,453  |
| 12,040  | 491   | 12,531  |
| 10,889  | 526   | 11,415  |
| 10,483  | 482   | 10,965  |

**SLP AVAILABLE \_\_\_\_\_ 495**  
**MILITARY AND DV \_\_\_\_\_ 190**  
**RESTRICTED USE \_\_\_\_\_ 51**  
**STATE SPECIALTY \_\_\_\_\_ 132**  
**VENDOR SPECIALTY \_\_\_\_\_ 122**

**TEXAS  
SPECIALTY PLATE  
TOTAL REVENUE  
COLLECTED  
FY-94 to FY-19  
\$308,431,612**

### SPECIAL PLATES UNIT CUSTOMER SERVICE FY 2020

50,068

32,166

61

16,000

3,165

30

21,500

Personalized Plate  
Applications Reviewed  
(10% Declined)

Telephone Calls

Walk-in  
Customers

Emails

Refunds

Public Information  
Open Records

Correspondence  
(Including Plate  
Applications)



**To:** Texas Department of Motor Vehicles Board  
**From:** Linda M. Flores, CPA, Chief Financial Officer, Finance & Administrative Services Division Director  
**Agenda Item:** 12.A  
**Subject:** FY 2022-2023 Legislative Appropriations Request, Baseline and Exceptional Items

## RECOMMENDATION

Briefing only.

## PURPOSE AND EXECUTIVE SUMMARY

The Texas Department of Motor Vehicles (TxDMV) received instructions from the Legislative Budget Board (LBB) on August 18, 2020 to prepare and submit the FY 2022-2023 Legislative Appropriations Request (LAR). On August 20, 2020, the LBB also provided TxDMV with an adjusted General Revenue Fund baseline of \$34.2 million for the Motor Vehicle Crime Prevention Authority (MVCPA). TxDMV's deadline to submit its LAR was September 25, 2020.

## FINANCIAL IMPACT

TxDMV is a net-revenue-generating agency for the State. The department's budget request is supported by revenue collections. The staff estimates that TxDMV will collect \$3.9 billion for the State while retaining \$319.3 million for baseline agency operations over the biennium. The majority of the Legislative Appropriations Request (LAR) will be funded from the TxDMV Fund 0010 with General Revenue (GR) funding the baseline and two exceptional item requests for the MVCPA.

## BACKGROUND AND DISCUSSION

On August 6, 2020, TxDMV staff presented an appropriations request that included 1) a baseline request for on-going operations of \$310.8 million and capital items and 2) an exceptional item request for six new initiatives in the amount of \$17.5 million to achieve its goals, strategies and objectives during the next biennium.

With the adjusted baseline provided by the LBB, the baseline budget request submitted on September 25, 2020 now totals \$319.3 million. The submitted LAR includes the following modifications:

- 1) Base Amount Increase to MVCPA: The LBB approved a baseline amount of \$34,246,717 for the MVCPA for the 2022-2023 biennium. The amount reflects an increase of \$8,575,015 from the General Revenue Fund over the appropriated FY 2020-2021 base for the MVCPA function. The MVCPA base increase reflected the mandatory 5% reduction implemented for General Revenue appropriations in FY 2020-2021.
- 2) Revised MVCPA Fee Collections Unit Request: TxDMV modified the MVCPA's Fee Collections exceptional item to retain the request for three new full-time equivalents to staff the unit but removed the funding request. The cost of the request will be covered by the base increase approved for MVCPA.
- 3) New MVCPA Exceptional Item: TxDMV added a new exceptional item for MVCPA in the amount of \$2.5 million to expand motor vehicle crime prevention authority programs. The amount of the exceptional item represents

the statutory distribution of the full amount of the MVCPA fee collections based on FY 2020 collection data. This exceptional item would be funded by General Revenue appropriations.

There were no changes to the baseline or exceptional items funded by the TxDMV Fund which remains at \$285 million for the FY 2022-2023 biennium.

The submitted LAR retained the riders that currently exist in the FY 2020-2021 budget as presented in the Recommended LAR in the August board meeting. Those riders for FY 2022-2023 will include:

- Appropriation of Special License Plate Fees,
- Unexpended Balance Authority for Automation Funds,
- Federal Grants and Matching Funds,
- Headquarters Capital Maintenance,
- Carry-forward authority of operating funds between the biennium, and
- Rider that directs the TxDMV to submit annual report to the LBB on the financial status of the TxDMV Fund.

# **Texas Department of Motor Vehicles**



**FY 2022 – 2023  
Legislative Appropriations Request, Baseline and  
Exceptional Items  
September 25, 2020**

## Legislative Appropriations 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 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.

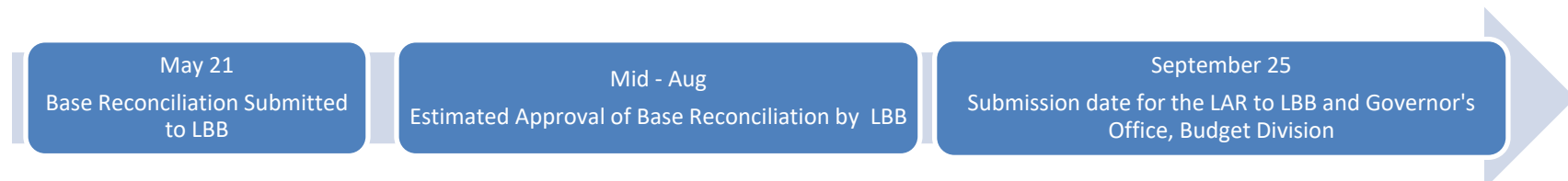
- The LAR begins with the base reconciliation and covers two separate fiscal years. The LAR becomes the basis for consideration of agency funding by the Legislature for the FY 2022-2023 biennium, covering September 1, 2021 through August 31, 2023.

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 2019-2021 Base Reconciliation requires TxDMV to reconcile its original appropriations by method of finance and the full-time equivalent (FTE) positions to fiscal year 2019 expended, fiscal year 2020 estimated, and fiscal year 2021 budgeted amounts. The following table shows a biennial baseline calculation of approximately \$319.3 million. That amount includes \$34.2 million in GR for Motor Vehicle Crime Prevention Authority (MVCPA) (previously Automobile Burglary and Theft Prevention Authority (ABTPA)), \$283.6 million for the TxDMV Fund and the remainder in Federal Funds). These amounts will be sufficient to fund the baseline FY 2022-2023 budget request.

| FY 2022-23 Base Calculation                              |                    |
|----------------------------------------------------------|--------------------|
| 2020 Estimated Expenditures                              | 158,047,088        |
| 2021 Budget                                              | 172,117,856        |
| <b>Total 2020-21</b>                                     | <b>330,164,943</b> |
| Less - TxDMV Automation UB (GR/Fund 0010)                | (19,223,148)       |
| Less - Additional ITD Grant Revenue estimated in FY 2020 | (181,075)          |
| Add - Base Adjustment for GR for MVCPA                   | 9,858,600          |
| Less - 5% Reduction for GR for MVCPA                     | (1,283,585)        |
| <b>Estimated FY2022-23 Baseline</b>                      | <b>319,335,735</b> |

## Key Differences from the August Preliminary LAR to the September Submitted LAR

### Baseline

- In August 2020, the Preliminary LAR included a base request for FY 2022-2023 of \$310.8 million
- The Submitted LAR reflects a base amount for FY 2022-2023 of \$319.3 million.
- The primary change from August to September is an increase in the Motor Vehicle Crime Prevention Authority (MVCPA) base amount as approved by the Legislative Budget Board; and adjustments between strategies. The MVCPA base increase for FY 2022-2023 is \$8,575,015

| Items of Appropriations                               | August Recommended LAR |                    |                    | September Submitted LAR |                    |                    | Variance         |
|-------------------------------------------------------|------------------------|--------------------|--------------------|-------------------------|--------------------|--------------------|------------------|
|                                                       | FY 2022                | FY 2023            | Biennial Total     | FY 2022                 | FY 2023            | Biennial Total     |                  |
| <b>Goal A. Optimize Services and Systems</b>          |                        |                    |                    |                         |                    |                    |                  |
| Strategy A.1.1. – Titles, Registrations, and Plates   | 71,757,919             | 71,659,681         | 143,417,600        | 70,966,915              | 70,868,685         | 141,835,600        | (1,582,000)      |
| Strategy A.1.2. – Vehicle Dealer Licensing            | 4,059,971              | 4,059,971          | 8,119,942          | 4,237,971               | 4,237,971          | 8,475,942          | 356,000          |
| Strategy A.1.3. – Motor Carrier Permits & Credentials | 9,031,570              | 9,031,571          | 18,063,141         | 9,506,571               | 9,506,570          | 19,013,141         | 950,000          |
| Strategy A.1.4. – Technology Enhancement & Automation | 10,838,152             | 2,704,575          | 13,542,727         | 10,838,153              | 2,704,574          | 13,542,727         | -                |
| Strategy A.1.5. – Customer Contact Center             | 3,269,094              | 3,269,094          | 6,538,188          | 3,367,094               | 3,367,094          | 6,734,188          | 196,000          |
| <b>Total, Goal A: Optimize Services and Systems</b>   | <b>98,956,706</b>      | <b>90,724,892</b>  | <b>189,681,598</b> | <b>98,916,704</b>       | <b>90,684,894</b>  | <b>189,601,598</b> | <b>(80,000)</b>  |
| <b>Goal B. Protect the Public</b>                     |                        |                    |                    |                         |                    |                    |                  |
| Strategy B.1.1. – Enforcement                         | 6,891,577              | 6,891,578          | 13,783,155         | 6,891,577               | 6,891,578          | 13,783,155         | -                |
| Strategy B.2.1. – Automobile Theft Prevention         | 12,835,851             | 12,835,851         | 25,671,702         | 17,123,359              | 17,123,358         | 34,246,717         | 8,575,015        |
| <b>Total, Goal B: Protect the Public</b>              | <b>19,727,428</b>      | <b>19,727,429</b>  | <b>39,454,857</b>  | <b>24,014,936</b>       | <b>24,014,936</b>  | <b>48,029,872</b>  | <b>8,575,015</b> |
| <b>Goal C: Indirect Administration</b>                |                        |                    |                    |                         |                    |                    |                  |
| Strategy C.1.1. – Central Administration              | 9,249,658              | 9,219,238          | 18,468,896         | 9,289,658               | 9,259,238          | 18,548,896         | 80,000           |
| Strategy C.1.2. – Information Resources               | 26,373,345             | 25,436,907         | 51,810,252         | 26,373,345              | 25,436,907         | 51,810,252         | -                |
| Strategy C.1.3. – Other Support Services              | 5,445,834              | 5,899,283          | 11,345,117         | 5,445,834               | 5,899,283          | 11,345,117         | -                |
| <b>Total, Goal C: Indirect Administration</b>         | <b>41,068,837</b>      | <b>40,555,428</b>  | <b>81,624,265</b>  | <b>41,108,837</b>       | <b>40,595,428</b>  | <b>81,704,265</b>  | <b>80,000</b>    |
| <b>Total Department of Motor Vehicles</b>             | <b>159,752,971</b>     | <b>151,007,749</b> | <b>310,760,720</b> | <b>164,040,477</b>      | <b>155,295,258</b> | <b>319,335,735</b> | <b>8,575,015</b> |
| <b>Method of Finance</b>                              |                        |                    |                    |                         |                    |                    |                  |
| General Revenue (GR) Fund 0001                        | 12,835,851             | 12,835,851         | 25,671,702         | 17,123,359              | 17,123,358         | 34,246,716         | 8,575,015        |
| Texas Department of Motor Vehicles Fund 0010          | 146,173,370            | 137,428,148        | 283,601,518        | 146,173,368             | 137,428,150        | 283,601,518        | -                |
| Federal Funds                                         | 743,750                | 743,750            | 1,487,500          | 743,750                 | 743,750            | 1,487,500          | -                |
| <b>Total Method of Finance</b>                        | <b>159,752,971</b>     | <b>151,007,749</b> | <b>310,760,720</b> | <b>164,040,477</b>      | <b>155,295,258</b> | <b>319,335,735</b> | <b>8,575,015</b> |
| <b>Full Time Equivalents (FTEs)</b>                   |                        |                    | <b>802.0</b>       |                         |                    | <b>802.0</b>       |                  |

## Key Differences from the August Recommended LAR to the September Submitted LAR

### Exceptional Items

- The key differences from the August Recommended LAR for exceptional items reflect adjustments to the MVCPA Exceptional Item requests.
- An additional MVCPA request is added to request full appropriation of estimated revenue collections; this would allow for expanded law enforcement coverage funded by MVCPA; and the existing request for a fee collection unit is adjusted to only request authorization of FTEs. Funding for the FTEs would be covered by the MVCPA base adjustment.

| Division                                     | Exceptional Item                    | Description                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Biennial Request |           |
|----------------------------------------------|-------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|-----------|
|                                              |                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | FTE              | Amount    |
| <b>Finance &amp; Administrative Services</b> | <b>New Building 5</b>               | To demolish Building 5 on the TxDMV Camp Hubbard campus and construct a new building in the same location. Based on an assessment completed by the Texas Facilities Commission (TFC), the age and physical condition of Building 5 is such that a tear-down and rebuilding is a more cost-effective approach than repairing and renovating. Funding in the FY 2022-2023 biennium would provide for planning and design services, with construction funding to follow in FY 2024-2025.                                                                                                                                                                                                                           |                  | 6,187,500 |
| <b>Finance &amp; Administrative Services</b> | <b>Accounts Receivables Systems</b> | Deploy the Centralized Accounting and Payroll/Personnel Systems (CAPPS) Accounts Receivables module to allow for better tracking of accounts receivables balances and to help insure that revenue collection is maximized. Currently the collection and monitoring of receivable accounts is done through 18 different applications. However, none of the systems are designed for conducting accounts receivable activities. The decentralized accounts receivable function and multiple systems have limited TxDMV's ability to properly monitor or conduct accounts receivable activities. Costs include one-time external contract services, temporary support during deployment, and two (2) ongoing FTEs. | 2.0              | 3,472,958 |

| Division                                                                                                              | Exceptional Item                                 | Description                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Biennial Request |                  |
|-----------------------------------------------------------------------------------------------------------------------|--------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|------------------|
|                                                                                                                       |                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | FTE              | Amount           |
| <b>Consumer Relations/<br/>Enforcement/ Motor<br/>Carrier/ Motor<br/>Vehicle /Information<br/>Technology Services</b> | <b>Complaint<br/>Management<br/>System (CMS)</b> | 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 funding for external contract services.                                                                                                                                                                                                                                                                           |                  | 5,225,712        |
| <b>Vehicle Titles, and<br/>Registration (VTR)</b>                                                                     | <b>New Dallas RSC<br/>Substation</b>             | To fund a new Dallas Regional Service Center (RSC) substation. The TxDMV Dallas/Carrollton RSC is currently located at 1925 Beltline Road, Suite 100, Carrollton, Texas and is housed in approximately 7,865 square feet of leased space with a staff of 22.5 employees. The Dallas RSC is expected to outgrow their current facility by 2028. In anticipation of future growth, and to better serve customers, this request is to open a new Dallas RSC substation office. An analysis of historical customer flow indicates the new location is best fit in southeast Dallas. Funding includes the build out of a new facility and operating costs for two (2) additional FTEs. | 2.0              | 855,970          |
| <b>Vehicle Titles, and<br/>Registration (VTR)</b>                                                                     | <b>New Houston RSC<br/>Substation</b>            | To fund a new Houston Regional Service Center (RSC) substation. The Houston RSC is currently located at 2110 East Governors Circle, Houston, Texas with a staff of 28.5 employees. The Houston RSC is expected to outgrow their current facility by 2028. In anticipation of future growth, and to better serve customers, this request is to open a new Houston RSC substation office. An analysis of historical customer flow indicates the new location is best fit in southeast Houston. Funding includes the build out of a new facility and operating costs for four (4) additional FTEs.                                                                                   | 4.0              | 1,180,119        |
| <b>Motor Vehicle Crime<br/>Prevention Authority</b>                                                                   | <b>Expanded Coverage</b>                         | <u>The MVCPA requests \$2.5 million be provided as required by Transportation Code 1006.153 (e) (1) which represents the full amount based on actual MVCPA fee collections of \$91.8 million deposited in GR Account 3206 in FY20. Funds provided under this exceptional item will be used to: 1) combat the over 10% increase in motor vehicle theft reported in the most recent year; 2) expand the coverage to areas of Texas not currently covered by MVCPA taskforces; 3) implement the authority to investigate fraud-related motor vehicle crime (like title and registration fraud) ordered by the 86th Legislature; and 4) support and increase the collections</u>      | 0.0              | <u>2,553,282</u> |

| Division                                        | Exceptional Item           | Description                                                                                                                                                                                                                                                                                                                                                                      | Biennial Request |                                            |
|-------------------------------------------------|----------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|--------------------------------------------|
|                                                 |                            |                                                                                                                                                                                                                                                                                                                                                                                  | FTE              | Amount                                     |
|                                                 |                            | <u>of funds for MVCPA and Uncompensated Trauma Care disbursement - CPA account # 5111.</u>                                                                                                                                                                                                                                                                                       |                  |                                            |
| <b>Motor Vehicle Crime Prevention Authority</b> | <b>Fee Collection Unit</b> | The Motor Vehicle Crime Prevention Authority (MVCPA) is requesting to add 3 positions to maintain that insurers that sell any form of motor vehicle insurance are aware and comply with the MVCPA Fee requirements. These new positions will provide analysis, audit, outreach and education to insurers. Funding will be covered by the MVCPA base adjustment for FY 2022-2023. | 3.0              | <del>560,000</del><br>0                    |
| <b>Total Exceptional Items</b>                  |                            |                                                                                                                                                                                                                                                                                                                                                                                  | <b>11.00</b>     | <b>19,475,541</b>                          |
| <b>Totals by Method of Finance</b>              |                            |                                                                                                                                                                                                                                                                                                                                                                                  |                  |                                            |
| <b>General Revenue</b>                          |                            |                                                                                                                                                                                                                                                                                                                                                                                  | <b>3.0</b>       | <del>560,000</del><br><b>2,553,282</b>     |
| <b>TxDMV Fund</b>                               |                            |                                                                                                                                                                                                                                                                                                                                                                                  | <b>8.0</b>       | <b>16,922,259</b>                          |
| <b>TOTAL</b>                                    |                            |                                                                                                                                                                                                                                                                                                                                                                                  | <b>11.00</b>     | <del>17,482,259</del><br><b>19,475,541</b> |



### Comparison of FY 2020-2021 to Submitted Baseline for FY 2022-2023

The baseline represents the amount necessary to maintain existing agency operations. The table below depicts the department's current appropriations of \$310.8 million to the approved baseline of \$319.3 million. The Legislative Budget Board (LBB) approved an increase in the General Revenue appropriation for the Motor Vehicle Crime Prevention Authority (MVCPA) in the amount of \$8,575,015 for the FY 2022-2023 biennium.

| Appropriation Summary                 | Approved Appropriation |             | Submitted Base Appropriation |             |
|---------------------------------------|------------------------|-------------|------------------------------|-------------|
|                                       | FY 2020                | FY 2021     | FY 2022                      | FY 2023     |
| Goal A: Optimize Services and Systems | 99,047,769             | 91,396,627  | 98,916,704                   | 90,684,894  |
| Goal B: Protect the Public            | 20,302,938             | 19,953,569  | 24,014,936                   | 24,014,936  |
| Goal C: Indirect Administration       | 38,402,264             | 41,657,553  | 41,108,837                   | 40,595,428  |
| Total Appropriations                  | 157,752,971            | 153,007,749 | 164,040,477                  | 155,295,258 |
|                                       |                        |             |                              |             |
| Method of Finance                     |                        |             |                              |             |
| General Revenue                       | 12,835,851             | 12,835,851  | 17,123,359                   | 17,123,358  |
| TxDMV Fund                            | 146,173,370            | 137,428,148 | 146,173,368                  | 137,428,150 |
| Federal Reimbursements                | 743,750                | 743,750     | 743,750                      | 743,750     |
| Total Method of Finance               | 159,752,971            | 151,007,749 | 164,040,477                  | 155,295,258 |
| FTE                                   | 802                    | 802         | 802                          | 802         |

### FY 2022-2023 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 to the State Highway Fund (Fund 0006), which is the primary source of funding for the state's transportation and infrastructure system; TxDMV Fund (Fund 0010); and General Revenue Fund (Fund 0001). For the FY 2020-2021 biennium, TxDMV estimates it will deposit \$3.75 billion in total revenues: \$3.23 billion to State Highway Fund 0006; \$316 million to TxDMV Fund 0010; and \$208 million to General Revenue Fund 0001. In the FY 2022-2023 biennium, TxDMV projects collections of \$3.37 billion to be deposited to State Highway Fund 0006; \$334 million to TxDMV Fund 0010; and \$223 million to General Revenue Fund 0001. Collections are expected to experience slightly higher than typical growth rates in FY 2022-2023. This is because revenues in these years are rebounding from FY 2020-2021 amounts that are lower than they otherwise would have been due to the recent economic downturn caused by the Covid-19 pandemic. A return toward normal patterns is expected by FY 2022-2023. The FY 2020-2021 collections below as compared to the TxDMV LAR submitted in 2018 are lower by 4.0% in State Highway Fund 0006 and 6.8% in General Revenue Fund 0001.

| Expected TxDMV Revenue Collections |                         |                         |                         |                         |
|------------------------------------|-------------------------|-------------------------|-------------------------|-------------------------|
| Fund Type                          | FY 2020                 | FY 2021                 | FY 2022                 | FY 2023                 |
| State Highway Fund 0006            | \$ 1,578,008,790        | \$ 1,652,148,000        | \$ 1,665,536,000        | \$ 1,700,071,000        |
| TxDMV Fund 0010                    | \$ 156,261,675          | \$ 160,144,000          | \$ 164,795,000          | \$ 168,834,000          |
| General Revenue Fund 0001          | \$ 105,846,913          | \$ 102,328,000          | \$ 110,096,000          | \$ 113,057,000          |
| <b>Total</b>                       | <b>\$ 1,840,117,378</b> | <b>\$ 1,914,620,000</b> | <b>\$ 1,940,427,000</b> | <b>\$ 1,981,962,000</b> |

The table below reflects projected revenues to TxDMV Fund 0010 for the four-year period beginning in FY 2020 broken out by major categories, using moderate growth projections. The FY 2020-2021 collections below as compared to the TxDMV LAR submitted in 2018 are lower by 4.7% in TxDMV Fund 0010. The FY 2020-2021 collections have been modified to reflect fiscal impacts of the Covid-19 pandemic.

| TxDMV Revenue Forecast                |                       |                       |                       |                       |
|---------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Category                              | FY 2020               | FY 2021               | FY 2022               | FY 2023               |
| Motor Vehicle Titles                  | \$ 36,964,892         | \$ 39,763,000         | \$ 40,949,000         | \$ 42,172,000         |
| Motor Vehicle Registration            | \$ 35,044,378         | \$ 34,223,000         | \$ 35,080,000         | \$ 35,959,000         |
| Motor Carrier - Oversize / Overweight | \$ 14,711,609         | \$ 13,650,000         | \$ 16,380,000         | \$ 16,871,000         |
| Motor Vehicle Business Licenses       | \$ 7,390,831          | \$ 7,682,000          | \$ 7,989,000          | \$ 8,149,000          |
| Processing and Handling Fee           | \$ 52,707,612         | \$ 56,336,000         | \$ 55,578,000         | \$ 56,689,000         |
| Miscellaneous Fees                    | \$ 9,442,352          | \$ 8,490,000          | \$ 8,819,000          | \$ 8,994,000          |
| <b>Total</b>                          | <b>\$ 156,261,675</b> | <b>\$ 160,144,000</b> | <b>\$ 164,795,000</b> | <b>\$ 168,834,000</b> |

The TxDMV Fund 0010 balance is projected to be at \$157.7 million at the end of the FY 2020-2021 biennium. The table below illustrates that the balance at the end of the FY 2022-2023 biennium will be sufficient to fund the requested exceptional items.

| FY 2019-2023 Pro Forma Summary     |                    |                    |                    |                    |                    |
|------------------------------------|--------------------|--------------------|--------------------|--------------------|--------------------|
|                                    | FY 2019 Actual     | FY 2020 Estimated  | FY 2021 Budgeted   | FY 2022 Requested  | FY 2023 Requested  |
| Beginning Balance                  | 92,020,744         | 130,992,342        | 149,495,011        | 157,710,863        | 163,832,494        |
| Capital UB Authority               | 21,300,224         | 18,968,806         | 19,110,107         |                    |                    |
| MVCPA Grant UB Authority           | 360,679            |                    |                    |                    |                    |
| <b>Subtotal</b>                    | <b>113,681,647</b> | <b>149,961,148</b> | <b>168,605,118</b> | <b>157,710,863</b> | <b>163,832,494</b> |
| <b>Revenues</b>                    |                    |                    |                    |                    |                    |
| General Revenue (MVCPA)            | 12,835,851         | 12,835,851         | 12,835,851         | 17,123,358         | 17,123,358         |
| TxDMV Fund                         | 171,451,224        | 156,261,675        | 160,144,000        | 164,795,000        | 168,834,000        |
| Federal Reimbursement              | 224,258            | 924,825            | 743,750            | 743,750            | 743,750            |
| <b>Total Revenues</b>              | <b>184,511,333</b> | <b>170,022,351</b> | <b>173,723,601</b> | <b>182,662,108</b> | <b>186,701,108</b> |
|                                    |                    |                    |                    |                    |                    |
| <b>Total Income</b>                | <b>298,192,980</b> | <b>319,983,499</b> | <b>342,328,719</b> | <b>340,372,971</b> | <b>350,533,602</b> |
| <b>Obligations</b>                 |                    |                    |                    |                    |                    |
| Operating Expenses                 | 150,412,183        | 153,747,087        | 167,883,856        | 159,431,477        | 150,554,258        |
| Credit Card Service Fees           | 4,643,141          | 4,321,903          | 4,234,000          | 4,609,000          | 4,701,000          |
| Employee Benefits                  | 12,145,314         | 12,419,498         | 12,500,000         | 12,500,000         | 12,500,000         |
| <b>Total Obligations</b>           | <b>167,200,638</b> | <b>170,488,488</b> | <b>184,617,856</b> | <b>176,540,477</b> | <b>167,755,258</b> |
|                                    |                    |                    |                    |                    |                    |
| <b>Fund Balance</b>                |                    |                    |                    |                    |                    |
| <b>Exceptional Items</b>           |                    |                    |                    |                    |                    |
| Exceptional Items TxDMV Fund       |                    |                    |                    | 16,206,630         | 715,629            |
| Exceptional Items General Revenue  |                    |                    |                    | 1,276,641          | 1,276,641          |
| <b>Total Exceptional Items</b>     |                    |                    |                    | <b>17,483,271</b>  | <b>1,992,270</b>   |
|                                    |                    |                    |                    |                    |                    |
| <b>Revised Ending Fund Balance</b> | <b>130,992,342</b> | <b>149,495,011</b> | <b>157,710,863</b> | <b>163,832,494</b> | <b>182,778,344</b> |

## Motor Vehicle Crime Prevention Authority Fee Collections

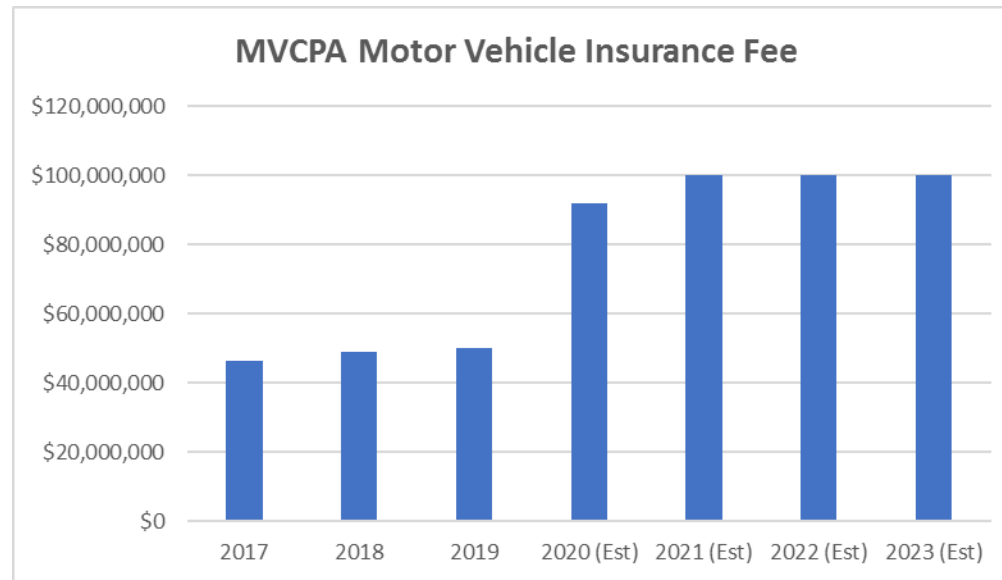
The Motor Vehicle Crime Prevention Authority (MVCPA) has fostered a state-wide cooperative network of law enforcement groups, prosecutors, insurance industry representatives, local tax assessor-collectors, and concerned citizens to combat vehicle theft and burglary through enforcement, prevention, public information, and education initiatives. In addition to providing guidance and oversight, MVCPA awards financial grants to agencies, organizations, and concerned parties in an effort to raise public awareness of vehicle theft and burglary and implement education and prevention initiatives.

The predecessor of the Motor Vehicle Crime Prevention Authority (MVCPA) was established by the 72nd Texas Legislature in 1991 as the Automobile Theft Prevention Authority (ATPA). It was one of the nation's first statewide efforts to reduce auto theft. The 80th Legislature expanded the ATPA mission to include combating motor vehicle burglary and changed the name to the Automobile Burglary and Theft Prevention Authority. The 86th Legislature changed the name to the Motor Vehicle Crime Prevention Authority and added fraud-related motor vehicle crime to its mission. To better align the operation and improve coordination with the Texas Department of Motor Vehicles (TxDMV), the enabling statute for the MVCPA was codified in the Texas Transportation Code. Under the recodification the MVCPA is required to:

1. Collect a \$4 fee for every motor vehicle insured in Texas.
2. Issue grants to law enforcement agencies and other statutorily designated groups to combat motor vehicle crime.
3. Develop, collect and monitor performance data on arrests, recovery of vehicles and cases cleared and other performance measures for motor vehicle crime.
4. Report annually to the Texas Legislature fiscal and program data.
5. Develop a biennial statewide Plan of Operation to combat motor vehicle crime.
6. Examine and make determinations for refunds to insurers that overpay the \$4 per vehicle fee.

House Bill (HB) 2048, passed during the 86<sup>th</sup> Legislature, increased the fee that motor vehicle insurance companies pay per motor vehicle year from \$2.00 to \$4.00. HB 2048 also changed the allocation of the fee revenue to MVCPA from 50% of the \$2.00 fee to 20% of the \$4.00 fee.

The following charts illustrates the recent trend in the MVPCA motor vehicle insurance fee collections and estimates for the FY 2022-2023 biennium.



## FY 2022-2023 Baseline Budget Appropriations Submitted Request by Strategy

The following table illustrates the submitted 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 FY2020-2021 appropriation and the FY 2022-2023 amount are adjustments between strategies to better align costs with functions and an increase in the approved amount for General Revenue appropriations for the Motor Vehicle Crime Prevention Authority.

| Items of Appropriations                               | Current Appropriation |                    |                    | Legislative Appropriations Request Submission<br>09-25-2020 |                    |                    | Variance         |
|-------------------------------------------------------|-----------------------|--------------------|--------------------|-------------------------------------------------------------|--------------------|--------------------|------------------|
|                                                       | FY 2020               | FY 2021            | Biennial Total     | Base FY 2022                                                | Base FY 2023       | Biennial Total     |                  |
| <b>Goal A. Optimize Services and Systems</b>          |                       |                    |                    |                                                             |                    |                    |                  |
| Strategy A.1.1. – Titles, Registrations, and Plates   | 72,974,245            | 72,077,418         | 145,051,663        | 70,966,915                                                  | 70,868,685         | 141,835,600        | (3,216,063)      |
| Strategy A.1.2. – Vehicle Dealer Licensing            | 4,169,189             | 4,182,971          | 8,352,160          | 4,237,971                                                   | 4,237,971          | 8,475,942          | 123,782          |
| Strategy A.1.3. – Motor Carrier Permits & Credentials | 9,270,184             | 9,152,569          | 18,422,753         | 9,506,571                                                   | 9,506,570          | 19,013,141         | 590,388          |
| Strategy A.1.4. – Technology Enhancement & Automation | 9,306,276             | 2,714,575          | 12,020,851         | 10,838,153                                                  | 2,704,574          | 13,542,727         | 1,521,876        |
| Strategy A.1.5. – Customer Contact Center             | 3,327,875             | 3,269,094          | 6,596,969          | 3,367,094                                                   | 3,367,094          | 6,734,188          | 137,219          |
| <b>Total, Goal A: Optimize Services and Systems</b>   | <b>99,047,769</b>     | <b>91,396,627</b>  | <b>190,444,396</b> | <b>98,916,704</b>                                           | <b>90,684,894</b>  | <b>189,601,598</b> | <b>(842,798)</b> |
| <b>Goal B. Protect the Public</b>                     |                       |                    |                    |                                                             |                    |                    |                  |
| Strategy B.1.1. – Enforcement                         | 7,467,087             | 7,117,718          | 14,584,805         | 6,891,577                                                   | 6,891,578          | 13,783,155         | (801,650)        |
| Strategy B.2.1. – Motor Vehicle Crime Prevention      | 12,835,851            | 12,835,851         | 25,671,702         | 17,123,359                                                  | 17,123,358         | 34,246,717         | 8,575,015        |
| <b>Total, Goal B: Protect the Public</b>              | <b>20,302,938</b>     | <b>19,953,569</b>  | <b>40,256,507</b>  | <b>24,014,936</b>                                           | <b>24,014,936</b>  | <b>48,029,872</b>  | <b>7,773,365</b> |
| <b>Goal C: Indirect Administration</b>                |                       |                    |                    |                                                             |                    |                    |                  |
| Strategy C.1.1. – Central Administration              | 8,220,092             | 8,602,518          | 16,822,610         | 9,289,658                                                   | 9,259,238          | 18,548,896         | 1,726,286        |
| Strategy C.1.2. – Information Resources               | 26,935,545            | 25,918,345         | 52,853,890         | 26,373,345                                                  | 25,436,907         | 51,810,252         | (1,043,368)      |
| Strategy C.1.3. – Other Support Services              | 3,246,627             | 7,136,690          | 10,383,317         | 5,445,834                                                   | 5,899,283          | 11,345,117         | 961,800          |
| <b>Total, Goal C: Indirect Administration</b>         | <b>38,402,264</b>     | <b>41,657,553</b>  | <b>80,059,817</b>  | <b>41,108,837</b>                                           | <b>40,595,428</b>  | <b>81,704,265</b>  | <b>1,644,448</b> |
| <b>Total Department of Motor Vehicles</b>             | <b>157,752,971</b>    | <b>153,007,749</b> | <b>310,760,720</b> | <b>164,040,477</b>                                          | <b>155,295,258</b> | <b>319,335,735</b> | <b>8,575,015</b> |
| <b>Method of Finance</b>                              |                       |                    |                    |                                                             |                    |                    |                  |
| General Revenue (GR) Fund 0001                        | 12,835,851            | 12,835,851         | 25,671,702         | 17,123,359                                                  | 17,123,358         | 34,246,717         | 8,575,015        |
| Texas Department of Motor Vehicles Fund 0010          | 144,173,370           | 139,428,148        | 283,601,518        | 146,173,368                                                 | 137,428,150        | 283,601,518        | -                |
| Federal Funds                                         | 743,750               | 743,750            | 1,487,500          | 743,750                                                     | 743,750            | 1,487,500          | -                |
| <b>Total Method of Finance</b>                        | <b>157,752,971</b>    | <b>153,007,749</b> | <b>310,760,720</b> | <b>164,040,477</b>                                          | <b>155,295,258</b> | <b>319,335,735</b> | <b>8,575,015</b> |
| <b>Full Time Equivalents (FTEs)</b>                   |                       |                    | <b>802.0</b>       |                                                             |                    | <b>802.0</b>       |                  |

### FY 2022-2023 Capital Budget Project Summary Baseline

The following table illustrates FY 2022-2023 Submitted Capital budget. There are no changes from the August Recommended.

| Capital Budget                                                                                   | August 2020<br>Recommended Base<br>Request | September 2020<br>Biennial Base<br>Request |
|--------------------------------------------------------------------------------------------------|--------------------------------------------|--------------------------------------------|
|                                                                                                  | FY 2022-2023                               | FY 2022-2023                               |
| TxDMV Automation System                                                                          | \$ 8,133,578                               | \$ 8,133,578                               |
| Growth and Enhancement – Agency Operations Support                                               | 1,614,996                                  | 1,614,996                                  |
| Technology Replacement and Upgrades - Regional Support for County Tax Assessor Collector Offices | 10,025,000                                 | 10,025,000                                 |
| PC Replacement                                                                                   | 541,600                                    | 541,600                                    |
| Cybersecurity Initiative Projects                                                                | 400,000                                    | 400,000                                    |
| Transportation – Replacement Vehicles                                                            | 90,000                                     | 90,000                                     |
| RSC Maintenance and Repair                                                                       | 500,000                                    | 500,000                                    |
| Consumer Protection and Enforcement Tracking                                                     | -                                          | -                                          |
| Infrastructure Improvements                                                                      | -                                          | -                                          |
| Data Center Consolidation                                                                        | 22,288,028                                 | 22,288,028                                 |
| <b>Total Capital Budget</b>                                                                      | <b>43,593,202</b>                          | <b>43,593,202</b>                          |
| <b>Method of Finance</b>                                                                         |                                            |                                            |
| Texas Department of Motor Vehicles Fund 0010                                                     | \$ 43,593,202                              | \$ 43,593,202                              |
| <b>Total Method of Finance</b>                                                                   | <b>\$ 43,593,202</b>                       | <b>\$ 43,593,202</b>                       |

## ***FY 2022-2023 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 \$0.50 automation fee. The FY2022-2023 Automation project will focus on maintenance and upgrades to the Registration and Titling System (RTS) and expanding online applications.

***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 TAC offices and the TxDMV Registration and Title 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 provide for the replacement of 4 vehicles. The vehicles would be used to support investigation activities in the Enforcement and Compliance and Investigations (CID) divisions.

***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.

***Data Center Services*** – This appropriation supports information technology infrastructure assets and functions through statutorily required participation in the State Data Center maintained by the Texas 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 2022-2023 Submitted Exceptional Item Requests

The following table is a preliminary list of exceptional items that will be requested by TxDMV for the FY 2022-2023 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    |
| <b>Finance &amp; Administrative Services</b>                                                          | <b>New Building 5</b>                    | To demolish Building 5 on the TxDMV Camp Hubbard campus and construct a new building in the same location. Based on an assessment completed by the Texas Facilities Commission (TFC), the age and physical condition of Building 5 is such that a tear-down and rebuilding is a more cost-effective approach than repairing and renovating. Funding in the FY 2022-2023 biennium would provide for planning and design services, with construction funding to follow in FY 2024-2025.                                                                                                                                                                                                                           |                  | 6,187,500 |
| <b>Finance &amp; Administrative Services</b>                                                          | <b>Accounts Receivables Systems</b>      | Deploy the Centralized Accounting and Payroll/Personnel Systems (CAPPS) Accounts Receivables module to allow for better tracking of accounts receivables balances and to help insure that revenue collection is maximized. Currently the collection and monitoring of receivable accounts is done through 18 different applications. However, none of the systems are designed for conducting accounts receivable activities. The decentralized accounts receivable function and multiple systems have limited TxDMV's ability to properly monitor or conduct accounts receivable activities. Costs include one-time external contract services, temporary support during deployment, and two (2) ongoing FTEs. | 2.0              | 3,472,958 |
| <b>Consumer Relations/ Enforcement/ Motor Carrier/ Motor Vehicle /Information Technology Services</b> | <b>Complaint Management System (CMS)</b> | 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 funding for external contract services.                                                                                                                                                                                                                                                                                                         |                  | 5,225,712 |

| Division                                        | Exceptional Item                  | Description                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Biennial Request |                         |
|-------------------------------------------------|-----------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|-------------------------|
|                                                 |                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | FTE              | Amount                  |
| <b>Vehicles, Titles, and Registration (VTR)</b> | <b>New Dallas RSC Substation</b>  | To fund a new Dallas Regional Service Center (RSC) substation. The TxDMV Dallas/Carrollton RSC is currently located at 1925 Beltline Road, Suite 100, Carrollton, Texas and is housed in approximately 7,865 square feet of leased space with a staff of 22.5 employees. The Dallas RSC is expected to outgrow their current facility by 2028. In anticipation of future growth, and to better serve customers, this request is to open a new Dallas RSC substation office. An analysis of historical customer flow indicates the new location is best fit in southeast Dallas. Funding includes the build out of a new facility and operating costs for two (2) additional FTEs.                                                                         | 2.0              | 855,970                 |
| <b>Vehicles, Titles, and Registration (VTR)</b> | <b>New Houston RSC Substation</b> | To fund a new Houston Regional Service Center (RSC) substation. The Houston RSC is currently located at 2110 East Governors Circle, Houston, Texas with a staff of 28.5 employees. The Houston RSC is expected to outgrow their current facility by 2028. In anticipation of future growth, and to better serve customers, this request is to open a new Houston RSC substation office. An analysis of historical customer flow indicates the new location is best fit in southeast Houston. Funding includes the build out of a new facility and operating costs for four (4) additional FTEs.                                                                                                                                                           | 4.0              | 1,180,119               |
| <b>Motor Vehicle Crime Prevention Authority</b> | <b>Expanded Coverage</b>          | The MVCPA requests \$2.5 million be provided as required by Transportation Code 1006.153 (e) (1) which represents the full amount based on actual MVCPA fee collections of \$91.8 million deposited in GR Account 3206 in FY20. Funds provided under this exceptional item will be used to: 1) combat the over 10% increase in motor vehicle theft reported in the most recent year; 2) expand the coverage to areas of Texas not currently covered by MVCPA taskforces; 3) implement the authority to investigate fraud-related motor vehicle crime (like title and registration fraud) ordered by the 86th legislature; and 4) support and increase the collections of funds for MVCPA and Uncompensated Trauma Care disbursement - CPA account # 5111. | 0.0              | <u>2,553,282</u>        |
| <b>Motor Vehicle Crime Prevention Authority</b> | <b>Fee Collection Unit</b>        | The Motor Vehicle Crime Prevention Authority (MVCPA) is requesting to add 3 positions to maintain that insurers that sell any form of motor vehicle insurance are aware and comply with the MVCPA Fee requirements. These new positions will                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 3.0              | <del>560,000</del><br>0 |

| Division                           | Exceptional Item | Description                                                                                                                    | Biennial Request |                                             |
|------------------------------------|------------------|--------------------------------------------------------------------------------------------------------------------------------|------------------|---------------------------------------------|
|                                    |                  |                                                                                                                                | FTE              | Amount                                      |
|                                    |                  | provide analysis, audit, outreach and education to insurers. Funding includes salaries and operating costs for three (3) FTEs. |                  |                                             |
| <b>Total Exceptional Items</b>     |                  |                                                                                                                                | <b>11.00</b>     | <b>19,475,541</b>                           |
| <b>Totals by Method of Finance</b> |                  |                                                                                                                                |                  |                                             |
| <b>General Revenue</b>             |                  |                                                                                                                                | <b>3.0</b>       | <b><del>560,000</del><br/>2,553,282</b>     |
| <b>TxDMV Fund</b>                  |                  |                                                                                                                                | <b>8.0</b>       | <b>16,922,259</b>                           |
| <b>TOTAL</b>                       |                  |                                                                                                                                | <b>11.00</b>     | <b><del>17,482,259</del><br/>19,475,541</b> |

## 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 2022-2023 LAR, the agency, at minimum, intends to request five riders to assist in its operations.

### Riders Previously Approved in FY 2020-2021 and Re-requested for FY 2022-2023

- ***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 2020-2021 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 2021 be carried forward to the new biennium beginning FY 2022 for the agency’s use. This rider was included in the FY 2020-2021 General Appropriation Act.
- ***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 2021 in FY 2022. This rider was included in the FY 2020-2021 General Appropriation Act.
- ***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 included in the FY 2020-2021 General Appropriation Act.
- ***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 2021 be carried forward to the new biennium beginning FY 2022 for the agency’s use.
- ***TxDMV Fund 0010 Report*** – this rider requires the agency to submit a report on financial activities for TxDMV Fund 0010. The Department of Motor Vehicles shall provide to the Legislative Budget Board, in the format prescribed by the Legislative Budget Board, an annual report of revenue collections, expenditures, and fund balances in the Texas Department of Motor Vehicles Fund No. 0010.

## Appendix A – Exceptional Item Detail

| 2022-2023 LAR Exceptional Item Request Schedule                     |                                                   |  |  |                    |              |
|---------------------------------------------------------------------|---------------------------------------------------|--|--|--------------------|--------------|
| Division:                                                           | FAS                                               |  |  | Division Director: | Linda Flores |
| Item Name:                                                          | Building 5 Replacement                            |  |  | Item Priority:     | 1            |
| Strategy:                                                           | C.1.3 Other Support Services                      |  |  |                    |              |
| Code                                                                | Total Exceptional Item Request                    |  |  | Requested          |              |
|                                                                     |                                                   |  |  | 2022               | 2023         |
|                                                                     | Objects of Expense:                               |  |  |                    |              |
| 5000                                                                | Capital Expenditures                              |  |  | \$ 6,187,500       | -            |
|                                                                     | Total, Objects of Expense                         |  |  | \$ 6,187,500       | -            |
|                                                                     | Method of Financing:                              |  |  |                    |              |
| 001                                                                 | General Revenue                                   |  |  |                    |              |
| 010                                                                 | TxDMV Fund                                        |  |  | \$ 6,187,500       | -            |
| 8082                                                                | Federal Reimbursements                            |  |  |                    |              |
|                                                                     | Total, Method of Finance                          |  |  | \$ 6,187,500       | -            |
| Number of Full-time Equivalent Positions (FTE):                     |                                                   |  |  |                    |              |
| Detail for Capital Appropriation Items: (included in above amounts) |                                                   |  |  |                    |              |
| 5001                                                                | Acquisition of Land and Other Real Property       |  |  |                    |              |
| 5002                                                                | Construction of Buildings and Facilities          |  |  | \$ 6,187,500       |              |
| 5003                                                                | Repairs or Rehabilitation                         |  |  |                    |              |
| 5005                                                                | Acquisition of Information Resources Technologies |  |  | \$ -               |              |
| 5006                                                                | Transportation Items                              |  |  |                    |              |
| 5007                                                                | Acquisition of Capital Equipment and Items        |  |  |                    |              |
| 7000                                                                | Data Center Consolidation Services                |  |  | \$ -               | \$ -         |
|                                                                     | Total, Capital Appropriation Items                |  |  | \$ 6,187,500       | \$ -         |
| Detail on Object of Expenses and FTEs: (Included above)             |                                                   |  |  |                    |              |

| 2022-2023 LAR Exceptional Item Request Schedule                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                    |                                 |               |  |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------|---------------------------------|---------------|--|
| Division:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | FAS                                | Division Director: Linda Flores |               |  |
| Item Name:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Building 5 Replacement             | Item Priority: 1                |               |  |
| Strategy:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | C.1.3 Other Support Services       |                                 |               |  |
| Code                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Total Exceptional Item Request     | Requested                       |               |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                    | 2022                            | 2023          |  |
| Detail for Capital Appropriation Items: (included above)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                    |                                 |               |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                    | FY 2022-2023                    | FY 2024-2025  |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Architectural Engineering Services | \$ 3,750,000                    | \$ -          |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Environmental Services             | \$ 468,750                      | \$ -          |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Surveying Services                 | \$ 937,500                      | \$ -          |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Geotech Engineers                  | \$ 468,750                      | \$ -          |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Utility Connections                | \$ -                            | \$ 250,000    |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Demolition and clean up            | \$ -                            | \$ 1,875,000  |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Utility Improvements (CH7)         | \$ -                            | \$ 250,000    |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | CH5 Construction                   | \$ -                            | \$ 46,875,000 |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Moving Expenses                    | \$ -                            | \$ 330,554    |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Swing Space rental for staff       | \$ -                            | \$ 7,200,000  |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | New Modular Furniture              | \$ -                            | \$ 1,466,500  |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Contingency                        | \$ 562,500                      | \$ 5,824,705  |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                    | \$ 6,187,500                    | \$ 64,071,759 |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                    |                                 |               |  |
| Description/Justification (2000 character limit)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                    |                                 |               |  |
| In 2019 the department requested the Texas Facilities Commission (TFC) perform multiple building assessments to determine the overall condition (i.e. mechanical, plumbing, electrical, HVAC, environmental quality, etc.) of all buildings located on the Camp Hubbard Campus. On February 26, 2020 TxDMV received the final report and overview of each building’s age, size, estimated repair and replacement costs, and then used this information to develop the Facility Condition Index (FCI). FCI is used to determine the physical condition of a facility expressed by the ratio of repair costs to replacement value of the facility (See Exhibit A at the end of this document for FCI details). Building 1 FCI = 153% and Building 5 FCI = 134%. Both building 1 & 5 were built in 1955 and due to their age and current conditions, it is more expensive to repair the buildings than to replace them. Based on these findings, TFC recommends demolishing Building 5 and constructing a new building in the same location. Current building code permits a maximization of the existing space with a 5-story structure at 37,500 sf per floor. The proposed building has a gross square footage of 187,500 which exceeds what DMV currently occupies, 166,158 sf for both buildings 1 and 5. Costs are allocated across two (2) bienniums, with design and planning in FY 2022-2023 and construction in FY 2024-2025. |                                    |                                 |               |  |

## Replacement of Building 5

In 2019 the department requested the Texas Facilities Commission (TFC) perform multiple building assessments to determine the overall condition (i.e. mechanical, plumbing, electrical, HVAC, environmental quality, etc.) of all buildings located on the Camp Hubbard Campus. On February 26, 2020 we received the final report and overview of each building's age, size, estimated repair and replacement costs, and then used this information to develop the Facility Condition Index (FCI). FCI is used to determine the physical condition of a facility expressed by the ratio of repair costs to replacement value of the facility (See Exhibit A at the end of this document for FCI details). Building 1 FCI = 153% and Building 5 FCI = 134%. Both building 1 & 5 were built in 1955 and due to their age and current conditions, it is more expensive to repair the buildings than to replace them. Based on these findings, TFC recommends demolishing Building 5 and constructing a new building in the same location. Current building code permits a maximization of the existing space with a 5-story structure at 37,500 sf per floor. The proposed building has a gross square footage of 187,500 which exceeds what DMV currently occupies, 166,158 sf for both buildings 1 and 5.



## Texas Department of Motor Vehicles

## 2022-23 LAR Exceptional Item Request Schedule

|                   |                                              |                           |                     |
|-------------------|----------------------------------------------|---------------------------|---------------------|
| <b>Division:</b>  | <b>Finance &amp; Administrative Services</b> | <b>Division Director:</b> | <b>Linda Flores</b> |
| <b>Item Name:</b> | CAPPS Accounts Receivable Implemenation      | <b>Item Priority:</b>     | <b>2</b>            |
| <b>Strategy:</b>  | C.1.1 Central Administration                 |                           |                     |

| Code                                                                       | Total Exceptional Item Request                    | Requested    |                |           |           |
|----------------------------------------------------------------------------|---------------------------------------------------|--------------|----------------|-----------|-----------|
|                                                                            |                                                   | 2022         | 2023           |           |           |
|                                                                            | <b>Objects of Expense:</b>                        |              |                |           |           |
| 1001                                                                       | Salaries                                          | \$ 111,304   | \$ 111,304     |           |           |
| 1002                                                                       | Other Personnel Costs                             | \$ 557       | \$ 557         |           |           |
| 2001                                                                       | Professional Fees & Services (includes DCS)       | \$ 3,234,784 | \$ -           |           |           |
| 2009                                                                       | Other Operating Expense                           | \$ 12,226    | \$ 2,226       |           |           |
|                                                                            | <b>Total, Objects of Expense</b>                  | \$ 3,358,871 | \$ 114,087     |           |           |
|                                                                            | <b>Method of Financing:</b>                       |              |                |           |           |
| 010                                                                        | TxDMV Fund                                        | \$ 3,358,871 | \$ 114,087     |           |           |
|                                                                            | <b>Total, Method of Finance</b>                   | \$ 3,358,871 | \$ 114,087     |           |           |
| <b>Number of Full-time Equivalent Positions (FTE):</b>                     |                                                   |              |                |           |           |
| <b>Detail for Capital Appropriation Items: (included in above amounts)</b> |                                                   |              |                |           |           |
| 5005                                                                       | Acquisition of Information Resources Technologies | \$ 3,234,784 |                |           |           |
|                                                                            | <b>Total, Capital Appropriation Items</b>         | \$ 3,234,784 | \$ -           |           |           |
| <b>Detail on Object of Expenses and FTEs: (Included above)</b>             |                                                   |              |                |           |           |
| <u>Recommend use of Exceptional Item Cost Worksheet for calculations.</u>  |                                                   |              |                |           |           |
| Salary                                                                     |                                                   | FTE          | Monthly Salary | FY 2022   | FY 2023   |
|                                                                            | Job Class New Positions                           |              |                |           |           |
|                                                                            | Accountant V                                      | 1.00         | \$ 5,301       | \$ 63,616 | \$ 63,616 |
|                                                                            | Accountant III                                    | 1.00         | \$ 3,974       | \$ 47,688 | \$ 47,688 |

## Texas Department of Motor Vehicles

## 2022-23 LAR Exceptional Item Request Schedule

|                                                          |                                                                                 |                                 |        |            |            |
|----------------------------------------------------------|---------------------------------------------------------------------------------|---------------------------------|--------|------------|------------|
| Division: Finance & Administrative Services              |                                                                                 | Division Director: Linda Flores |        |            |            |
| Item Name: CAPPS Accounts Receivable Implemenation       |                                                                                 | Item Priority: 2                |        |            |            |
| Strategy: C.1.1 Central Administration                   |                                                                                 |                                 |        |            |            |
| Code                                                     | Total Exceptional Item Request                                                  | Requested                       |        |            |            |
|                                                          |                                                                                 | 2022                            |        | 2023       |            |
| Other Expenses (list line items)                         |                                                                                 | Unit Cost                       | Units  | FY 2022    | FY 2023    |
|                                                          | Other Operating - Training 1% of salary/yr per FTE                              |                                 | -      | \$ 1,113   | \$ 1,113   |
|                                                          | Other Operating - Cubicles \$5,000 per FTE                                      | \$ 5,000                        | 2.00   | \$ 10,000  | \$ -       |
|                                                          | Other Operating - Payroll Health Contribution 1% (Legislatively Mandated)       |                                 |        | \$ 1,113   | \$ 1,113   |
|                                                          | Other Personnel - Employee Retirement Contribution .5% (Legislatively Mandated) |                                 |        | \$ 557     | \$ 557     |
| Subtotal, Detail on Object of Expenses and FTEs          |                                                                                 |                                 |        | \$ 124,087 | \$ 114,087 |
| Detail for Capital Appropriation Items: (included above) |                                                                                 |                                 |        |            |            |
| Professional Fees                                        | CAPPS Implementation Fees to CPA                                                | \$ 500,000.00                   | 1      | 500,000    |            |
| Professional Fees                                        | 1 Project Manager                                                               | \$ 116.00                       | 2,080  | 241,280    |            |
| Professional Fees                                        | 1 IT Business Analyst                                                           | \$ 106.00                       | 2,080  | 220,480    |            |
| Professional Fees                                        | 6 IT Contractor/Programmers                                                     | \$ 100.00                       | 12,480 | 1,248,000  |            |
| Professional Fees                                        | 1 IT System Integrations Tester                                                 | \$ 82.00                        | 2,080  | 170,560    |            |
| Professional Fees                                        | IT Contingency (20%)                                                            |                                 |        | 376,064    |            |
| Professional Fees                                        | 1 Temp Staff to Backfill CAPPS Security                                         | \$ 75.00                        | 2,080  | 156,000    |            |
| Professional Fees                                        | 1 Temp Staff to Backfill Revenue Acct                                           | \$ 50.00                        | 2,080  | 104,000    |            |
| Professional Fees                                        | 1 Temp Staff to Backfill Revenue Acct V                                         | \$ 55.00                        | 2,080  | 114,400    |            |
| Professional Fees                                        | 1 Temp Staff to Backfill Revenue Acct IV                                        | \$ 50.00                        | 2,080  | 104,000    |            |
| Professional Fees                                        | Total Professional Fees                                                         |                                 |        | 3,234,784  | -          |

| 2022-2023 LAR Exceptional Item Request Schedule                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                       |                                              |             |                                        |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------|----------------------------------------------|-------------|----------------------------------------|
| <b>Division:</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                       | <b>Finance &amp; Administrative Services</b> |             | <b>Division Director:</b> Linda Flores |
| <b>Item Name:</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                       | CAPPS Accounts Receivable Implemenation      |             | <b>Item Priority:</b> 2                |
| <b>Strategy:</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | C.1.1 Central Administration          |                                              |             |                                        |
| <b>Code</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <b>Total Exceptional Item Request</b> | <b>Requested</b>                             |             |                                        |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                       | <b>2022</b>                                  | <b>2023</b> |                                        |
| <b>Description/Justification (2000 character limit)</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                       |                                              |             |                                        |
| <p>At TxDMV, the collection and monitoring of receivable accounts is done through 18 different applications. However, none of the systems are designed for conducting accounts receivable activities. The decentralized accounts receivable function and multiple systems have limited TxDMV's ability to properly monitor or conduct accounts receivable activities. Deploying the CAPPS Accounts Receivable module and integrating it with existing TxDMV applications will allow for better tracking of accounts receivable balances and will help insure that revenue collection is maximized. Included in the estimated costs for this project are implementation fees payable to Comptroller of Public Accounts, 1 project manager, 1 IT Business Analyst, 6 IT Programmers, 1 IT System Integrations Tester &amp; 4 additional contractors to backfill the day to day duties of FAS subject matter experts while they work primarily on the CAPPS deployment. Due to the large number of systems TxDMV will be integrating with the CAPPS Accounts Receivable (A/R) module, significant IT programming resources are required. Additionally, once the CAPPS A/R module is live, 2 additional permanent FTE's within the FAS organization will be required to centrally manage the accounts receivable reporting process for the entire Department; while collection efforts continue to remain as decentralized functions within the program areas.</p> |                                       |                                              |             |                                        |

## Accounts Receivable System

At TxDMV, the collection and monitoring of accounts receivable function is spread across six divisions and eighteen (18) different system applications. The divisions include Enforcement, Information Technology Services, Motor Carrier, Motor Vehicle, Vehicle Title and Registration and Finance and Administrative Services. TxDMV has 28 receivable accounts where payments are collected in advance or in arrears of services rendered. The collection and monitoring of receivable accounts are performed through 18 different applications, however none of the systems were designed to manage accounts receivable activities.

The decentralized accounts receivable function and multiple systems have limited TxDMV's ability to properly monitor or conduct accounts receivable activities. Deploying the CAPPS Accounts Receivable (A/R) module and integrating it with existing TxDMV applications will allow for better tracking of accounts receivable balances and will help insure that revenue collection is maximized.

Two additional staff are included in the request to centrally manage, reconcile and report Department-wide accounts receivable.

| 2022-2023 LAR Exceptional Item Request Schedule                                                                                                                                          |                                                   |              |                           |                 |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|--------------|---------------------------|-----------------|
| <b>Division:</b>                                                                                                                                                                         | Enforcement                                       |              | <b>Division Director:</b> | Corrie Thompson |
| <b>Item Name:</b>                                                                                                                                                                        | Complaint Management System                       |              | <b>Item Priority:</b>     | 3               |
| <b>Strategy:</b>                                                                                                                                                                         | A.1.4 Technology Enhancement and Automation       |              |                           |                 |
| Code                                                                                                                                                                                     | Total Exceptional Item Request                    | Requested    |                           |                 |
|                                                                                                                                                                                          |                                                   | 2022         | 2023                      |                 |
|                                                                                                                                                                                          | <b>Objects of Expense:</b>                        |              |                           |                 |
| 2001                                                                                                                                                                                     | Professional Fees & Services (includes DCS)       | \$ 2,090,712 |                           |                 |
| 2009                                                                                                                                                                                     | Other Operating Expense                           | \$ 3,135,000 |                           | -               |
|                                                                                                                                                                                          | <b>Total, Objects of Expense</b>                  | \$ 5,225,712 |                           | -               |
|                                                                                                                                                                                          | <b>Method of Financing:</b>                       |              |                           |                 |
| 010                                                                                                                                                                                      | TxDMV Fund                                        | \$ 5,225,712 |                           | -               |
|                                                                                                                                                                                          | <b>Total, Method of Finance</b>                   | \$ 5,225,712 |                           | -               |
| <b>Number of Full-time Equivalent Positions (FTE):</b>                                                                                                                                   |                                                   |              |                           |                 |
| <b>Detail for Capital Appropriation Items: (included in above amounts)</b>                                                                                                               |                                                   |              |                           |                 |
| 5005                                                                                                                                                                                     | Acquisition of Information Resources Technologies | \$ 5,225,712 |                           |                 |
|                                                                                                                                                                                          | <b>Total, Capital Appropriation Items</b>         | \$ 5,225,712 | \$                        | -               |
| Professional Fee                                                                                                                                                                         | Acquisition of Information Resource Tech          | \$ 2,090,712 |                           |                 |
| Contract Svcs                                                                                                                                                                            | Vendor Costs                                      | \$ 3,000,000 |                           |                 |
| Software                                                                                                                                                                                 | Software                                          | \$ 135,000   |                           |                 |
| <b>Description/Justification (2000 character limit)</b>                                                                                                                                  |                                                   |              |                           |                 |
| Sunset Recommendation<br>Develop and maintain a complaint management system which would include data on the status of complaints, complaint procedures, and documentation of complaints. |                                                   |              |                           |                 |

## Complaint Management System

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 department's 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 merging 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.

| 2022-23 LAR Exceptional Item Request Schedule                              |                                                   |            |                                          |         |         |
|----------------------------------------------------------------------------|---------------------------------------------------|------------|------------------------------------------|---------|---------|
| <b>Division:</b> Vehicle Titles & Registration                             |                                                   |            | <b>Division Director:</b> Jeremiah Kuntz |         |         |
| <b>Item Name:</b> Dallas Regional Service Center Substation                |                                                   |            | <b>Item Priority:</b> 4                  |         |         |
| <b>Strategy:</b> A.1.1 Titles Registration and Plates                      |                                                   |            |                                          |         |         |
| Code                                                                       | Total Exceptional Item Request                    | Requested  |                                          |         |         |
|                                                                            |                                                   | 2022       | 2023                                     |         |         |
| <b>Objects of Expense:</b>                                                 |                                                   |            |                                          |         |         |
| 1001                                                                       | Salaries                                          | 110,702    | 110,702                                  |         |         |
| 1002                                                                       | Other Personnel Costs                             | 554        | 554                                      |         |         |
| 2001                                                                       | Professional Fees & Services (includes DCS)       | 50,000     | -                                        |         |         |
| 2003                                                                       | Consumable Supplies                               | 600        | 600                                      |         |         |
| 2005                                                                       | Travel                                            | 6,400      | 6,400                                    |         |         |
| 2006                                                                       | Rent - Building                                   | 122,100    | 122,100                                  |         |         |
| 2009                                                                       | Other Operating Expense                           | 17,484     | 2,274                                    |         |         |
| 5000                                                                       | Capital Expenditures                              | 305,500    | -                                        |         |         |
| <b>Total, Objects of Expense</b>                                           |                                                   | 613,340    | 242,630                                  |         |         |
| <b>Method of Financing:</b>                                                |                                                   |            |                                          |         |         |
| 001                                                                        | General Revenue                                   |            |                                          |         |         |
| 010                                                                        | TxDMV Fund                                        | 613,340    | 242,630                                  |         |         |
| 8082                                                                       | Federal Reimbursements                            |            |                                          |         |         |
| <b>Total, Method of Finance</b>                                            |                                                   | 613,340    | 242,630                                  |         |         |
| <b>Number of Full-time Equivalent Positions (FTE):</b>                     |                                                   | 2.0        | 2.0                                      |         |         |
| <b>Detail for Capital Appropriation Items: (included in above amounts)</b> |                                                   |            |                                          |         |         |
| 5001                                                                       | Acquisition of Land and Other Real Property       |            |                                          |         |         |
| 5002                                                                       | Construction of Buildings and Facilities          | \$ 255,500 |                                          |         |         |
| 5005                                                                       | Acquisition of Information Resources Technologies | \$ 50,000  |                                          |         |         |
| 7000                                                                       | Data Center Consolidation Services                | \$ -       | \$ -                                     |         |         |
| <b>Total, Capital Appropriation Items</b>                                  |                                                   | \$ 305,500 | \$ -                                     |         |         |
| <b>Detail on Object of Expenses and FTEs: (Included above)</b>             |                                                   |            |                                          |         |         |
| <u>Recommend use of Exceptional Item Cost Worksheet for calculations.</u>  |                                                   |            |                                          |         |         |
| Salary                                                                     |                                                   | FTE        | Monthly Salary                           | FY 2022 | FY 2023 |
|                                                                            | Job Class New Positions                           |            |                                          |         |         |
|                                                                            | Manager II                                        | 1.00       | 6,066                                    | 72,789  | 72,789  |
|                                                                            | Customer Service Rep III                          | 1.00       | 3,159                                    | 37,914  | 37,914  |
|                                                                            |                                                   |            |                                          |         |         |
| Travel                                                                     | Supervisor travel = \$200/day*16 days/year        |            |                                          | 6,400   | 6,400   |

| 2022-2023 LAR Exceptional Item Request Schedule                 |                                                                                 |                  |              |                           |                       |
|-----------------------------------------------------------------|---------------------------------------------------------------------------------|------------------|--------------|---------------------------|-----------------------|
| <b>Division:</b>                                                | <b>Vehicle Titles &amp; Registration</b>                                        |                  |              | <b>Division Director:</b> | <b>Jeremiah Kuntz</b> |
| <b>Item Name:</b>                                               | Dallas Regional Service Center Substation                                       |                  |              | <b>Item Priority:</b>     | <b>4</b>              |
| <b>Strategy:</b>                                                | A.1.1 Titles Registration and Plates                                            |                  |              |                           |                       |
| Code                                                            | Total Exceptional Item Request                                                  |                  |              | Requested                 |                       |
|                                                                 |                                                                                 |                  |              | 2022                      | 2023                  |
| Travel                                                          | Supervisor travel = \$200/day*16 days/year                                      |                  |              | 6,400                     | 6,400                 |
| <b>Other Expenses (list line items)</b>                         |                                                                                 | <b>Unit Cost</b> | <b>Units</b> | <b>FY 2022</b>            | <b>FY 2023</b>        |
|                                                                 | Consumable Supplies \$300/yr per FTE                                            | 300              | 2.00         | 600                       | 600                   |
|                                                                 | Other Operating - share of xerox rental \$30/FTE                                | 30               | 2.00         | 60                        | 60                    |
|                                                                 | Other Operating - Training 1% of salary/yr per FTE                              | 0                | -            | 1,107                     | 1,107                 |
|                                                                 | Other Operating - Chair \$350 per FTE                                           | 350              | 2.00         | 700                       |                       |
|                                                                 | Other Operating - Computer, printer, monitor phone                              | 2,255            | 2.00         | 4,510                     |                       |
|                                                                 | Other Operating - Cubicles \$5,000 per FTE                                      | 5,000            | 2.00         | 10,000                    |                       |
|                                                                 | Other Operating - Payroll Health Contribution 1% (Legislatively Mandated)       |                  |              | 1,107                     | 1,107                 |
|                                                                 | Other Personnel - Employee Retirement Contribution .5% (Legislatively Mandated) |                  |              | 554                       | 554                   |
|                                                                 |                                                                                 |                  |              |                           |                       |
| <b>Subtotal, Detail on Object of Expenses and FTEs</b>          |                                                                                 |                  |              | \$ 135,740                | \$ 120,530            |
| <b>Detail for Capital Appropriation Items: (included above)</b> |                                                                                 |                  |              |                           |                       |
|                                                                 |                                                                                 |                  |              |                           |                       |
|                                                                 | Buildout of new location                                                        |                  |              | 255,500                   |                       |
|                                                                 | Furniture                                                                       |                  |              | 50,000                    |                       |
|                                                                 |                                                                                 |                  |              |                           |                       |



| 2022-2023 LAR Exceptional Item Request Schedule                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                      |                                          |      |  |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------|------------------------------------------|------|--|
| <b>Division:</b> Vehicle Titles & Registration                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                      | <b>Division Director:</b> Jeremiah Kuntz |      |  |
| <b>Item Name:</b> Dallas Regional Service Center Substation                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                      | <b>Item Priority:</b> 4                  |      |  |
| <b>Strategy:</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | A.1.1 Titles Registration and Plates |                                          |      |  |
| Code                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Total Exceptional Item Request       | Requested                                |      |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                      | 2022                                     | 2023 |  |
| <b>Description/Justification (2000 character limit)</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                      |                                          |      |  |
| <p>The TxDMV Dallas/Carrollton Regional Service Center (RSC) is currently located at 1925 Beltline Road, Suite 100, Carrollton, Texas and is housed in approximately 7,865 square feet of leased space with a staff of 22.5 employees. The Dallas RSC is expected to outgrow their current facility by 2028. In anticipation of future growth, and to better serve our customers, the Vehicle Titles and Registration Division is recommending we open a new Dallas RSC substation office. An analysis of historical customer flow indicates the new location is best fit in southeast Dallas. It is estimated that approximately 50% of the current Dallas RSC customer base would utilize the new location. An additional supervisor would be required to oversee the location. One existing coordinator and half of the existing staff would be reassigned to the new location. One additional customer service representative is needed to adequately staff the new</p> |                                      |                                          |      |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                      |                                          |      |  |
| <b>External/Internal Factors (2000 character limit)</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                      |                                          |      |  |
| <p>Texas added more population in the past twelve months than any other state. The growth is forecasted to continue at, or above, the current rate. Much of this population settled, and will continue to settle, in the Dallas-Fort Worth metroplex. As the population expands, the demands for the services of TxDMV regional service centers also increases. Additional resources are required, as described herein, to meet those demands proactively to ensure the department continues to provide exceptional services to its customers. By creating a third location in the metroplex rather than expanding our current location, the department will be positioned closer to its customers, thereby enhancing the customer experience, reducing traffic congestion, and protecting the environment.</p>                                                                                                                                                             |                                      |                                          |      |  |

## Dallas Regional Service Center Substation

The **Dallas RSC** is expected to outgrow their current facility by 2028. In anticipation of future growth, and to better serve our customers, the Vehicle Titles and Registration Division is recommending a new Dallas RSC substation office. An analysis of historical customer flow indicates the new location is best situated in southeast Dallas. It is estimated that approximately 50% of the current Dallas RSC customer base would utilize the new location. Two new staff are included in this request--a supervisor would be required to oversee the location and one additional customer service representative. Existing staff would also be reassigned to adequately staff the new location.

| 2022-23 LAR Exceptional Item Request Schedule                              |                                                   |                                            |                |                                          |         |
|----------------------------------------------------------------------------|---------------------------------------------------|--------------------------------------------|----------------|------------------------------------------|---------|
| <b>Division:</b>                                                           |                                                   | <b>Vehicle Titles &amp; Registration</b>   |                | <b>Division Director:</b> Jeremiah Kuntz |         |
| <b>Item Name:</b>                                                          |                                                   | Houston Regional Service Center Substation |                | <b>Item Priority:</b> 5                  |         |
| <b>Strategy:</b>                                                           |                                                   | A.1.1 Titles Registration and Plates       |                |                                          |         |
| Code                                                                       | Total Exceptional Item Request                    | Requested                                  |                |                                          |         |
|                                                                            |                                                   | 2022                                       | 2023           |                                          |         |
| <b>Objects of Expense:</b>                                                 |                                                   |                                            |                |                                          |         |
| 1001                                                                       | Salaries                                          | 186,529                                    | 186,529        |                                          |         |
| 1002                                                                       | Other Personnel Costs                             | 933                                        | 933            |                                          |         |
| 2001                                                                       | Professional Fees & Services (includes DCS)       | 50,000                                     | -              |                                          |         |
| 2003                                                                       | Consumable Supplies                               | 1,200                                      | 1,200          |                                          |         |
| 2005                                                                       | Travel                                            | 6,400                                      | 6,400          |                                          |         |
| 2006                                                                       | Rent - Building                                   | 160,000                                    | 160,000        |                                          |         |
| 2009                                                                       | Other Operating Expense                           | 34,270                                     | 3,850          |                                          |         |
| 5000                                                                       | Capital Expenditures                              | 381,875                                    | -              |                                          |         |
| <b>Total, Objects of Expense</b>                                           |                                                   | 821,207                                    | 358,912        |                                          |         |
| <b>Method of Financing:</b>                                                |                                                   |                                            |                |                                          |         |
| 001                                                                        | General Revenue                                   |                                            |                |                                          |         |
| 010                                                                        | TxDMV Fund                                        | 821,207                                    | 358,912        |                                          |         |
| 8082                                                                       | Federal Reimbursements                            |                                            |                |                                          |         |
| <b>Total, Method of Finance</b>                                            |                                                   | 821,207                                    | 358,912        |                                          |         |
| <b>Number of Full-time Equivalent Positions (FTE):</b>                     |                                                   | 4.0                                        | 4.0            |                                          |         |
| <b>Detail for Capital Appropriation Items: (included in above amounts)</b> |                                                   |                                            |                |                                          |         |
| 5005                                                                       | Acquisition of Information Resources Technologies | \$ 50,000                                  |                |                                          |         |
| <b>Total, Capital Appropriation Items</b>                                  |                                                   | \$ 50,000                                  | \$ -           |                                          |         |
| <b>Detail on Object of Expenses and FTEs: (Included above)</b>             |                                                   |                                            |                |                                          |         |
| <u>Recommend use of Exceptional Item Cost Worksheet for calculations</u>   |                                                   |                                            |                |                                          |         |
| Salary                                                                     |                                                   | FTE                                        | Monthly Salary | FY 2022                                  | FY 2023 |
|                                                                            | Job Class New Positions                           |                                            |                |                                          |         |
|                                                                            | Manager II                                        | 1.00                                       | 6,066          | 72,789                                   | 72,789  |
|                                                                            | Customer Service Rep III                          | 3.00                                       | 3,159          | 113,741                                  | 113,741 |
|                                                                            |                                                   |                                            |                |                                          |         |

| 2022-23 LAR Exceptional Item Request Schedule                   |                                                                                 |                  |              |                           |                       |
|-----------------------------------------------------------------|---------------------------------------------------------------------------------|------------------|--------------|---------------------------|-----------------------|
| <b>Division:</b>                                                | <b>Vehicle Titles &amp; Registration</b>                                        |                  |              | <b>Division Director:</b> | <b>Jeremiah Kuntz</b> |
| <b>Item Name:</b>                                               | Houston Regional Service Center Substation                                      |                  |              | <b>Item Priority:</b>     | <b>5</b>              |
| <b>Strategy:</b>                                                | A.1.1 Titles Registration and Plates                                            |                  |              |                           |                       |
| Code                                                            | Total Exceptional Item Request                                                  |                  |              | Requested                 |                       |
|                                                                 |                                                                                 |                  |              | 2022                      | 2023                  |
| Travel                                                          | Supervisor travel = \$200/day*16 days/year                                      |                  |              | 6,400                     | 6,400                 |
| <b>Expenses (list line items)</b>                               |                                                                                 | <b>Unit Cost</b> | <b>Units</b> | <b>FY 2022</b>            | <b>FY 2023</b>        |
|                                                                 | Consumable Supplies \$300/yr per FTE                                            | 300              | 4.00         | 1,200                     | 1,200                 |
|                                                                 | Other Operating - share of xerox rental \$30/FTE                                | 30               | 4.00         | 120                       | 120                   |
|                                                                 | Other Operating - Training 1% of salary/yr per FTE                              | 0                | -            | 1,865                     | 1,865                 |
|                                                                 | Other Operating - Chair \$350 per FTE                                           | 350              | 4.00         | 1,400                     |                       |
|                                                                 | Other Operating - Computer, printer, monitor phone                              | 2,255            | 4.00         | 9,020                     |                       |
|                                                                 | Other Operating - Cubicles \$5,000 per FTE                                      | 5,000            | 4.00         | 20,000                    |                       |
|                                                                 | Other Operating - Payroll Health Contribution 1% (Legislatively Mandated)       |                  |              | 1,865                     | 1,865                 |
|                                                                 | Other Personnel - Employee Retirement Contribution .5% (Legislatively Mandated) |                  |              | 933                       | 933                   |
|                                                                 |                                                                                 |                  |              |                           |                       |
| <b>Subtotal, Detail on Object of Expenses and FTEs</b>          |                                                                                 |                  |              | <b>\$ 229,332</b>         | <b>\$ 198,912</b>     |
| <b>Detail for Capital Appropriation Items: (included above)</b> |                                                                                 |                  |              |                           |                       |
|                                                                 |                                                                                 |                  |              |                           |                       |
|                                                                 | Buildout of new location                                                        |                  |              | 331,875                   |                       |
|                                                                 | Furniture                                                                       |                  |              | 50,000                    |                       |
|                                                                 |                                                                                 |                  |              |                           |                       |
|                                                                 |                                                                                 |                  |              | -                         | -                     |
|                                                                 |                                                                                 |                  |              |                           |                       |

| 2022-2023 LAR Exceptional Item Request Schedule                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                       |                                          |             |  |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------|------------------------------------------|-------------|--|
| <b>Division:</b> Vehicle Titles & Registration                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                       | <b>Division Director:</b> Jeremiah Kuntz |             |  |
| <b>Item Name:</b> Houston Regional Service Center Substation                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                       | <b>Item Priority:</b> 5                  |             |  |
| <b>Strategy:</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | A.1.1 Titles Registration and Plates  |                                          |             |  |
| <b>Code</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <b>Total Exceptional Item Request</b> | <b>Requested</b>                         |             |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                       | <b>2022</b>                              | <b>2023</b> |  |
| <b>Description/Justification (2000 character limit)</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                       |                                          |             |  |
| <p>The Houston Regional Service Center (RSC) is currently located at 2110 East Governors Circle, Houston, Texas with a staff of 28.5 employees. The Houston RSC is expected to outgrow their current facility by 2028. In anticipation of future growth, and to better serve our customers, Vehicle Titles and Registration Division is recommending we open a new Houston RSC substation office. An analysis of historical customer flow indicates the new location is best fit in southeast Houston. It is estimated that approximately 50% of the current Houston RSC customer base would utilize the new location. An additional supervisor would be required to oversee the location. One existing coordinator and one-third of the existing staff would be reassigned to the new location. Three additional customer service representatives are needed to adequately staff the new location.</p> |                                       |                                          |             |  |

## **Houston Regional Service Center Substation**

As the Texas population expands, the demands for the services of TxDMV regional service centers in the Houston metroplex also increases. Additional resources are required to meet those demands proactively to ensure the department continues to provide exceptional services to its customers. By creating a second location in the Houston area rather than expanding the current location, the department will be positioned closer to its customers, thereby reducing wait times, traffic congestion and protecting the environment.

| 2022-23 LAR Exceptional Item Request Schedule   |  |                                                |  |                                 |              |              |           |
|-------------------------------------------------|--|------------------------------------------------|--|---------------------------------|--------------|--------------|-----------|
| Division:                                       |  | Motor Vehicle Crime Prevention Authority       |  | Division Director: Bryan Wilson |              |              |           |
| Item Name:                                      |  | Expanded Coverage                              |  | Item Priority: 6                |              |              |           |
| Strategy:                                       |  | B.2.1 Motor Vehicle Crime Prevention Authority |  |                                 |              |              |           |
| Code                                            |  | Total Exceptional Item Request                 |  |                                 | Requested    |              |           |
|                                                 |  | Objects of Expense:                            |  |                                 |              |              |           |
| 4000                                            |  | Grants                                         |  |                                 | 1,276,641    | 1,276,641    |           |
|                                                 |  | Total, Objects of Expense                      |  |                                 | 1,276,641    | 1,276,641    |           |
|                                                 |  | Method of Financing:                           |  |                                 |              |              |           |
| 001                                             |  | General Revenue                                |  |                                 | 1,276,641    | 1,276,641    |           |
| 010                                             |  | TxDMV Fund                                     |  |                                 | -            | -            |           |
| 8082                                            |  | Federal Reimbursements                         |  |                                 |              |              |           |
|                                                 |  | Total, Method of Finance                       |  |                                 | 1,276,641    | 1,276,641    |           |
| Expenses (list line items)                      |  | Unit Cost                                      |  | Units                           | FY 2022      | FY 2023      |           |
|                                                 |  | Grants                                         |  | 0                               | -            | 1,276,641    | 1,276,641 |
|                                                 |  |                                                |  |                                 |              |              |           |
| Subtotal, Detail on Object of Expenses and FTEs |  |                                                |  |                                 | \$ 1,276,641 | \$ 1,276,641 |           |

## **Motor Vehicle Crime Prevention Authority (MVCPA) Expanded Coverage**

The MVCPA requests that \$2.5 million be provided as required by Transportation Code 1006.153 (e) (1) which represents the full amount based on actual MVCPA fee collections of \$91.8 million deposited in GR Account 3206 in FY20. Funds provided under this exceptional item will be used to: 1) combat the over 10% increase in motor vehicle theft reported in the most recent year; 2) expand the coverage to areas of Texas not currently covered by MVCPA taskforces; 3) implement the authority to investigate fraud-related motor vehicle crime (like title and registration fraud) ordered by the 86<sup>th</sup> legislature; and 4) support and increase the collections of funds for MVCPA and Uncompensated Trauma Care disbursement - CPA account # 5111. The current statute provides that the MVCPA shall be appropriated 20% of the funds collected by MVCPA. The LBB approved baseline provided to TxDMV plus this exceptional item request will meet the statutorily required amount.



| 2022-23 LAR Exceptional Item Request Schedule                                                       |                                                |                                          |  |                                 |      |
|-----------------------------------------------------------------------------------------------------|------------------------------------------------|------------------------------------------|--|---------------------------------|------|
| Division:                                                                                           |                                                | Motor Vehicle Crime Prevention Authority |  | Division Director: Bryan Wilson |      |
| Item Name:                                                                                          |                                                | Fee Collection Unit                      |  | Item Priority: 7                |      |
| Strategy:                                                                                           | B.2.1 Motor Vehicle Crime Prevention Authority |                                          |  |                                 |      |
| Code                                                                                                | Total Exceptional Item Request                 |                                          |  | Requested                       |      |
|                                                                                                     |                                                |                                          |  | 2022                            | 2023 |
| Number of Full-time Equivalent Positions (FTE):                                                     |                                                |                                          |  | 3.0                             | 3.0  |
|                                                                                                     |                                                |                                          |  |                                 |      |
|                                                                                                     |                                                |                                          |  |                                 |      |
| The MVCPA Fee Collection Unit is a request for FTEs only. No additional funding is being requested. |                                                |                                          |  |                                 |      |

## Motor Vehicle Crime Prevention Authority (MVCPA) Fee Collections Unit

In 2019, the Auto Burglary Theft Prevention Authority name changed to the Motor Vehicle Crime Prevention Authority (MVCPA) and its responsibilities were expanded to include **fraud-related motor vehicle crime**. The insurance fee increased to \$4 with 20% to be appropriated to the Authority and 60% going to emergency and trauma centers. MVCPA works with the Comptroller of Public Accounts, Texas Department of Insurance (TDI), insurance companies and insurance trade associations to ensure all motor vehicle insurers are in full compliance with the law regarding the collection of the fee.

The goal of this request is to create the Motor Vehicle Crime Prevention Insurance Fee Collections Unit. The employees will ensure equitable collection practices to provide fair market conditions for all insurers. The unit will also assist insurers with the MVCPA fee compliance and focus on accurate and timely collections and refunds of fees. All positions will be funded through MVCPA appropriations.

This request will be submitted for the authorization of the FTEs. No additional funds are being requested as the cost of the FTEs will be funded through the existing MVCPA base budget.

**To:** Finance & Audit Committee, Texas Department of Motor Vehicles Board  
**From:** Linda M. Flores, CPA, Chief Financial Officer, Finance & Administrative Services Division Director  
**Agenda Item:** 12.B  
**Subject:** FY 2020 Fourth Quarter Financial Report (BRIEFING ONLY) – Linda M. Flores and Sergio Rey

## PURPOSE

The TxDMV Board is briefed quarterly on revenue collections and department expenditures. This report contains sections detailing year-to-date status as well as actual versus projections of revenues and expenditures. The year-to-date report includes a section dedicated to the TxDMV Fund and a section with information on Motor Vehicle Crime Prevention Authority (MVCPA) fee collections that support the MVCPA program. An additional section provides information about the TxDMV mid-year budget process.

Attached is the FY 2020 financial summary report for the period ending August 31, 2020.

## EXECUTIVE SUMMARY

The TxDMV is self-sufficient and supports all its expenditures through revenues deposited to TxDMV Fund 0010, except for the Motor Vehicle Crime Prevention Authority. MVCPA is fully funded through fees deposited to the credit of the General Revenue Fund.

As of the end of the FY 2020 fourth quarter, the key highlights of the department's revenues and expenditures are:

- The department's total revenue deposits (all funds) were \$1.8 billion, a 6.8% decrease compared to the fourth quarter of FY 2019.
- TxDMV Fund 0010 collections totaled \$156.3 million, an 8.9% decrease compared to the fourth-quarter FY 2019.
- All-fund (General Revenue Fund and TxDMV Fund) expenditures (including obligations and encumbrances) totaled \$153.8 million. This includes expenditures associated with COVID-19 in the amount of \$1.75 million.
- The department collected sufficient revenue in FY 2020 to support its expenditures during the same period.
- The ending TxDMV Fund 0010 balance at August 31, 2020, was \$161.4 million. Inclusion of encumbrances adjusts the net balance to \$147.5 million.

## FINANCIAL SUMMARY

### TOTAL REVENUES (All Funds)

TxDMV revenue deposits totaled \$1.8 billion through the fourth quarter of FY 2020. This amount comprises:

- \$ 1.58 billion for the State Highway Fund (Fund 0006);
- \$ 105.85 million for the General Revenue Fund (Fund 0001); and

- \$ 156.26 million for the TxDMV Fund (Fund 0010).
- 

### COVID-19 IMPACT TO REVENUES

TxDMV collected \$1,840,117,378 in FY 2020, which was below the originally forecasted amount of \$1,997,611,090, as shown in the table immediately below. FY 2020 collections were \$157,493,712 less than originally forecasted FY 2020 revenues.

| All-Funds Revenue by Category       | Original<br>Forecast<br>FY 2020 | Actual<br>FY 2020       | Variance from<br>Original Forecast to<br>Actual FY 2020 |
|-------------------------------------|---------------------------------|-------------------------|---------------------------------------------------------|
| Motor Vehicle Certificates of Title | \$ 89,338,000                   | \$ 78,290,902           | \$ (11,047,098)                                         |
| Motor Vehicle Registration          | \$ 1,619,278,000                | \$ 1,510,001,445        | \$ (109,276,555)                                        |
| Motor Carrier - Oversize/Overweight | \$ 204,420,000                  | \$ 173,477,380          | \$ (30,942,620)                                         |
| Motor Carrier Credentialing         | \$ 6,161,000                    | \$ 5,889,314            | \$ (271,686)                                            |
| Motor Vehicle Business Licenses     | \$ 8,065,000                    | \$ 7,390,831            | \$ (674,169)                                            |
| Miscellaneous Revenue               | \$ 13,386,090                   | \$ 12,359,893           | \$ (1,026,197)                                          |
| Processing and Handling Fee         | \$ 56,963,000                   | \$ 52,707,612           | \$ (4,255,388)                                          |
| <b>Total Revenue</b>                | <b>\$ 1,997,611,090</b>         | <b>\$ 1,840,117,378</b> | <b>\$ (157,493,712)</b>                                 |

### TxDMV FUND 0010 REVENUES

FY 2020 collections for TxDMV Fund 0010 totaled \$156,261,675. This amount comprises revenues from titles, registered vehicles, license plates, oversize/overweight permits, motor vehicle business licenses, processing and handling fees, and miscellaneous fees.

TxDMV Fund 0010 revenues decreased by 8.9% compared to FY 2019. The decrease in FY 2020 revenues compared to FY 2019 is attributable to the fee waivers and decline in economic activity related to COVID-19.

### EXPENDITURES/OBLIGATIONS

Obligations through August 31, 2020, totaled \$153.8 million (\$133.6 million in expenditures and \$20.2 million in encumbrances) for all funds. Significant expenditure categories continue to include salaries, contract services for plate production, printing costs for Vehicle Titles and Registration Division forms, postage, and Data Center Services costs. Included in expenditures is \$5.1 million for contract payments to MyPlates, the specialty-plates vendor. Contract payments to MyPlates are contingent upon revenues collected.

The department incurred \$1.75 million in obligations related to the COVID-19 response for FY 2020. The majority of the cost is related to staff time responding to operational issues, i.e., planning and implementing new policies/procedures, modifying facilities for customer service and disinfecting services.

The estimated remaining unspent balance of FY 2020 appropriations is approximately \$10.2 million. The primary drivers of the remaining balance include savings from vacant positions, less than anticipated license plate production expenses, and agency reserves. TxDMV has the authority to carry forward, to FY 2021, any unspent balances from FY 2020.

The FY 2020 capital project budget obligations include expenditures of approximately \$15.4 million and encumbrances of approximately \$5.3 million, for a total obligated amount of \$20.7 million. This includes \$10.9 million in obligations for Data Center Services; \$5.4 million for Automation; and \$2.3 million for County Technology. The remaining capital obligations are for agency support in vehicle replacement, technology, and facilities. The FY 2020 capital project budget includes \$18.0 million in funds carried forward from FY 2019; the majority of the carry forward is for the Automation capital budget.

The FY 2020 budget includes funding for exceptional items that were approved by the Legislature during the 86th Legislative Session. The exceptional items approved include nine new full-time equivalents (FTEs) and associated funding for the Consumer Relations Division, and twelve new FTEs for the Information Technology Services Division. The Legislature also approved a contingency rider for the implementation of a digital license plate program that included two FTEs for the Vehicle Titles and Registration Division. Administrative rules to establish the digital plate program have been approved and a vendor Request for Proposal (RFP) is currently being prepared. The digital license plate program is anticipated to be implemented by the end of the calendar year.

### MyPlates

The current (third) specialty-plates marketing contract executed with MyPlates runs from November 19, 2019, to December 31, 2025, with an option to renew the contract for an additional six-year term. The contract includes a minimum guarantee of \$25 million into the General Revenue Fund from the sale of personalized and non-personalized new vendor specialty plates, as well as 5% of the revenue from the renewal of these plates, during the term of the contract.

General Revenue Fund 0001 deposits associated with the MyPlates contract from November 19, 2019, to August 31, 2020, totaled \$12.2 million. Of the \$12.2 million, \$5.6 million counts toward the \$25 million contract guarantee.



# Texas Department of Motor Vehicles

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## 4th Quarter Financial Report ending August 31, 2020 Fiscal Year 2020



# Texas Department *of* Motor Vehicles

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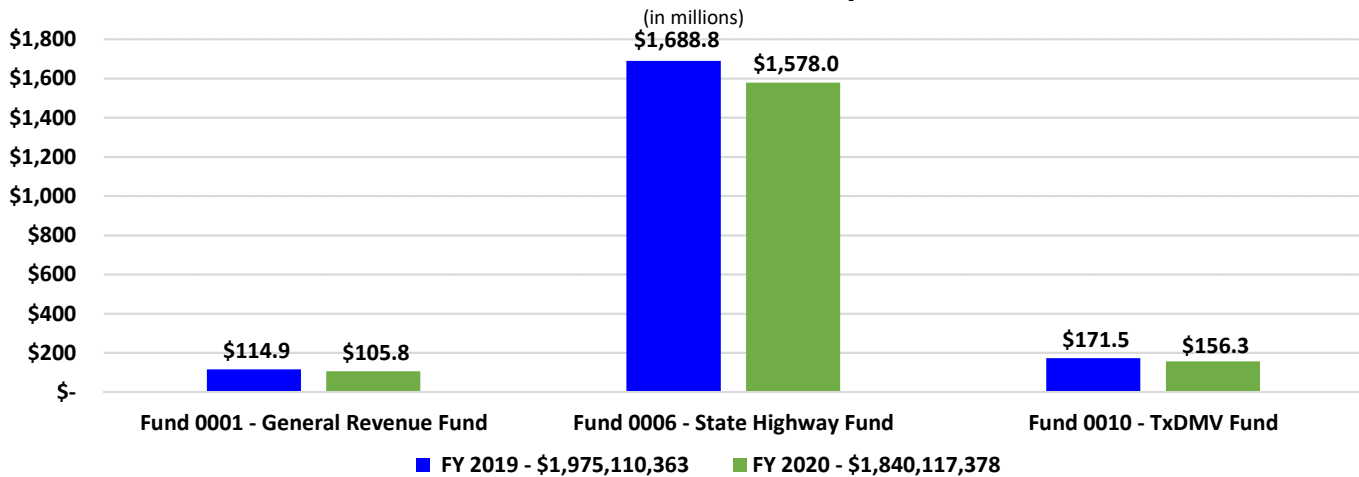
Actual Revenue (All Funds)

# Financial Summary through the Fourth Quarter

## September through August FY 2020

### Overall Revenue Collections

#### FY 2019 and FY 2020 Year-over-Year Revenue by Fund



The Texas Department of Motor Vehicles (TxDMV) collected \$1.8 billion in FY 2020, significantly below the originally forecasted amount of \$2.0 billion. This represents 7.9% less than the originally projected FY 2020 total, and 6.8% below FY 2019 collections. However, it is expected that \$34.7 million of the FY 2020 drop from original projections is registration (and the associated processing and handling fee) revenue that will be *postponed* per governor proclamation and collected in FY 2021 as discussed on page 10. Excluding this estimated postponement amount, TxDMV deposits in FY 2020 actually represented a loss of 6.1% from projections rather than the above-mentioned 7.9%. Through the first two quarters, the state had experienced a strong start to the collections of revenue, and TxDMV was on track to meet its revenue projections. COVID-19 has affected the state's economy, including reduced auto sales and downward impacts to the oil-and-gas sector as a result of low oil prices.

Revenue collected for all three funds totaled \$1,840,117,378 through the fourth quarter of FY 2020. This was a decrease of 6.8% over the same time period of FY 2019. The amount of revenue collected for each fund in FY 2020 consisted of: Fund 0001, General Revenue Fund, \$105,846,913; Fund 0006, State Highway Fund, \$1,578,008,790; and Fund 0010, TxDMV Fund, \$156,261,675. These fees include: Motor Vehicle Certificates of Title, Motor Vehicle Registration, Motor Carrier Oversize/Overweight, Motor Carrier Credentialing, Motor Vehicle Business Licenses, Processing and Handling Fee, and miscellaneous revenues.

TxDMV revenue deposits in FY 2020 in each of the three funds did not meet FY 2020 projections.

#### FY 2020 versus FY 2019 Year-to-Date Comparison

| Revenue Category                    | Year over Year          |                         |              |   |
|-------------------------------------|-------------------------|-------------------------|--------------|---|
|                                     | FY 2019<br>Actual       | FY 2020<br>Actual       | % Difference |   |
| Motor Vehicle Certificates of Title | \$ 87,719,058           | \$ 78,290,902           | -10.7%       | ↓ |
| Motor Vehicle Registration          | 1,603,892,380           | 1,510,001,445           | -5.9%        | ↓ |
| Motor Carrier - Oversize/Overweight | 198,973,450             | 173,477,380             | -12.8%       | ↓ |
| Motor Carrier Credentialing         | 6,100,069               | 5,889,314               | -3.5%        | ↓ |
| Motor Vehicle Business Licenses     | 7,906,911               | 7,390,831               | -6.5%        | ↓ |
| Miscellaneous Revenue               | 13,760,028              | 12,359,893              | -10.2%       | ↓ |
| Processing and Handling Fee         | 56,758,468              | 52,707,612              | -7.1%        | ↓ |
| <b>Total</b>                        | <b>\$ 1,975,110,363</b> | <b>\$ 1,840,117,378</b> | <b>-6.8%</b> | ↓ |



# Financial Summary through the Fourth Quarter

## COVID-19 Revenue Impact Actuals vs Projections

### FY 2020 Actuals versus Projections

| Revenue Category                    | FY 2020<br>Projections  | FY 2020<br>Actual       | % Difference |   |
|-------------------------------------|-------------------------|-------------------------|--------------|---|
| Motor Vehicle Certificates of Title | \$ 89,338,000           | \$ 78,290,902           | -12.4%       | ↓ |
| Motor Vehicle Registration          | 1,619,278,000           | 1,510,001,445           | -6.7%        | ↓ |
| Motor Carrier - Oversize/Overweight | 204,420,000             | 173,477,380             | -15.1%       | ↓ |
| Motor Carrier Credentialing         | 6,161,000               | 5,889,314               | -4.4%        | ↓ |
| Motor Vehicle Business Licenses     | 8,065,000               | 7,390,831               | -8.4%        | ↓ |
| Miscellaneous Revenue               | 13,386,090              | 12,359,893              | -7.7%        | ↓ |
| Processing and Handling Fee         | 56,963,000              | 52,707,612              | -7.5%        | ↓ |
| <b>Total</b>                        | <b>\$ 1,997,611,090</b> | <b>\$ 1,840,117,378</b> | <b>-7.9%</b> | ↓ |

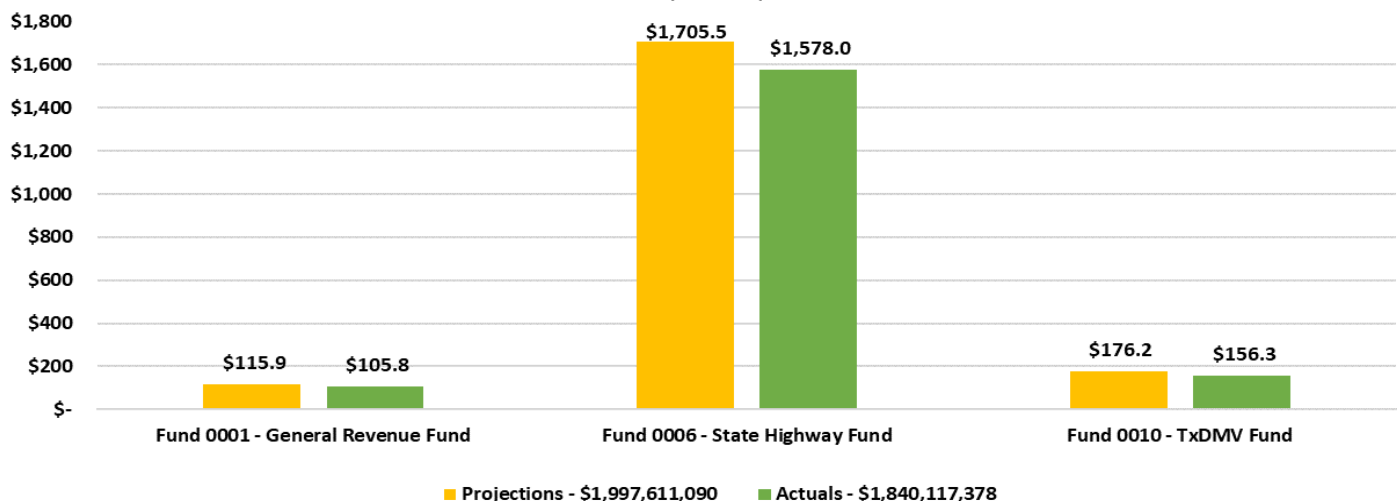
TxDMV collected \$1.8 billion in FY 2020, which was below the originally forecasted amount of \$2.0 billion. FY 2020 collections were 7.9% less (\$157.5 million) than originally forecasted in FY 2020 revenues. As discussed on page 3, it is estimated that \$34.7 million of the \$157.5 million drop from original projections is registration (and the associated processing and handling fee) revenue that is allowed to be postponed by customers per governor proclamation and will eventually be collected in FY 2021.

Excluding this estimated postponement amount, TxDMV deposits in FY 2020 represents a loss of 6.1% (\$122.8 million) from projections rather than the above-mentioned 7.9%.

Of the \$122.8 million in lower-than-expected FY 2020 revenues, \$97.9 million is attributable to a general decline in economic activity, and \$24.9 million is attributable to actual waivers of fees (the delinquent title transfer penalty, and certain temporary permits). TxDMV collections in the last few months of FY 2020 reflected an upswing in most revenue streams from the lows of April and early May. This includes title fees and dealer license fees, along with many customers proceeding with renewing registration of their vehicles even with the allowable postponement.

### FY 2020 Actuals vs Projections Revenue by Fund

(in millions)





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# TxDMV Fund 0010

## Financial Status Highlights

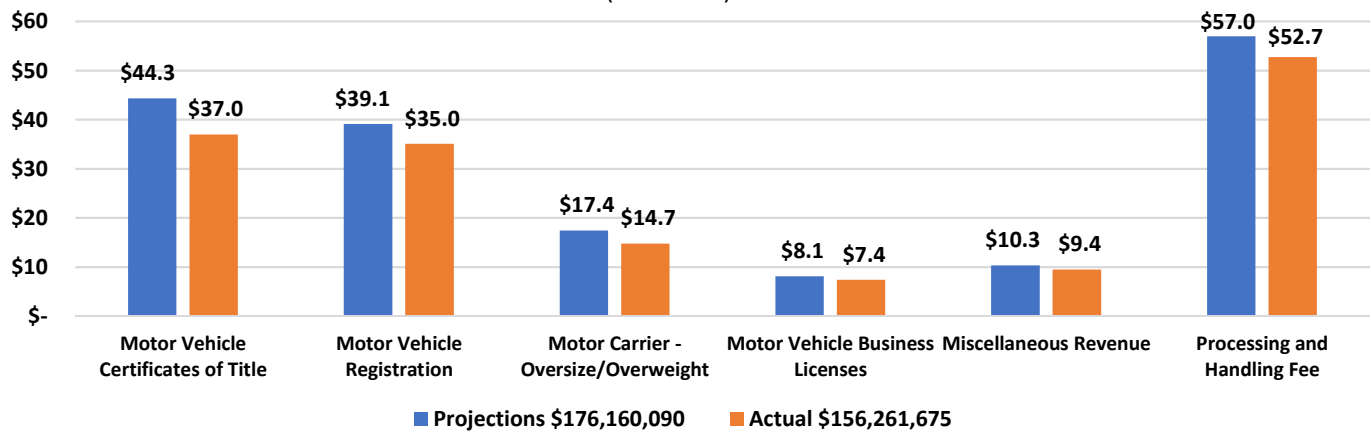
# Financial Summary through the Fourth Quarter

September through August FY 2020

## TxDMV Fund 0010 Highlights

### Actuals vs Projections

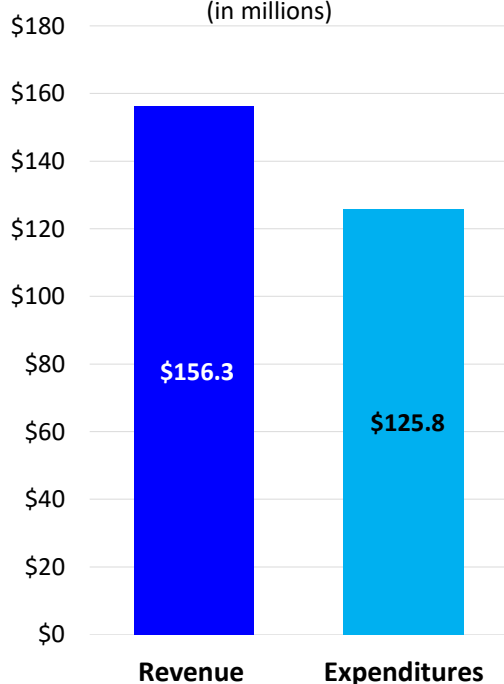
(in millions)



- Overall, TxDMV Fund (0010) revenues for FY 2020 compared to FY 2019 decreased by 8.9%. Excluding the effect of \$1.8 million in processing and handling fee revenue *postponed* until FY 2021, the drop from FY 2019 was only 7.8%. The original TxDMV Fund forecast (\$176.2 million) was not met for FY 2020.
- TxDMV Fund revenue collections totaled \$156.3 million, which was 8.9% lower (\$15.2 million) than collections during the same time period of FY 2019. This represented: a 14.3% decrease in title revenue, a 4.4% decrease in registration revenue, a 13.0% decrease in oversize/overweight revenue, a 6.5% decrease in motor vehicle business license revenue, a 6.4% decrease in miscellaneous revenue, and a 7.1% decrease in processing and handling fee revenue.
- TxDMV Fund deposits were below original projections by 11.3% (\$19.9 million) through the fourth quarter of FY 2020.

### FY 2020 Activity-to-date

(in millions)



### TxDMV Fund 0010 Balance

|                                             | Year-to-date   |
|---------------------------------------------|----------------|
| <b>Beginning Fund Balance</b>               | \$ 130,992,341 |
| <b>Fund 0010 Revenue</b>                    |                |
| Motor Vehicle Certificates of Title         | \$ 36,964,892  |
| Motor Vehicle Registration                  | \$ 35,044,378  |
| Motor Carrier - Oversize/Overweight         | \$ 14,711,609  |
| Motor Vehicle Business Licenses             | \$ 7,390,831   |
| Miscellaneous Revenue                       | \$ 9,442,352   |
| Processing and Handling Fee                 | \$ 52,707,612  |
| <b>Total Revenue</b>                        | \$ 156,261,675 |
| <b>Fund 0010 Expenditures</b>               |                |
| TxDMV Operational Expenditures              | \$ 113,366,077 |
| Fringe Benefits                             | \$ 12,415,602  |
| <b>Total Operational Expenditures</b>       | \$ 125,781,679 |
| <b>Ending Fund Balance, August 31, 2020</b> | \$ 161,472,337 |
| <b>Adjustment for Encumbrances</b>          | \$ 13,969,237  |
| <b>Adjusted Net Cash Balance</b>            | \$ 147,503,100 |



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## Motor Vehicle Crime Prevention Authority

## September through August FY 2020

### Motor Vehicle Crime Prevention Authority

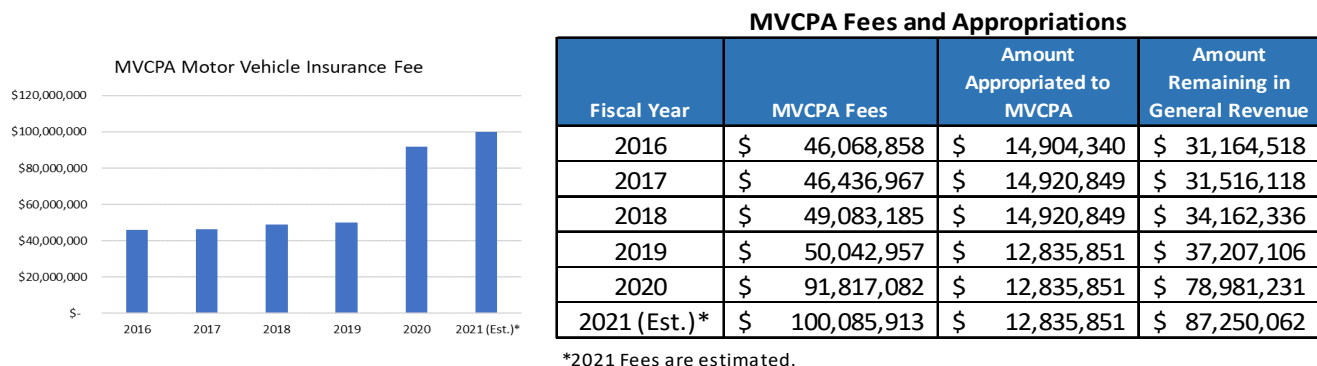
The Motor Vehicle Crime Prevention Authority (MVCPA) has fostered a statewide cooperative network of law-enforcement groups, prosecutors, insurance industry representatives, local tax assessor-collectors, and concerned citizens to combat vehicle theft and burglary through enforcement, prevention, public information, and education initiatives. In addition to providing guidance and oversight, MVCPA awards financial grants to agencies, organizations, and concerned parties in an effort to raise public awareness of vehicle theft and burglary and implement education and prevention initiatives.

The predecessor of the Motor Vehicle Crime Prevention Authority (MVCPA) was established by the 72nd Texas Legislature in 1991 as the Automobile Theft Prevention Authority (ATPA). It was one of the nation's first statewide efforts to reduce auto theft. The 80th Legislature expanded the ATPA mission to include combating motor vehicle burglary and changed the name to the Automobile Burglary and Theft Prevention Authority. The 86th Legislature changed the name to the Motor Vehicle Crime Prevention Authority and added fraud-related motor vehicle crime to its mission. To better align the operation and improve coordination with the Texas Department of Motor Vehicles (TxDMV), the enabling statute for the MVCPA was codified in the Texas Transportation Code. Under the recodification the MVCPA is required to:

- Collect a \$4 fee for every motor vehicle insured in Texas.
- Issue grants to law-enforcement agencies and other statutorily designated groups to combat motor vehicle crime.
- Develop, collect, and monitor performance data on arrests, recovery of vehicles, and cases cleared, as well as other performance measures for motor vehicle crime.
- Report annually, to the Texas Legislature, fiscal and program data.
- Develop a biennial statewide Plan of Operation to combat motor vehicle crime.
- Examine and make determinations for refunds to insurers that overpay the \$4 per vehicle fee.

House Bill (HB) 2048, passed during the 86th Legislature, increased the fee that motor vehicle insurance companies pay per motor vehicle year from \$2.00 to \$4.00. HB 2048 also changed the allocation of the fee revenue to MVCPA from 50% of the \$2.00 fee to 20% of the \$4.00 fee.

The following charts illustrate the six-year trend in the MVCPCA motor vehicle insurance fee collections and a comparison of fees collected to MVCPCA appropriations.



Year-to-date revenue collected through August is \$91,817,082 with the majority deposited in February, July, and August. The MVCPCA fees are forecasted to remain flat for 2022 and 2023.

|            | Actual        | Actual        | Actual        | Forecast       | Forecast       | Forecast       |
|------------|---------------|---------------|---------------|----------------|----------------|----------------|
|            | 2018          | 2019          | 2020          | 2021 (Est.)    | 2022 (Est.)    | 2023 (Est.)    |
| MVCPCA Fee | \$ 49,083,185 | \$ 50,042,957 | \$ 91,817,082 | \$ 100,085,913 | \$ 100,085,913 | \$ 100,085,913 |



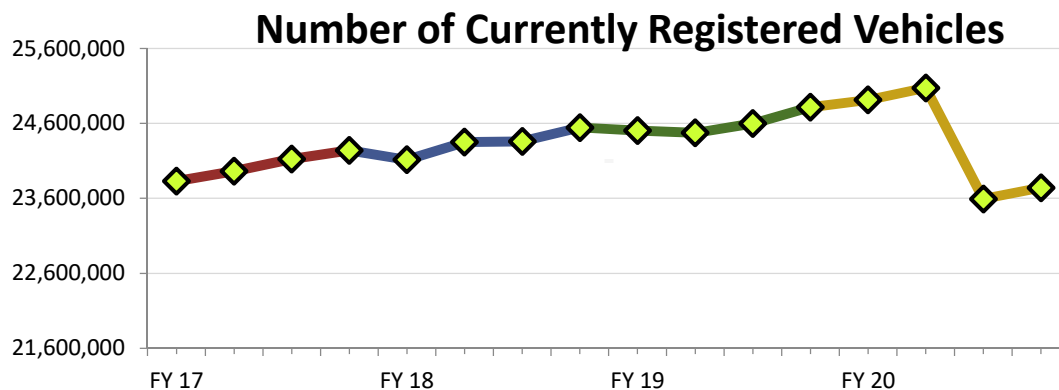
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All Funds (Fund 0001, Fund 0006,  
and Fund 0010) on Title,  
Registration, Oversize/Overweight,  
and Processing and Handling Fees

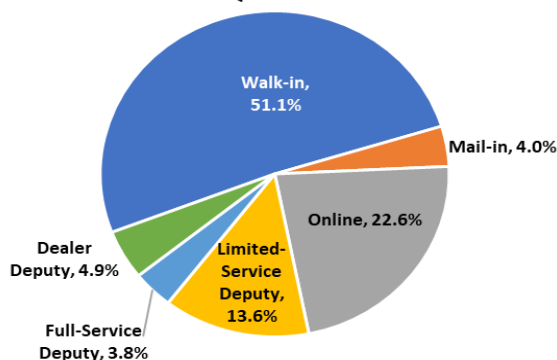
## Registration Revenue

- All-funds registration revenue in FY 2020 decreased 5.9% from FY 2019. This is based mostly on the waiver of certain temporary permits and the permitted *deferral* of annual-registration renewals until 60 days after the public announcement of the resumption of normal TxDMV operations (the deferral is expected to postpone registration-revenue collections for many FY 2020 expirations into FY 2021 instead).
- All-funds registration revenue was 5.9% (\$93.9 million) lower than FY 2019 collections. This revenue category did not meet the original FY 2020 projection (\$1.6 billion). The number of registered vehicles went from 25.1 million at the end of February to 23.7 million at the end of August, a decrease of 1.3 million vehicles. The number of registered vehicles will rebound within 60 days after the resumption of normal TxDMV operations.



## Processing and Handling Fee

### Transaction Mix from Annual Registrations through the Fourth Quarter

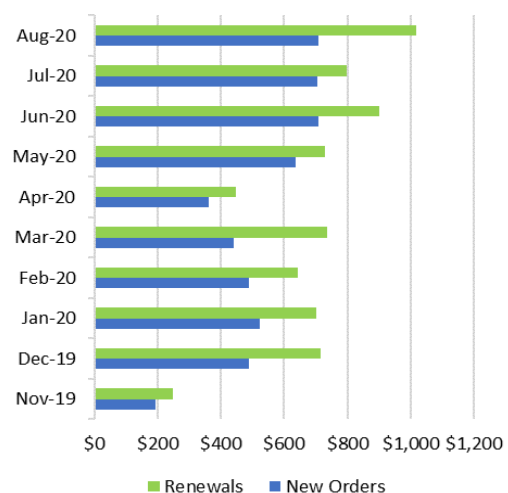


- The majority (51.1%) of annual-registration transactions year-to-date were processed at county offices. Year-to-date online utilization is 22.6%, a 6.2-percentage-point increase from FY 2019.
- With some county offices closed temporarily, more registration renewals were processed online during the fourth quarter of FY 2020 than the same period of FY 2019. During the fourth quarter, online registrations made up 26.9% of the 6.6 million FY 2020 transactions versus 17.1% of the 6.9 million FY 2019 transactions.

## Vendor Plates

- General Revenue Fund 0001 deposits associated with the (third) MyPlates contract from November 19, 2019, to August 31, 2020, totaled \$12.2 million, of which \$5.6 million counted toward the contract's \$25 million guarantee.
- Since the effective date of the current contract, new orders made up 43.1% of the Fund 0001 mix, and renewals made up 56.9%.

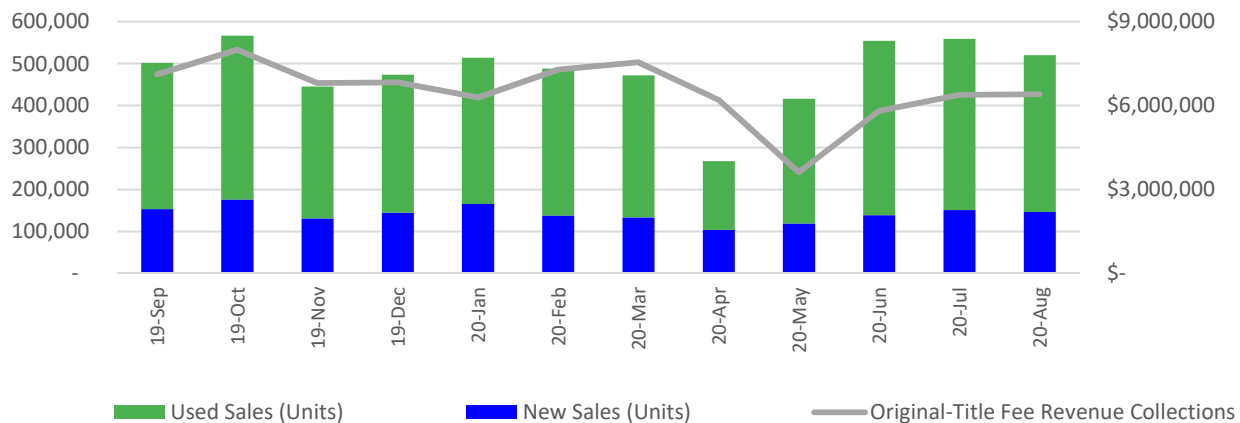
### MyPlates Orders (Fund 0001 Portion) (in thousands)



## Motor Vehicle Certificates of Title

- The agency recognized a decline (from projections) in FY 2020 in all-funds title revenue of 12.4% (\$11.0 million) through August FY 2020. Due to COVID-19 and the current economic status, original projections for the year were not met.

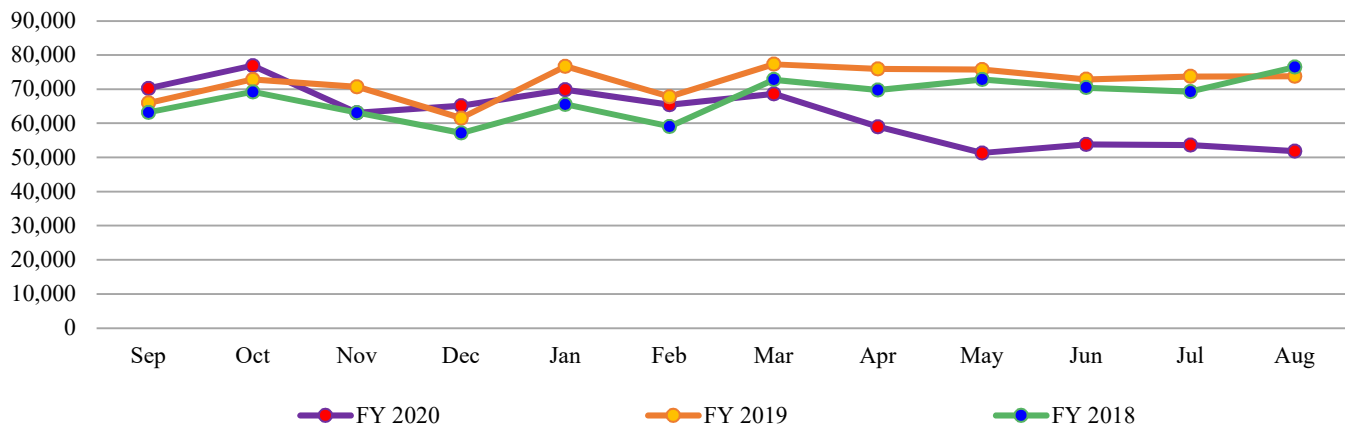
### Monthly Auto Sales and Original-Title Fee Revenue Collections



- Revenue from the original-title fee makes up the largest component of certificates of title revenue. In FY 2020, revenue was collected from the issuance of about 6.2 million original titles. This is a decrease of 7.3% from the same time period in FY 2019. Original-title issuance is driven by new- and used-vehicle sales.
- Compared to FY 2019, auto sales in FY 2020 decreased by 6.7%, with used-car sales down 6.5% and new-car sales down 7.2%, all contributing to a year-over-year decrease in revenue.

## Motor Carrier Oversize/Overweight

### Monthly Oversize/Overweight Permit Issuance



- All-funds oversize/overweight permitting revenue was 15.1% (\$30.9 million) under FY 2020 projections. The number of permits issued in FY 2020 year-to-date was 749,083 compared to 865,171 issued in FY 2019, a decrease of 13.4% (116,088 more permits in FY 2019). Recent decreased activity in the oil-and-gas sector has had an impact on the issuance of motor-carrier permits, resulting in lower-than-expected oversize/overweight fee deposits. As a result of recent worldwide events and continued lower oil prices, revenue in this category did not meet FY 2020 expectations.





# Texas Department of Motor Vehicles

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## TxDMV Budget

# Financial Summary through the Fourth Quarter

## September through August FY 2020

### TxDMV Fund 0010

The approved budget for FY 2020 includes a number of new initiatives that were authorized during the 86th legislative session.

- Additional Full-Time Equivalents (FTEs) were added for Consumer Relations (9.0 FTEs) and Information Technology Services (12.0 FTEs).
- Capital funding was added for Regional Service Center renovations and upgrades (\$250,000); ITS infrastructure and application improvements (\$1,850,000); and consumer protection and enforcement tracking (\$470,000)
- Funding was also approved in the amount of \$730,000 to address increases in Statewide Cost Allocation Plan costs. These costs are for legislatively mandated reimbursements to the General Revenue Fund for central services provided by the Comptroller of Public Accounts, such as the maintenance of the statewide financial system used by TxDMV.
- A contingency rider was also approved during the 86th legislative session for implementing a digital license plates program. An appropriation in the amount of \$1.2 million was approved for FY 2020 for two new FTEs in the Vehicle Titles and Registration (VTR) Division and technology costs in the ITS Division. Administrative code rules to establish a digital license plates program have been finalized and a Request for Proposal (RFP) to contract with at least one digital license plates vendor is nearing publication. One position has been filled and the second one is anticipated to be filled by the fourth quarter, and the digital license plates program is anticipated to be implemented by the end of calendar year 2020 for eligible vehicles.

As of the end of August FY 2020, total TxDMV obligations for all funds is \$153.8 million, which represents a 2.6% increase over the obligated amount at the end of August FY 2019. The increase over the prior year is attributable to an overall improvement in the number of filled positions since the beginning of FY 2020. FY 2020 expenditures also include obligations related to the COVID-19 pandemic response.

### COVID-19 Expenditures

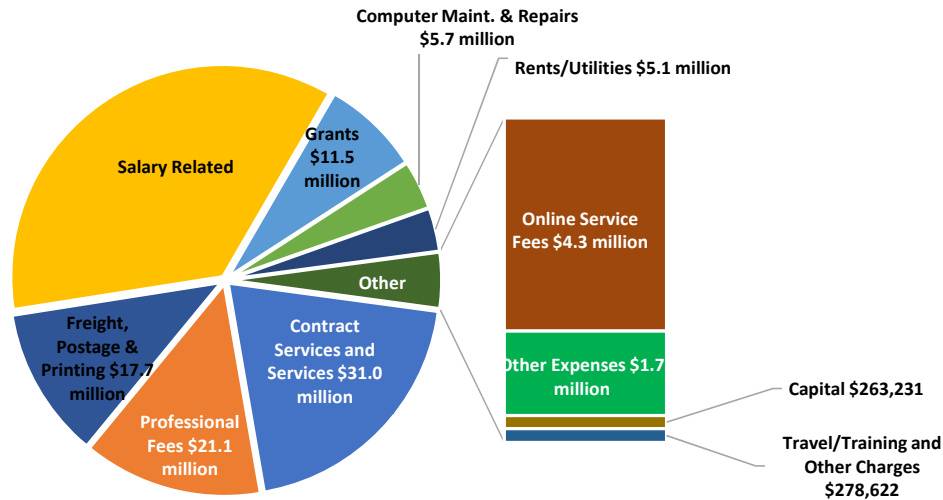
Through the end of August 2020, TxDMV has classified approximately \$1.75 million in obligations related to the COVID-19 response. Those obligations are included in the overall obligation total of \$153.8 million. The majority of expenditures related to the COVID-19 response has been for employee time, directly related to responding to COVID-19 issues; examples include planning meetings and preparing facilities for customer service. The other major expenditures for COVID-19 include cleaning services for facilities and personal protective equipment (PPE) for employees.

## September through August FY 2020

## Obligations

- Fourth quarter TxDMV obligations for all funds totaled \$153.8 million (expenditures of \$133.6 million and \$20.2 million in encumbrances). Encumbrances are outstanding purchase orders that have been issued for goods and services that will be received and expended in the future.

## Fourth Quarter Obligations by Category - All Funds

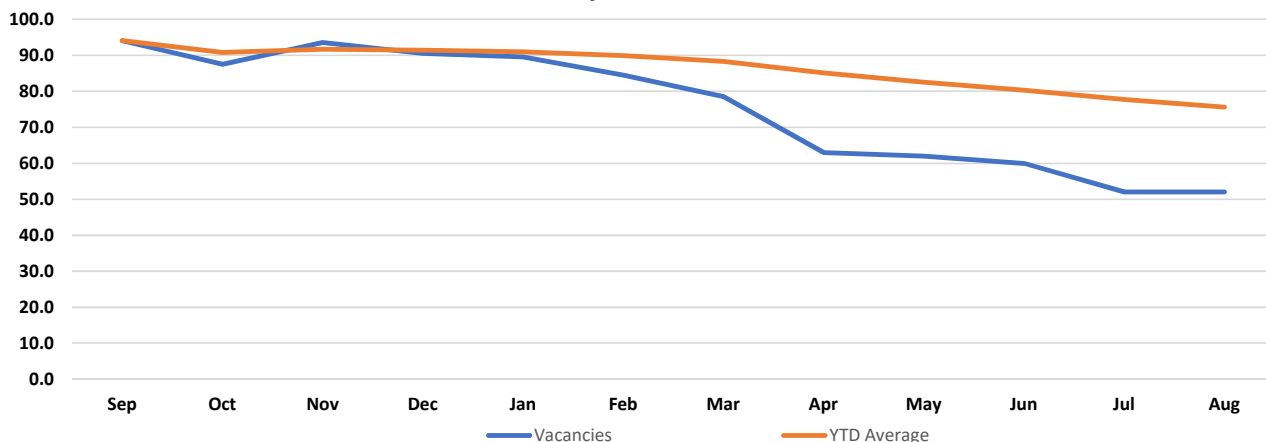


- Major fourth-quarter obligations in FY 2020 are listed in the chart above. Obligations for freight/postage/printing (primarily postage/printing), contract services, professional fees, salary related, and grants constitute 90% of the department's obligations for the fourth quarter.
- Printing expenditures are associated with titling and registration forms and imaging costs. Contract services include costs of license plates production, registration decal production, and MyPlates contract obligations. Professional fees are associated with data center services and capital project contractors working on department technology initiatives.

## Full-Time Equivalents

- In FY 2020, the approved department FTE count increased from 779 to 802: nine new FTEs for Consumer Relations, twelve new FTEs for Information Technology Services, and two new FTEs for Vehicle Titles and Registration for digital license plates.
- Overall, filled positions have increased from 712.0 FTEs in August 2019 to 750.0 FTEs as of August 2020. Overall staffing, since the beginning of FY 2020 has been steadily improving and vacancies have decreased from 93.5 at the end of the first quarter to 52.0 vacancies at the end of the fourth quarter.

## Monthly Vacancies FY 2020



**FY 2020 Mid-Year Budget Review**

- The Mid-Year Review is a process where staff assesses the budgetary needs for TxDMV and for individual Divisions to determine if additional resources are available to fund unanticipated cost changes and items not included in the initial budget.
- The review process began in January and included Division input and a detailed analysis of TxDMV revenues/expenditures during the year.
- FAS staff prepared estimates of FY 2020 year-end balances and anticipated obligations for the end of the fiscal year. The estimates were based on accumulated data through the end of February 2020, which represents the midpoint of the fiscal year.
- As a result of the analysis, a number of budget actions were approved during the Mid-Year process:
  - Funding in the amount of \$1.5 million was transferred from savings generated by vacant positions to agency reserves. This funding provides for future unanticipated costs and will assist with COVID 19 expenditures.
  - Savings from vacant positions will also be used for one-time merit costs.
  - \$400K was approved during the Mid-Year process to provide funding for a consultant contract to assist with the development of an Accounts Receivable System procurement.
  - Funding was established to address internal FTE reallocations.

In addition to the items above, approval was given to address a number of issues within Division budgets for items not anticipated at the beginning of the fiscal year. These items include:

- Funding to begin the implementation of a fleet vehicle telematics contract, which will allow Fleet Services to gather usage data on TxDMV fleet vehicles.
- One-time costs to develop a Lemon Law educational video to be used by the Office of Administrative Hearings
- Funding for one-time contractor costs in Information Technology and one-time legal services in the Office of General Counsel.

## FY 2020 Year-End

- As of August 31, 2020, the projected year-end salary and operating categories are expected to lapse approximately \$10.2 million. The lapsed amount excludes capital projects.
- The major drivers of the lapse amount include salary and payroll-related savings from vacant positions (\$2.4 million); license plates production (\$2.6 million); and agency-wide reserves (\$1.7 million).
- During the 86th Legislative Session, approval was given to TxDMV to allow the carry forward from FY 2020 to FY 2021 the remaining balances from all appropriations. The approval is provided in the General Appropriations Act (GAA) as TxDMV Rider 10.
- The authority allowed by Rider 10 will enable the carry forward of the \$10.2 million for one-time needs in FY 2021. The carry forward can also provide for funding of FY 2021 COVID-19 expenditures.

| Budget Category                  | Item                                                         | Estimated Lapse      |
|----------------------------------|--------------------------------------------------------------|----------------------|
| Salary and Payroll Related Costs | Lapse from vacant positions                                  | \$ 2,400,000         |
| License Plates                   | Less than anticipated costs                                  | \$ 2,600,000         |
| General Operating                | Accumulated total from all other remaining budget categories | \$ 3,500,000         |
| Agency-Wide Reserve              | Agency Wide Reserve funds                                    | \$ 1,700,000         |
| <b>Totals</b>                    |                                                              | <b>\$ 10,200,000</b> |

## Capital Budget and Projects

### Capital Project Budget Status

|                                | Revised Budget       | Expenditures         | Encumbrances        | Available Budget     |
|--------------------------------|----------------------|----------------------|---------------------|----------------------|
| Technology                     | \$ 18,779,093        | \$ 11,079,697        | \$ 3,086,354        | \$ 4,613,042         |
| Automation                     | \$ 20,382,870        | \$ 2,598,511         | \$ 1,874,644        | \$ 15,909,715        |
| Other Capital Projects         | \$ 4,809,413         | \$ 1,786,624         | \$ 321,614          | \$ 2,701,175         |
| <b>All Capital Grand Total</b> | <b>\$ 43,971,376</b> | <b>\$ 15,464,832</b> | <b>\$ 5,282,612</b> | <b>\$ 23,223,932</b> |

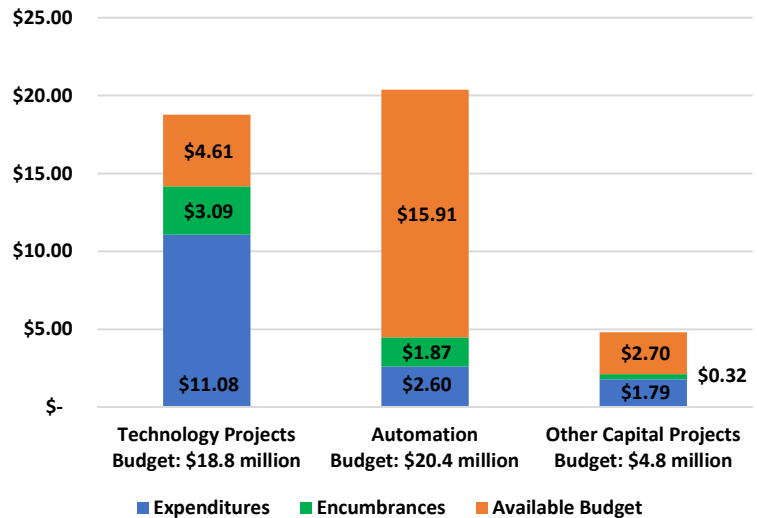
### Capital Budget Status

The capital budget totals \$43,971,376.

- Including: Expenditures of \$15.4 million, and encumbrances of \$5.3 million, for a total of \$20.7 million in obligations.
- The budget as of the end of the quarter for capital consists of \$18.3 million carried forward from FY 2019 for Automation and HQ Maintenance projects, and \$25.7 million in new appropriations.
- Detailed information on Technology Projects is shown below, and Automation and Other Capital Project information is on the following page.

### Fourth Quarter Capital Budget Status

(In Millions)



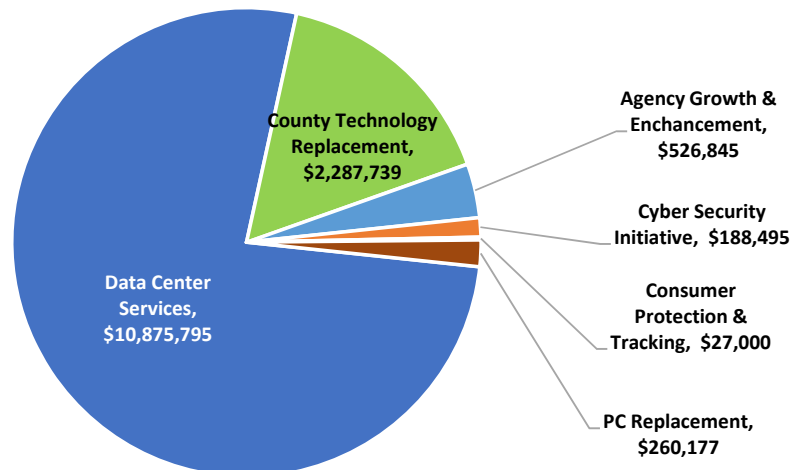
## Technology Capital Projects

### Technology Highlights

The obligations in the Technology category consist of:

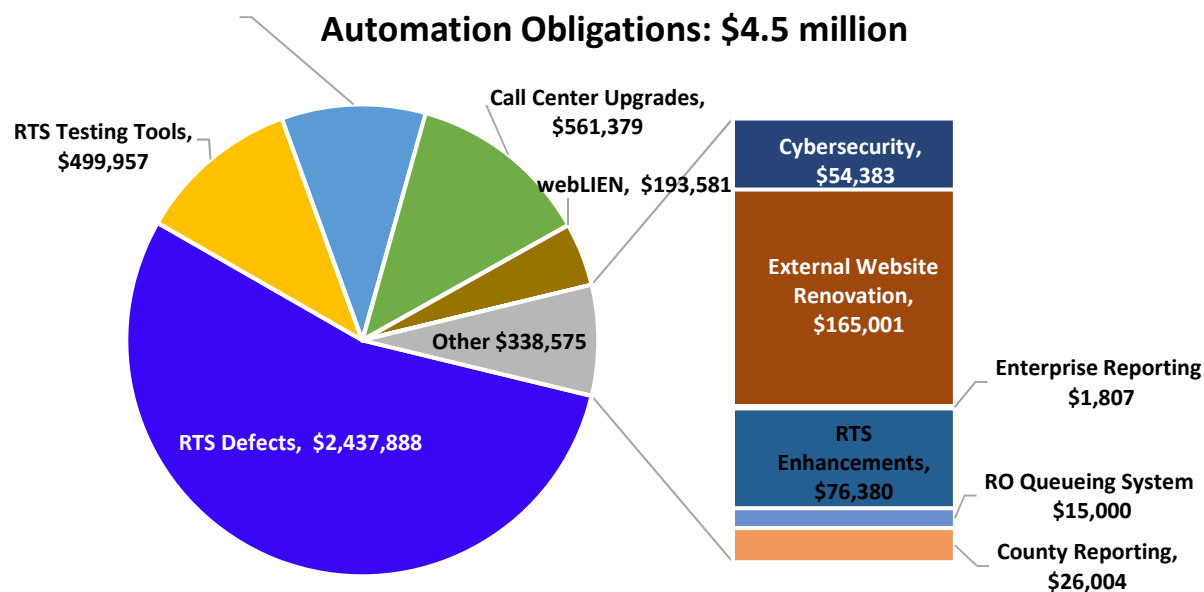
- Data Center Services (DCS), the largest single component of the Technology budget (\$10.9 million), provides management of applications, hardware and technology services for TxDMV.
- The majority of expenditures and encumbrances through August 2020 includes Data Center Services, and toner and technical support for the counties. Significant expenditures in County Technology Replacement and PC Replacement include laptops and desktops for the refresh programs.

### Technology Capital Projects



# Financial Summary through the Fourth Quarter

## Automation Capital Projects



- The TxDMV Automation project consists of \$4.5 million in obligations. The primary obligations as of August 2020 are for Registration and Titling System (RTS) defects, Computer Aided Software Testing (CAST), RTS Testing Tools, and the Call Center Upgrades Project.
- New projects for FY 2020 include the RTS defects project and the RTS batch cycle improvement project.
- All Automation balances have been transferred into FY 2020 using unexpended-balance authority.
- In the fourth quarter of FY 2020, \$4.3 million was transferred from Unallocated Reserve to fund the Texas by Texas Project (\$1.4 million), webDEALER SWA Project (\$2.7 million) and Call Center Upgrades Project. Approximately, \$4.3 million remains in Unallocated Reserve at the end of August.

## Other Capital Projects

- Other Capital Projects budget of \$4.8 million consists of: \$90,000 for agency vehicles, \$290,000 for HQ security/badge, \$250,000 for regional service center maintenance, and \$4.2 million for HQ maintenance.
- HQ maintenance had \$1,635,317 in obligations as of August 2020. The primary expenditures to date have been for a facility assessment study. Weatherization, roof replacement and security and badge system projects have entered the planning phase with projected completion dates in FY 2021.
- Several HQ Projects within HQ maintenance are in the assessment and vendor procurement stages and these remaining projects have projected completion dates in FY 2021.
- The RSC maintenance capital budget has been used to address facility needs related to COVID-19 response, such as acquiring partitions to provide safety measures between employees and customers.



# Texas Department of Motor Vehicles

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**To:** Finance & Audit Committee, Texas Department of Motor Vehicles Board  
**From:** Linda M. Flores, CPA, Chief Financial Officer, Finance & Administrative Services Division Director  
**Agenda Item:** 12.C  
**Subject:** Financial Impacts of COVID-19 on TxDMV

## RECOMMENDATION

Briefing Only.

## PURPOSE AND EXECUTIVE SUMMARY

TxDMV is required by the Legislative Budget Board and the Governor's Office to prepare monthly reports on the financial impact to TxDMV from the COVID-19 event. The monthly reporting addresses the impact on revenue collections and on expenditures for COVID-19 response. TxDMV also submitted a 5% savings plan for its General Revenue funded appropriation in response to the economic conditions resulting from the COVID-19 event.

## FINANCIAL IMPACT

The COVID-19 event has impacted TxDMV financially in three distinct areas: revenue collections, expenditures for COVID-19 response, and mandated appropriation reductions.

## BACKGROUND AND DISCUSSION

### **REVENUE DISCUSSION**

TxDMV has actual revenue information for September 2019 to August 2020 (12 months). Collection differences include:

- a loss of \$10,092,000 to General Revenue Fund 0001;
- a loss of \$127,503,000 to State Highway Fund 0006; and
- a loss of \$19,898,000 to TxDMV Fund 0010.

Collections reflect the effect of proclamations from the Texas governor stating that certain fees/permits are suspended or outright waived from March 16 until 60 days after TxDMV notifies the public that its services have re-commenced as normal.

Even though many fee streams are not directly affected or named by the national, state, or local measures, the economic changes have affected many fee collections.

### **EXPENDITURE DISCUSSION**

Through the end of August 2020, TxDMV expended a total of \$1,750,327 in response to COVID-19. The expenditures are primarily from staff time for planning and preparation of COVID-19 response activities, the acquisition of personal

protective equipment (PPE) items for employees and customers, cleaning supplies, and facility preparation and response activities such as cleaning and defogging services and the installation of plexiglass partitions for public areas. It is anticipated that staff time related to COVID-19 planning and response will continue into FY 2021 and that specific cleaning services for COVID-19 responses will continue throughout FY 2021.

A detailed month-by-month obligation table is included in the Financial Impact of COVID-19 Supplement.

## Financial Impacts of COVID-19

### REVENUE FORECASTS

The tables below provide fiscal impacts of the Covid-19 pandemic to the Texas Department of Motor Vehicle FY 2020 revenue collections. The red figures shown in the table below are the variances from FY 2020 revenue projections.

| Funds 0001, 0006, and 0010 Estimated FY 2020 Revenue Impact |                        |                         |                        |                         |
|-------------------------------------------------------------|------------------------|-------------------------|------------------------|-------------------------|
| Combined Revenue (Funds 0001, 0006, and 0010)               | Waived                 | Postponed until FY 2021 | Economic Impact        | Variance within FY 2020 |
| Motor Vehicle Certificates of Title                         | \$ (7,020,000)         | \$ -                    | \$ (4,027,097)         | \$ (11,047,097)         |
| Motor Vehicle Registration                                  | \$ (16,944,000)        | \$ (32,856,000)         | \$ (59,476,555)        | \$ (109,276,555)        |
| Motor Carrier - Oversize/Overweight                         | \$ -                   | \$ -                    | \$ (30,942,620)        | \$ (30,942,620)         |
| Motor Carrier Credentialing                                 | \$ -                   | \$ -                    | \$ (271,686)           | \$ (271,686)            |
| Motor Vehicle Business Licenses                             | \$ -                   | \$ -                    | \$ (674,169)           | \$ (674,169)            |
| Miscellaneous Revenue                                       | \$ -                   | \$ -                    | \$ (1,026,197)         | \$ (1,026,197)          |
| Processing and Handling Fee                                 | \$ (934,000)           | \$ (1,848,000)          | \$ (1,473,388)         | \$ (4,255,388)          |
| <b>Total Combined Funds</b>                                 | <b>\$ (24,898,000)</b> | <b>\$ (34,704,000)</b>  | <b>\$ (97,891,711)</b> | <b>\$ (157,493,711)</b> |
|                                                             |                        |                         |                        |                         |
| General Revenue Fund (Fund 0001)                            | Waived                 | Postponed until FY 2021 | Economic Impact        | Variance within FY 2020 |
| Motor Vehicle Certificates of Title                         | \$ -                   | \$ -                    | \$ (2,980,989)         | \$ (2,980,989)          |
| Motor Vehicle Registration                                  | \$ -                   | \$ -                    | \$ 706,163             | \$ 706,163              |
| Motor Carrier - Oversize/Overweight                         | \$ -                   | \$ -                    | \$ (7,379,115)         | \$ (7,379,115)          |
| Motor Carrier Credentialing                                 | \$ -                   | \$ -                    | \$ (271,686)           | \$ (271,686)            |
| Miscellaneous Revenue                                       | \$ -                   | \$ -                    | \$ (166,459)           | \$ (166,459)            |
| <b>Total General Revenue Fund</b>                           | <b>\$ -</b>            | <b>\$ -</b>             | <b>\$ (10,092,087)</b> | <b>\$ (10,092,087)</b>  |
|                                                             |                        |                         |                        |                         |
| State Highway Fund (Fund 0006)                              | Waived                 | Postponed until FY 2021 | Economic Impact        | Variance within FY 2020 |
| Motor Vehicle Certificates of Title                         | \$ -                   | \$ -                    | \$ (739,000)           | \$ (739,000)            |
| Motor Vehicle Registration                                  | \$ (16,944,000)        | \$ (32,856,000)         | \$ (56,113,097)        | \$ (105,913,097)        |
| Motor Carrier - Oversize/Overweight                         | \$ -                   | \$ -                    | \$ (20,851,114)        | \$ (20,851,114)         |
| <b>Total State Highway Fund</b>                             | <b>\$ (16,944,000)</b> | <b>\$ (32,856,000)</b>  | <b>\$ (77,703,210)</b> | <b>\$ (127,503,210)</b> |
|                                                             |                        |                         |                        |                         |
| TxDMV Fund (Fund 0010)                                      | Waived                 | Postponed until FY 2021 | Economic Impact        | Variance within FY 2020 |
| Motor Vehicle Certificates of Title                         | \$ (7,020,000)         | \$ -                    | \$ (307,108)           | \$ (7,327,108)          |
| Motor Vehicle Registration                                  | \$ -                   | \$ -                    | \$ (4,069,622)         | \$ (4,069,622)          |
| Motor Carrier - Oversize/Overweight                         | \$ -                   | \$ -                    | \$ (2,712,391)         | \$ (2,712,391)          |
| Motor Vehicle Business Licenses                             | \$ -                   | \$ -                    | \$ (674,169)           | \$ (674,169)            |
| Miscellaneous Revenue                                       | \$ -                   | \$ -                    | \$ (859,738)           | \$ (859,738)            |
| Processing and Handling Fee                                 | \$ (934,000)           | \$ (1,848,000)          | \$ (1,473,388)         | \$ (4,255,388)          |
| <b>Total TxDMV Fund</b>                                     | <b>\$ (7,954,000)</b>  | <b>\$ (1,848,000)</b>   | <b>\$ (10,096,414)</b> | <b>\$ (19,898,414)</b>  |

Color coding in the table above links to the color-coding on the table on Page 2

Note: Of the \$105.9 million shown as a revenue loss/variance within FY 2020 for State Highway Fund 0006 registration fees, \$32.9 million is revenue that is postponed and is expected to be deposited in FY 2021. The processing and handling fee on registration transactions is effectively postponed as well, with \$1.8 million of the FY 2020 \$4.3 million loss/variance (in Fund 0010) expected to be deposited in FY 2021.



## Texas Department of Motor Vehicles

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| Estimated FY 2020 Revenue Impact of TxDMV Fees Waived or Postponed                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                    |      |               |                  |                   |                         |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|------|---------------|------------------|-------------------|-------------------------|
| Fee                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Statutory Citation | Fund | Payer of Fee  | Waived/Postponed | Fee-Loss Estimate | Postponed until FY 2021 |
| Delinquent Title Transfer Penalty                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 501.146(a)         | 0010 | Dealer        | waived           | \$ (1,283,000)    | \$ -                    |
| Delinquent Title Transfer Penalty                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 501.146            | 0010 | Individual    | waived           | \$ (5,737,000)    | \$ -                    |
| Temporary Permit (72-hour)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 502.094(c)(2)      | 0006 | Motor Carrier | waived*          | \$ (2,633,000)    | \$ -                    |
| Temporary Permit (144-hour)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 502.094(c)(2)      | 0006 | Motor Carrier | waived*          | \$ (6,791,000)    | \$ -                    |
| Temporary Permit (30-Day)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 502.095(e)(2)(B)   | 0006 | Individual    | waived*          | \$ (7,520,000)    | \$ -                    |
| Processing and Handling Fee                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 502.1911(b)        | 0010 | Individual    | postponed/waived | \$ (934,000)      | \$ (1,848,000)          |
| Annual-Registration Fee                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 502.252-502.256    | 0006 | Individual    | postponed        | \$ -              | \$ (32,856,000)         |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                    |      |               |                  | \$ (24,898,000)   | \$ (34,704,000)         |
| <p>Of the \$157.5 million decline in projected FY 2020 revenue presented (shown on page 1), \$34.7 million is expected to be deposited in FY 2021. Of the \$122.8 million projected revenue loss, \$97.9 million is attributed to a decline in economic activity (including lower oil prices), and \$24.9 million from a direct waiver of fees.</p> <p>The postponement amount dropped from the last submittal. This is a result of more registration-renewal transactions (with FY 20 expiration dates) occurring in July and August than previously expected, rather than those customers holding off on registration payment (that is, even with proclamations still in effect that allow them to do so).</p> |                    |      |               |                  |                   |                         |
| * This fee was waived per governor proclamation (30-day) and for vehicles engaged in virus-relief efforts (72-hour and 144-hour).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                    |      |               |                  |                   |                         |

**General Observations** - TxDMV has FY 2020 actual revenues by month for September 2019 through August 2020 (12 months) detailed by fund (0001, 0006, and 0010) and revenue category.

TxDMV considered numerous factors when putting the figures together. TxDMV will continue to monitor actual revenues and customer activity on an ongoing basis.

**Return to Normal Operations Start Date** - The analysis incorporates proclamations from the Texas governor stating that certain fees/permits are suspended or outright waived from March 16 until 60 days after TxDMV notifies the public that its services have re-commenced as normal; this includes the reopening of county tax assessor-collector offices and TxDMV regional service centers to in-person customer activity. Therefore, to perform this revenue analysis for certain fees, it is necessary to assume a future, to-be-determined date for resumption of normal operations. Accordingly, it is assumed for calculations in this analysis that TxDMV will announce resumption of normal operations on November 1, with most fee/permit suspensions and waivers ending December 31, 2020.

**Economic Impacts** - Even though many fee streams are not directly affected or named by the state measures, the economic changes have affected many fee collections (for example, a decrease in dealer-licensing activity from licensee customers not purchasing/renewing their licenses).

### EXPENDITURE IMPACTS OF COVID-19 PANDEMIC

The total expended amount related to COVID-19 response through the end of August is \$1,750,327. The expenditures are primarily from staff time for planning and responding to Covid-19 activities, the acquisition of personal protective equipment (ppe) items for employees and customers, cleaning supplies, and facility preparation and response activities such as cleaning and disinfecting fogging services and the installation of plexiglass partitions for public areas.

The following table provides monthly actuals for March through August by Object of Expense for FY 2020.

| TxDMV COVID 19 Obligations by Month |                                   |               |               |                |               |               |               |                 |
|-------------------------------------|-----------------------------------|---------------|---------------|----------------|---------------|---------------|---------------|-----------------|
| Actuals                             |                                   |               |               |                |               |               |               |                 |
| Object of Expense                   | Description                       | March         | April         | May            | June          | July          | August        | Total           |
| 1001                                | Salaries and Wages                | \$ 238,247.50 | \$ 262,130.47 | \$ 184,298.49  | \$ 131,119.04 | \$ 134,447.68 | \$ 105,162.21 | \$ 1,055,405.39 |
| 1002                                | Other Personnel costs             | \$ 1,191.24   | \$ 1,310.65   | \$ 694.65      | \$ 347.32     | \$ 672.24     | \$ 525.81     | \$ 4,741.91     |
| 2001                                | Professional Fees and Services    | \$ -          | \$ 114,889.58 | \$ (72,674.12) | \$ 9,625.30   | \$ -          | \$ -          | \$ 51,840.76    |
| 2002                                | Fuels and Lubricants              | \$ -          | \$ -          | \$ -           | \$ -          | \$ -          | \$ -          | \$ -            |
| 2003                                | Consumable Supplies               | \$ 898.62     | \$ 12,802.14  | \$ 123,391.90  | \$ 15,008.29  | \$ 153.37     | \$ 250.82     | \$ 152,505.14   |
| 2004                                | Utilities                         | \$ 3,762.44   | \$ 20,533.02  | \$ 3,502.31    | \$ 1,417.20   | \$ 1,574.93   | \$ 976.76     | \$ 31,766.66    |
| 2005                                | Travel                            | \$ -          | \$ -          | \$ -           | \$ -          | \$ -          | \$ -          | \$ -            |
| 2006                                | Rent - Building                   | \$ -          | \$ -          | \$ -           | \$ -          | \$ -          | \$ -          | \$ -            |
| 2007                                | Rent - Machine and Other          | \$ -          | \$ -          | \$ -           | \$ -          | \$ -          | \$ -          | \$ -            |
| 2008                                | Debt Service                      | \$ -          | \$ -          | \$ -           | \$ -          | \$ -          | \$ -          | \$ -            |
| 2009                                | Other Operating Expense           | \$ (4,969.82) | \$ 40,981.23  | \$ 324,362.87  | \$ 28,289.91  | \$ 63,486.38  | \$ 1,916.81   | \$ 454,067.38   |
| 3001                                | Client Services                   | \$ -          | \$ -          | \$ -           | \$ -          | \$ -          | \$ -          | \$ -            |
| 3002                                | Food for Persons - Wards of State | \$ -          | \$ -          | \$ -           | \$ -          | \$ -          | \$ -          | \$ -            |
| 4000                                | Grants                            | \$ -          | \$ -          | \$ -           | \$ -          | \$ -          | \$ -          | \$ -            |
| 5000                                | Capital Expenditures              | \$ -          | \$ -          | \$ -           | \$ -          | \$ -          | \$ -          | \$ -            |
|                                     |                                   | \$ 239,129.98 | \$ 452,647.09 | \$ 563,576.10  | \$ 185,807.06 | \$ 200,334.60 | \$ 108,832.42 | \$ 1,750,327.24 |
| Fund 0001                           |                                   | \$ 1,589.82   | \$ 879.53     | \$ 29,353.24   | \$ 293.18     | \$ 542.37     | \$ 351.81     | \$ 33,009.95    |
| Fund 0010                           |                                   | \$ 237,540.16 | \$ 451,767.57 | \$ 534,222.86  | \$ 185,513.89 | \$ 199,792.23 | \$ 108,480.60 | \$ 1,717,317.30 |
|                                     |                                   | \$ 239,129.98 | \$ 452,647.09 | \$ 563,576.10  | \$ 185,807.06 | \$ 200,334.60 | \$ 108,832.42 | \$ 1,750,327.24 |

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**To:** Texas Department of Motor Vehicles Board  
**From:** Sandra Menjivar-Suddeath, Internal Audit Division Director  
**Agenda Item:** 12.C  
**Subject:** Internal Audit Division Status

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**RECOMMENDATION**

Briefing Only – No recommendation.

**PURPOSE AND EXECUTIVE SUMMARY**

The status update provides information on current Internal Audit Division (IAD) activities. The October 2020 update contains the fiscal year (FY) 2021 Internal Audit Plan status and external coordination efforts.

**FINANCIAL IMPACT**

None.

**BACKGROUND AND DISCUSSION**

At every TxDMV Board meeting, IAD provides an update and status on current activities. For the October 2020 update, the IAD is providing information on the FY 2021 Internal Audit Plan status and external coordination efforts.

**FY 2021 Internal Audit Plan**

The IAD completed one report and began four engagements, including the required annual activities report. Each year, IAD submits its required annual report that summarizes the activities conducted by the division in the previous fiscal year (FY2020). The report is attached to the status update.

**External Coordination**

The State Auditor's Office informed the Department that it will begin a follow-up review for the management action recommendations issued to the Department by the Sunset Commission.

## Fiscal Year (FY) 2021 Audit Plan Status

| Engagement                                       | Description                                                                                                                                                                                             | Status                                                                                                                                      |
|--------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|
| <b>FY 2020 Annual Audit Activities Report</b>    | The required report summarizes the internal audit activities conducted in FY2020.                                                                                                                       | <i>Completed</i><br><br>Report attached.                                                                                                    |
| <b>Quality Assurance and Improvement Program</b> | To assess if the Internal Audit Division is meeting auditing standards and provide information on the division's performance.                                                                           | <i>Reporting</i><br><br>Anticipated Release: October 2020                                                                                   |
| <b>Employee Relations</b>                        | An audit to evaluate the employee relations process within the Department                                                                                                                               | <i>Planning</i><br><br>Anticipated Release: January 2021                                                                                    |
| <b>Procurement Measures</b>                      | An advisory service to review roles, responsibilities, and timelines within the procurement process.                                                                                                    | <i>Planning</i><br><br>Anticipated Release: January 2021                                                                                    |
| <b>FY 2021 Internal Audit Follow-Up</b>          | This engagement verifies if audit recommendations have been fully implemented. Currently, IAD is reviewing internal recommendations that were due or completed between September 1 – November 30, 2020. | <i>Fieldwork</i><br><br>The FY 2020 Third and Fourth Quarter Implementation Status Memorandum was submitted to the Board in late September. |

## External Coordination

- The State Auditor's Office informed the Department that it will be conducting a review to determine the implementation status of management action recommendations issued in the Sunset Advisory Commission report. The Department provided its self-reported implementation status on September 21, 2020.



# Texas Department *of* Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

## Fiscal Year 2020 Annual Audit Activities Report 21 – 01

Internal Audit Division  
September 2020



## Fiscal Year 2020 Annual Audit Activities, 21-01

### Executive Summary

#### BACKGROUND

On an annual basis, the Internal Audit Division (IAD) submits its internal audit report to statutorily required parties. The parties that receive a copy of this report include the State Auditor's Office, Legislative Budget Board, and the Governor's Office. In addition, the report is posted on the Texas Department of Motor Vehicles (TxDMV) website.

The report provides information on the assurance (audit) services, consulting (advisory) services, and other activities that were conducted in fiscal year 2020.

The report is developed using the guidelines set forth by the State Auditor's Office. The guidelines require the report to include information on engagements conducted, the audit plan, and external reviews.

#### RESULTS

In fiscal year (FY) 2020, IAD completed five audit and advisory service engagements. The five engagements conducted by IAD included three audit engagements, one advisory service engagement, and 1 follow-up engagement.

The FY 2021 audit plan, which was approved by the TxDMV Board on August 6, 2020. The approved audit plan included engagements for the first six month and contingency/potential engagements for the second half of the fiscal year. The plan includes division initiatives and added value services as well. These items listed in the audit plan were identified using a risk-based methodology and cover risk related to contract management and information technology risks.

Finally, this report includes information on the external reviews coordinated by the IAD as well as a brief description of actions taken by TxDMV to comply with the fraud reporting and investigation coordination requirements.

## Contents

|                                                                     |           |
|---------------------------------------------------------------------|-----------|
| <b>Compliance with Texas Government Code Section 2102.015 .....</b> | <b>1</b>  |
| Fiscal Year 2020 Internal Audit Plan Summary .....                  | 1         |
| <b>Internal Audit Plan for Fiscal Year 2020.....</b>                | <b>3</b>  |
| Internal Audit Plan Deviation.....                                  | 3         |
| <b>Consulting Services and Nonaudit Services Completed .....</b>    | <b>4</b>  |
| Consulting Services .....                                           | 4         |
| Nonaudit Services .....                                             | 4         |
| <b>External Quality Assurance Review.....</b>                       | <b>5</b>  |
| <b>Internal Audit Plan for Fiscal Year 2021.....</b>                | <b>7</b>  |
| FY 2021 Engagements.....                                            | 7         |
| Division Initiatives .....                                          | 11        |
| Added Value Services.....                                           | 11        |
| Risk Assessment Methodology .....                                   | 12        |
| Hour Analysis .....                                                 | 13        |
| SAO Related Items .....                                             | 13        |
| <b>External Audit Services Procured in Fiscal Year 2020 .....</b>   | <b>14</b> |
| <b>Reporting Suspected Fraud and Abuse.....</b>                     | <b>15</b> |
| Fraud Reporting Requirements.....                                   | 15        |
| Investigation Coordination Requirements.....                        | 15        |
| <b>Appendix 1: Report Distribution and Rating Information.....</b>  | <b>16</b> |
| Report Distribution .....                                           | 16        |

## Compliance with Texas Government Code Section 2102.015

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The Internal Auditing Act, Texas Government Code §2102.015, requires that within 30 days of approval an entity should post its audit plan and internal audit annual report on its internet web site. The Texas Department of Motor Vehicles (TxDMV) Board approved the *Fiscal Year 2021 First Six Month Internal Audit Plan* on August 6, 2020, and the TxDMV web master posted the plan to the website after that. Similarly, the annual report will be presented to the TxDMV Board on October 1, 2020, and the TxDMV web master will post the report on the TxDMV website after that date.

In addition, all public audit and follow - up reports are made available on the TxDMV website. The Internal Audit Plan, Annual Activities Report, and other audit reports can be found at <https://www.txdmv.gov/motorists/consumer-protection/internal-audit-division>.

### Fiscal Year 2020 Internal Audit Plan Summary

In fiscal year (FY) 2020, the IAD completed five audit and advisory service engagements. The five engagements conducted by IAD included three audit engagements, one advisory service engagement, and 1 follow-up engagement.

The Internal Audit Division post every non-confidential audit report on the TxDMV website. Each report includes a summary of any concerns resulting from the audit plan or annual report and actions taken to address those issues. In addition, the reports are summarized below:

- **20-03 Title and Registration Customer Support:** The audit had three objectives: to evaluate the consistency of title and registration of customer support to tax-assessor collector offices and the general public; the communication and planning processes between the Department's title and registration customer support functions; and, the design of the Department's decentralized customer support resources. IAD found TxDMV's title and registration customer support processes are at a level 2 maturity level, where similar procedures are followed by several employees, but the results may not be consistent.

The Department has established similar performance measures, comparable customer feedback mechanisms, and consistent training and resources for frontline staff in all title and registration customer service divisions and the customer service model routes customer issues that cannot be resolved at the frontline to program areas with specialized knowledge of the issue. However, each division is only responsible for the portion of the customer's issue to which their expertise applies. IAD issued two HIGH priority recommendations designed to establish ownership of issue processing and quality assurance standards for title and registration customer support across divisions.

- **20-04 Patch Management:** The audit had two objectives: to evaluate and determine the effectiveness of patch management for workstations, servers, and network devices and to assess management's design of configuration for network devices. IAD found the patch management

process is at a level 2 maturity level, where a process is repeatable but intuitive. The audit has one results and two recommendations strengthen patch management processes.

- **20-05 Law Enforcement Information Requests:** This engagement was an advisory service. See the [Consulting Services](#) for more details.
- **20-06 Payment Card Industry (PCI) Compliance – Requirement 2:** The objective of the audit was to determine whether the Department replaces vendor-supplied defaults for system passwords and other security parameters. IAD found that the process is at a level 2 maturity rating. The audit had one result and one recommendation.
- **20-00 FY 2020 Internal Audit Follow-Up:** The audit objective was to verify the implementation status of internal and external audit recommendations that were due in FY 2020. For the time period, IAD reviewed 85 internal and external audit recommendations that were due in FY 2020. The majority of the audit recommendations were implemented.

## Internal Audit Plan for Fiscal Year 2020

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The status of the FY 2020 audit plan engagements is outlined below in Table 1.

Table 1. FY 2020 Internal Audit Plan Status

| Engagement Code and Name                              | Report Date    |
|-------------------------------------------------------|----------------|
| 20-00 FY 2020 Internal Audit Follow-Up                | N/A            |
| 20-01 Annual Activities Report                        | September 2019 |
| 20-02 QAIP: Internal Assessment                       | October 2019   |
| 20-03 Title and Registration Customer Support         | January 2020   |
| 20-04 Patch Management                                | January 2020   |
| 20-05 Law Enforcement Information Requests            | September 2020 |
| 20-06 Payment Card Industry Compliance: Requirement 2 | September 2020 |
| 20-07 Internal Audit Plan                             | August 2020    |

## Internal Audit Plan Deviation

Two engagements were deferred to conduct the Law Enforcement Information Request advisory service engagement:

- **Applications Services Section Audit:** Application Services Section supports Department applications. The audit was to evaluate how the section prioritizes and balances support needs.
- **Temporary Tags Advisory Service:** TxDMV issues temporary tags for vehicles subject to Texas registration laws, but not authorized to travel on Texas highways. This advisory service was to provide strategies to further combat temporary tag fraud.

## Consulting Services and Nonaudit Services Completed

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### Consulting Services

The IAD conducted one advisory service, or consulting service, during FY 2020. The advisory service engagement related to Law Enforcement Information Requests.

### Law Enforcement Information Requests

The Office of General Counsel (OGC) requested a review of law enforcement information request, report 20-05. The advisory service objectives were to determine and communicate the following:

- Identify processes used throughout the Department to handle and process law enforcement requests.
- Review and test law enforcement information requests for compliance with applicable state laws and rules.

The Texas Department of Motor Vehicles' (TxDMV) Information Technology Services (ITSD), Enforcement (ENF), Compliance and Investigations (CID), Vehicle Title and Registration (VTR), Motor Vehicle (MVD) and Motor Carrier (MCD) divisions receive law enforcement information requests from local, county, state, and/or national external law enforcement entities. Each division responds individually to their own received requests. The requested information was provided to the OGC and no recommendations were issued in September 2020.

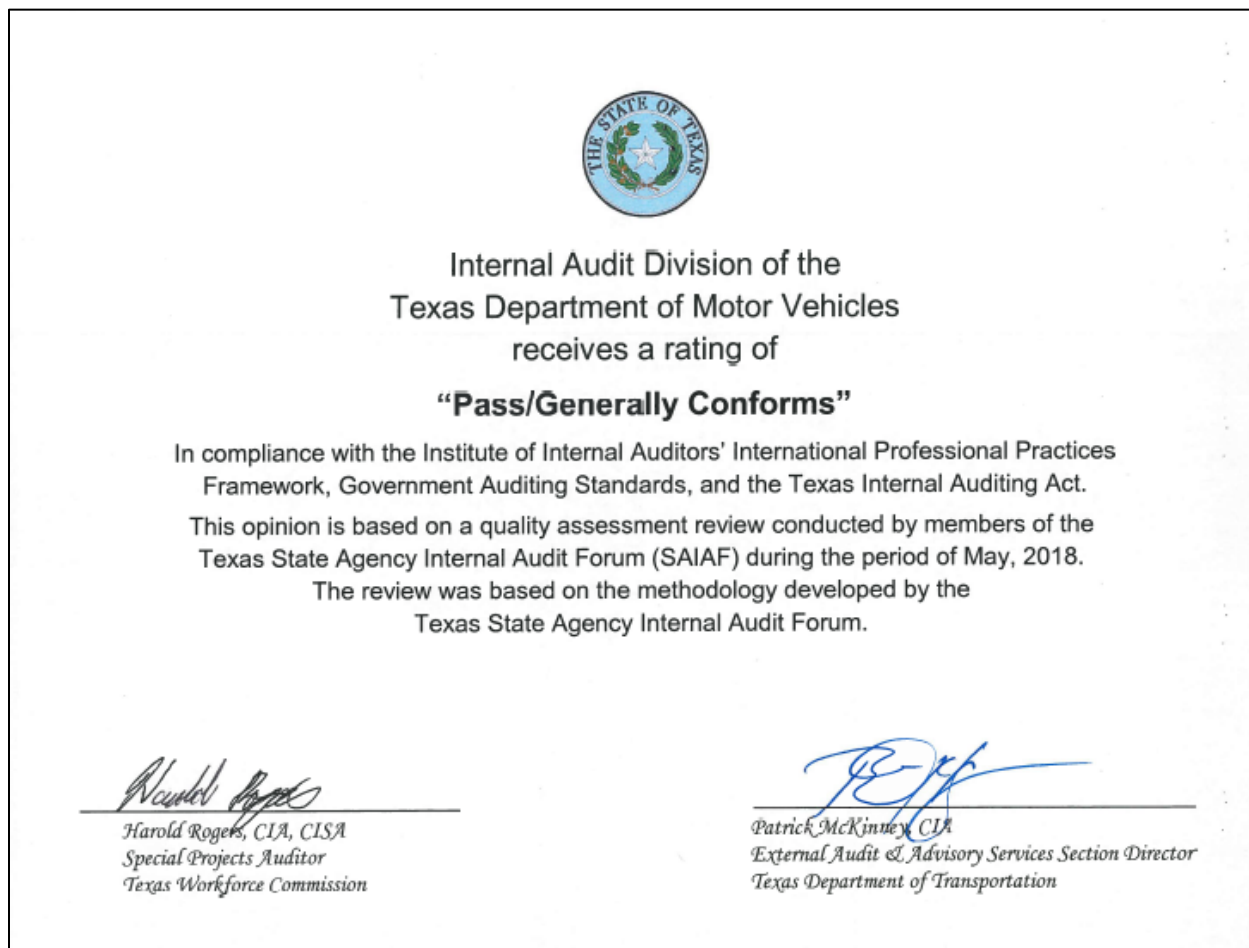
### Nonaudit Services

IAD performed nonaudit services during FY 2020. The nonaudit services include facilitating external coordination, providing advice on several agency workgroups, and participating as non-voting member in the enterprise project governance process.

## External Quality Assurance Review

IAD underwent an external quality assurance review (peer review) in May 2018. Representatives of the State Agency Internal Audit Forum performed the peer review in accordance with current peer review policies and procedures. On May 2018, IAD received a rating of “pass” out of three possible ratings: pass, pass with deficiencies, or fail (see Figure 2). IAD implemented the recommendation in 2020.

Figure 2. Peer Review Certificate



The report noted one opportunity for improvement; the opportunity and the Internal Audit Division Director's response is as follows:

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.*

Figure 3, Peer Review Opinion, is an excerpt from the TxDMV Internal Audit Division External Quality Assurance Review – May 2018.

Figure 3. Peer Review Opinion

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                |                                                                                                                                                                                                                                                |                |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <p>Texas Department of Motor Vehicles Internal Audit Division<br/>External Quality Assurance Review – May 2018</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                |                                                                                                                                                                                                                                                |                |
| <p><b>Overall Opinion</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                |                                                                                                                                                                                                                                                |                |
| <p>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 <b>"Pass/Generally Conforms"</b> and is in compliance with the Institute of Internal Auditors (IIA) <i>International Standards for the Professional Practice of Internal Auditing</i> and <i>Code of Ethics</i>, the United States Government Accountability Office (GAO) <i>Government Auditing Standards</i>, 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.</p> |                |                                                                                                                                                                                                                                                |                |
| <p>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.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                |                |                                                                                                                                                                                                                                                |                |
| <p>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.</p>                                                                                                                                                                                                                                                                                                                                                                                                                |                |                                                                                                                                                                                                                                                |                |
| <p>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.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                |                                                                                                                                                                                                                                                |                |
| <p><b>Acknowledgements</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |                                                                                                                                                                                                                                                |                |
| <p>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.</p>                                                                                                                                                                                                                                                                                                                                                                                     |                |                                                                                                                                                                                                                                                |                |
| <br>Harold Rogers, CIA, CISA<br>Special Projects Auditor<br>Texas Workforce Commission<br>SAIAF Peer Review Team<br>Leader                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 6/1/18<br>Date | <br>Patrick McKinney, CIA<br>External Audit & Advisory Services<br>Section Director<br>Texas Department of Transportation<br>SAIAF Peer Review Team Member | 6/1/18<br>Date |



## Internal Audit Plan for Fiscal Year 2021

The TxDMV Board approved the Fiscal Year 2021 First Half Internal Audit Plan on August 6, 2020. The audit plan included nine engagements for the first half of the fiscal year, five potential engagements for the second half of the fiscal year, division initiatives, and added value services. Table 2 and 3 provide information on the engagements.

### FY 2021 Engagements

Table 2. FY 2021 Engagements – First Half

| Engagement Area             | Hours | Strategic Goal(s)                 | Impacted Division(s)                            | Background                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|-----------------------------|-------|-----------------------------------|-------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Telecommuting</b>        | 700   | Optimized Services and Innovation | Department-wide<br><br>Human Resources Division | Telecommuting, or remote work, has become the standard in the COVID-19 environment. Telecommuting must be set up properly to be effective for the organization and employees. Set up includes processes for monitoring employee productivity, program usage, and whether program objectives were properly articulated. This engagement ties to COSO elements of Control Environment, Risk Assessment, Control Activities, and Monitoring.                                             |
| <b>Employee Relations</b>   | 680   | Performance Driven                | Human Resources Division                        | Employee relations involves creating and maintaining a positive environment between the organization, its managers, and employees, where employees feel engaged and are accountable for their work. When employees may not be performing at expected levels, processes should exist to help management and the employee achieve output expectations. This engagement ties to COSO elements of Control Environment, Control Activities, Information and Communication, and Monitoring. |
| <b>Procurement Measures</b> | 750   | Optimized Services and Innovation | Finance & Administrative Services Division      | Procurements, or purchases, conducted by the Department range from consumable goods to complex information technology products. Regardless of the procurement, timelines, roles, and measures should be                                                                                                                                                                                                                                                                               |

| Engagement Area                                   | Hours | Strategic Goal(s)                                                                   | Impacted Division(s)                                                                                                                 | Background                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|---------------------------------------------------|-------|-------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                   |       |                                                                                     |                                                                                                                                      | established to measure the effectiveness and performance of the procurement function. This engagement ties to COSO elements of Control Environment, Risk Assessment, Control Activities, and Monitoring.                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>License Plate Manufacturing and Monitoring</b> | 850   | Optimized Services and Innovation<br><br>Customer Centric<br><br>Performance Driven | Finance & Administrative Services Division<br><br>Vehicle Titles & Registration Division<br><br>Compliance & Investigations Division | The Department contracts with the Texas Department of Criminal Justice (TDCJ) to manufacture license plates, disabled placards, and other items. The Department's contract outlines the minimum requirements of goods produced and responsibilities between the departments. The goods are produced at the Wynne Unit, a facility owned and operated by the TDCJ. TxDMV has staff at the Wynne Unit to oversee the manufacturing, storage, and disbursement of manufactured goods. The engagement will be coordinated with the TDCJ's internal audit division. This engagement ties to COSO elements of Risk Assessment, Control Activities, and Monitoring. |
| <b>Information Technology Change Management</b>   | N/A   | Performance Driven                                                                  | Information Technology Services Division                                                                                             | The initial engagement was selected using the Cybersecurity roadmap and will co-sourced. Change management is the process that ensures all changes are processed in a controlled manner, including standard changes and emergency maintenance relating to information technology. Changes include, but are not limited to interruption of service, implementation of new functionality, and the repair and/or removal of existing functionality. This engagement is contingent on vendor availability. This engagement ties to COSO elements of Control Activities and Monitoring.                                                                           |

| Engagement Area                                                        | Hours | Strategic Goal(s)                                                                   | Impacted Division(s)    | Background                                                                                                                                                                                                                                                                                                                                                              |
|------------------------------------------------------------------------|-------|-------------------------------------------------------------------------------------|-------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Annual Audit Activities</b>                                         | 35    | Performance Driven                                                                  | Department-wide         | A statutorily required review that summarizes internal activities conducted in FY 2020. The State Auditor's Office prescribes the report format and information.                                                                                                                                                                                                        |
| <b>Quality Assurance and Improvement Program – Internal Assessment</b> | 75    | Performance Driven                                                                  | Internal Audit Division | An internal assessment to determine compliance with audit standards and provide information on IAD's performance. IAD's performance includes an evaluation of Key Performance Indicators and Capability Model.                                                                                                                                                          |
| <b>Quality Assurance and Improvement Program – External Assessment</b> | 50    | Performance Driven                                                                  | Internal Audit Division | Every three years, the division is required to obtain an External Assessment (Peer Review) on whether the internal audit function complies with the applicable professional auditing standards in all material aspects. The division produces a self-assessment report and the report is used to obtain information on how the IAD meets applicable auditing standards. |
| <b>Audit Recommendation Implementation Status Follow-Up</b>            | 125   | Optimized Services and Innovation<br><br>Customer Centric<br><br>Performance Driven | Department-wide         | An engagement to verify if outstanding audit recommendations have been fully implemented. Quarterly reporting for internal audit recommendations will be done.                                                                                                                                                                                                          |

Table 3. FY 2021 Engagements – Potential Second Half and Contingency

| Engagement Area                | Strategic Goal(s)                          | Impacted Division(s)                 | Preliminary Engagement Information                                                                                                                                                                                                                       |
|--------------------------------|--------------------------------------------|--------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Strategic Communication</b> | Customer Centric<br><br>Performance Driven | Government & Strategic Communication | The Department provides written communications, in various forms, to customers and employees with key information that impact the operations internally and externally and to employees. With the need to communicate quickly and effectively, processes |

| Engagement Area                        | Strategic Goal(s)                                           | Impacted Division(s)                                                        | Preliminary Engagement Information                                                                                                                                                                                                                                                                                                                                                              |
|----------------------------------------|-------------------------------------------------------------|-----------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                        |                                                             |                                                                             | should exist to ensure effective communication. This engagement ties to COSO elements of Control Environment and Information and Communication.                                                                                                                                                                                                                                                 |
| <b>Payment Card Industry (PCI)</b>     | Performance Driven                                          | Information Technology Services Division                                    | The Department accepts credit cards and is required to meet PCI standards. This potential audit would evaluate PCI compliance with one of the 12 requirements. This audit was identified as an area of review in the Cybersecurity roadmap. This engagement ties to COSO elements of Risk Assessment, Control Activities, and Monitoring.                                                       |
| <b>Staff Retention and Recruitment</b> | Optimized Services and Innovation<br><br>Performance Driven | Human Resources Division                                                    | Staff retention and recruitment begins with processes and policies that help divisions identify the talent needed to achieve organizational goals. It also includes those divisions using available policies and processes to keep employees. This engagement ties to COSO elements of Control Environment, Risk Assessment, Control Activities, Information and Communication, and Monitoring. |
| <b>Strategic Purchasing</b>            | Optimized Services and Innovation<br><br>Performance Driven | Finance & Administrative Services Division                                  | Purchasing is a key component to ensure the Department's needs and objectives are met. Without a purchasing strategy, needs and objectives may not be met. This includes key purchases, such as technology purchases. This engagement ties to COSO elements of Control Environment, Risk Assessment, Control Activities, Information and Communication, and Monitoring.                         |
| <b>Contract Development</b>            | Optimized Services and Innovation                           | Finance & Administrative Services Division<br><br>Office of General Counsel | The state continues to evolve its procurement and contract rules and regulation and has begun focusing more on the development of contracts. This engagement would review processes that exist to develop contracts and amend contracts. This engagement ties to COSO elements of Control Environment, Risk Assessment, Control Activities, Information and Communication, and Monitoring.      |
| <b>Placeholder</b>                     | TBD                                                         | TBD                                                                         | In case a risk emerges that requires immediate review, this engagement will be used to substitute one of the risk-based engagements. This engagement will only be conducted in consultation with the                                                                                                                                                                                            |

| Engagement Area | Strategic Goal(s) | Impacted Division(s) | Preliminary Engagement Information                               |
|-----------------|-------------------|----------------------|------------------------------------------------------------------|
|                 |                   |                      | Finance & Audit Committee Chair and members and the Board Chair. |

## Division Initiatives

In addition to audit engagements, IAD conducts several divisional initiatives to help the division provide more risk coverage. In the first half of the fiscal year, IAD will be conducting the following division initiatives:

- **Key Risk Indicators**: IAD will be finalizing processes to conduct continuous risk evaluation for the following items:
  - *Fraud Indicators*: IAD will monitor TxDMV leave balances and payment information.
  - *Regional Service Center (RSC) Transactions*: IAD will be monitoring RSC transactions to identify potential fraud or inefficiencies.
  - *Procurement and Contract Management Monitoring*: IAD will monitor procurement and contracts to identify potential high-risk procurements that might warrant additional review.
- **TeamMate Transition**: IAD will transition to TeamMate +, a web-based, audit software at the beginning of the fiscal year. Staff will receive training and provide support to the Department staff.
- **Staff Development Plans and Training**: IAD staff take training and create development plans to obtain required knowledge, skills, and abilities.
- **Dashboard Report Development**: IAD will develop an interactive dashboard style report to provide more focused information on results.
- **Board Communication**: IAD will continue refining dashboards and other items to provide a snapshot of the Department's risk management and governance information.

## Added Value Services

IAD also provides added value services throughout the years. These added value services include fraud, waste, and abuse items, external audit coordination, adhoc advisory, workgroup participation, and department training.

## Risk Assessment Methodology

The audit plan was developed using a risk-based methodology, which incorporated input from TxDMV board members, executive management, division management, and risks identified by audit staff through previous fiscal year engagements and observations. IAD also analyzed TxDMV information and reviewed internal audit and industry publications to identify and rank potential audit topics by risk. In addition, IAD collected information on the potential controls that were in place to mitigate the identified risks.

Each risk was reviewed using approved Department risk guidance that included 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
- Control design strength

247 Department risks were identified through the risk assessment. Each risk identified was scored using the above factors to determine the engagements for the first half of fiscal year 2021 and contingency engagements.

The risk scores ranged from zero, which is the lowest risk score, to ten, which is the highest risk score. Table 4 provides information on the risk scores for each item.

Table 4. Risk Scores

| Very Low Risk | Low Risk  | Medium Risk | High Risk | Very High Risk |
|---------------|-----------|-------------|-----------|----------------|
| 0 - 1.5       | 1.5 – 2.5 | 2.5 – 3.5   | 3.5 – 4.5 | 4.5 +          |

## Themes

For the FY 2021, the Internal Audit Division introduced “themes” to help organize and categorize the internal audit plan. The themes include: Human Resources, Transformation, Information Technology, and Procurement & Supply Chain Management. In addition, the themes were significantly impacted by COVID-19:

- **Transformation:** Areas where new solutions are needed to address the post COVID-19 environment, which poses difficult problems that significantly disrupt current operations.
- **Human Resources:** Areas within human resources that play a critical role in ensuring our organization has a competitive advantage in hiring and retaining staff, as well as improving morale and coaching staff.
- **Information Technology:** Areas where the spread of new technologies, data collection methodologies, and automation increases risks to our organization and customers.
- **Procurement & Supply Chain Management:** Areas in procurement and supply chain that are critical to ensure costs are being contained and services/goods are provided on time and as needed.

## Hour Analysis

Hours were calculated using historical data and auditor’s judgement. Hours are an estimate and could be adjusted. IAD anticipates about 1700 hours available for required and risk-based engagements for the second half of the fiscal year and 3625 hours available for the first half of the fiscal year.

## SAO Related Items

The FY 2021 Internal Audit plan includes items to monitor contract management and technology risks. For contract management, the plan includes following up on previously issued procurement and contract management recommendations and conducting engagement on License Plate Manufacturing and Monitoring and on Procurement Measures. IAD’s Key Risk Indicators initiative will also review high risk procurement and contracts.

IAD will be evaluating technology risk in the Department through its engagements in IT Change Management.

## External Audit Services Procured in Fiscal Year 2020

---

TxDMV received three external audits in FY 2020. The list below provides information on the external audits received:

- **Texas Workforce Commission** - Civil Rights Division Personnel Policies and Procedures Review.
- **Texas Commission on Law Enforcement** - Training Program Evaluation Report (TPER).
- **State Office of Risk Management** – Onsite Consultation at Texas Department of Motor Vehicles: Austin Regional Service Center.



## Reporting Suspected Fraud and Abuse

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### Fraud Reporting Requirements

To comply with fraud reporting requirements in the General Appropriations Act (86th Legislature, Article IX-37, Section 7.09), the TxDMV has taken the following actions:

- Provides information on the home page of the TxDMV website ([www.txdmv.gov](http://www.txdmv.gov)) on how to report suspected fraud, waste, and abuse directly to the State Auditor's Office (SAO)
- Includes in the agency's Human Resources Manual information on how to report suspected fraud involving state funds to the SAO. Employees are directed by agency policy to report any suspected incidents of fraud to their manager, the Internal Audit Director, and the SAO
- Provides a link on the Internal Audit Division's intranet page to the SAO fraud hotline website.
- Provides information on the Internal Audit Division's internet page about reporting fraud.

The Department formed the Compliance and Investigations Division (CID) to handle external fraud and have an active working group that review policies related to anti-fraud, waste, and abuse.

### Investigation Coordination Requirements

The IAD coordinates compliance with Texas Government Code, Section 321.022 (Coordination of Investigations) by submitting a quarterly report to the State Auditor's Office on the disposition of allegations received.

The IAD also evaluates all instances of fraud, waste, or abuse reported to the IAD to determine appropriate action. If the Internal Audit Director has reasonable cause to believe that fraudulent or unlawful conduct has occurred in relation to the operation of the TxDMV, the Director will work with appropriate parties and notify the SAO.

## Appendix 1: Report Distribution and Rating Information

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### Report Distribution

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, and the State Auditor's Office. The report will also be distributed to the executive management team.

## **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 Legitimizing

3.2.4.1. Promotion of the organization to the external stakeholders, including the Texas Legislature, based on the vision of the agency.

3.2.4.2. Ensuring the interests of a broad network of stakeholders are represented.

3.2.4.3. Board members lend their positional, professional and personal credibility to the organization through their position on the board.

### 3.2.5. Self-reflection and Assessment

3.2.5.1. Regular reviews of the functions and effectiveness of the Board itself.

3.2.5.2. Assessing the level of trust within the Board and the effectiveness of the group processes.

## 3.3. Board Governance Investment

Because poor governance costs more than learning to govern well, the Board shall invest in its governance capacity. Accordingly:

3.3.1. Board skills, methods, and supports shall be sufficient to ensure governing with excellence.

- 3.3.1.1. Training and retraining shall be used liberally to orient new members, as well as maintain and increase existing member skills and understanding.
  - 3.3.1.2. Outside monitoring assistance shall be arranged so that the board can exercise confident control over agency performance. This includes, but is not limited to, financial audits.
  - 3.3.1.3. Outreach mechanisms shall be used as needed to ensure the Board's ability to listen to stakeholder viewpoints and values.
  - 3.3.1.4. Other activities as needed to ensure the Board's ability to fulfill its ethical and legal obligations and to represent and link to the motoring public and the various motor vehicle industries.
- 3.3.2. The Board shall establish its cost of governance and it will be integrated into strategic planning and the agency's annual budgeting process.

### **3.4. Practice Discipline and Assess Performance**

The Board shall ensure the integrity of the board's process by practicing discipline in Board behavior and continuously working to improve its performance. Accordingly:

- 3.4.1. The assigned result is that the Board operates consistently with its own rules and those legitimately imposed on it from outside the organization.
  - 3.4.1.1. Meeting discussion content shall consist solely of issues that clearly belong to the Board to decide or to monitor according to policy, rule and law. Meeting discussion shall be focused on performance targets, performance boundaries, action on items of Board authority such as conduct of administrative hearings, proposal, discussion and approval of administrative rule-making and discussion and approval of all strategic planning and fiscal matters of the agency.
  - 3.4.1.2. Board discussion during meetings shall be limited to topics posted on the agenda.
  - 3.4.1.3. Adequate time shall be given for deliberation which shall be respectful, brief, and to the point.
- 3.4.2. The Board shall strengthen its governing capacity by periodically assessing its own performance with respect to its governance model. Possible areas of assessment include, but are not limited to, the following:
  - 3.4.2.1. Are we clear and in agreement about mission and purpose?

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- 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.

| 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:<br>A. Online<br>B. Mail<br>C. In Person | A. 15%<br>B. 5%<br>C. 80% | A. 16%<br>B. 5%<br>C. 79% |        | VTR   |
|                    |                                  | 25 | Total dealer title applications:<br>A. Through Webdealer<br>B. Tax Office                               | Baseline in development   | A. 5%<br>B. 95%           |        | VTR   |

| GOAL                              | STRATEGY                                                        | #  | MEASURE                                                                                                                                                | Baseline                                                   | Target                                                                                         | Actual             | OWNER     |
|-----------------------------------|-----------------------------------------------------------------|----|--------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------|------------------------------------------------------------------------------------------------|--------------------|-----------|
| Optimized Services and Innovation |                                                                 | 26 | Percent of total lien titles issued:<br>A. Electronic Lien Title<br>B. Standard Lien Title                                                             | A. 16%<br>B. 84%                                           | A. 20%<br>B. 80%                                                                               |                    | VTR       |
|                                   |                                                                 | 27 | Percent of total OS/OW permits:<br>A. Online (self-issued)<br>B. Online (MCD-issued)<br>C. Phone<br>D. Mail<br>E. Fax                                  | A. 57.47%<br>B. 23.03%<br>C. 11.33%<br>D. 1.76%<br>E. 6.4% | A. 58% or greater<br>B. 25% or greater<br>C. 10% or less<br>D. 1.7% or less<br>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       |
|                                   | 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 EPMD project management standards based upon internal quality assurance reviews                             | Baseline in development                                    | 100%                                                                                           |                    | EPMD      |
|                                   | 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<br>(SEE 2012)                                         | 3.65                                                                                           | 3.60<br>(SEE 2013) | HR        |
|                                   |                                                                 | 38 | Increase in the overall SEE score                                                                                                                      | 337<br>(SEE 2012)                                          | 360                                                                                            | 351<br>(SEE 2013)  | HR        |
| Focus on the internal customer    | Focus on the internal customer                                  | 39 | Percent of favorable responses from customer satisfaction surveys                                                                                      | Baseline in development                                    | 90%                                                                                            |                    | EPMD      |
|                                   |                                                                 | 40 | Annual agency voluntary turnover rate                                                                                                                  | 6.5%<br>(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<br>Completed - 735        | Available - 31<br>Completed - 814                                                              |                    | VTR       |

| GOAL                                                                                                                                                                                                                                                                                                                                                                                                                  | STRATEGY                   | #        | MEASURE                                                                                                            | Baseline                                                                     | Target                                                                 | Actual | OWNER           |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|----------|--------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------|------------------------------------------------------------------------|--------|-----------------|
| Customer Center                                                                                                                                                                                                                                                                                                                                                                                                       | Excellent Service Delivery | 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   |
|                                                                                                                                                                                                                                                                                                                                                                                                                       |                            | 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<br>Permits - 2.08 minutes<br>CFS - 54.38 seconds | Credentialing - 1.5 minutes<br>Permits - 2 minutes<br>CFS - 50 seconds |        | MCD             |
|                                                                                                                                                                                                                                                                                                                                                                                                                       |                            | 53       | Abandoned call rate                                                                                                | Credentialing - 7%<br>Permits - 6.42%<br>CFS - 5.63%                         | Credentialing - 6%<br>Permits - 5%<br>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-Transparency, Efficiency, EXcellence, Accountability, and Stakeholders.                                                                                                                                                                                                                                                                  |                            |          |                                                                                                                    |                                                                              |                                                                        |        |                 |