Board Meeting Agenda Book

Texas Department *of* Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

November 3, 2016

Full Board Meeting, 8:00 a. m.

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

AGENDA
BOARD MEETING
TEXAS DEPARTMENT OF MOTOR VEHICLES
4000 JACKSON AVE., BUILDING 1, LONE STAR ROOM
AUSTIN, TEXAS 78731
THURSDAY, NOVEMBER 3, 2016
8:00 A.M.

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

1. Roll Call and Establishment of Quorum

PAGE

2. Chair's Reports - Chairman Raymond Palacios
4 A. Introduction of New Board Member Kate Hardy
B. Committee Member Appointments
C. Appointment of a Member to Act in the Absence of the Chair and the Vice Chair Pursuant to Transportation Code, §1001.023(b)(9)
5 D. Proposed 2017 Board Meeting Schedule

3. Executive Director's Reports - Whitney Brewster
6 A. Awards, Recognition of Years of Service, and Announcements
7 B. Performance Measures
9 C. Operational Plans
- Summary of FY 2016 Operational Plan
- Overview of FY 2017 Operational Plan
D. FY 2017 Interagency Agreement between TxDOT and TxDMV Update

4. Public Comment

<u>ACTION AND COMMITTEE ITEMS</u>

5. Vice Chair Election

6. Legislative and Public Affairs - Committee Chair Treviño
11 A. Agency Process (BRIEFING ONLY)
B. 85th Legislature - Recommended Legislation Pursuant to
15 Transportation Code, §1001.025

7. Specialty Plate Design - Jeremiah Kuntz
22 Texas Tough Black (New Vendor Plate)

PAGE

24 **8. Finance and Audit**

A. Internal Audit Charter Recommendation - Sandra Menjivar-Suddeath

34 B. Internal Audit Update- Sandra Menjivar -Suddeath (BRIEFING ONLY)
- Annual Internal Audit Report for FY 2016, TxDMV 17-01

51 C. Approval to Modify the November 14, 2013, Resolution Adopting Contract Approval Procedures - Linda M. Flores

58 D. Quarterly Financial Report - Linda M. Flores and Renita Bankhead (BRIEFING ONLY)

68 E. TxDMV Fund Update (BRIEFING ONLY)

9. Projects and Operations

70 A. Facilities Update - Linda M. Flores (BRIEFING ONLY)

78 B. Registration and Titling System (RTS) Refactoring Update - Eric Obermier (BRIEFING ONLY)

95 C. Enterprise Projects Update - Judy Sandberg (BRIEFING ONLY)

CONTESTED CASE

10. Franchised Dealer's Complaint against Distributor under Occupations Code, §§2301.467, 2301.468, and 2301.478 - Daniel Avitia and Michelle Lingo
MVD Docket No. 14-0006.LIC; SOAH Docket No. 608-14-1208.LIC

107 *New World Car Nissan, Inc., d/b/a World Car Hyundai, World Car Nissan; and New World Car Imports San Antonio, Inc., d/b/a World Car Hyundai, Complainants v. Hyundai Motor America, Respondent*

RULES - ADOPTIONS

11. Title 43, Texas Administrative Code, Chapter 217, Vehicle Titles and Registration - Jeremiah Kuntz and David D. Duncan

297 • Amendments, §217.9, Bonded Titles (Proposal Published September 23, 2016 - 41 Tex. Reg. 7467)

329 • Corrections (Non-Substantive Amendments), §§217.3, 217.28, 217.40, 217.42, 217.45, 217.47, 217.52, 217.54, 217.56, 217.82, 217.84, 217.86, 217.103, and 217.163 (Proposal Published September 23, 2016 - 41 Tex. Reg. 7444)

450 • New, §217.57, Report of Alternatively Fueled Vehicles (Proposal Published September 23, 2016 - 41 Tex. Reg. 7469)

RULES - PROPOSALS

12. Title 43, Texas Administrative Code, Chapter 218, Motor Carriers

458 A. Household Goods Rules Advisory Committee (HGRAC) Recommendation - Board Member Walker, Committee Chair Jim French, and Committee Member Bill Harbeson

B. Amendments, §§218.2, 218.13, 218.31, 218.32, 218.52, 218.53, 218.56, 218.59, 218.60, and 218.61 - Bill Harbeson and Jimmy Archer

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.

- **Section 551.076** - Security devices or security audits:
  - the deployment, or specific occasions for implementation, of security personnel or devices; or
  - a security audit.

14. ACTION ITEMS FROM EXECUTIVE SESSION

15. ADJOURNMENT

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

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

Any individual with a disability who plans to attend this meeting and requires auxiliary aids or services should notify the department as far in advance as possible, but no less than two days in advance, so that appropriate arrangements can be made. Contact Stacy Steenken by telephone at (512) 302-2380.

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

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

Texas Department *of* Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

September 8, 2016

Board Members
Texas Department of Motor Vehicles

Fellow Members of the Board,

Based on my authority under Texas Transportation Code §1001.023(b)(8) to create subcommittees of the Board and appoint members to such committees, I hereby appoint the chairs and members of board committees as listed below. I appreciate your willingness to serve in this capacity, and your dedicated service on the Board.

Finance and Audit Committee
Luanne Caraway, Chair
Brett Graham
Kate Hardy
Johnny Walker

Projects and Operations Committee
Blake Ingram, Chair
Barney Barnwell
Luanne Caraway
Johnny Walker

Legislative and Public Affairs Committee
Memo Trevino, Chair
Barney Barnwell
Blake Ingram
Gary Painter

Sincerely,

Raymond Palacios
Chair

Texas Department *of* Motor Vehicles

2017 Board Meeting HOLD DATES are highlighted yellow

Note: These are hold dates in case there will be a meeting in the month; start time is 8:00 a.m.; meetings are at the call of the Chairman; when we know for certain there will be a meeting we will confirm and provide as much notice as possible.

January

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September

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October

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31						

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

DATE: November 3, 2016

Action Requested: BRIEFING

To: **Texas Department of Motor Vehicles Board**
From: **Sharon Brewer, Human Resources Division**
Agenda Item: ***3.A.*** **Executive Director's Reports – Recognition of Years of Service**

RECOMMENDATION

Board Chair and Members offer congratulations to employees reaching a state service milestone.

PURPOSE AND EXECUTIVE SUMMARY

Beginning November 3, 2016, the Executive Director will announce the name of individuals who retired from the agency and will recognize employees who have reached a state service milestone of 20 years and every five-year increment thereafter.

Recognition at the November 3, 2016 Board meeting will be for retirements and state service awards for the months of September and October.

Employees reaching a state service milestone of 20 years are Mary (Esther) Acosta in the Motor Vehicle Division, Carol Birdow in the Vehicle Titles and Registration Division, and Bryan Wilson Director of ABTPA.

Employees reaching a state service milestone of 25 years are Diane Chavez in the Enforcement Division, Tonie Knight in the Motor Vehicle Division, Anne Lehnick in the Enforcement Division, and Terry Stabeno in the Consumer Relations Division.

Employees reaching a state service milestone of 35 years are Barbara Johnston in the Vehicle Titles and Registration Division and Jeff Kushaney in the Finance and Administrative Services Division.

Finally, the following individuals recently retired from the agency are Irene Perez, Rhonda Snow, and Allison Burgess.

Texas Department of Motor Vehicles
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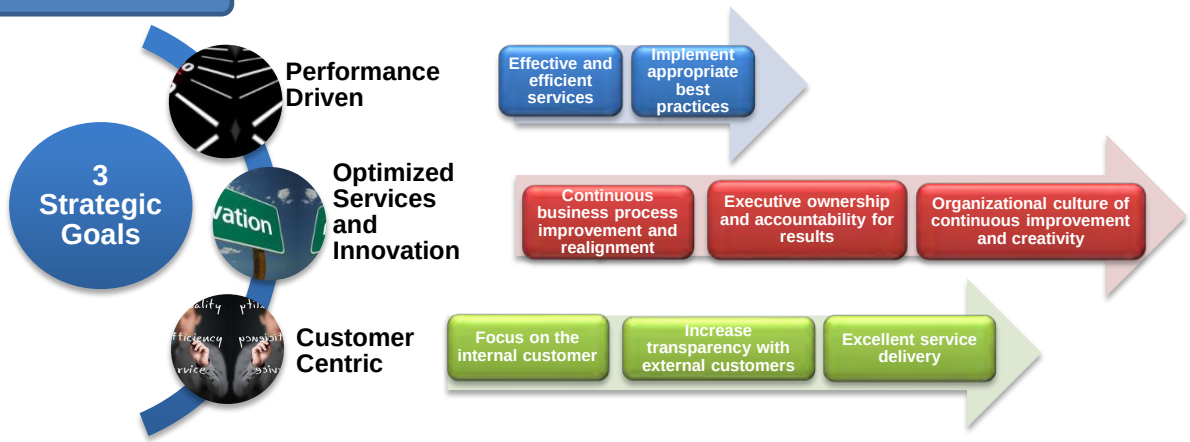
Key Performance Indicator Dashboard 3rd Quarter 2016

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.

Strategic Goals and Objectives:



Displaying **3rd Q 2015** to **3rd Q 2016**. To display different periods, use the slider below.

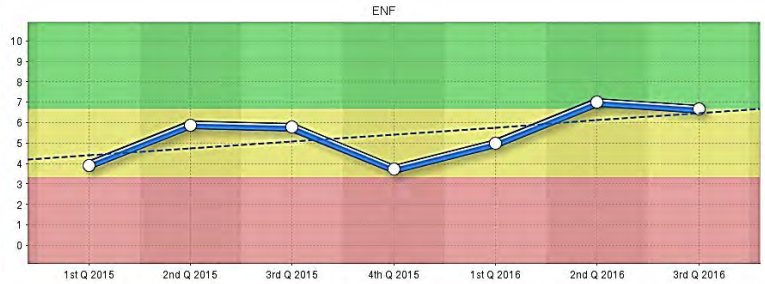
Series Color	Scorecard Object	Organization	Series	3rd Q 2015	4th Q 2015	1st Q 2016	2nd Q 2016	3rd Q 2016
	Performance Driven	TxDMV Agency-wide	Score	5.71	5.12	5.4	6.39	5.94
	Optimized Services and Innovation	TxDMV Agency-wide	Score	3.6	3.67	3.66	3.66	3.77
	Customer Centric	TxDMV Agency-wide	Score	3.76	3.52	3.82	4.42	4.57

Balanced scorecard scale 1-10 for the three strategic goals

VALUES • Transparency • Efficiency • Excellence • Accountability • Stakeholders

Overall Key Performance Indicator Scores by Division 1st Q 2015 – 3rd Q 2016

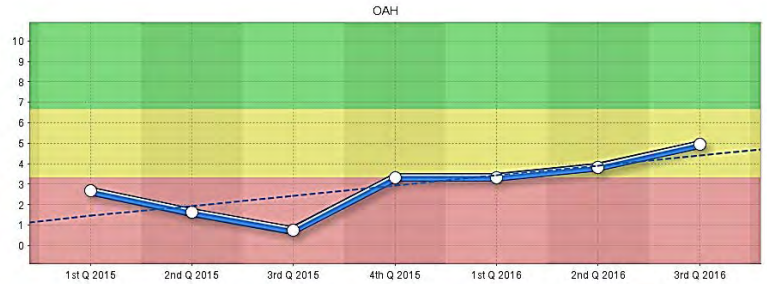
Enforcement



Trendline Over Time

Series Color	Scorecard Object	Organization	Series	1st Q 2015	2nd Q 2015	3rd Q 2015	4th Q 2015	1st Q 2016	2nd Q 2016	3rd Q 2016
	ENF	ENF	Score	3.92	5.89	5.77	3.72	4.98	6.99	6.66

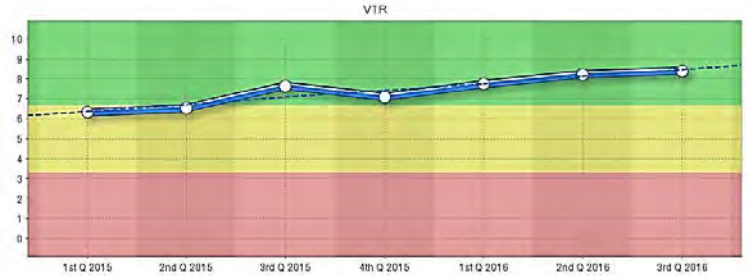
Office of Administrative Hearings



Trendline Over Time

Series Color	Scorecard Object	Organization	Series	1st Q 2015	2nd Q 2015	3rd Q 2015	4th Q 2015	1st Q 2016	2nd Q 2016	3rd Q 2016
	OAH	OAH	Score	2.67	1.63	0.74	3.33	3.33	3.83	4.94

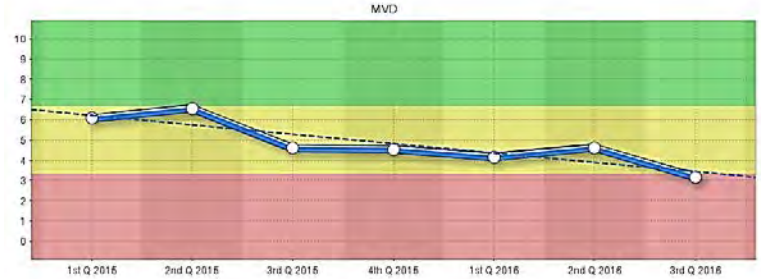
Vehicle Titles and Registration



Trendline Over Time

Series Color	Scorecard Object	Organization	Series	1st Q 2015	2nd Q 2015	3rd Q 2015	4th Q 2015	1st Q 2016	2nd Q 2016	3rd Q 2016
	VTR	VTR	Score	6.33	6.54	7.65	7.09	7.74	8.23	8.41

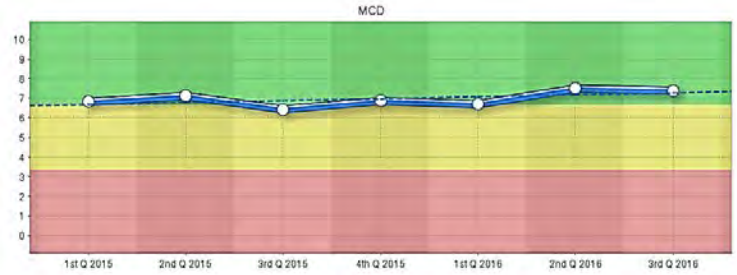
Motor Vehicle



Trendline Over Time

Series Color	Scorecard Object	Organization	Series	1st Q 2015	2nd Q 2015	3rd Q 2015	4th Q 2015	1st Q 2016	2nd Q 2016	3rd Q 2016
	MVD	MVD	Score	6.07	6.56	4.6	4.55	4.16	4.62	3.17

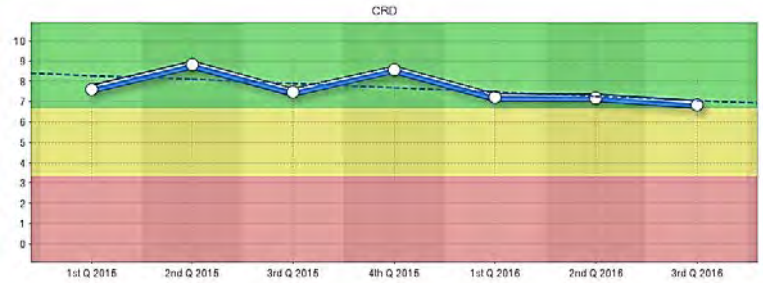
Motor Carrier



Trendline Over Time

Series Color	Scorecard Object	Organization	Series	1st Q 2015	2nd Q 2015	3rd Q 2015	4th Q 2015	1st Q 2016	2nd Q 2016	3rd Q 2016
	MCD	MCD	Score	6.82	7.11	6.44	6.87	6.7	7.5	7.39

Consumer Relations



Trendline Over Time

Series Color	Scorecard Object	Organization	Series	1st Q 2015	2nd Q 2015	3rd Q 2015	4th Q 2015	1st Q 2016	2nd Q 2016	3rd Q 2016
	CRD	CRD	Score	7.6	8.8	7.46	8.56	7.21	7.18	6.84

Texas Department of Motor Vehicles
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DATE: November 3, 2016

Action Requested: BRIEFING

To: **Texas Department of Motor Vehicles Board (TxDMV)**
From: **Whitney Brewster, Executive Director**
Agenda Item: 3.C. Operational Plan Updates for FY 16 and FY 17

PURPOSE AND EXECUTIVE SUMMARY

To update the Board on status of agency's Operational Plans by summarizing FY 16 and providing an overview of FY 17.
FY 16: TxDMV divisions initially proposed 50 initiatives of which 49 were summarized as follows:

Internal initiative project focus - 28
External initiative project focus – 13
Internal and external initiative project focus – 8
Total = 49

Single-year initiatives – 30
Multi-year initiatives – 18
Transitioned from single-year to multi-year – 1
Total = 49

Single-year initiatives completed – 20
Single-year initiatives continuing – 10
Single-year initiatives cancelled - 1
Multi-year initiatives completed – 4
Multi-year initiatives continuing - 14
Total = 49

Summarizing FY 16, approximately 50% (24 out of 49) initiatives were fully completed and 50% are carrying over into FY 17.

A sampling of highlights from completed FY 16 projects include:

- Enforcement division developed and delivered training for Household Goods movers
- Enterprise Project Management Office division documented its standard operating procedures
- Finance and Administrative Services division established the TxDMV Fund
- Government and Strategic Communications division catalogued the agency's publications and compiled a list of required reports
- Information Technology Services division implemented RemedyForce change management software, system uptime reporting, and video teleconferencing
- Motor Carrier division implemented automated restriction "violation" notification to permit holders through the Texas Permitting and Routing Optimization System (TxPROS) which eliminated a paper-based process and also implemented many upgrades and improvements to the Motor Carrier Credentialing System (MCCS)
- Motor Vehicle division updated its salvage rules and streamlined the criminal fitness review for licensees
- Office of Administrative Hearings streamlined its decision writing process and created an FAQ section on the agency's web site
- Vehicle Titling and Registration division updated its standard operating procedures for the Regional Service Centers and updated numerous registration forms

FY 17 Operational Plans include the new option of two or more divisions collaborating and can be summarized as follows:

Approximately 34 initiatives have been proposed

Single division initiatives - 25
Two or more division initiatives – 9
Total = 34

Internal initiative project focus – 18
External initiative project focus – 11
Internal and external initiative project focus – 5
Total = 34

Single-year initiatives – 15
Multi-year initiatives – 19
Total = 34

FINANCIAL IMPACT

Has not been determined.

BACKGROUND AND DISCUSSION

Operational Plans were begun in FY 2015 and this marks the third year of use. Operational Plans have assisted divisions in focusing on value added projects called initiatives for both their external customers and themselves. Initiatives are actions undertaken in addition to a division's regular duties as part of the agency's continuing efforts to improve and grow.

Operational Plan initiative progress is tracked by both the Office of Innovation and Strategy (OIS) and the Executive and Deputy Executive Directors during each division director's monthly meeting. Operational Plan documents are prepared by OIS. Soft copies of both documents are available for your review and will be placed on the agency's web site.

Texas Department of Motor Vehicles
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DATE: November 3, 2016

Action Requested: APPROVAL

To: **Texas Department of Motor Vehicles Board (TxDMV)**
From: **Caroline Love, Director, Government and Strategic Communications Division**
Agenda Item: **6.A. Legislative and Public Affairs – Agency Process**

PURPOSE AND EXECUTIVE SUMMARY

This briefing will cover the process followed by Texas Department of Motor Vehicles (TxDMV) staff throughout the 85th Legislative Session, including providing information as requested by lawmakers and their staffs; and analyzing the operational and fiscal impacts of legislation.

FINANCIAL IMPACT

None.

BACKGROUND AND DISCUSSION

TxDMV's Government & Strategic Communications (GSC) Division will review all legislation filed by the Legislature to determine if it should be monitored further by the Department. Staff will then be responsible for analyzing potential operational and fiscal impacts from such legislation. GSC will follow any impact bills coming up for hearing and coordinate analyses with staff, including the submission of fiscal impact statements to the Legislative Budget Board, in a timely manner. TxDMV staff will be coordinating board and department involvement throughout the legislative session and will provide regular updates on the status of legislation impacting the department.

Texas Department of Motor Vehicles
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Agency Process for the 85th Legislative Session

Texas Department of Motor Vehicles Board Meeting

Agenda Item 6.A.

November 3, 2016

Texas Department of Motor Vehicles staff will have many responsibilities and duties throughout the 85th Legislative Session, including providing information as requested by lawmakers and their staffs and analyzing the operational and fiscal impacts of legislation.

Here are a few key dates to keep in mind:

- Monday, November 14 is the first day of bill filing
    - During the first week of bill filing in recent sessions, approximately 500 – 600 pieces of legislation are introduced
- Tuesday, January 10th, 2017 is the First Day of Session
- Committee assignments in the House of Representatives are typically announced in early February, and we will anticipate a significant increase in bills being filed at that point by committee chairs and members

- Friday, March 10th is the 60th day of the session and the general bill filing deadline (except for local and emergency bills)
- Monday, May 29th is the 140th day, the last day of session
- Sunday, June 18th is the 20th day following final adjournment and the last day governor can sign or veto bills
- Thursday, August 31st, 2017 is 91st day following final adjournment and the date in which bills without specific effective dates become law

TxDMV's Government & Strategic Communications (GSC) Division will review all legislation filed in the Legislature to determine if it should be monitored further by the department.

TxDMV staff will then be responsible for analyzing potential operational and fiscal impacts from such legislation. GSC will follow any impact bills coming up for hearing and coordinate analyses with staff, including the submission of fiscal impact statements to the Legislative Budget Board, in a timely manner.

All bills are required to go through the committee hearing process and consider public testimony. GSC attends all hearings for bills that impact TxDMV and will coordinate with other divisions on participation. In addition, informational meetings may be requested by members of the Legislature which could also require participation.

Staff will attempt to provide as much notice as possible for such meetings and hearings, but the Legislature has only 140 days to accomplish a lot of work, and deadlines will often be tight. Please note committees are required to post their agendas, including which bills are to be considered, at least 5 days in the House and

up to 24 hours in the Senate prior to the public hearing. GSC will ensure any witnesses are fully briefed and have the most recent and relevant background materials for reference.

I know staff will lead the Texas Department of Motor Vehicles through a great process and we are looking forward to another successful Legislative Session.

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

DATE: November 3, 2016

Action Requested: APPROVAL

To: **Texas Department of Motor Vehicles Board (TxDMV)**
From: **Caroline Love, Director, Government and Strategic Communications Division**
Agenda Item: **6.B. Legislative and Public Affairs – 85th Legislature Proposed Agenda**

RECOMMENDATION
Staff recommends the Board adopt the proposed legislative agenda as developed by Texas Department of Motor Vehicles (TxDMV) staff with stakeholder input and involvement. A summary of the proposed agenda is attached for the Board's consideration.

PURPOSE AND EXECUTIVE SUMMARY
The TxDMV Board is charged with considering opportunities for improvements to operations with recommended changes to statute to the Texas Legislature under Texas Transportation Code, Section 1001.025. Throughout 2016 TxDMV's Government and Strategic Communications Division worked with staff to identify areas of statute for such recommendations, and further evaluated those recommendations with stakeholders to develop the attached agenda for the Board's further consideration.

The areas for consideration include statutory clean-up items as well as several concepts approved by the TxDMV Board in 2014 for the 84th Legislative Session in 2015 which did not become law. In addition there are several items related to conforming state statutes to recently adopted federal laws and regulations. Lastly, there are several new recommendations related to efficient operations and optimal customer service as outlined in the agenda.

FINANCIAL IMPACT
None, any impact would be dependent upon actions taken by the Legislature.

BACKGROUND AND DISCUSSION
Upon approval, the items contained in the proposed agenda will be reviewed for individual bill drafting and staff will discuss the concepts further with members of the legislature for potential filing. The Government and Strategic Communications Division will be providing regular updates throughout the session on the status of the approved agenda items.

Texas Department of Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

Proposed Agenda for 85th Legislative Session

Agenda Item 6.B.

Government & Strategic Communications Division

November 3, 2016

85th Legislature Proposed Agenda

The Texas Department of Motor Vehicles (TxDMV) Board is charged with considering opportunities to improve the operations of the department and recommending statutory changes to the Texas Legislature under Texas Transportation Code, Section 1001.025. TxDMV's Government and Strategic Communications Division worked with all the department's divisions and offices to identify statutory changes the board could recommend. Those changes have also been evaluated by stakeholders. The results of that process are in front of the board today for possible approval to be official recommendations to the Legislature.

Upon approval, the items contained in the proposed agenda will be discussed with members of the legislature for potential filing as bills. The Government and Strategic Communications Division will provide regular updates prior to and throughout the session on the status of the approved agenda items.

Clean-Up and Repeat Items

The TxDMV Board's approved 84th Legislative Agenda resulted in the filing of the department's omnibus bills: H.B. 2701 by Pickett and S.B. 1043 by Nichols. However neither bill became law due to timing issues towards the end of the session. Many of the elements of those bills are included in this recommended legislative agenda and are noted accordingly.

Most notably, one of the repeated items relates to making the Token Trailer license plate permanent in Texas. This is intended to make Texas more competitive with other states

offering such plates, and the industry is excited about the opportunities to register more token trailers in Texas due to this being the type of registration offered.

Another repeated item from the previously approved agenda relates to the most recently issued certified copy of original title (CCO) superseding any previously issued title or CCO. Many states have this type of model currently, and there is certainly concern for fraud with these duplicate titles. In addition to establishing the superseding title language, this recommendation also includes the ability for the board to set the CCO fee at a cost recovery rate. A previous study by the Legislative Budget Board issued in their Government Efficiency and Effectiveness Report in January 2015, estimated the cost to produce a CCO is approximately $17.

Conforming with Federal Laws and Requirements

Several other items contained in the list relate to conforming Texas statutes with recent changes to federal laws and regulations. Many of these items relate to motor carrier size and weight limits, such as allowing for vehicles to carry up to 500 extra pounds if they have idle reduction technology, heavier weights for emergency vehicles, automobile transporter length and back haul standards, and trailer transporter towing unit weights.

In addition, recent regulations added at the federal level relating to odometer disclosure statements require some clarifications in statute to provide uniformity and clarify on how such information is provided and recorded.

New Recommendations

There are several new recommendations contained within the proposed legislative agenda.

One item in the proposed agenda would streamline the timing of the repair attempts needed to qualify for filing a complaint under the “Lemon Law.” The House Judiciary and Civil Jurisprudence Committee held a hearing on the “Lemon Law” program earlier this

year and was very interested in simplifying the process for consumers. Additionally, many states' "Lemon Law" programs are the same as these proposed changes.

Another issue coming to light in recent months relates to a need for additional investigative resources to help combat motor vehicle crimes and fraud. These crimes cost the state and taxpayers millions of dollars annually. Per a story earlier this year on Dallas' CBS affiliate, "The Lone Star state ranks second in the country for rollbacks, costing drivers $600 million dollars a year, according to Carfax."

The statutes governing the industries and activities regulated by TxDMV have criminal penalties available; however, with limited resources available due to higher priority cases impacting public safety, these cases are infrequently addressed by local law enforcement agencies. One item is to authorize the TxDMV Board to commission TxDMV investigators as peace officers so the department can issue criminal citations and build criminal cases. Several stakeholders expressed concerns about the role these peace officers play in industry activities, however the focus of the peace officers would be to pursue unlicensed activities like curb stoning and areas that are rarely enforced by local law enforcement such as title fraud and the like. The ability of the officers to issue criminal citations and search warrants as well as interact with local law enforcement as fellow peace officers will significantly enhance the department's enforcement abilities.

Another item included in the proposed agenda relates to additional escort and flagger requirements for OS/OW loads to improve safety for such movements. We are getting feedback from the industry, the Texas Department of Public Safety and the Texas Department of Transportation on this item as there are some questions that have been raised regarding training for such activities.

Currently if customers wait until the end of the month to renew their vehicle registration, the only way to have "proof" of registration is to get the sticker from the county office or a deputized location. The agenda proposes to allow the online registration renewal system

receipt to serve as proof of registration for 30 days. The hope is this will shorten lines at county offices.

Another customer service recommendation relates to clarifying what the process is for when a tax assessor-collector office is closed for an extended time for any reason (natural disaster, staff unavailability, etc.). The proposal clarifies that other counties can process transactions from the closed county.

Lastly, there are a few revenue redirects to the TxDMV Fund included in the legislative agenda to adequately compensate the department for operating certain programs. There is an item to set a fixed percentage of OS/OW permits fees to be sent to the TxDMV fund for any current or future permits which do not expressly set such an amount. Also, there are items to redirect the fees associated with motor carrier registration/credentialing and salvage dealer licensing. In the amount of additional revenues to the TxDMV fund from these two items would be about $7.3 and $1.4 million a year respectively.

Stakeholder Involvement

TxDMV staff worked to involve our stakeholders throughout the development of this agenda and further discuss these concepts. Following please find a list of those stakeholders.

- Texas Automobile Dealers Association
- Texas Independent Automobile Dealers Association
- Texas Trucking Association
- Texas Recreational Vehicle Association
- Tax Assessor Collectors Association
- Texas Association of Counties
- Texas Conference of Urban Counties
- Alliance of Automobile Manufacturers
- Texas Farm Bureau

- Texas Automotive Recyclers Association
- Multiple insurance, trade and law enforcement entities in the salvage motor vehicle industry sector

Texas Department of Motor Vehicles
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DATE: November 3, 2016

Action Requested: APPROVAL

To: Texas Department of Motor Vehicles Board (TxDMV)
From: Jeremiah Kuntz, Vehicle Titles and Registration Division
Agenda Item: 7 Specialty Plate Design

RECOMMENDATION

The Vehicle Titles and Registration Division seeks board approval or denial of the proposed vendor plate design submitted for consideration.

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 is in Texas Transportation Code, Section(s) 504.851 (g) and (g-1) (1)). The board's approval criteria is clarified in Administrative Code, Section 217.52, *Marketing of Specialty License Plates through a Private Vendor.*

The renewed vendor contract specifies (paragraph #11, *Inventory Management Controls*) that following the board's contingent approval of a plate, the vendor must get at least 200 commitments within six months of the approval in order for the plate to be produced. (Equally, existing plates must maintain 200 registered in order to stay in the program.) My Plates' procedure is to first offer a plate to the public to register their interest. Following the board's contingent approval, My Plates then offers a plate online for prepaid orders. My Plates confirms when 200 prepaid orders are achieved. (Since the contract with My Plates was renewed in March 2014, the board has contingently approved 13 vendor plates. Of the 13, six did not achieve the required 200 commitments and were not produced.)

TxDMV's procedure is to invite comments on all proposed plates ahead of the board's review. The department's intent is to determine if any unforeseen public concerns about a plate's design exist. 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 received thousands of eView "dislikes" in 2010 (presumably because of college football rivalry) and has since sold over 1,000 plates.

AUGUST 2016 EVIEW

No negative comments were received during the public comment period in August 2016. One plate was presented: Texas Tough Black from the license plate vendor.

PROPOSED PLATE

Texas Tough Black
As of September 20, 2016, My Plates stated that 195 people have registered their interest in this plate.

The eView indicated 299 people liked this design and 84 did not.

FINANCIAL IMPACT

BACKGROUND AND DISCUSSION

Texas Department of Motor Vehicles
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DATE: November 3, 2016

Action Requested: APPROVAL

To: **Texas Department of Motor Vehicles Board (TxDMV)**
From: **Sandra Menjivar-Suddeath, Director, Internal Audit Division**
Agenda Item: **8. A. Approval of the Internal Audit Charter**

RECOMMENDATION
Recommendation to approve the TxDMV Internal Audit Charter.

PURPOSE AND EXECUTIVE SUMMARY
The Texas Department of Motor Vehicles (TxDMV) *Internal Audit Charter* describes the mission, purpose, authority, scope, and responsibilities of the internal audit function. It establishes the independency and objectivity of the internal audit function so it can provide assurance services (audits) and advisory services (consulting) to the TxDMV Board and TxDMV Management. It further provides the authority to allow the internal audit function to have full access to records, personnel, and physical properties needed to conduct assurance and advisory services. The TxDMV *Internal Audit Charter* has to be approved by the TxDMV Board and requires the signature of the Board Chair, the Finance & Audit Committee Chair, the Executive Director, and the Internal Audit Director.

FINANCIAL IMPACT
None.

BACKGROUND AND DISCUSSION
The Texas Internal Auditing Act (Govt Code 2102.008) requires that the internal audit function adhere to the *International Standards for the Professional Practice of Internal Auditing (*Standards). Those standards require the internal audit function have an internal audit charter that is periodically updated and outlines the purpose, mission, authority, independence/objectivity, and responsibilities for the internal audit function. The internal audit charter should also outlines the board's and management's responsibilities related to the internal audit function.

The current TxDMV *Internal Audit Charter* was approved by the TxDMV Board in March 2014 and does not reflect current leadership for the Internal Audit Division or the TxDMV Board. In addition, the Standards have been updated to require the audit charter to have the updated definition of internal audit and a reference to the *Core Principles for the Professional Practice of Internal Auditing*.

The updated definition of internal audit is "Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes."

The *Core Principles for the Professional Practice of Internal Auditing* are as follows:

- Demonstrates integrity.
- Demonstrates competence and due professional care.
- Is objective and free from undue influence (independent).
- Aligns with the strategies, objectives, and risks of the organization.
- Is appropriately positioned and adequately resourced.
- Demonstrates quality and continuous improvement.
- Communicates effectively.
- Provides risk-based assurance.
- Is insightful, proactive, and future-focused.
- Promotes organizational improvement.

Texas Department of Motor Vehicles
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Internal Audit Charter

INTRODUCTION

This charter sets forth the mission, purpose, authority, and responsibility of the internal audit activity at the Texas Department of Motor Vehicles (TxDMV). The charter establishes the internal audit activity's position within the TxDMV; authorizes access to records, personnel, and physical properties needed to conduct engagements; and defines the scope of the internal audit activities.

Internal auditing is an independent and objective assurance and consulting activity that is guided by a philosophy of adding value to improve the operations of the TxDMV. It assists the TxDMV in accomplishing its objectives by bringing a systematic and disciplined approach to evaluate and improve the effectiveness of the organization's governance, risk management, and internal control processes.

Internal Audit will follow (1) the *Generally Accepted Government Auditing Standards (GAGAS)* as promulgated by the U.S. Government Accountability Office (GAO) and (2) the *International Standards for the Professional Practice of Internal Auditing*, the *Code of Ethics,* and the *Core Principles for the Professional Practice of Internal Auditing as* prescribed by the Institute of Internal Auditors (IIA).

In addition, internal audit employees will adhere to the TxDMV's policies and procedures and the internal audit activity's standard operating procedures manual.

MISSION

The mission of the Internal Audit Division is to be a value-added, technologically advanced internal audit unit that identifies, addresses, and helps mitigate high and emerging information technology, financial, contracting, and operational risks that impact the TxDMV’s service to the public and achievement of its vision, mission, and goals.

PURPOSE

The Internal Audit Division provides assurance services to the Board by conducting periodic audits of the Department's functions, operations, and information systems. Assurance services may include financial audits, compliance audits, economy and efficiency audits, effectiveness audits, and investigations. The Internal Audit Division also offers advisory services, the nature and scope of which may be agreed upon with management or the Board. An advisory service is intended to add value and improve agency operations and may include, but are not limited to, advice and counsel, facilitation, and training. In addition, the Division will assist in the investigation of suspected fraudulent, waste, or abuse activities as necessary.

AUTHORITY

The internal audit activity, with strict accountability for confidentiality and safeguarding records and information, is authorized full, free, and unrestricted access to any and all of TxDMV records, physical properties, and personnel pertinent to carrying out any engagement. All employees are expected to assist the internal audit activity in fulfilling its roles and responsibilities. The internal audit activity will also have free and unrestricted access to the Board and its members and any TxDMV related records they possess.

The Internal Audit Director is authorized to:

- In the performance of authorized audits and other engagements and with strict accountability for safekeeping and confidentiality, have unrestricted access to all TxDMV activities, records, manual and automated systems, properties, and personnel.
- Audit or review any function, activity, or unit of the TxDMV, including vendors, contractors, and subcontractors (to the extent as related to the vendor/contractor/subcontractor deliverables and/or statements of work in applicable TxDMV contracts).
- Communicate and interact directly with the Board and present any matter that may warrant immediate attention or action.
- Have direct access to the TxDMV Executive Director and present any matter that may warrant immediate attention or action. The Board will also be notified immediately.
- Allocate resources, select subjects, determine scopes of work, and apply the techniques required to accomplish the audit objectives.
- Obtain the necessary assistance of personnel in TxDMV units, as well as other specialized services from within or outside of TxDMV that the Internal Audit Director engages for the purpose of consulting with internal audit or providing assurance services.

The Internal Audit Director is not authorized to:

- Perform any operational duties for TxDMV.
- Initiate or approve financial transactions external to the internal audit function.
- Direct the activities of any TxDMV employee not employed by the internal audit activity, except to the extent such employees have been assigned to the internal audit function or to otherwise assist the Internal Audit Director.

INDEPENDENCE AND OBJECTIVITY

To assure the independence of the internal audit function, the Internal Audit Director reports functionally to the Board and its Finance and Audit Committee and administratively to the Executive Director.

The internal audit activity will remain free from control by TxDMV employees, including matters of audit selection, scope, procedures, frequency, timing, or report content to permit maintenance of an independent and objective state of mind.

Internal auditors will have no direct operational responsibility or authority over any of the activities audited. Accordingly, they will not implement internal controls, develop procedures, install systems, prepare records, or engage in any other activity related to non-audit functions that may impair internal auditor's independence.

Internal auditors will exhibit the highest level of professional objectivity in gathering, evaluating, and communicating information about the activity or process being examined. Internal auditors will make a balanced assessment of all relevant circumstances and not be influenced by their own interests or by others in forming judgments.

The Internal Audit Director will confirm to the board, at least annually, the organizational independence of the internal audit activity.

RESPONSIBILITIES

The **Board** will:

- Approve the internal audit charter.
- Approve the risk based internal audit plan.
- Approve the annual internal audit budget and resource plan.
- Receive communications from the Internal Audit Director on the internal audit activity's performance relative to its plan and other matters.
- Approve decisions regarding the appointment and removal of the Internal Audit Director.
- Provide an annual performance evaluation of the Internal Audit Director.
- Approve the remuneration of the Internal Audit Director.
- Review the resources dedicated to the internal audit program and determine if adequate resources exist to ensure that risks identified in the annual risk assessment are adequately covered within a reasonable time frame.

The **Internal Audit Director** is responsible for performing the following duties:

- Acting as agency liaison for all external auditors and monitors.
- Developing a risk based annual audit plan for review and approval by the Board that identifies the engagements to be conducted during the fiscal year.
- Conducting engagements specified in the annual audit plan, including follow-up reviews of prior recommendations and documenting deviations from the plan.
- Maintaining a professional audit staff with sufficient knowledge, skills, experience, and professional certification to meet the requirements of this charter.
- Establishing a quality assurance program by which the Internal Auditor assures the Board that operations of internal auditing activities are acceptable.
- Preparing final reports of findings and recommendations for review by the TxDMV Executive Director, the TxDMV Board, and subsequent distribution to the Office of the Governor, Legislative Budget Board, Sunset Advisory Commission, and State Auditor's Office as specified by the Texas Internal Auditing Act.
- Reporting and verifying on the implementation status of recommendations from internal and external audits, reviews, assessments, and advisory services.
- Preparing an annual report for review by the Board and submission pursuant to the requirements of the Act.
- Conducting an annual Quality Assurance and Improvement Program (QAIP) and periodically participating in comprehensive external peer reviews.
- Preparing for a comprehensive external peer review every three years.
- Conducting economy and efficiency audits and program results audits as directed by the Board.
- Serving as a contact for fraud, waste and abuse elimination activities and investigating any reported cases.
- Notifying the Board and management of the results for any fraud, waste, and abuse elimination activities or investigations

- Reviewing State Auditor's Office Hotline complaints, taking appropriate action, and reporting out results.
- Carrying out advisory services as may be requested by the Board that are not prohibited by statute or professional standards.
- Carrying out any advisory services as may be requested by management that are not prohibited by statute or professional standards and for which resources are available as determined by the Internal Audit Director.

TxDMV management is responsible for the following activities:

- Establishing and maintaining effective controls to ensure that goals and objectives are met, services are provided effectively, and assets are safeguarded.
- Providing information to internal audit as requested.
- Maintaining a process to ensure timely management responses and that appropriate action is taken on audit recommendations.
- Informing the Internal Audit Director of reviews, evaluations, assessments, audits, or inspections scheduled by local, state, or national agencies and/or external consultants or auditors evaluating programs or controls.

APPROVAL

Whitney H. Brewster Executive Director	Sandra Menjivar-Suddeath, CIA, CISA, CGAP Internal Audit Director

This charter is approved by the Board of the Texas Department of Motor Vehicles on November 3, 2016.

Raymond Palacios, Jr., Chairman Board of Texas Department of Motor Vehicles	Luanne Caraway, Chair Finance and Audit Committee Board of Texas Department of Motor Vehicles

Texas Department of Motor Vehicles
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Internal Audit Charter

INTRODUCTION

This charter sets forth the mission, purpose, authority, and responsibility of the internal audit activity at the Texas Department of Motor Vehicles (TxDMV). The charter establishes the internal audit activity's position within TxDMV; authorizes access to records, personnel, and physical properties needed to conduct engagements; and defines the scope of the internal audit activities.

Internal auditing is an independent and objective assurance and consulting activity that is guided by a philosophy of adding value to improve the operations of the TxDMV. It assists TxDMV in accomplishing its objectives by bringing a systematic and disciplined approach to evaluate and improve the effectiveness of the organization's governance, risk management, and internal control.

Internal Audit will follow (1) the *Generally Accepted Government Auditing Standards (GAGAS)* as promulgated by the U.S. Government Accountability Office (GAO) and (2) ~~At the TxDMV, the internal audit function is carried out by the Internal Audit Division in compliance with requirements of the Texas Internal Auditing Act (Act, Government Code, Chapter 2102). The Act requires that internal audit follow the (1)~~ *International Standards for the Professional Practice of Internal Auditing*, *the* ~~and related~~ *Code of Ethics*, and the Core Principles for the Professional Practice of Internal Auditing~~(2) the *Generally Accepted Government Auditing Standards (GAGAS)* as promulgated by the U.S. Government Accountability Office (GAO)~~.

In addition, internal audit employees will adhere to the TxDMV's policies and procedures and the Internal Audit Division's standard operating procedures manual.

MISSION

To be a value-added, technologically advanced internal audit unit that identifies, addresses, and helps mitigate high and emerging information technology, financial, contracting, and operational risks that impact the TxDMV's service to the public and achievement of its vision, mission, and goals.

PURPOSE

The Internal Audit Division provides assurance services to the Board by conducting periodic audits of the Department's functions, operations and information systems. Assurance services may include financial audits, compliance audits, economy and efficiency audits, effectiveness audits, and investigations. The Internal Audit Division also offers advisory services, the nature and scope of which may be agreed upon with management or the Board. The advisory service are intended ~~and which are intended~~ to add value and ~~and~~ improve agency operations.

These advisory services may include, but are not limited to, advice and counsel, facilitation, and training. In addition, the Division will assist in the investigation of suspected fraudulent activities as necessary.

AUTHORITY

The internal audit activity, with strict accountability for confidentiality and safeguarding records and information, is authorized full, free, and unrestricted access to any and all of TxDMV records, physical properties, and personnel pertinent to carrying out any engagement. All employees are expected to assist the internal audit activity in fulfilling its roles and responsibilities. The internal audit activity will also have free and unrestricted access to the Board and its members and any TxDMV related records they possess.

The ~~Chief Audit Executive~~Internal Audit Director is authorized to:

- In the performance of authorized audits and other engagements and with strict accountability for safekeeping and confidentiality, have unrestricted access to all TxDMV activities, records, manual and automated systems, properties, and personnel.
- Audit or review any function, activity, or unit of TxDMV, including vendors, contractors, and subcontractors (to the extent as related to the vendor/contractor/subcontractor deliverables and/or statements of work in applicable TxDMV contracts).
- Communicate and interact directly with the Board and present any matter that may warrant immediate attention/action.
- Have direct access to the TxDMV Executive Director of and present any matter that may warrant immediate attention/action. The Board will also be notified immediately.
- Allocate resources, select subjects, determine scopes of work, and apply the techniques required to accomplish the audit objectives.
- Obtain the necessary assistance of personnel in TxDMV units, as well as other specialized services from within or outside of TxDMV that the Internal Audit Director engages for the purpose of consulting with internal audit or providing assurance services.

The ~~Chief Audit Executive~~Internal Audit Director is not authorized to:

- Perform any operational duties for TxDMV.
- Initiate or approve financial transactions external to the internal audit function.
- Direct the activities of any TxDMV employee not employed by the internal audit activity, except to the extent such employees have been assigned to the internal audit function or to otherwise assist the Internal Auditor.

INDEPENDENCE AND OBJECTIVITY

To assure the independence of the internal audit function, the ~~Chief Audit Executive~~Internal Audit Director reports functionally to the Board and its Finance and Audit Committee and administratively to the Executive Director.

The internal audit activity will remain free from control by TxDMV employees, including matters of audit selection, scope, procedures, frequency, timing, or report content to permit maintenance of an independent and objective state of mind.

Internal auditors will have no direct operational responsibility or authority over any of the activities audited. Accordingly, they will not implement internal controls, develop procedures, install systems, prepare records, or engage in any other activity related to non-audit functions that may impair internal auditor's independence.

Internal auditors will exhibit the highest level of professional objectivity in gathering, evaluating, and communicating information about the activity or process being examined. Internal auditors will make a balanced assessment of all relevant circumstances and not be influenced by their own interests or by others in forming judgments.

The ~~Chief Audit Executive~~Internal Audit Director will confirm to the board, at least annually, the organizational independence of the internal audit activity.

RESPONSIBILITIES

The **Board** will:

- Approve the internal audit charter.
- Approve the risk based internal audit plan.
- Approve the annual internal audit budget and resource plan.
- Receive communications from the Internal Audit Director ~~Chief Audit Executive~~ on the internal audit activity's performance relative to its plan and other matters.
- Approve decisions regarding the appointment and removal of the ~~Chief Audit Executive~~Internal Audit Director.
- Provide an annual performance evaluation of the ~~Chief Audit Executive~~Internal Audit Director.
- Approve the remuneration of the ~~Chief Audit Executive~~Internal Audit Director.
- Review the resources dedicated to the internal audit program and determine if adequate resources exist to ensure that risks identified in the annual risk assessment are adequately covered within a reasonable time frame.

The **~~Chief Audit Executive~~Internal Audit Director** is responsible for performing the following

duties:

- Serving as ~~Chief Audit Executive~~Internal Audit Director including acting as agency liaison for all external auditors and monitors.
- Developing a risk based annual audit plan for review and approval by the Board that identifies the engagements to be conducted during the fiscal year.
- Conducting engagements specified in the annual audit plan, including follow-up reviews of prior recommendations and documenting deviations from the plan.
- Maintaining a professional audit staff with sufficient knowledge, skills, experience, and professional certification to meet the requirements of this charter.
- Establishing a quality assurance program by which the Internal Auditor assures the Board that operations of internal auditing activities are acceptable.
- Preparing final reports of findings and recommendations for review by the Board and subsequent distribution to the Office of the Governor, Legislative Budget Board, Sunset Advisory Commission, and State Auditor's Office as specified by the Texas Internal Auditing Act.
- Reporting on the implementation status of recommendations from internal and external audits, reviews, assessments, and advisory services.
- Preparing an annual report for review by the Board and submission pursuant to the requirements of the Act.
- Conducting quality assurance reviews and periodically participating in comprehensive external peer reviews.
- Conducting economy and efficiency audits and program results audits as directed by the Board.
- Serving as ~~TxDMV's~~ a contact for fraud, waste and abuse elimination activities, investigating any reported cases~~, and~~
- ~~notifying~~ Notifying the Board and management of the results for any fraud, waste, and abuse elimination activities or investigations
- Reviewing State Auditor's Office Hotline complaints, taking appropriate action, and reporting out results.
- Carrying out advisory services as may be requested by the Board that are not prohibited by statute or professional standards.
- Carrying out any advisory services as may be requested by management that are not prohibited by statute or professional standards and for which resources are available as determined by the ~~Chief Audit Executive~~Internal Audit Director.

TxDMV management is responsible for:

- Establishing and maintaining effective controls to ensure that goals and objectives

are met, services are provided effectively, and assets are safeguarded.

- Providing information to internal audit as requested.
- Maintaining a process to ensure timely management responses and that appropriate action is taken on audit recommendations.
- Informing the ~~Chief Audit Executive~~Internal Audit Director of reviews, evaluations, assessments, audits, or inspections scheduled by local, state, or national agencies and/or external consultants or auditors evaluating programs or controls.

APPROVAL

_____	_____
Whitney H. Brewster	Sandra Menjivar-Suddeath~~Vice,~~ CIA, ~~CGAP~~CISA, CGAP~~, CISA~~
Executive Director	Internal Audit Director

This Charter is approved by the Board of Texas Department of Motor Vehicles on ~~October XX~~November 3, 2016.

_____	_____
Raymond Palacios, Jr.~~John H. Walker, III~~, Chairman	_____~~Raymond Palacios, Jr.,~~-Luanne Caraway, Chair~~man~~
Board of Texas Department of Motor Vehicles	Finance and Audit Committee Board of Texas Department of Motor Vehicles

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DATE: **November 3, 2016**
Action Requested: **BRIEFING**

To: **Texas Department of Motor Vehicles Board (TxDMV)**
From: **Sandra Menjivar-Suddeath, Director, Internal Audit Division**
Agenda Item: **8. B. Internal Audit Division Status**

RECOMMENDATION
None.

PURPOSE AND EXECUTIVE SUMMARY
The status update provides information on current activities being conducted by the Internal Audit Division (IAD). This status update includes information on current audit engagements, external reviews, and personnel information.

FINANCIAL IMPACT
None.

BACKGROUND AND DISCUSSION
The IAD has begun an audit engagement on the Registration and Title System (RTS) that will focus on the data reliability of Cognos reports and is in the reporting phase of the Oversize/Overweight Permitting Audit. The IAD also completed the *Annual Internal Audit Report for Fiscal Year 2016*, which summarized fiscal year 2016 audit activities.

Annual Internal Audit Report for Fiscal Year 2016
The Texas Internal Auditing Act (Govt Code 2102.008) requires the internal audit function to submit a report on audit activities conducted in the previous fiscal year. The report was submitted to the Governor's Office, the Legislative Budget Board, the Sunset Advisory Committee, and the State Auditor's Office (SAO) on November 1, 2016, as required by the Texas Internal Auditing Act.

The report requirements, including form and content, are prescribed by the SAO. For fiscal year 2016 (September 1, 2015 – August 31, 2016), the SAO required all reports to have the following information:

- Compliance with Texas Government Code, Section 2102.015: A summary on when the fiscal year 2017 annual audit plan and the annual audit report for fiscal year 2016 was posted on the TxDMV webpage and a summary of fiscal year 2016 audit recommendations and current implementation status.

- Internal Audit Plan for Fiscal Year 2016: A summary of planned fiscal year 2016 audits, including the report number, date issue, report title, and if the planned audits were completed. Any deviations from the audit plan needed to be explained as well.

- Consulting Service and Nonaudit Service Completed: A summary of consulting (advisory services) and any nonaudit services performed in fiscal year 2016 by the internal audit function.

- External Quality Assurance Review (Peer Review): A summary of the most recent Peer Review findings and conclusions.

- Internal Audit Plan for Fiscal Year 2017: A copy of the approved fiscal year 2017 Audit Plan.

- External Audit Services Procured in Fiscal Year 2016: A summary of external audits that occurred in fiscal year 2016.

- Reporting Suspected Fraud and Abuse: A summary of how the TxDMV complies with fraud reporting requirements.

Texas Department of Motor Vehicles

Internal Audit Division (IAD) November Status Update
TxDMV Board Meeting

Status of the Fiscal Year 2017 Internal Audit Plan

Current Internal Audit Division projects			
Project	**Description**	**Current Status**	**Expected Report Release/Presentation Date**
Oversize/Overweight Permitting Audit	Audit of the agency's processes to issue OS/OW permits	Finalizing Report	Management is reviewing the audit report. The report will be presented to the TxDMV Board at the next board meeting.
Registration and Title System (RTS) Refactoring and Single Sticker Post-implementation review Audit	Audit on the data reliability of Refactored RTS – Cognos reports	Planning	The audit commenced in October 2016. Fieldwork will begin in early November 2016. Report will be released in early 2017.
Annual Internal Audit Report for Fiscal Year 2016	A summary of internal audit activities for fiscal year 2016	Completed	See attachment.

State Auditor's Office (SAO) Fraud Hotline Coordination

TxDMV provided the SAO with the SAO Fraud Hotline Coordination letter on October 3, 2016. The letter included the official agency response to 6 referrals and provided a status update on two internal referrals.

External Audits

1. The SAO began an audit on the agency's complaint process and held their entrance conference on October 19, 2016.

IAD Personnel

1. Derrick Miller was promoted to Auditor VI in September 2016 and obtained his Certified Government Audit Professional (CGAP) certificate on October 7, 2016.
2. Jason Gonzalez will start on November 14, 2016 as an Auditor V.

Attachments

1. Annual Internal Audit Report for Fiscal Year 2016

Texas Department of Motor Vehicles

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Annual Internal Audit Report For Fiscal Year 2016

TxDMV 17-01

Internal Audit Division

November 1, 2016

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Texas Department of Motor Vehicles
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November 1, 2016

Honorable Greg Abbott, Governor
Members of the Legislative Budget Board
Members of the Sunset Advisory Commission
Lisa R. Collier, CPA, CFE, CIDA, First Assistant State Auditor
Mr. Raymond Palacios, Jr., Chairman, TxDMV Board

Subject: Annual Internal Audit Report for Fiscal Year 2016

Attached is the annual report for the Internal Audit Division of the Texas Department of Motor Vehicles (TxDMV). This report includes a status update on the internal audit plan for fiscal year 2016, the audit plan for fiscal year 2017, and external audit services procured.

This report fulfills the requirements set forth in the Texas Internal Auditing Act and the State Auditor's Office guidelines for submitting the annual report. The TxDMV posts required reports at http://www.txdmv.gov/reports-and-data.

Please contact me at (512) 465-4118 or at Sandra.Menjivar-Suddeath@txdmv.gov with questions about this report or internal audit activities.

Sincerely,

Sandra T. Menjivar-Suddeath, CIA, CISA, CGAP
Internal Audit Director

cc: Ms. Luanne Caraway, Chair, Finance and Audit Committee
Mr. Brett Graham, Member, Finance and Audit Committee
Ms. Kate Hardy, Member, Finance and Audit Committee
Mr. John Henry Walker III, Member, Finance and Audit Committee
Mr. Guillermo "Memo" Trevino, Board Member
Mr. Robert "Barney" Barnwell, Board Member
Mr. Blake Ingram, Board Member
Mr. Gary Wayne Painter, Board Member
Ms. Whitney Brewster, TxDMV Executive Director
Ms. Shelly Mellott, TxDMV Deputy Executive Director

Posting the Internal Audit Plan, Internal Audit Annual Report, and Other Audit Information on the Internet Web site

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 *TxDMV Internal Audit Plan for Fiscal Year 2017* on September 1, 2016 and the agency web master posted the plan to the agency's web site on September 1, 2016. The *Annual Internal Audit Report for Fiscal Year 2016* will be posted to the TxDMV web site following the November 2016 TxDMV Board meeting. These reports may be found at http://www.txdmv.gov/reports-and-data.

Government Code §2102.015 also requires an entity to post a summary of any concerns resulting from the audit plan or annual report and actions taken to address those issues. To address these requirements, the Internal Audit Division summarized fiscal year 2016 audit recommendations to findings and the agency's progress in implementing corrective actions in the table below. The Internal Audit Division will fulfill the requirement to post this information when the annual report is added to the TxDMV web site following the November 2016 TxDMV Board meeting.

Summary of Fiscal Year 2016 Internal Audit Recommendations and Agency Implementation Status	
An Audit of the Texas Department of Motor Vehicles' Administration of Statutes and Rules Through Tax Assessor-Collectors (Report Number TxDMV 15-4, November 13, 2015)	
Audit Summary	**Implementation Status**
The audit objectives were to evaluate internal controls the TxDMV has established to administer agency rules and statutes to register and title motor vehicles through Tax Assessor-Collectors (TAC) and to compile TAC offices' practices for the TxDMV's consideration in developing the TAC Gold Standard, with input from stakeholders.	On-going.
The Internal Audit Division made 5 recommendations to strengthen the enforcement over late registrations and remittances and to establish a recognition program (the Gold Standard) for TAC offices and Regional Service Centers.	Recommendations will be implemented by November 30, 2016.
A Confidential Follow-up Audit on the Information Security Standards Gap Assessment (Report Number TxDMV 15-5, November 13, 2015)	
Audit Summary	**Implementation Status**
The audit objective was to determine the implementation status of recommendations from the Texas Administrative Code Title 1, Chapter 202 (TAC 202) gap assessment. The Internal Audit Division made 16 recommendations to remove the TAC 202 gaps. The audit report was issued as a confidential report due to the discussion of information security controls and was not made available for public release.	On-going. Recommendations will be addressed in 2017.

Fiscal Year 2016 Internal Audit Plan

The status of the fiscal year 2016 audit plan engagements are outlined below. No deviations from the fiscal year 2016 annual plan occurred.

Report Title	Report Number	Release Date
Annual Internal Audit Report for Fiscal Year 2015	N/A	October 27, 2015
Fiscal Year 2017 Internal Audit Plan	N/A	September 1, 2016
An Audit on the Efficiency of the Texas International Registration Plan Compliance Audit Process	TxDMV 16-03	September 1, 2016
A Confidential Audit of Texas Department of Motor Vehicles' Internal Controls Related to the Driver's Privacy Protection Act	TxDMV 16-04	November 3, 2016
Oversize and Overweight Permitting	TxDMV 16-05	January 2017
Other Audit Plan Engagements	**Status**	
Registration and Titling System (RTS) Refactoring and Single Sticker Post-Implementation Review	This audit was carried forward to the fiscal year 2017 audit plan due to staffing changes and division transition. The audit began in October 2016.	

Consulting Services and Nonaudit Services Completed

Consulting Services

The Internal Audit Division (IAD) conducted one consulting engagement during fiscal year 2016. The consulting engagement related to reviewing the TxDMV fraud, waste, and abuse program. The title of the report was named *Implementing an Anti-Fraud, Waste, and Abuse Program* (report number TxDMV 16-2). The report was issued on February 4, 2016 and the audit had two objectives:

- To assess the TxDMV staffs' preparedness and knowledge about their role in preventing, detecting, and reporting fraud, waste, and abuse.
- To make recommendations to implement a robust agency-wide fraud prevent program.

The consulting engagement found that TxDMV had various activities to prevent, detect, investigate, and report fraud, waste and abuse (fraud). These activities, however, generally have not been coordinated or been part of a cohesive agency anti-fraud program. The IAD recommended that the TxDMV update its existing fraud policy and adopt a fraud risk management framework to develop a more robust anti-fraud program.

Specifically, the IAD compiled 18 best practices on fraud policies and compared them with the TxDMV Human Resources Manual to identify potential gaps in the agency's fraud policy. IAD identified that the TxDMV Human Resources Manual contained 72 percent of best practices for a fraud policy.

The IAD also administered a survey to the TxDMV employees to assess their general knowledge of fraud and the TxDMV's fraud reporting procedures, and their confidence in the TxDMV's treatment of reported fraud. Survey responses indicated the following:

- Employees want fraud awareness training.
- Employees are most likely to report suspicions of fraudulent activity to a supervisor.
- 83 percent of employees are very or somewhat confident the TxDMV would conduct a thorough and fair fraud investigation.

Nonaudit Services

In addition to the consulting engagement conducted in fiscal year 2016, the IAD is an advisor on the TxDMV Executive Steering Committees and Governance Committee for technology and capital projects. In the committees, the IAD only provided risk perspective on issues and followed the Generally Accepted Government Auditing Standards (GAGAS) 3.45-3.47 and 3.56.

External Quality Assurance Review

The IAD underwent an external quality assurance review (peer review) in March 2015. Representatives of the State Agency Internal Audit Forum performed the peer review in accordance with its peer review policies and procedures effective February 2013. On April 1, 2015, the Internal Audit Division received a rating of "pass" out of three possible ratings: pass, pass with deficiencies, or fail. The report noted one opportunity for improvement; the opportunity and the Audit Director's response is as follows:

> ***Opportunity for Improvement:***
>
> *In evaluating the impact of technology on the Agency's future resource needs, consideration should be given to additional audit resources whose primary expertise and responsibility is auditing technology, including the complexities of contracts required for technology projects.*
>
> ***Director's Response:***
>
> *The Director agrees with the above opportunity for improvement. Current staff will take steps to increase their technology skills and knowledge through professional development. If an audit requires technical skills the audit team does not possess, the Division will request approval to hire a temporary contract IT auditor. Also, the Internal Audit Division will seek an auditor with information technology experience when it has a vacancy or if additional resources are assigned to the Division.*

See the following page for the peer review opinion and certificate, excerpted from the *TxDMV Internal Audit Division External Quality Assurance.*

TEXAS DEPARTMENT OF MOTOR VEHICLES
INTERNAL AUDIT DIVISION
EXTERNAL QUALITY ASSURANCE REVIEW - April 2015

OVERALL OPINION

Based on the information received and evaluated during this external quality assurance review, it is our opinion that the Texas Department of Motor Vehicles (TxDMV) Internal Audit Division receives a rating of "pass" and is in compliance with the Institute of Internal Auditors (IIA) *International Professional Practices Framework (effective January 1, 2013)* and Code of Ethics, the United States Government Accountability Office (GAO) *Government Auditing Standards (December 2011 Revision)*, and the Texas Internal Auditing Act (*Texas Government Code*, Chapter 2102). This opinion, which is the highest of the three possible ratings, means that policies, procedures, and practices are in place to implement the standards and requirements necessary for ensuring the independence, objectivity, and proficiency of the internal audit function.

We found that the Internal Audit Division is independent, objective, and able to render impartial and unbiased judgments on the audit work performed. The staff members are qualified, proficient, and knowledgeable in the areas they audit. Individual audit projects are planned using risk assessment techniques; audit conclusions are supported in the working papers; and findings and recommendations are communicated clearly and concisely.

The Internal Audit Division is well managed internally. In addition, the Division has effective relationships with the Board and is well respected and supported by management. Surveys and interviews conducted during the quality assurance review indicate that management considers Internal Audit a useful part of the overall agency operations and finds that the audit process and report recommendations add value and help improve the Agency's operations.

ACKNOWLEDGEMENTS

We appreciate the courtesy and cooperation extended to us by the Internal Audit Director, Internal Audit staff, the Chairman of the Board and Finance and Audit Committee Chairman, the Executive Director, and the senior managers who participated in the interview process. We would also like to 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.

Héctor Lozano 4/1/15
Héctor Lozano *Date*
Senior Internal Auditor
Texas Department of Family and Protective Services
SAIAF Peer Review Team Leader

Luis Solis 4/1/15
Luis Solis *Date*
Audit Manager
Texas Workforce Commission
SAIAF Peer Review Team Member

The Internal Audit Division of the Texas Department of Motor Vehicles

Receives a rating of

Pass

In compliance with the Institute of Internal Auditors' International Professional Practices Framework, Government Auditing Standards, and the Texas Internal Auditing Act

This opinion is based on a quality assessment review conducted by members of the Texas State Agency Internal Audit Forum during the period of February 2015 through March 2015. The review was based on the methodology developed by the Texas State Agency Internal Audit Forum

Hector Lozano, CPA
Senior Internal Auditor
Texas Department of Family and Protective Services

Luis Solis, CGAP, CRMA
Audit Manager
Texas Workforce Commission

Fiscal Year 2017 Internal Audit Plan

The TxDMV Board approved the *TxDMV Internal Audit Plan for Fiscal Year 2017* on September 1, 2016.

Texas Department of Motor Vehicles Fiscal Year 2017 Internal Audit Plan		
Topic	**Division**	**Background and Preliminary Objectives**
Required Reports under the Texas Internal Auditing Act		
1. Fiscal Year 2016 Annual Internal Audit Report 35 hours	Agency-wide	Background: A summary of internal audit activities, including the status of the FY 2016 audit plan, nonaudit services provided, and external audit services procured; and the FY 2017 audit plan. This report must be submitted before November 1 of each year to the Governor, the Legislative Budget Board, the State Auditor's Office, the Sunset Advisory Commission, and the TxDMV Board and be posted on the agency's website (Government Code, Section 2102.009).
2. Fiscal Year 2018 Internal Audit Plan 100 hours	Agency-wide	Background: The annual audit plan is prepared using risk assessment techniques to identify individual audits to be conducted during the year. The TxDMV Board must review and approve the annual audit plan (Government Code, Section 2102.005).
Audits and Advisory Services		
1. Oversize/ Overweight Permitting 250 hours *Carry-over from Fiscal Year 2016 Internal Audit Plan*	Motor Carrier	Background: The TxDMV regulates oversize vehicles and loads on highways and bridges. In fiscal year 2014, the Oversize/ Overweight Permits Section issued over 836,000 permits; responded to over 198,000 permit-related calls from customers, and collected more than $178 million in fees. The agency uses the Texas Permitting and Routing Optimization System (TxPROS), an online permitting & mapping system, to allow customers to apply for and self-issue many permits. Tentative Objectives: (1) Determine whether the TxDMV issues Oversize/Overweight permits and collects the appropriate fees in accordance with laws and regulations (2) Determine whether the TxDMV validates, updates, and communicates route restriction information on a timely basis to ensure routes are safe for permitted Oversize/Overweight loads

Texas Department of Motor Vehicles Fiscal Year 2017 Internal Audit Plan		
Topic	**Division**	**Background and Preliminary Objectives**
2. Registration and Title System (RTS) Refactoring and Single Sticker Post-implementation Review 1400 hours *Carry-over from Fiscal Year 2016 Internal Audit Plan*	Agency-wide	Background: Refactored RTS included Cognos reports that replaced standard reports from legacy RTS and included updated ad hoc reporting capabilities. Staff and management use information from Cognos reports to make strategic and operational decisions. Tentative Objectives: (1) Determine whether Cognos reports provide management and staff with complete and accurate information from RTS (2) Determine whether Cognos reports provide at least the same level of information or service as reports from the legacy RTS
3. Texas Department of Motor Vehicles (TxDMV) Fund tables and Processing & Handling (P&H) Fees 1150 hours	Finance & Administrative Services (FAS) Information Technology Services (ITS) Vehicle Titles and Registration (VTR)	Background: SB 1512 (84th Texas Legislature) re-directs revenue sources to the newly created TxDMV fund starting September 1, 2016. HB 6 exempts the fund and its revenues from consolidation. The intent of the bill is to separate the fund from the General Revenue and State Highway funds, allowing the TxDMV to fund its operations. The TxDMV Board of Directors used its authority to adopt a P&H fee structure to fund agency operations during its June 2016 board meeting. The P&H fees are effective for motor vehicle registrations starting January 2017. Tentative Objectives: (1) Determine whether appropriate revenues, including registration fees, are deposited to the TxDMV fund appropriately (2) Determine whether appropriate amounts are transferred to counties per agency rule
4. Continuous Monitoring of Vehicle Registration and Title Transactions 1000 hours *Advisory Project*	VTR ITS	Background: Fiscal year 2016 had a number of suspicious and fraudulent registration and title transaction activities within the agency and through Tax-Assessor Collectors offices across the state, including high visibility arrests related to alleged fraud. The agency employs 1 investigator to investigate suspected title fraud. Auditors would analyze registration and title transactions from the RTS on a scheduled basis to identify suspicious and possibly fraudulent transactions processed through agency or Tax-Assessor Collectors offices. Refer suspicious and possible fraudulent transactions to VTR to investigate.

Texas Department of Motor Vehicles Fiscal Year 2017 Internal Audit Plan		
Topic	**Division**	**Background and Preliminary Objectives**
5. Management or Board Request 350 hours	TBD	Time has been allotted to management and the Board for a special request or to review a new and emerging risk for the agency. If no request is received, one of the audits from the other possible project list will be conducted.

Other Internal Audit Division Duties

- Coordinating with external auditors and reviewers (25 hours)
- Investigating allegations of fraud, waste, and abuse that Internal Audit receives or that the State Auditor's Office refers from its fraud hotline and advising on the Anti-Fraud, Waste, and Abuse Workgroup (300 hours)
- Conducting an annual Quality Assurance and Improvement Program as required by auditing standards (75 hours)
- Tracking and monitoring the status of prior-year audit recommendations (100 hours)
- Advising the agency's Governance Team and Executive Steering Committees (425 hours)

Total Budgeted Hours on Required Reports, Audits ,and Advisory Service:	**4,285**
Total Budgeted Hours on Other Internal Audit Division Duties:	**925**
Total Budgeted Hours:	**5,210**

Contingency Audits, which also received "high" risk rankings, were approved by the TxDMV Board in case additional audit resources become available. As a result, these audits are not scheduled and may not be performed.

Contingency Audits		
1. Planning and Requirements Analysis Process for Major Projects 1000 hours *Advisory Project*	Agency-wide	Background: The TxDMV has experienced changes in scope, budget, and schedule in developing major systems. This project would review major project documentation to evaluate activities conducted during the planning and requirements analysis phases to determine what actions could be changed to facilitate a smoother system development in the future.
2. MyPlates Contract 600 hours	FAS	Background: Executive Management Team rated this project for considerations for future audit plans during the FY2015 IAD risk assessment. Tentative Objective: Determine whether TxDMV and MyPlates adhere to contract provisions—including requirements related to fee collections and distributions.

Contingency Audits		
3. Motor Vehicle Division (MVD) Licensing Process and eLicensing 1400 hours	MVD	Background: The MVD adjusted its process to license independent, franchise, and salvage dealers starting in 2013, which greatly reduced the time for applicants to receive a license (from as much as 6 months). The eLicensing system is scheduled to go live in 2016. This project would evaluate MVD's process after go live. Tentative Objectives: (1) Determine if MVD's licensing process complies with statutory and rule requirements (2) Review eLicensing's impact on the licensing process post-implementation.
4. Enforcement Division's (ENF) Investigations Process 600 hours	ENF	Background: The Enforcement Division investigates complaints against licensees regulated by TxDMV, and files administrative charges alleging violation of laws. Tentative Objectives: (1) Determine whether investigations are conducted according to statutes, rules, and policies and procedures (2) Determine how the division's key performance indicators affect investigations

The IAD developed the audit plan using a risk-based methodology, including obtaining input from TxDMV Board members and executive management. The IAD also analyzed agency information to rank potential audit topics by risk, including expenditure transfers, capital budget controls, contract management and information technology risks. The proposed audits that address these risks are the following:

- RTS Refactoring and Single Sticker Post-Implementation Review will address contract management and information technology risks.
- TxDMV Fund tables and Processing & Handling Fee will address expenditure transfers, capital budget controls, and information technology risks.
- Planning and Requirements for Analysis Process for Major Project, which will be conducted in fiscal year 2017 if resources are available, would address contract management and information technology risks.
- My Plates Contract, which will be conducted in fiscal year 2017 if resources are available, would address contract management.

External Audit Services Procured in Fiscal Year 2016

Internal Audit assisted in several external audit reviews during Fiscal Year 2016.

Report Title	Provider's Name	Report Number and Released Date
Heavy Vehicle Use Tax (HVUT) Triennial Review for the State of Texas	Federal Highway Administration	HPP-TX October 14, 2015
International Registration Plan (IRP) Peer Review Final Report for: Texas November 18-19, 2015	International Registration Plan, Inc	No Report Number Provided February 26, 2016
On-site Consultations for Austin Headquarters	State Office of Risk Management (SORM)	16-02 March 8, 2016
State of Texas Financial Portion of the Statewide Single Audit Report for the Year Ended August 31, 2015	State Auditor's Office (SAO)	16-555 March 14, 2016
On-site Consultations for Beaumont Regional Service Center	SORM	16-03 March 31, 2016
Analysis of Quality Assurance Team Projects	SAO	16-026 May 10, 2016
On-site Consultations for Carrollton Regional Service Center	SORM	16-05 June 7,2016
On-site Consultations for Longview Regional Service Center	SORM	16-07 July 27, 2016
On-site Consultations for Waco Regional Service Center	SORM	16-08 August 30, 2016

Reporting Suspected Fraud and Abuse

To comply with fraud reporting requirements in the General Appropriations Act (83rd Legislature, Article IX, Section 7.09), the TxDMV has taken the following actions:

- Provides information on the home page of the TxDMV website (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

In addition, the IAD conducted a consulting engagement to assess the TxDMV staffs' preparedness and knowledge about their role in preventing, detecting, and reporting fraud, waste, and abuse and to make recommendations to implement a robust agency-wide fraud prevent program. Since the engagement, the TxDMV created a work group to develop an anti-fraud, waste, and abuse program within the agency and is in the process of outlining the process for reporting and investigating fraud and developing training for employees.

The IAD also 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.

Internal audit will evaluate all instances of fraud, waste or abuse reported to the Internal Audit Division 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 notify the SAO.

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

DATE: November 3, 2016
Action Requested: APPROVAL

To: **Texas Department of Motor Vehicles Board (TxDMV)**
From: **Linda M. Flores, CPA, Chief Financial Officer**
Agenda Item: **8. C. Contract Approval Procedures**

RECOMMENDATION

TxDMV staff recommends approval to modify the November 14, 2013 Resolution Adopting Contract Approval Procedures.

PURPOSE AND EXECUTIVE SUMMARY

The agency adopted contract approval procedures on November 14, 2013. It established delegated contract values to the Executive director for approval and contract values for board consideration and action. The procedures provided exemptions from board consideration for routine contracts associated with agency operations and pre-approved statewide contracts.

The proposed amendments were developed in accordance with established best practices with input and guidance from the Office of General Counsel. Revisions to the resolution include clarifications which further establish internal processes and requirements for the approval of contracts prior to award to a vendor. Key changes include:

- Addition of language that clarifies that the agency may enter into the procurement process prior to Board approval provided the department complies with the General Contract Approval requirements;
- Clarification of items excluded from Board approval such as contracts for routine operations; and
- Overall language clean-up and clarification.

FINANCIAL IMPACT

No financial impact is expected from this request.

BACKGROUND AND DISCUSSION

Contract approval procedures were approved by the TxDMV Board on March 10, 2011. The procedures delegated authority for the Executive director to approve and sign contracts on behalf of the department for procurements mandated by statute or use by other state agencies. It also specified that the Executive director could execute contracts under $200,000 within budget guidelines according to established procurement and contract laws, rules, regulations and policies of oversight agencies. The board authorized the Executive director to adopt separate internal procedures and/or administrative rules to assist with the implementation of the resolution.

These procedures were modified on September 12, 2013 and November 14, 2013. The modifications were to clarify board approvals for contract renewals and/or change orders that exceed $200,000; increase the original contract by 25 percent or more with a $50,000 or more value; or increases the original contract by $100,000 or more. The modification also reflected specific exemptions and a provision for the agency's annual budget document to include all agency contracts which are expected to $200,000 in the next fiscal year.

BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES

~~RESOLUTION ADOPTING~~ CONTRACT APPROVAL PROCEDURES
Revised ~~September~~November 03, 2016

The Board of the Texas Department of Motor Vehicles (Board) finds it necessary to adopt procedures relating to contracts executed on behalf of the Texas Department of Motor Vehicles (department). The Executive Director (or designee) has the authority to sign and/or approve contracts on behalf of the department without Board approval, to the extent this contract approval procedures~~resolution~~ does not require prior Board approval and Board approval is not required by law. The Board authorizes the Executive Director to adopt separate internal procedures to assist with the implementation of this contract approval procedures~~resolution~~.

Procurement Process:
The d~~D~~epartment may enter into the procurement process to acquire goods and/or services without consultation or prior Board approval provided that the department complies with the General Contract Approval procedures below~~requirements listed below~~.

General Contract Approval:
Department contracts must be submitted to the Board by the Executive Director (or designee) for review and approval prior to execution and/or award ~~of any contract~~ if:

- the contract or contract renewal exceeds $200,000.
- a change order, individually or in combination with other change orders (other than the exercise of available renewal options), increases the original contract by twenty-five percent or more, as long as the dollar amount of the change order is $50,000 or more.
- any change order, individually or in combination with other change order (other than the exercise of available renewal options), increases the original contract by $100,000 or more.

At the discretion of the Executive Director (or designee), the department may request the Board consider any contract of any amount.

Exclusions:
The department is not required to obtain approval for any grants awarded to the department ~~received~~ or awarded by the department or any contracts which do not obligate the department to pay, such as the contract for the TexasSure program.

The following department contracts are for routine operations and are excluded from the contract approval procedures listed above:

~~Texas Procurement and Support Services~~Statewide Procurement Division (~~TPASS~~SPD) Contracts	Lawn Services
Department of Information Resources (DIR) Contracts	Janitorial Services
Council on Competitive Government (CCG) Contracts	Vehicles
Hardware/Software Maintenance ~~(Renewal)~~	Leased Copiers
Vehicle Registration Renewal Notices	Copier Maintenance
Vehicle Titles	Trash Disposal
TXMAS Contracts[1]~~Digital Imaging~~	Interagency/Interlocal Agreements[2]~~TXMAS Contracts[3]~~
Registration Stickers	Software – Off-the shelf
Equipment Maintenance	Set-Aside Contracts[4]
Temporary Staff Services	Postage ~~License Plates and Placards~~
	~~Registration Stickers~~

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Emergency Procurements:

In the event a contract is needed on an emergency basis, the Executive Director (or designee) will contact the Board Chairman or the Finance and Audit Committee for approval to execute such a contract and will brief the full Board at the next regularly scheduled Board meeting.

An emergency procurement is an unforeseeable situation requiring a procurement and the possible execution and/or award of a contract ~~more quickly~~ to:

- prevent a hazard to life, health, safety, welfare, or property;
- avoid undue additional costs to the state; or
- avoid undue delay to any department operations.

Budgeting and Reporting:

Even though the routine contracts listed above are excluded from Board review, the Executive Director (or designee) must still ensure that all contracts are within budget guidelines and adhere to all established procurement contract laws, rules, regulations and policies of oversight agencies.

No later than August 31st of each fiscal year, the Chief Financial Officer (or designee) shall submit to the Board an annual report which identifies all agency contracts which are expected to exceed

[1] Texas Multiple Award Schedule (TXMAS) contracts are contracts that have been developed from contracts awarded by the federal government or any other governmental entity of any state.

[2] However, the interagency contract between TxDMV and the Texas Department of Transportation pursuant to House Bill 3097 from the 81st Regular Legislative Session and/or Senate Bill 1420 from the 82nd Regular Legislative Session is excluded from this exclusion. So the department must obtain Board approval for this contract prior to execution of such contract, to the extent the dollar amount triggers the requirement for Board approval.

~~[3] Texas Multiple Award Schedule (TXMAS) contracts are contracts that have been developed from contracts awarded by the federal government or any other governmental entity of any state.~~

[4] Set-aside contracts are a specific set of contracts for which a competitive procurement is not required, such as contracts for commodities or services that are available from Texas Correctional Industries and ~~any~~ the Central Nonprofit Agency under contract with the ~~Texas Council on Purchasing from People with Disabilities (Council)~~Texas Workforce Commission (TWC). Currently, TIBH Industries, Inc. is the ~~only~~ Central Nonprofit Agency under contract with ~~the Council~~TWC.

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$200,000 in the next fiscal year. This report shall include, but not be limited to, vendor name, contract purpose, contract amount, and contract duration. Additionally, the Chief Financial Officer (or designee) shall state whether sufficient funds are available in the agency's proposed operating budget for such contracts.

Funds for the department's contracts are first considered when the Board reviews and approves the department's operating budget. The Board's approval of the operating budget constitutes approval of any contracts listed in the operating budget. After the Board approves the operating budget, the department's Executive Director (or designee) is authorized to execute such contracts according to established procurement and contract laws, rules, regulations and policies of oversight agencies.

IT IS THEREFORE ORDERED by the Board that these contract approval procedures are adopted. The ~~resolution~~ contract approval procedures dated November 14~~03~~, 2013~~September 12~~~~XX~~, 2013~~36~~, and titled *Board of the Texas Department of Motor Vehicles*, ~~*Resolution Adopting*~~ *Contract Approval Procedures* is rescinded, effective ~~September~~November 03~~November 14~~, 201~~3~~6.

The Department is directed to take necessary steps to implement the actions authorized in this contract approval procedures~~resolution~~.

~~November 14, 2013~~~~September~~November ~~X~~ ~~X~~03, 2016

_____

~~John H. Walker III~~Raymond Palacios, Jr., Chairman
Board of the Texas Department of Motor Vehicles

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BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES

CONTRACT APPROVAL PROCEDURES

Revised November 03, 2016

The Board of the Texas Department of Motor Vehicles (Board) finds it necessary to adopt procedures relating to contracts executed on behalf of the Texas Department of Motor Vehicles (department). The Executive Director (or designee) has the authority to sign and/or approve contracts on behalf of the department without Board approval, to the extent this contract approval procedures does not require prior Board approval and Board approval is not required by law. The Board authorizes the Executive Director to adopt separate internal procedures to assist with the implementation of this contract approval procedures.

Procurement Process:

The department may enter into the procurement process to acquire goods and/or services without consultation or prior Board approval provided that the department complies with the General Contract Approval procedures below.

General Contract Approval:

Department contracts must be submitted to the Board by the Executive Director (or designee) for review and approval prior to execution and/or award if:

- the contract or contract renewal exceeds $200,000.
- a change order, individually or in combination with other change orders (other than the exercise of available renewal options), increases the original contract by twenty-five percent or more, as long as the dollar amount of the change order is $50,000 or more.
- any change order, individually or in combination with other change order (other than the exercise of available renewal options), increases the original contract by $100,000 or more.

At the discretion of the Executive Director (or designee), the department may request the Board consider any contract of any amount.

Exclusions:

The department is not required to obtain approval for any grants awarded to the department or awarded by the department or any contracts which do not obligate the department to pay, such as the contract for the TexasSure program.

The following department contracts are for routine operations and are excluded from the contract approval procedures listed above:

Statewide Procurement Division (SPD) Contracts	Lawn Services
Department of Information Resources (DIR) Contracts	Janitorial Services
Council on Competitive Government (CCG) Contracts	Vehicles
Hardware/Software Maintenance	Leased Copiers
Vehicle Registration Renewal Notices	Copier Maintenance
Vehicle Titles	Trash Disposal
TXMAS Contracts[1]	Interagency/Interlocal Agreements[2]
Registration Stickers	Software – Off-the shelf
Equipment Maintenance	Set-Aside Contracts[3]
Temporary Staff Services	Postage

Emergency Procurements:

In the event a contract is needed on an emergency basis, the Executive Director (or designee) will contact the Board Chairman or the Finance and Audit Committee for approval to execute such a contract and will brief the full Board at the next regularly scheduled Board meeting.

An emergency procurement is an unforeseeable situation requiring a procurement and the possible execution and/or award of a contract to:

- prevent a hazard to life, health, safety, welfare, or property;
- avoid undue additional costs to the state; or
- avoid undue delay to any department operations.

Budgeting and Reporting:

Even though the routine contracts listed above are excluded from Board review, the Executive Director (or designee) must still ensure that all contracts are within budget guidelines and adhere to all established procurement contract laws, rules, regulations and policies of oversight agencies.

No later than August 31st of each fiscal year, the Chief Financial Officer (or designee) shall submit to the Board an annual report which identifies all agency contracts which are expected to exceed $200,000 in the next fiscal year. This report shall include, but not be limited to, vendor name, contract purpose, contract amount, and contract duration. Additionally, the Chief Financial Officer (or designee) shall state whether sufficient funds are available in the agency's proposed operating budget for such contracts.

[1] Texas Multiple Award Schedule (TXMAS) contracts are contracts that have been developed from contracts awarded by the federal government or any other governmental entity of any state.

[2] However, the interagency contract between TxDMV and the Texas Department of Transportation pursuant to House Bill 3097 from the 81st Regular Legislative Session and/or Senate Bill 1420 from the 82nd Regular Legislative Session is excluded from this exclusion. So the department must obtain Board approval for this contract prior to execution of such contract, to the extent the dollar amount triggers the requirement for Board approval.

[3] Set-aside contracts are a specific set of contracts for which a competitive procurement is not required, such as contracts for commodities or services that are available from Texas Correctional Industries and the Central Nonprofit Agency under contract with the Texas Workforce Commission (TWC). Currently, TIBH Industries, Inc. is the Central Nonprofit Agency under contract with TWC.

Funds for the department's contracts are first considered when the Board reviews and approves the department's operating budget. The Board's approval of the operating budget constitutes approval of any contracts listed in the operating budget. After the Board approves the operating budget, the department's Executive Director (or designee) is authorized to execute such contracts according to established procurement and contract laws, rules, regulations and policies of oversight agencies.

IT IS THEREFORE ORDERED by the Board that these contract approval procedures are adopted. The contract approval procedures dated November 14, 2013, and titled *Board of the Texas Department of Motor Vehicles, Contract Approval Procedures* is rescinded, effective November 03, 2016.

The Department is directed to take necessary steps to implement the actions authorized in this contract approval procedures.

November 03, 2016

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Raymond Palacios, Jr., Chairman
Board of the Texas Department of Motor Vehicles

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

DATE: November 3, 2016
Action Requested: Briefing

To: Texas Department of Motor Vehicles Board (TxDMV)
From: Linda M. Flores, CPA, Chief Financial Officer and Renita Bankhead, Assistant Chief Financial Officer
Agenda Item: 8.D. Quarterly Financial Report

RECOMMENDATION

The attached Financial Summary reflects preliminary year end revenues and expenditures for the TxDMV as of the end of the fourth quarter (August 31, 2016). These numbers are preliminary as accounting staff are in the process of completing the Annual Financial Report for 2016 which will include a final accounting revenues and expenses.

PURPOSE AND EXECUTIVE SUMMARY

The Texas Department of Motor Vehicles (TxDMV) Board are briefed quarterly by staff on the revenue collections and agency expenditures. At the end of the fourth quarter agency revenue collections totaled over $1.7 billion, exceeding projections by $16 million. Expenses for the same period totaled $127.6 million with salaries and contract services constituting the majority of the expenditures. The net estimated lapse for 2016 will be approximately $6.3 million.

The agency completed 2016 without any major cost overruns or unanticipated expenditures. Revenue collections were close to projections without any unanticipated fluctuations. In 2017 TxDMV will be primarily dependent upon the TxDMV Fund and collections from the Processing and Handling (P&H) fee. This change in method of financing will require added vigilance by staff to ensure that sufficient revenues are collected to support agency operations. Also expenditures will be closely scrutinized not only at Mid Year but in the final quarter to ensure that lapses are kept to a minimum.

FINANCIAL IMPACT

TxDMV is a net revenue-generating agency for the state with over 87% of revenues collected in 2016 deposited to the State Highway Fund; the remaining revenues are deposited into General Revenue. Beginning in 2017 the agency will be funded from the newly created TxDMV Fund, with the exception of Automobile Burglary and Theft Prevention Authority (ABTPA) which will continue to be funded from General Revenue. Any 2016 agency funds not expended or obligated through encumbrances or eligible for transfers to 2017 will be lapsed to General Revenue.

BACKGROUND AND DISCUSSION

Revenues

For the fourth quarter, overall revenue collections ended 1.6% or $28 million higher compared to 2015.

A majority of the higher than projected revenue collections in 2016 was increased registration revenue driven by a 1.6% increase in the number of registered vehicles and natural population growth. Strong auto sales within the state combined with a Seasonally Adjusted Annual Rate (SAAR) national sales rate of over 17 million units nationally helped drive motor vehicle certificate revenue nearly $3.6 million over projection. Unfortunately, these increases were offset by decreased revenue collections related to permits for Oversize/Overweight carriers due to the slump in oil prices and the related down turn in the oil patch.

As of August 31, 2016, revenue collections for the new MyPlates contract exceeded $19 million of which $9.6 million counts against the $15 million General Revenue guarantee. At the current collection rate it is estimated the $15 million General Revenue guarantee will be met in late summer of calendar year 2017.

Expenditures

Year-to-date expenditures through August 31, 2016 totaled $127,657,728. Significant expenditure categories includes salaries; and operating expenses (postage, reproduction/printing and contract services), license plate production, registration and titling. Capital budget expenses totaled $19 million primarily consisting of expenditures for the Data Center Consolidation contract ($7.4 million) and the TxDMV Automation project ($8.8 million).

The largest portion of TxDMV Automation expenditures were associated with the Registration and Titling System (RTS) Refactoring ($6 million) project.

As of the end of the fourth quarter there was a balance of $68.5 million in available funds (budget less actual expenditures). Of that total approximately $10.0 million consists of outstanding fiscal year 2016 obligations leaving a net of $58.8 million. TxDMV has the authority to carry forward to fiscal year 2017 $49.8 million in capital funds including Automation, the Data Center Contract (DCS), and other capital projects further reducing the projected year-end balance to $8.9 million.

Included in the projected year-end balance is $2.3 million in estimated contract payments to the MyPlates vendor that were not needed due to reduced revenue collections. Contract payments are contingent upon revenues collected. This final adjustment results in a net estimated lapse of $6.3 million. The estimated lapse is an increase from the prior year due to higher than estimated vacancies resulting in increased year end salary lapse and expected expenses that did not occur for monies set aside for the FileNet project, postage and software.

Texas Department of Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

FY 2016 Financial Summary for the 4th Quarter ending August 31, 2016

Finance and Administrative Services Division

October 14, 2016

4th Quarter FY 2016 Financial Status Highlights

Revenues:

In FY 2016 overall revenue collections increased 1.6% or $28.1 million over FY 2015.

The largest source of this increase is attributed to registration revenue as the number of registered vehicles finished 1.6% higher in FY 2016 compared to FY 2015. Revenue increases in motor vehicle registration were partially offset by decreases in oversize/overweight revenue, as fewer permits were issued and a slump in oil prices continued. Motor vehicle certificates revenue finished FY 2016 higher due to overall title issuance that was 4.3% higher than FY 2015. Revenue from commercial transportation fees, business dealer licenses and other miscellaneous fees was flat in FY 2016 compared to FY 2015 when combined.

In FY 2016 combined revenue projections were $1.73 billion with actual collections finishing $16 million (0.9%) over projections. Two categories of revenue exceeded projections and two were below projections for the entire year.

Title revenue exceeded projections by $3.6 million and motor vehicle registration exceeded projections by $35.0 million.

The categories finishing under projection were a) Oversize/Overweight with revenue $22 million below estimates and b) Business Dealer Licenses with revenue almost $200,000 under projection.

Revenue for Commercial Transportation was virtually flat for the year.

Expenditures:

Year-to-date expenditures through August 31, 2016 total $127,657,728. The significant expenditure categories are detailed below:

Salaries ($37.8 million) – As of August 31, 2016, there were 711 filled positions and 52 vacancies.

Purchased Contract Services ($33.9 million) – This line item includes Huntsville license plate production ($25.1 million); Special License Plate Fees - Rider 3, ($4.4 million); and registration renewal and specialty plate mailing ($4.0 million).

Professional Fees ($17.9 million) – The majority of these expenses are Data Center Services (DCS) ($7.4 million) and Automation ($6.5 million), Information Technology staff augmentation & Texas Department of Transportation (TxDOT) DCS ($2.1 million), and the Commercial Vehicle Information Systems and Networks (CVISN) project ($600,000).

Postage ($8.7 million) – Postage permits for registration renewal mailings.

Reproduction & Printing ($4.8 million) – Printing and imaging of titles ($2.5 million), title paper, envelopes, and registration inserts ($2.1 million).

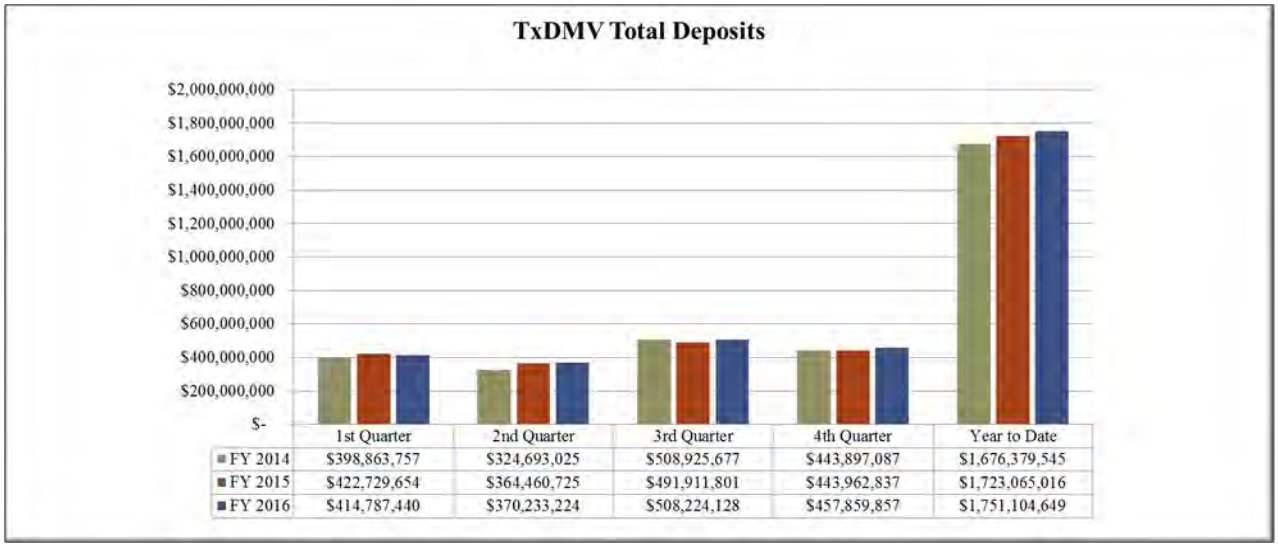
TxDMV Lapse/Carry-Forward to 2017:

As of August 31, 2016 there was a balance of $68.5 million in available funds (budget less actual expenditures). Of that total approximately $10.0 million consisted of outstanding FY 2016 obligations leaving a net of $58.8 million. TxDMV will carry forward to 2017 $49.8 million in capital funds for Automation, computer refresh for the Tax Assessor Collectors and the DCS further reducing the FY 2016 balance to $49.8 million. The remaining balance includes $2.3 million in estimated contracted payments the MyPlates contract that were not needed due to reduced revenue collections.

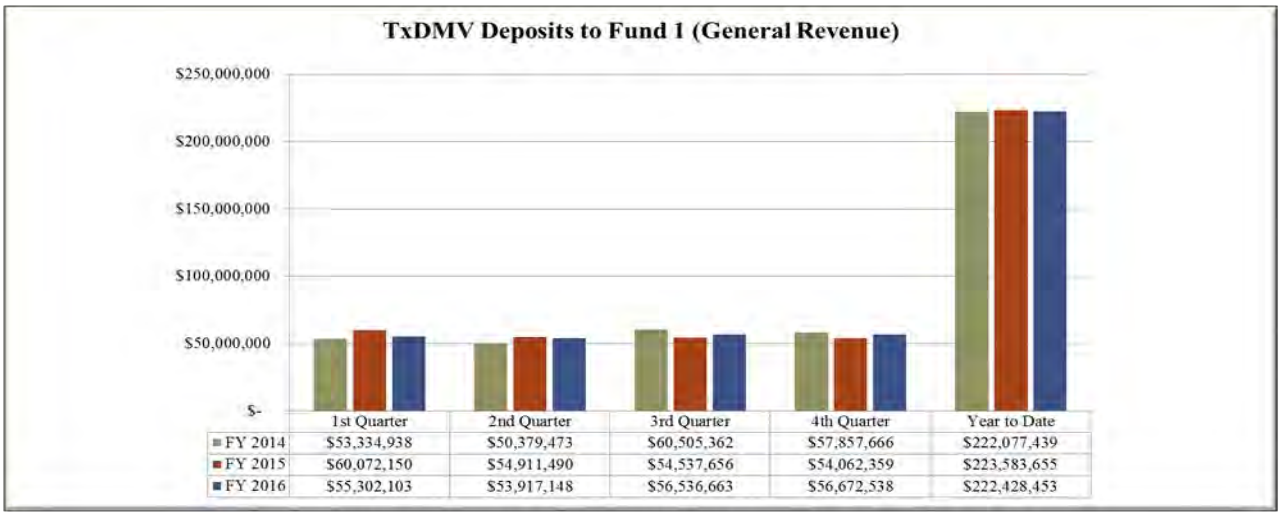
Taking into account the adjustments outlined above, the estimated year-end lapse will be approximately $6.3 million. This balance is more than prior years due to higher than estimated vacancies resulting in increased year end salary lapse and expected expenses that did not occur for monies set aside for the FileNet project, postage and software.

4th Quarter FY 2016 Financial Status Highlights

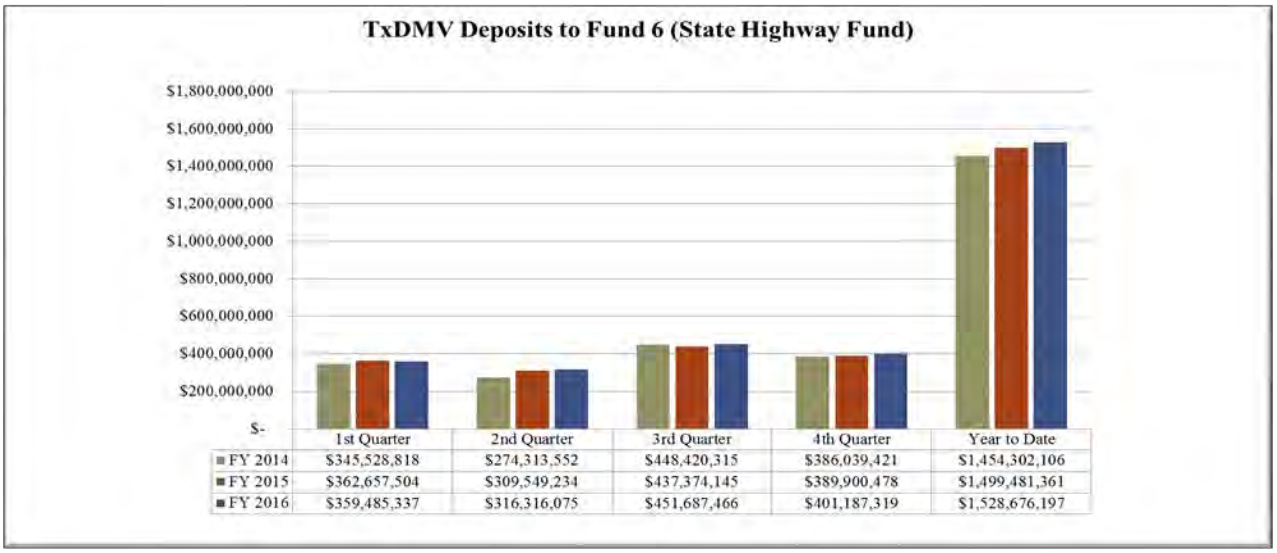
TxDMV Deposits to Fund 1 & Fund 6



	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Year to Date
FY 2014	$398,863,757	$324,693,025	$508,925,677	$443,897,087	$1,676,379,545
FY 2015	$422,729,654	$364,460,725	$491,911,801	$443,962,837	$1,723,065,016
FY 2016	$414,787,440	$370,233,224	$508,224,128	$457,859,857	$1,751,104,649



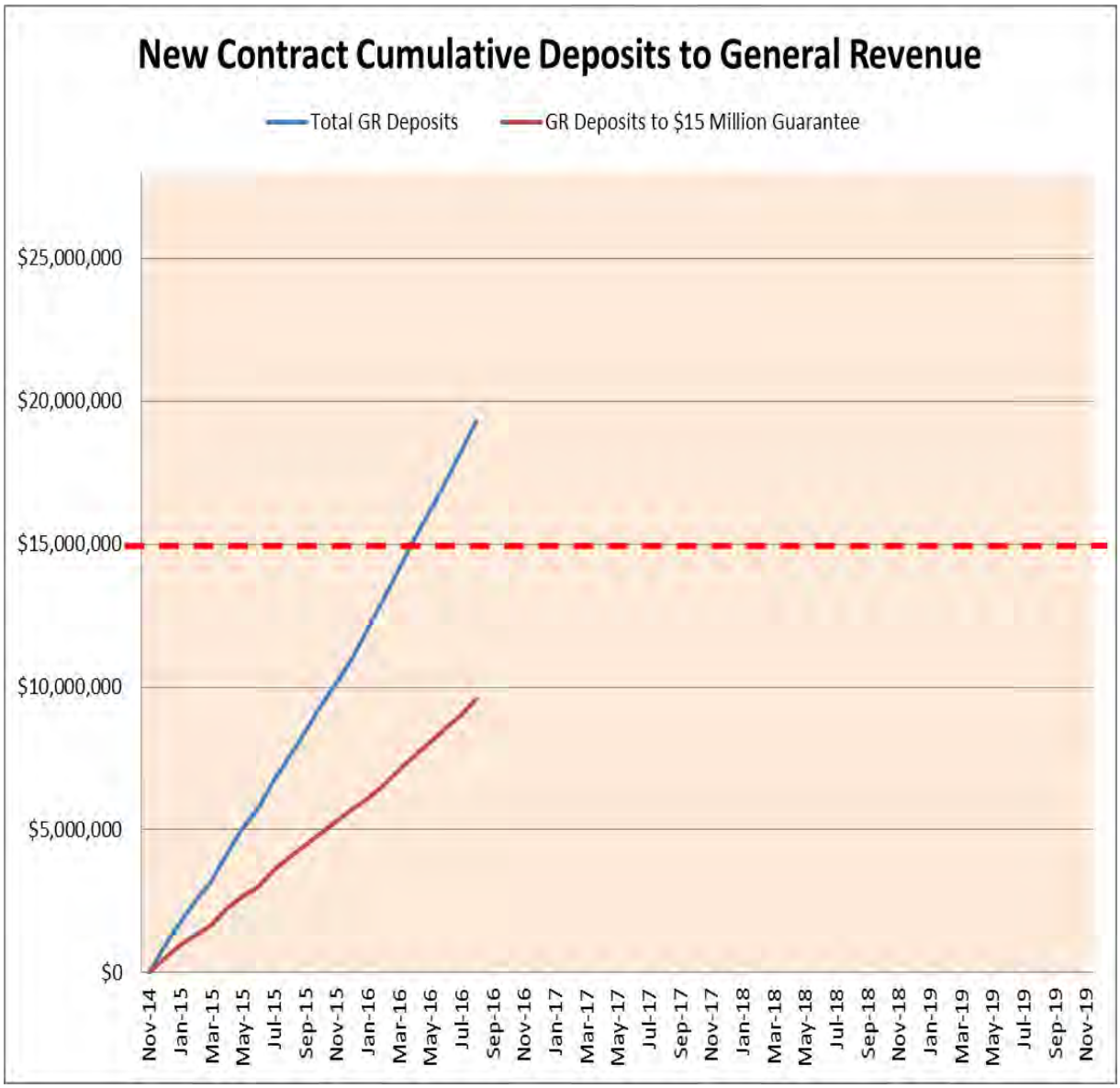
	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Year to Date
FY 2014	$53,334,938	$50,379,473	$60,505,362	$57,857,666	$222,077,439
FY 2015	$60,072,150	$54,911,490	$54,537,656	$54,062,359	$223,583,655
FY 2016	$55,302,103	$53,917,148	$56,536,663	$56,672,538	$222,428,453



	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Year to Date
FY 2014	$345,528,818	$274,313,552	$448,420,315	$386,039,421	$1,454,302,106
FY 2015	$362,657,504	$309,549,234	$437,374,145	$389,900,478	$1,499,481,361
FY 2016	$359,485,337	$316,316,075	$451,687,466	$401,187,319	$1,528,676,197

4th Quarter FY 2016 Financial Status Highlights

MyPlates Analysis
New Contract Revenue and Guarantee Status



Snapshot at 8/31/16	Total
New Contract Cumulative Deposits to General Revenue*	**$19,270,225**
New Order Deposits to General Revenue	$9,061,353
Renewal Deposits to General Revenue	$10,208,872
General Revenue Deposits Counted Toward $15 Million Guarantee [1]	$9,571,797

* Figures exclude refund data and are subject to minimal revision.

1 – GR revenue from the sale of new plates and 5% of renewal plate revenue shall count toward the guarantee.

4th Quarter FY 2016 Financial Status Highlights

Statement of Revenues and Expenditures
August 31, 2016

Revenues:	FY 2016 YTD Projected Revenue	1Q Sep - Nov	2Q Dec - Feb	3Q Mar - May	4Q Jun - Aug	YTD Revenues
Motor Vehicle Certificates	$ 78,805,000	$ 19,351,920	$ 19,020,758	$ 22,699,733	$ 21,332,728	$ 82,405,139
Motor Vehicle Registration Fees	$ 1,460,203,300	$ 349,507,999	$ 307,196,429	$ 445,351,691	$ 393,193,157	$ 1,495,249,276
Motor Carrier - Oversize / Overweight	$ 175,208,000	$ 39,214,121	$ 38,145,730	$ 36,700,874	$ 39,003,176	$ 153,063,901
Commercial Transportation Fees [1]	$ 6,096,000	$ 3,255,514	$ 2,518,563	$ (419,719)	$ 721,664	$ 6,076,022
Motor Vehicle Business Licenses	$ 7,611,000	$ 1,657,698	$ 1,803,863	$ 2,025,209	$ 1,924,333	$ 7,411,103
Miscellaneous Revenue	$ 7,040,700	$ 1,800,188	$ 1,547,881	$ 1,866,340	$ 1,684,799	$ 6,899,208
Total DMV Revenue	**$ 1,734,964,001**	**$ 414,787,440**	**$ 370,233,224**	**$ 508,224,128**	**$ 457,859,857**	**$ 1,751,104,649**

Expenditures:	2016 Approved Adjusted Budget	1Q Sep - Nov	2Q Dec - Feb	3Q Mar - May	4Q Jun- Aug	YTD Expenditures	FY 2016 Available Budget	FY 2016 Projected Remaining Expenditures	FY 2016 Available Budget
Salaries and Wages	$ 38,378,660	$ 9,473,469	$ 9,450,451	$ 9,445,082	$ 9,524,236	$ 37,893,238	$ 485,422	$ -	$ 485,422
Benefit Replacement Pay	$ 116,537	$ 11,121	$ 71,679	$ 19,273	$ 10,954	$ 113,027	$ 3,510	$ -	$ 3,510
Other Personnel Costs	$ 2,029,844	$ 293,556	$ 324,005	$ 347,124	$ 881,117	$ 1,845,802	$ 184,042	$ -	$ 184,042
Professional Fees and Services	$ 57,175,972	$ 2,671,678	$ 5,658,671	$ 5,551,224	$ 4,049,934	$ 17,931,507	$ 39,244,465	$ 1,052,052	$ 38,192,413
Fuels & Lubricants	$ 57,013	$ 7,090	$ 8,469	$ 9,664	$ 14,495	$ 39,718	$ 17,295	$ 15,671	$ 1,624
Consumable Supplies	$ 1,195,339	$ 246,901	$ 161,617	$ 360,941	$ 151,807	$ 921,266	$ 274,073	$ 33,660	$ 240,413
Utilities	$ 4,546,110	$ 725,964	$ 698,322	$ 1,150,673	$ 1,475,753	$ 4,050,712	$ 495,398	$ 438,007	$ 57,391
Travel In-State	$ 366,984	$ 52,883	$ 54,522	$ 85,553	$ 77,553	$ 270,511	$ 96,473	$ -	$ 96,473
Travel Out-of-State	$ 81,201	$ 8,879	$ 2,968	$ 21,734	$ 24,656	$ 58,237	$ 22,964	$ -	$ 22,964
Rent - Building	$ 671,564	$ 203,698	$ 159,724	$ 166,170	$ 116,539	$ 646,131	$ 25,433	$ 14,169	$ 11,264
Rent - Machine and Other	$ 337,796	$ 50,651	$ 76,646	$ 67,243	$ 62,850	$ 257,390	$ 80,406	$ 56,593	$ 23,813
Advertising & Promotion	$ 208,083	$ 13,881	$ 9,252	$ 17,530	$ 12,045	$ 52,708	$ 155,375	$ 103,204	$ 52,171
Purchased Contract Services	$ 38,203,783	$ 4,569,375	$ 7,543,118	$ 8,929,741	$ 12,901,071	$ 33,943,305	$ 4,260,478	$ 1,060,765	$ 3,199,713
Computer Equipment Software	$ 2,475,154	$ 220,556	$ 139,093	$ 326,139	$ 412,837	$ 1,098,625	$ 1,376,529	$ 98,321	$ 1,278,208
Fees & Other Charges	$ 1,268,653	$ 241,080	$ 268,270	$ 276,046	$ 205,624	$ 991,020	$ 277,633	$ 236,729	$ 40,904
Freight	$ 829,297	$ 166,990	$ 160,710	$ 235,004	$ 208,208	$ 770,912	$ 58,385	$ 51,885	$ 6,500
Maintenance & Repair	$ 8,892,754	$ 341,746	$ 543,239	$ 1,232,837	$ 1,523,239	$ 3,641,061	$ 5,251,693	$ 240,188	$ 5,011,505
Memberships & Training	$ 296,659	$ 81,443	$ 22,959	$ 51,309	$ 46,100	$ 201,811	$ 94,848	$ 21,474	$ 73,374
Other Expenses	$ 2,404,408	$ 36,239	$ 91,728	$ 62,586	$ 80,646	$ 271,199	$ 2,133,209	$ 32,080	$ 2,101,129
Postage	$ 11,228,673	$ 2,234,537	$ 1,944,032	$ 2,536,573	$ 1,948,059	$ 8,663,201	$ 2,565,472	$ -	$ 2,565,472
Reproduction & Printing	$ 5,400,910	$ 1,006,917	$ 1,209,758	$ 1,185,337	$ 1,424,592	$ 4,826,604	$ 574,306	$ 480,094	$ 94,212
Services	$ 1,420,532	$ 140,620	$ 161,971	$ 242,526	$ 235,005	$ 780,122	$ 640,410	$ 103,091	$ 537,319
Grants	$ 14,245,699	$ -	$ 1,255,217	$ 3,694,818	$ 3,260,597	$ 8,210,632	$ 6,035,067	$ 5,969,425	$ 65,642
Other Capital	$ 4,331,309	$ -	$ 102,880	$ 7,359	$ 68,750	$ 178,989	$ 4,152,320	$ 601	$ 4,151,719
	$ 196,162,934	**$ 22,799,274**	**$ 30,119,301**	**$ 36,022,486**	**$ 38,716,667**	**$ 127,657,728**	**$ 68,505,206**	**$ 10,008,009**	**$ 58,497,197**
				YTD Aug Net Surplus (Deficit)		***$ 1,623,446,921***		Less UB of Capital 2016 to 2017	$ (49,812,540)
								Less MyPlates Unobligated Balance	$ (2,336,918)
								Estimated Year-End Lapse	$ 6,347,739

Budget Adjustments

Adjusted Automation UB [2]	$ (2,828,000)
Adjustment to 2.5% Salary Increase Estimate [3]	$ (105,294)
Adjustment to Benefit Replacement Pay (BRP) [3]	$ (6,623)
Total adjustment to original approved budget of $198.9 million	**$ (2,939,917)**

Comparison to Prior Year	Adjusted Fiscal Year 2015	Adjusted Fiscal Year 2016	Percent Change
Approved Adjusted Budget	$ 176,912,626	$ 196,162,934	10.88%
Year-to-Date Expenditures	$ 132,442,291	$ 127,657,728	-3.61%
Available Budget	$ 44,470,335	$ 68,505,206	54.05%
Encumbrances/Remaining Expenses	$ 13,084,390	$ 10,008,009	-23.51%
Capital Unexpended Balances	$ 29,809,157	$ 49,812,540	67.10%
MyPlates adjustment	$ -	$ 2,336,918	0.00%
Available Budget	**$ 1,576,788**	**$ 6,347,739**	**302.57%**

Notes:

1. In November of FY 16, a Unified Carrier Registration (UCR) deposit in the amount of $ 1.4 million was incorrectly coded by the Comptroller's automated lockbox processing. This resulted in an over reporting of commercial transportation fees in the Month of November FY 16. In April FY 16, a manual correction was made and the $1.4 million was moved into a special fund that is used to pay invoices received from the Indiana National Unified Carrier Registration Depository. The correction, combined with a partial reporting period, makes the commercial transportation category appear negative in the 3rd Qtr. Overall, as compared to FY 15, commercial transportation fees were up 1.0% in FY 16.

2. Unexpended balance amount adjusted to reflect payments for the RTS project that were expected to be paid in 2016 funds; however, the payments were processed at the end of 2015.

3. The amounts for these items were estimates, adjustments were made to reflect the actual amount budgeted.

Capital Project Status

Technology Replacements and Upgrades - County Support

This project consists of funding to deploy and maintain printers, computers, monitors, laptops, cash drawers, etc. utilized at county Tax Assessor/Collector offices throughout the state. A major initiative in FY 2016 was planning for the refresh of technology at the county offices; this initiative was formally approved by the Governance Team as a project and a project manager has been appointed for the project. A purchase order in the amount of $6.9 million was issued in August 2016 to Insight Public Sector, with the majority of the costs to be expended in 2017.

TxDMV Automation System

The TxDMV Automation capital project provides for the continued development of information technology assets to improve customer services and improve access to agency programs for customers and the public.

The majority of the Automation expenditures were for the Registration and Titling System (RTS) Refactoring Project, which is estimated to be $27.0 million at year end. The Point of Sale (POS) component has been implemented in all 254 counties and the migration of RTS off the mainframe onto DCS-based servers was completed in November 2016. The overall schedule for the project has been updated and work has begun for the impact of the new Process and Handling (P&H) fee on the RTS.

A purchase order in the amount of $4.3 million for FY 2016 was issued to Deloitte for the Licensing, Administration, Consumer Affairs, and Enforcement (LACE) System Replacement, which is now known as the E-Licensing Project. Funding in 2016 provided for the independent verification & validation (IV&V) contract for the E-Licensing Project.

The Web Dealer Project continued with dealer implementation and enhancement testing. The modules implemented to date include New Vehicles, Used Vehicles, and Commercial Fleet. The Salvage module was implemented in July 2016. Adjustments are also being made for the impact to Web Dealer from the implementation of the TxDMV Fund and the new Process and Handling (P&H) fee.

The second phase of Single Sticker continued this fiscal year. The Automation funding for this project was $1.2 million, with the majority of that cost to be utilized for the TxDMV International Registration Plan (IRP) system upgrade, which will implement an automated inspection process to replace the manual verification process for commercial fleet services.

The unallocated reserve for Automation was increased in August 2016 by $1.9 million through a transfer from operating lapse to fund the new WebLien project anticipated to begin in FY 2017. The unallocated reserve and the funding for WebLien will carry forward to 2017.

Growth and Enhancement – Agency Operations Support

This budget provides funds to acquire hardware/software to support agency operations. Expenditures and encumbrances to date include costs for miscellaneous computer equipment, computer monitors, and security software.

Commercial Vehicle Information Systems and Networks (CVISN) Grant

The Commercial Vehicle Information Systems and Networks (CVISN) federal grant that focuses on safety enforcement on high-risk operators; integrating systems to improve the accuracy, integrity, and verifiability of credentials; improving efficiency through electronic screening and enabling online application and issuance of credentials. The Motor Carrier Division (MCD) works with three other state agencies – Texas Department of

4th Quarter FY 2016 Financial Status Highlights

Transportation (TxDOT), Texas Department of Public Safety (DPS), and State Comptroller – to implement the grant, with expenditures planned for TxCVIEW maintenance and core augmentation, the ABC Warning Project, and travel. As of the end of August 2016, $85,000 is encumbered for TxDOT services for the ABC Warning Project and $43,000 is encumbered for work to be performed by the Southwest Research Institute (SwRI). The available budget of $354,703 will be carried forward to FY 2017.

Data Center Services

The Data Center Services (DCS) program enables state agencies to access data center computing as a managed service. State agencies are billed for the amount of services consumed. Expenditures totaled $7.3 million through the end of August. The year-to-date total reflects charges through July 2016 services. Total projected DCS charges for FY 2016 are projected to come in below the overall total budget. The total DCS budget of $9.8 million does not include the projected $1.5 million payment to TxDOT for DCS charges, which will be paid from IT Operating in FY 2016.

Relocation of Regional Service Centers

This project provides funding in FY 2016 for the relocation three of Regional Service Centers from TxDOT facilities. TxDMV staff completed work with Texas Facilities Commission (TFC) on stakeholder feedback and preliminary space planning and specifications have been submitted to TFC. The Regional Service Centers at San Antonio, Pharr, and Corpus Christi have been identified as the facilities to be relocated.

A contract for lease space for the Corpus Christi Regional Service Center was approved by TxDMV Board at the June 2016 meeting.

TFC engaged the services of a realty company to assist with property searches for Pharr and San Antonio, and the Aquila firm provided property lists for both locations. Site visits have been conducted for potential properties in Pharr and San Antonio.

Application Migration & Server Infrastructure Transformation (AMSIT)

The Application Migration and Server Infrastructure Transformation project will identify shared assets, applications, and servers to be relocated from their current position to satisfy the goal of establishing a standalone agency environment. Although this project is related to Automation, it is a separate capital project. Funds have been encumbered for project management, software implementation, and a $1.1 million purchase order was issued in February 2016 for project services, with the remaining balance of $5.8 million to be used for future project costs.

Physical Security

In 2016, the TxDMV Board approved transfers from EPMO operating ($122,040), and Growth and Enhancement, ($175,000), to create the FY 2016 Physical Security Project budget. Expenditures through the end of August total $83,733 for project management costs, and $175,000 is encumbered for cabling costs.

4th Quarter FY 2016 Financial Status Highlights

Statement of Capital Project Expenditures through August 31, 2016

Capital Projects	2016 Approved Adjusted Budget	1Q Sep - Nov	2Q Dec - Feb	3Q Mar - May	4Q Jun - Aug	FY 2016 YTD Expenditures	FY 2016 Available Budget	FY 2016 Encumbrances	FY 2016 Available Budget
Application Migration & Server Transformation (AMSIT)	7,353,955		18,868	105,510	257,326	381,704	6,972,251	1,437,563	5,534,688
Commerical Vehicle Information Systems & Network (CVISN)	1,078,944	65,032	149,045	184,906	196,913	595,896	483,048	128,345	354,703
Data Center Consolidations	9,080,222	1,483,313	2,682,555	1,531,362	1,665,053	7,362,283	1,717,939	1,717,939	-
Growth & Enhancements - Agency Operations Support	774,498	92,464	47,046	156,610	99,727	395,847	378,651	270,234	108,417
Technology Replacement & Upgrades - County Support	5,500,000	410,012	216,332	471,001	362,814	1,460,159	4,039,841	116,878	3,922,963
TXDMV Automation System Project	43,901,651	686,603	2,383,418	3,998,033	1,697,593	8,765,647	35,136,004	22,326,443	12,809,561
Regional Office Relocation	871,500	-	-	-	-	-	871,500	30,000	841,500
Physical Security	297,040	-	-	-	83,733	83,733	213,307	210,076	3,231
Total	**68,857,809**	**2,737,423**	**5,497,263**	**6,447,421**	**4,363,158**	**19,045,268**	**49,812,540**	**26,237,477**	**23,575,062**

Statement of TxDMV Automation Project Expenditures through August 31, 2016

TxDMV Automation Project Appropriations	FY 2016
Original Estimated Unexpended Balance Carry-Forward from FY 2015	$ 28,730,221
Unexpended Balance Adjustments	$ (2,828,000)
Transfer from Operating	$ 1,921,230
Fiscal Year 2016 Appropriation	$ 16,078,201
Total Automation Appropriations	**$ 43,901,652**

TxDMV Automation	2016 Approved Adjusted Budget	1Q Sep - Nov	2Q Dec - Feb	3Q Mar - May	4Q Jun - Aug	2016 YTD Expenditures	2016 YTD Encumbrances	Available Budget
813003 HQ Communication Infrastructure	$ 473,374	$ 60,355.00	$ 258,437.00	$ 16,148.00	$ 70,775.00	$ 405,715	$ 67,659	$ -
813010 RTS Refactoring	$ 27,012,027	$ 440,652.00	$ 1,587,161.00	$ 2,839,820.00	$ 1,106,757.00	$ 5,974,390	$ 15,070,050	$ 5,967,587
813013 RTS Data Purification/Name Address	$ 130,000	$ 11,560.00	$ 4,593.00	$ -	$ -	$ 16,153	$ -	$ 113,847
813015 WebDealer E-Titles	$ 2,652,993	$ 148,994.00	$ 288,074.00	$ 397,844.00	$ 336,935.00	$ 1,171,847	$ 213,096	$ 1,268,050
813020 E-Licensing	$ 8,660,994	$ 85.00	$ 225,200.00	$ 528,899.00	$ 183,125.00	$ 937,309	$ 6,054,300	$ 1,669,385
815028 Single Sticker Phase II	$ 1,200,000	$ 24,957.00	$ 19,953.00	$ 215,322.00	$ 1.00	$ 260,233	$ 921,338	$ 18,429
84BDGT Unallocated	$ 3,772,263	$ -	$ -	$ -	$ -	$ -	$ -	$ 3,772,263
TxDMV Automation Total	**$ 43,901,651**	**$ 686,603**	**$ 2,383,418**	**$ 3,998,033**	**$ 1,697,593**	**$ 8,765,647**	**$ 22,326,443**	**$ 12,809,561** *

** Balances in Automation will be brought forward to FY 2017 for project expenses.*

Texas Department of Motor Vehicles
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DATE: November 3, 2016
Action Requested: BRIEFING

To: **Texas Department of Motor Vehicles Board (TxDMV)**
From: **Linda M. Flores, Chief Financial Officer**
Agenda Item: **8 E. TxDMV Fund Update**
Subject: **Presentation of a summary of activities in the TxDMV Fund for month ending September 30, 2016**

RECOMMENDATION

This is a briefing of the TxDMV Fund revenue and expenditure activities for September, 2016. No action required.

PURPOSE AND EXECUTIVE SUMMARY

On September 1, 2016, the TxDMV began depositing revenue into the Texas Department of Motor Vehicle Fund (TxDMV Fund or Fund 0010.) The operating budget for Fiscal Year 2017 is primarily funded by revenues collected in the TxDMV Fund. Legislation authorized a one-time $23 million transfer of funds from General Revenue (Fund 0001) to the TxDMV Fund as start-up funds. This transfer was processed by the Comptroller's Office on September 2, 2016.

FINANCIAL IMPACT

As of the end of September, 2016, collections for the TxDMV Fund totaled $11.9 million, and with the inclusion of the one-time transfer of $23 million, the available cash balance is $34.9 million. Beginning in January, 2017, these collections will include funds from the newly created Processing & Handling Fee (P&H). Operating expenses from the TxDMV Fund for the same period were $7.6 million. The result is a net cash balance of $27.3 million for the month ending September 2016. Staff project that collected revenues will continue to cover operating costs.

BACKGROUND AND DISCUSSION

The 83rd Legislature, Regular Session, enacted two bills—H.B. 2202 and H.B. 6—that significantly affect TxDMV's revenue disposition for funds collected by the agency and its method of finance for the 2014-2015 biennium. The 84th Legislature, Regular Session enacted SB 1512 which ensured that the TxDMV Fund and its revenue dedications were recreated and rededicated revenues for deposit into the TxDMV Fund.

H.B. 2202, created the TxDMV Fund and directed certain fees collected by or on the behalf of the TxDMV that were previously deposited to the credit of the State Highway Fund to be deposited to the new fund beginning FY 2014. H.B. 2202 ensured statutorily dedicated fees were used for the intended purposes and provided transparency in funding. Subsequently, H.B. 6, the funds consolidation bill, abolished the TxDMV Fund and all revenues that would have been deposited into the newly created TxDMV Fund were re-directed to the credit of the General Revenue Fund.

S.B. 1512, "Relating to the Texas Department of Motor Vehicles," recreated the TxDMV Fund, and H.B. 6, funds consolidation bill, confirmed the creation of the TxDMV Fund as a special fund exempt from General Revenue Fund consolidation. The creation of this fund ended any "diversion" by separating the TxDMV from the State Highway Fund.

The TxDMV fund was created effective September 1, 2016, changing the agency's method of financing from General Revenue (with the exception of the Automobile Burglary and Theft Prevention Authority [ABTPA]) to the TxDMV Fund. The agency is projecting positive net income of $21,369,993 for year ending Fiscal Year 2017.

TxDMV Fund Revenue & Expenses

for month ending September 30, 2016

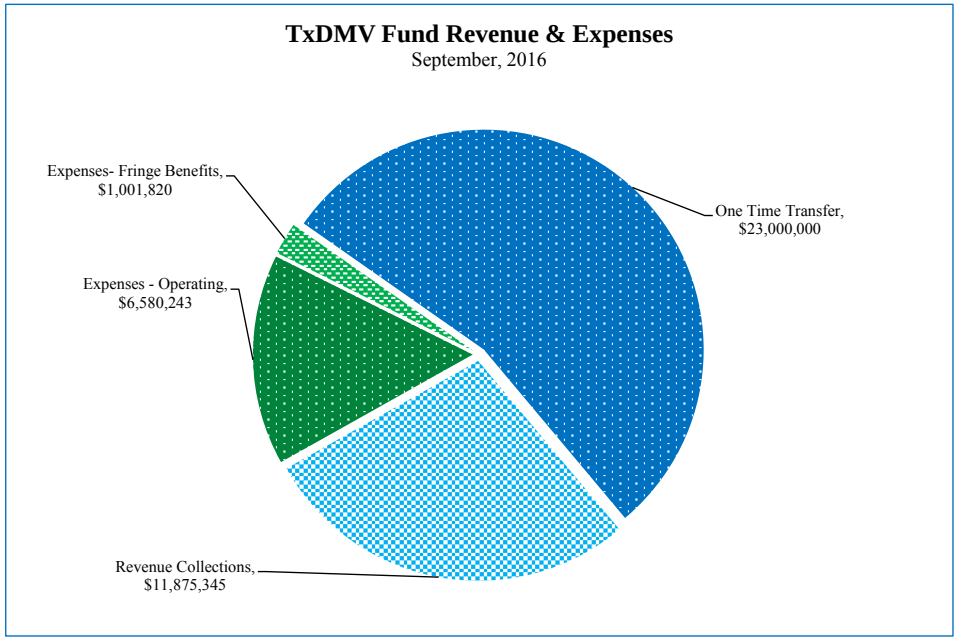
Revenues				
One Time Transfer			$	23,000,000
Motor Vehicle Certificates	$	3,141,994		
Motor Vehicle Registration Fees	$	4,648,149	(1)	
Motor Carrier - Oversize / Overweight	$	3,298,560	(2)	
Motor Vehicle Business Licenses	$	316,606		
Miscellaneous Revenue	$	470,035		
Subtotal Revenue Collections			**$**	**11,875,345**
Total Revenue			**$**	**34,875,345**

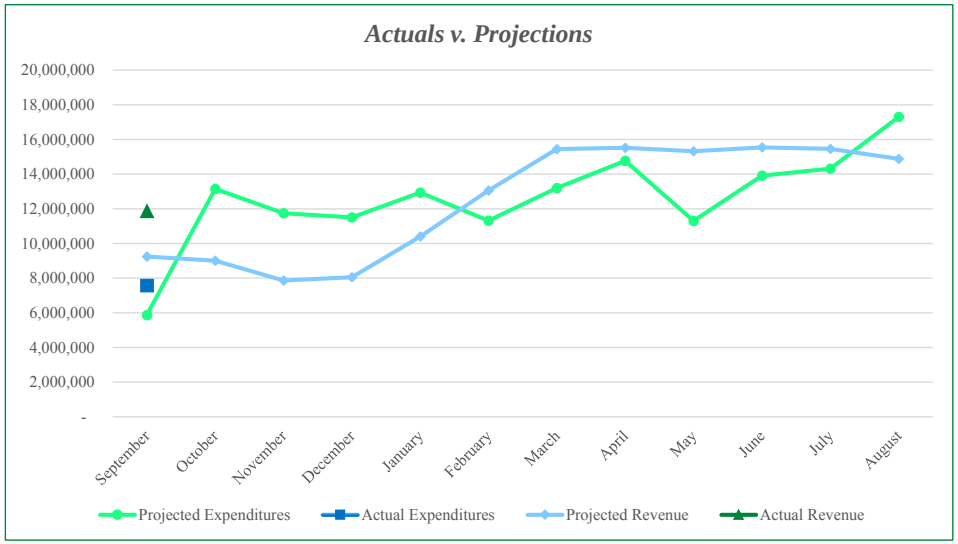
Expenditures				
Salary Related	$	3,183,371		
Professional Fees	$	85,177		
Travel	$	7,665		
Rent/Utilities	$	124,613		
Contract Services and Services	$	358,612	(1)	
Computer Equipment & Software and Maintenance & Repair	$	263,578		
Freight, Postage and Reproduction & Printing	$	2,293,744		
Membership & Training	$	43,995		
Advertising & Promotion, Fees & Other Charges	$	43,221		
Other Expenses	$	57,296		
Fuels & Lubricants and Consumables	$	118,971		
Capital	$	-		
Subtotal Operating Expenses			**$**	**6,580,243**
Fringe Benefits			$	1,001,820
Total Expenses			**$**	**7,582,063**
Net Cash Balance			**$**	**27,293,282**

Notes:

(1) MyPlates TxDMV Fund revenues for this period total $372,851 with expenses totaling $332,247.

(2) Motor Carrier - Oversize/Overweight includes escrow deposits.





Texas Department of Motor Vehicles
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DATE: November 3, 2016
Action Requested: BRIEFING

To: **Texas Department of Motor Vehicles Board (TxDMV)**
From: **Linda M. Flores, CPA Chief Financial Officer**
Agenda Item: **9.A. Facilities Update**

RECOMMENDATION
For information purposes only

PURPOSE AND EXECUTIVE SUMMARY

The 84th Legislature, Regular Session, appropriated 1) $1.5 million was appropriated to relocate the Motor Carrier Division (MCD), currently located at Bull Creek and 2) $1.4 million to relocate regional service centers from Texas Department of Transportation (TxDOT) facilities. An internal TxDMV workgroup was established and determined that three offices --- San Antonio (SA), Pharr (PH) and Corpus Christi (CC) were the best regional service center candidates for relocation during the biennium with the approved funding.

The following is a current status for the relocation of Motor Carrier Division to Camp Hubbard and the three regional service center offices.

- Bull Creek/Motor Carrier Division: In early October, TxDMV and TxDOT came to an agreement to allow MCD to relocate to Camp Hubbard Building 6, 5th Floor. This move is anticipated to occur January 2018. TxDMV Facilities Services and agency stakeholders, along with TxDOT architects are in the process of developing a workable layout for MCD staff. Both agencies also continue evaluating the parking situation at Camp Hubbard to accommodate the upcoming loss of the Bull Creek parking lots.

- Corpus Christi RSC: A lease has been signed for property at 602 North Staples, Corpus Christi, Texas with an estimated move date of April 1, 2017. TxDMV, TFC and the Corpus Christi Regional Transit Authority (CCRTA) representatives began weekly project planning meetings in mid-October. This first meeting included discussion of TxDMV required layouts and general logistical needs of the project and is anticipated to be the first of many planning meetings up to the actual move date. TxDMV Facilities Services has provided established square footage/room schedule, proposed work space layout and photographs of the Houston Regional Service Center layout that serves as the agency standard for regional offices.

- San Antonio RSC: A second site visit provided two viable properties of consideration. However, only one proposal was received. The proposal is acceptable to agency staff and TFC will compose a draft lease for consideration. TxDMV in conjunction with TFC will compile appropriate documentation for submission to the TxDMV Board and TFC Commission for review/consideration/approval.

- Pharr RSC: The landlord's real estate agent was unable to provide proposed layout information and the costs analysis in their Request for Proposal (RFP) was cost prohibitive to the agency. TxDMV Facilities Services has requested TFC architects assist with the proposed drawing and to collaborate with their available contractors regarding actual building retrofit estimates to re-negotiate a price that meets the anticipated project budget.

FINANCIAL IMPACT

The exceptional item for the relocation of MCD was appropriated at $1.5 million. Capital authority for the relocation of Motor Carrier Division is set to expire on August 31, 2017. Agency staff will collaborate with the Office of General Counsel and TxDOT to ensure funding is in place for this project.

The $1.4 million appropriated for the regional service centers has been allocated between the three offices as follows:

- Corpus Christi Project: Estimated $165,300 in one-time costs; $88,400 projected ongoing costs at Year 1
- San Antonio Project: Estimated $179,500 in one-time costs; $192,300 projected ongoing costs at Year 1
- Pharr Project: Estimated $174,500 in one-time costs; $88,400 projected ongoing costs at Year 1

Approximately $535,300 in contingency funding remains for use as needed.

BACKGROUND AND DISCUSSION

The TxDMV requested an exceptional item in the FY 2016-2017 Legislative Appropriations Request to relocate two mid-sized regional service centers from TxDOT owned facilities.

The request was an effort to establish stand-alone offices across the state and secure funding and avoid compressed timelines to secure acceptable office space across the State. In 2013, TxDOT undertook an initiative to reduce its real estate portfolio and sent the TxDMV notification to vacate the TxDOT owned Houston facility no later than September 27, 2014. The timing was created an issue for TxDMV because the agency's FY 2014-2015 appropriations did not include needed funding to secure new space by the deadline to vacate.

The agency's exceptional item was approved for the FY 2016-2017 biennium. Relocating these regional offices will result in 8 regional service centers housed on leased property with the other 8 remaining in TxDOT owned facilities.

In February 2015, TxDOT unofficially notified TxDMV that the property which housed the Motor Carrier Division was sold to Milestone Community Builders. Motor Carrier Division occupies five buildings at the Bull Creek location and is staffed by approximately 119 full time equivalents (ftes). In March 2015, after the 84th Legislature was underway, TxDMV was informed that a three year lease back provision was included in the final agreement. The deadline to vacate the Bull Creek location was February 2018. The issue was addressed during the legislative session and $1.5 million was approved to finance the relocation of the displaced division.

The TxDMV collaborated with the Texas Facility Commission and CBRE Realty company to identify appropriate office space in the Austin area. The TxDMV also collaborated with TxDOT and the Governor's office to locate office space to accommodate approximately 119 employees to minimize the fiscal impact to the State.

Texas Department of Motor Vehicles

FACILITIES UPDATE

November 3, 2016

Agency Property Relocation Projects (PRP)

2016-2017 Agency Moves

★ ★ ★ ★ ★

The agency received funding during the 84th Legislative Session to relocate staff from the Bull Creek Property (Motor Carrier Division) and selected Regional Service Centers. An internal TxDMV workgroup was established that determined San Antonio (SA), Pharr (PH) and Corpus Christi (CC) are best candidates for relocation during the biennium. TxDMV and Texas Facilities Commission (TFC) gathered space requirements to determine appropriate square footage and develop property specifications.

>Bull Creek/Motor Carrier Division (Austin, Texas)

Current Status:

- In early October, TxDMV came to an agreement with TxDOT to utilize Building 6, 5th Floor at Camp Hubbard to relocate the Motor Carrier Division (MCD) staff. We anticipate that the move will occur January 2018.
- TxDMV Facilities and stakeholders, along with TxDOT architects are in the process of developing a workable layout for MCD staff. The rest of the building will be occupied by TxDOT's information technology vendor, NTT Data. Both agencies will continue evaluating the parking situation to accommodate the loss of the Bull Creek parking lots. However, there will be some additional parking starting January 2017 as a result of TxDOT's reconfiguration of the existing parking lots for Buildings 1 and 5. Additionally, new parking spaces will be added once TxDOT demolishes Building 9, which is also in their plans.

Established Move Date: January 2018

Historical Status Information:

- The broker requested at least three (3) properties of consideration for negotiating purposes. Executive management and stakeholders met and reviewed four (4) properties under consideration. One was removed from the list as not suited for agency needs, and three were considered acceptable. The information was submitted to TFC and the real estate broker and the broker is in the process of negotiations to find the best suited property for the agency.
- Proposals for offers are due back to the broker by June 7, 2016, and verbal approval of a lease is anticipated by June 14, 2016.
- TxDMV/Facilities is drafting Board Agenda Detail and Summary documents for the June Board Meeting. The final selected property will also have to be presented at Texas Facility Commission's Meeting in July for their approval to award.

❖ *Agency Property Relocation Projects (PRP)*

- 2016-2017 Agency Moves
- $1.49 million Appropriated for Motor Carrier Division Relocation
- $1.4 million Appropriated for Regional Service Center Relocations

❖ *Property Updates*

- MCD Bull Creek
- Corpus Christi
- San Antonio
- Pharr

- Previously, the list was narrowed to three (3) properties of consideration; however, one of the property landlords has been less than enthusiastic about having TxDMV as a tenant. As such, our real estate agent provided us with another property offering that was reviewed in mid July 2016. The property appeared to be viable, so the real estate agent has been working with landlord real estate agents for the two (2) viable properties. As of today, the agency has received and will be reviewing preliminary test fitting proposals for the two properties and are awaiting updated financial summaries for consideration.
- TxDMV is working two parallel initiatives. One is through our realtor (CBRE) and the other is through TxDOT to find potential space at Camp Hubbard that might accommodate 120 staff. Two properties have been reviewed and found to be potentially viable and within agency budget and are in consideration. The agency has also been negotiating with TxDOT regarding the potential of their accommodating room for 120 employees, parking to accommodate the additional Motor Carrier staff coming from Bull Creek (current employee parking is 132 spaces, which includes general employee parking as well as spaces for the general public) and parking for approximately 90 additional spaces at Camp Hubbard to replace a portion of the current 184 overflow parking spaces at Bull Creek.

Background

- Established Square Footage: 19,461
- Designated Boundary: Within a southern boundary of 35th Street and Mopac Expressway (Loop 1); a northern boundary of Highway 183 and Mopac Expressway (Loop 1); and within a mile radius on either side of Mopac Expressway (Loop 1)
- **RFP Posted: 01/08/16**
- RFP Information: 303-7-20532 (see http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=122034)
- **RFP Closed: 02/25/16**
- Established Move Period: By or before 07/01/17
- The Texas Facilities Commission (TFC) did not receive any responses to the RFPs (requests for proposal) for this location. TFC entered into an agreement with a realty company, CBRE of Austin, to gather viable locations in Austin. CBRE assisted in locating our current Houston RSC location.
- CBRE compiled 10 viable property options for TxDMV review. Site visits were conducted the week of April 18th and the search has been narrowed to four (4) for further consideration. The second round of site visits occurred on May 2, 2016.

>Corpus Christi Regional Service Center (Corpus Christi, Texas)

Current Status:

- A final lease approved by TxDMV, TFC and the Corpus Christi Regional Transportation Authority (CCRTA) board was finalized in early September 2016.
- TxDMV, TFC and CCRTA scheduled a group conference call on Friday, October 14, 2016, to discuss TxDMV required layouts and general logistical needs of the project and is anticipated to be the first of many planning meetings.

Designated Move Date: By or before 4/01/2017

Historical Status Information:

- ***TFC received one proposal*** for property at the CCRTA Staples Service Center in Corpus Christi, TX 78401. Vehicle Title & Registration (VTR) division conducted a site visit and TxDMV Facilities coordinated the site evaluation with VTR and submitted scoring to TFC on 05/20/16.
- TFC in coordination with TxDMV Facilities completed scoring the Request For Proposal (RFP) on 5/24/16 and signed a non-disclosure on behalf of the agency. Both TFC and TxDMV determined the property suited agency needs, so TFC anticipates making a lease award by the end of May 2016.
- TxDMV Facilities is drafting Board Agenda Detail and Summary documents for the June Board Meeting.
- The property will also have to be presented at TFC's Commission Meeting in July for their approval to award.
- The Texas Facilities Commission (TFC) approved signing a lease on the selected property through their Commission in June 2015. TxDMV also sought and received approval through the Board in June 2015. We now await an early August review and approval through the Corpus Christi Regional Transit Authority (CCRTA). Once received, a lease will likely be signed in mid- to late August then needs discussions and the planning phase of the build will begin. The lease is anticipated to run from April 1, 2017 through March 31, 2027 (10 years).
- The TxDMV board approved a lease for this property at the June 2016 meeting. TFC and the Corpus Christi Regional Transportation Authority (CCRTA) board also approved going into a lease. The CCRTA attorney was reviewing the TFC lease and negotiating minor adjustments to the lease with TFC on 08/30/16 and CCRTA signed it and returned it to TFC for signature on 08/31/16.

Background

- Established Square Footage: 3,141
- Designated Boundary/Location: Within a 5 mile radius from 1701 South Padre Island Drive, Corpus Christi, Texas
- RFP Posted: 01/20/16
- RFP Information: 303-7-20538 (see http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=122280)
- **RFP Closed: 03/03/16**
- Designated Move Period: By or before 04/01/17

>San Antonio Regional Service Center (San Antonio, Texas)

Current Status:

- A second site visit was conducted in August 2016 to consider additional properties identified by the State's realtor, Aquila. Two viable properties were identified however only one Request for Proposal was submitted. The second property owner did not submit a proposal. The proposal submitted is within the agency's budget for this project and Vehicle Title and Registration stakeholders reviewed and approved the location on 10/13/16.
- Next Steps: TFC will compose a draft leasefor consideration. TxDMV Facilities and TFC staff will compile appropriate documentation for submission to the TxDMV Board and TFC Commission for review/consideration/approval and begin the building preparation process.

Historical Status Information:

- ***TFC received one proposal*** for a new building, approximately 1 acre along Woodchase Drive, adjacent to the corner of Eckhert Road. TxDMV staff performed a site visit on 04/14/16, reviewed the property, and completed and forwarded the site evaluation to TFC. The property was determined that it did not meet TxDMV needs. TFC suggested reposting as all of San Antonio, higher mileage ratios and other proposed zip codes. VTR and TxDMV conveyed a need to remain within a 5 mile radius of the current location each time.
- TFC initiated the TxMAS process for this project and a broker, Aquila, has been engaged and is interviewing potential property owners/landlords who have property for consideration and are willing to work with State lease requirements. The broker anticipates having a list of properties available for review late before the end of May.
- There were initially three (3) properties that were going to be reviewed; however, one of the landlords indicated a preference for a medical related tenant, so that property was removed from consideration. A property review team consisting of Ann Pierce, Mike Dominkowitz, William Diggs and Belinda Luna reviewed two (2) viable properties on July 8, 2016. Following the site walk thrus, there was a great deal of discussion regarding parking lot related needs. Real estate agents are in discussion and are working on test fit and financial information. Once received, they can be considered and a property can be selected for recommendation to the TFC Commission and TxDMV Board, or the team can start over and request additional properties for consideration.
- A Facilities and VTR team conducted site visits in late July/early August and determined that two properties were viable pending the landlords could accommodate the agency's special parking requirements. Two weeks later, the agency was notified that the landlords were unable to meet the parking requirements. The agency then extended the previous 5 mile radius from the current location to a 10 mile radius and asked our real estate agent (Aquila) to also look for retail space due to the success the agency had found in retail space in Pharr. The agency's real estate agents then began looking for more properties. Last week, TFC provided one property of consideration and the real estate agent provided two additional properties of consideration. The local regional service center manager was provided with information on each of the sites and conducted a drive by site visit and has shared her concerns that are currently being considered by agency management. She also provided another potential property address that might be available and that

location was shared with TFC; however, there is the possibility that the property did not initially show up for consideration because the landlord has already gone on record indicating they are not interested in entering into a lease for state property due to specifics that must be agreed upon in advance. TxDMV now awaits word back on that property while still considering the other three. A Facilities and VTR team may conduct a physical site visit next week pending the outcome of the consideration and hearing back from the landlords.

Background

- Established Square Footage: 3,916
- Designated Boundary: Within a 5 mile radius from 3500 NW Loop 410, San Antonio, Texas
- **RFP Posted: 01/19/16**
- RPF Information: 303-7-20537 (see http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=122251)
- **RPF Closed: 03/01/16**
- Established Move Period: By or before 02/01/17

>Pharr Regional Service Center (Pharr, Texas)

Current Status:

- The landlord's real estate agent was unable to provide proposed layout information for the proposed site and the cost analysis in their Request for Proposal (RFP) was cost prohibitive to the agency. As a result, TxDMV Facilities requested TFC architects assist with the proposed drawing. TFC will coordinatethe landlord's realtor to re-negotiate a price that meets the anticipated project budget. To aid in these negotiations, TFC is collaborating with their available contractors regarding building retrofit costs so a cost comparison can be performed.

Historical Status Information: ***No bids were received for this RFP***

- TFC compiled a list of three properties for TxDMV consideration, but the properties were not built yet and were determined not to suit agency needs.
- TFC then initiated the TxMAS process for this project and a broker, Aquila, been engaged and is interviewing potential property owners/landlords who have property for consideration and are willing to work with State lease requirements. The broker anticipates having a list of properties available for review late before the end of May.
- A property review team consisting of Ann Pierce, Mike Dominkowitz and William Diggs are scheduled to fly into Harlingen on Friday, August 5, 2016, to meet with Pharr Regional Service Center Manager, Rene Rangel, and real estate agents to review three properties of consideration. Two (2) properties are located in Pharr and one (1) is in nearby McAllen. Depending upon the outcome of the visits, the real estate agents will work to provide test fit and financial information on viable properties.
- Ann Pierce, Mike Dominkowitz, William Diggs and Rene Rangel conducted property site visits in early August, but one of the three viable properties of consideration had been sold and the other two sites could not meet the agency's special parking requirement needs. However, the showing real estate agent had also just contracted a nearby retail center and the group was able to visit that site. In doing so, the team found the parking area

had the potential to meet agency needs and three different available areas of the center could potentially meet business needs. The showing agent went back to the landlord who appears to be very excited about the potential of TxDMV moving into the site and agreed to the parking related needs. The agency's preferred location is one on a corner of the retail center, so the landlord is having an architect space plan and draw out the area to meet agency and TFC requirements. Our real estate agent (Aquila) anticipates we will have something back by or before the end of next week for consideration/discussion. **Background** • Established Square Footage: 3,787 • Designated Boundary: Within a 5 mile radius from 600 West Expressway 83, Pharr, Texas • RFP Posted: 01/25/16 • RFP Information: 303-7-20539 (see http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=1222364) • **RFP Closed: 03/10/16** • Designated Move Period: By or before 03/01/17	

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DATE: November 3, 2016

Action Requested: BRIEFING

To: **Texas Department of Motor Vehicles Board (TxDMV)**
From: **Eric Obermier, Chief Information Officer**
Agenda Item: **9.B Registration and Titling System (RTS) Refactoring Update Subject: Refactored RTS Operational Update**

RECOMMENDATION

Staff wishes to brief the TxDMV Board members and respond to any questions they have regarding the operational update on the refactored Registration & Titling System (RTS). No TxDMV Board action is being requested.

PURPOSE AND EXECUTIVE SUMMARY

The Operational Update for the refactored Registration & Titling System provides summary level information on application releases, system availability, factors that led to system down time, and ongoing activities to improve system availability. Representatives from TxDMV, Deloitte, the Department of Information Resources, and Atos will be present to respond to questions regarding the refactored Registration & Titling System.

FINANCIAL IMPACT

N/A

BACKGROUND AND DISCUSSION

Staff provided an Operational Update of the refactored Registration & Titling System to the Project & Operations Committee on April 6, 2016. Representatives from TxDMV, Deloitte, the Department of Information Resources, and Atos provided updates on application releases, system availability, factors that led to system down time, and ongoing activities to improve system availability. With a focus on the people, processes, and technology that support the refactored Registration & Titling System, a significant improvement in system availability was seen from May 2016 through July 2016. A dip in system availability in August 2016 prompted TxDMV to request additional focus on the factors that were causing RTS downtime. In response, Deloitte assembled a Tiger Team to put intense focus on the recurring issues including expert technical resources from outside of the RTS project team. This team was subsequently expanded to include resources from TxDMV, the Department of Information Resources, and Atos. The combined Tiger Team has already identified and coordinated implementation of multiple enhancements for various system configuration items in an effort to improve system availability and stability. The Tiger Team will complete its end to end analysis of the refactored Registration & Titling System and produce a final report detailing all findings, changes implemented at their recommendation, and additional changes all support organizations should consider going forward.

Registration and Titling System (RTS) Refactoring Operational Update

November 03, 2016

Eric Obermier – Texas Department of Motor Vehicles
Dale Richardson – Texas Department of Information Resources
Eric Reeder – Deloitte
Harold Gilchrist – Atos (DCS)

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RTS Support Teams

- TxDMV Information Technology Staff
- Deloitte Project Team – Workstream 4 Maintenance & Operations
- Department of Information Resources (Data Center Services Vendors, DIR Network Operations)

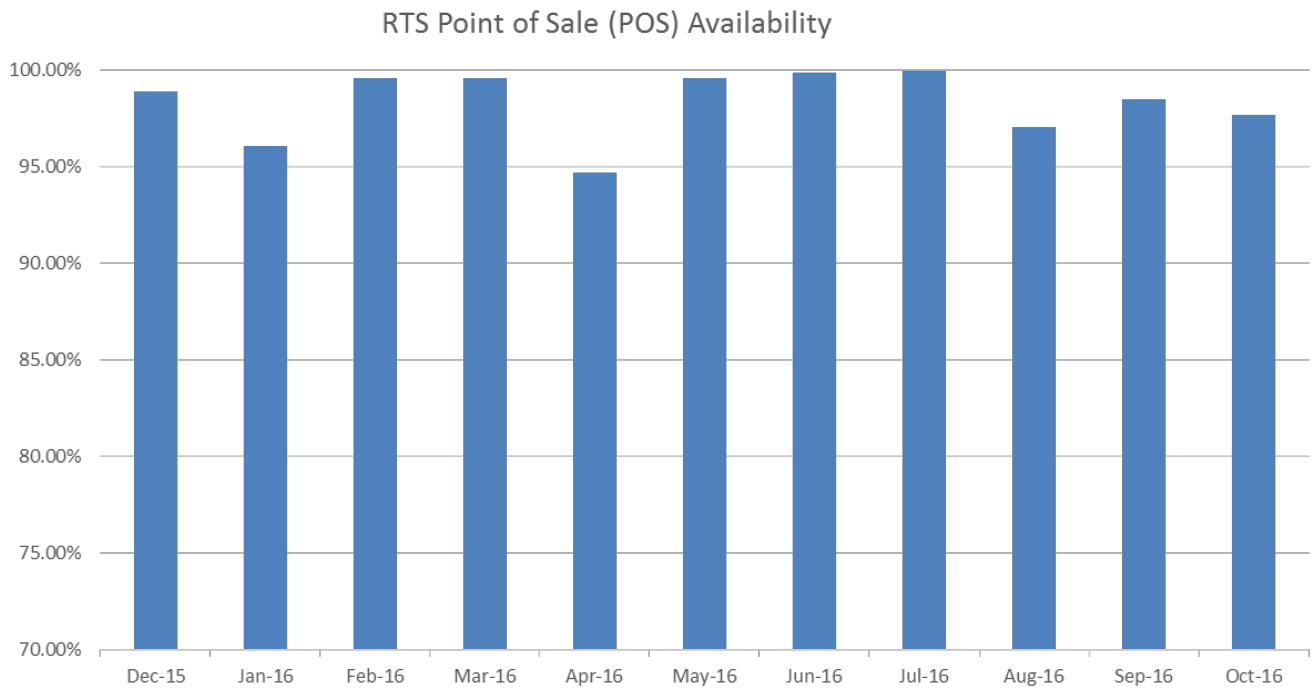
RTS Refactoring
Key Project Milestones

- Refactored Point of Sale and Cognos Deployment to TxDMV Regional Service Centers and Counties (5/18/2015-10/9/2015)
- Cognos Enterprise Reporting Quarterly Release 1 (10/31/2015)
- Refactored Core Launch (decommission of mainframe) (11/23/2015)
- Single Sticker Phase II Renewal Notices , Search by Customer Name – RTS 8.2.0 (12/7/2015)
- Legislative Updates – RTS 8.3.0 (1/2/2016)
- Cognos Enterprise Reporting Quarterly Release 2 (2/14/2016)
- Single Sticker Phase II – RTS 8.4.0 (3/5/2016)

RTS Refactoring
Key Project Milestones Cont.

- Cognos Enterprise Reporting Quarterly Release 3 (4/30/2016)
- Search by Customer Name, Common Checkout Page for Temp Permits – RTS 8.5.0 (6/20/2016)
- Cognos Enterprise Reporting Quarterly Release 4 (7/31/2016)
- TxDMV Fund, OAG Interface, Common Checkout Page for IVTRS – RTS 8.6.0 (8/29/2016)
- Processing & Handling, Centralized Print & Mail for IVTRS – RTS 8.7.0 (10/31/16)

RTS Availability



	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16	Aug-16	Sep-16	Oct-16
RTS POS Availability	98.92%	96.05%	99.60%	99.60%	94.70%	99.60%	99.90%	100.00%	97.03%	98.48%	97.71%

Availability calculations are based on the percentage of time the RTS Point of Sale was available between the hours of 7:00am and 6:00pm, Monday through Friday.

Summary of RTS Outages

Affected Users	Start Time	End Time	Description of Issue
All Users	12/7/2015 8:50	12/7/2015 11:25	Search by name performance issue
TxDMV Users	12/28/2015 8:30	12/28/2015 13:00	TxDMV Regional Offices could not create CCO's
All Users	1/7/2016 14:00	1/7/2016 19:00	Database Administrator Error, RTS Unavailable
All Users	1/21/2016 7:00	1/21/2016 8:00	Batch processing ran long
All Users	1/25/2016 16:55	1/25/2016 18:30	County workstation closeout process slow or unresponsive
All Users	1/26/2016 14:20	1/26/2016 14:50	Large file being moved on production server which severely impacted RTS performance
All Users	1/27/2016 7:00	1/27/2016 8:00	Print service not running after planned restart, RTS receipts and stickers would not print
All Users	1/28/2016 16:35	1/28/2016 16:45	Network connection to DIR experienced brief outage
All Users	2/25/2016 7:00	2/25/2016 7:20	Batch processing ran long
All Users	2/29/2016 7:00	2/29/2016 7:30	DCS network outage caused by card in another agency's server
All Users	3/3/2016 7:00	3/3/2016 8:00	Batch processing ran long
All Users	4/4/2016 7:00	4/4/2016 15:45	Storage connectivity issue, RTS unavailable
All Users	4/25/2016 7:00	4/25/2016 10:15	Storage connectivity issue, RTS unavailable
All Users	5/9/2016 16:00	5/9/2016 16:55	TxDOT network router issue. RTS unavailable
All Users	6/13/2016 10:35	6/13/2016 12:25	Database communication issue, RTS unavailable
All Users	8/12/2016 10:35	8/12/2016 12:05	Network equipment performance issue, RTS unavailable
All Users	8/15/2016 7:00	8/15/2016 13:45	Storage connectivity issue, RTS unavailable
All Users	9/6/2016 17:22	9/6/2016 18:00	Database communication issue, RTS unavailable
All Users	9/7/2016 10:12	9/7/2016 12:35	Database communication issue, RTS unavailable
All Users	9/20/2016 17:15	9/20/2016 18:00	TxDMV DNS server issue, RTS unavailable
All Users	10/5/2016 13:12	10/5/2016 23:00	Bug in server operating system that houses RTS database
All Users	10/19/2016 11:00	10/19/2016 11:20	Failed network change for county RTS network

Root Causes of RTS Outages from 8/1/2016 – 10/31/2016

- Technology Issues / Failures – 7 hours
  - Outage on 10/5/2016 accounts for almost 5 hours of the total
- Process Gaps / Non-adherence – 5 hours & 47 minutes
  - Changes to system were not executed successfully
  - Gaps in system validation post change implementation
- Performance / Unknown – 3 hours & 2 minutes
  - Likely database contention caused by multiple applications and ad-hoc database access

Tiger Team Genesis

- Created by Deloitte on 9/14/2016
  - To provide intense focus on a re-emergence of RTS issues
    - Analyzed previous three (3) months of incidents
    - Incidents categorized by cause
- Team Expanded on 10/10/2016
  - Added Resources from TxDMV, DIR & Atos
    - Twice daily checkpoint calls to verify stability of the system
    - Twice weekly workgroup meetings to develop, analyze and advance recommendations towards resiliency improvements

Tiger Team Objectives

- Improve RTS Resiliency
  - Identify, recommend and implement increased monitoring
  - Identify, recommend and implement system configurations that reduce the impact from ad-hoc users accessing the database
  - Identify code in batch jobs that unnecessarily block the database from the core system
  - Identify and recommend enhancements to address potential points of failure

Tiger Team Recommendations
-Implemented

- Change Management
  - Implement infrastructure change management process improvements
    - Continue to add more coordination
    - Update technical procedures for implementing changes
    - Enhance post change implementation testing
- Tuning Database for Ad-Hoc User Access
  - Queries to run in isolation
  - Trained users on when and how to more effectively run queries against the system

Tiger Team Recommendations
- Implemented

- Applications
  - Modified method applications use when accessing information from RTS such as the Motor Vehicle Information Network (MVINet), Texas Law Enforcement Telecommunications System (TLETS), to avoid database locks from normal user operations

- Database
  - Modified database configuration to reduce contention between applications simultaneously accessing the RTS database

Tiger Team Recommendations
- In Progress

- Monitoring
  - Review monitoring capabilities across all layers of the architecture and provide recommendation for improving proactive monitoring to avoid potential future outages

- Cognos
  - Tune isolation levels and database access (target implementation November 2016)

Tiger Team Recommendations
- For Evaluation

- Database
  - Establish a separate instance of the database to support Cognos and reporting in general without impacting registration and title transactions
- Infrastructure
  - Upgrade the Maxenso software to make better use of server memory during batch run window, reducing the potential impact of a delayed opening
  - Enter into a maintenance agreement with innoWake to ensure Maxenso software is routinely upgraded

Tiger Team Next Steps

- Continue checkpoint calls and workgroup meetings
- Continue to implement incremental improvements as identified
- By December 16, 2016, Produce formal Tiger Team report to include:
  - Findings
  - Changes Implemented
  - Additional Changes Recommended for Future Implementation
  - Estimated Costs and Timeline of Recommended Changes

Planned RTS Releases

Release Date	Description
11/21/16	Cognos Enterprise Reporting Quarterly Release 5
12/19/16	RTS Release 13 - Processing & Handling Part 2
4/17/17	RTS Release 14 - Prioritized Enhancements
8/28/2017*	RTS Release 15 - Legislative Implementation

** - Anticipated release date for Release 15 for any legislation that is passed with an effective date of 9/1/2017 that requires RTS programming*

Questions?

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

DATE: November 3, 2016

Action Requested: Briefing

To: **Texas Department of Motor Vehicles Board (TxDMV)**
From: **Judy Sandberg, Enterprise Project Management Office Director**
Agenda Item: **9. C. Enterprise Projects Update**

RECOMMENDATION
This is a briefing only and no decisions or actions are requested.

PURPOSE AND EXECUTIVE SUMMARY
The purpose of this briefing is to provide an update on enterprise projects. A Portfolio Trend dashboard is provided to show the combined health of all projects (the portfolio). A project dashboard is provided for each active project. In the interest of time during the Board meeting, a verbal update will be provided on the Refactored Registration and Titling System (RRTS) project, specifically the scheduled releases related to implementation of the Process and Handling (P&H) fee and the Licensing Administration Consumer Affairs and Enforcement (LACE) Replacement project. The LACE Replacement system is named e-LICENSING.

FINANCIAL IMPACT
As shown on the Portfolio Trend dashboard, all active projects are within budget and are on target to end within budget. Unplanned costs were identified in the LACE Replacement project and Physical Security Project. Both projects have sufficient contingency funds within the existing budgets to cover these costs. The unplanned costs for LACE Replacement are due to clarified requirements for Enforcement's notices of violation identified during testing. Unplanned costs for the Physical Security Project were discovered during the site preparation walk-throughs at 13 Regional Service Centers (RSCs). Examples of items include electrical needs, cabling, secure doors, and air conditioning. Additional cameras and panic buttons for larger RSCs are also provisioned. Funds are set aside for three RSCs scheduled to move, Corpus Christi, Pharr, and San Antonio.

BACKGROUND AND DISCUSSION
In response to Member John Walker's request at the September Board meeting, a new box entitled "Project % Complete" was added to each project dashboard. The format of this information was coordinated with Member Bake Ingram, Member Luann Caraway, and Member Walker. The new box provides project start and end dates and bar graphs showing the percent of scope accomplished, percent of schedule elapsed, and percent of budget spent and encumbered. Generally, the percents of the three bars should be in alignment, within a range of tolerance. However, the ranges may vary by project depending upon the level of effort required at different points in the life of the project and the cost of that effort.

Project dashboards are provided for the following projects:

1. Refactored RTS (Including TxDMV Fund/P&H Fee)
2. LACE Replacement
3. webDEALER
4. Application Migration and Server Infrastructure Transformation (AMSIT)
5. Single Sticker Phase II (Remaining Scope: Texas International Registration Plan (TxIRP)
6. Physical Security Project
7. County Equipment Refresh Project (CERP)

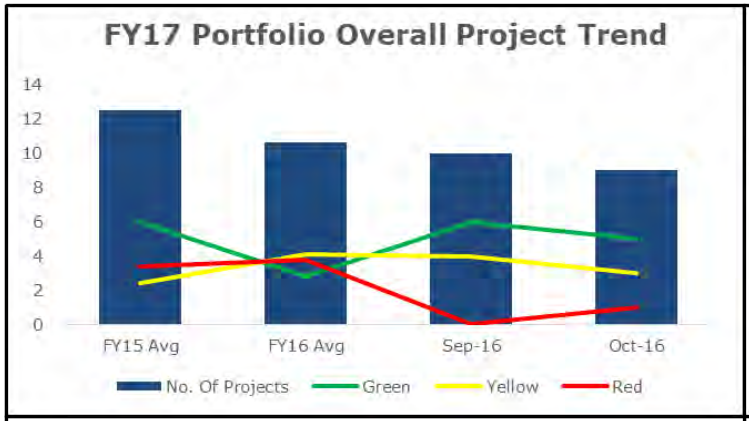
After the dashboards, a list is provided of projects closed so far during fiscal year 2017. Since September 1, 2016, two projects were closed including Centralized Accounting Payroll Personnel System (CAPPS) Human Resources (HR)/Payroll project and the FileNet project. The last page of the update provides a Glossary of terms.

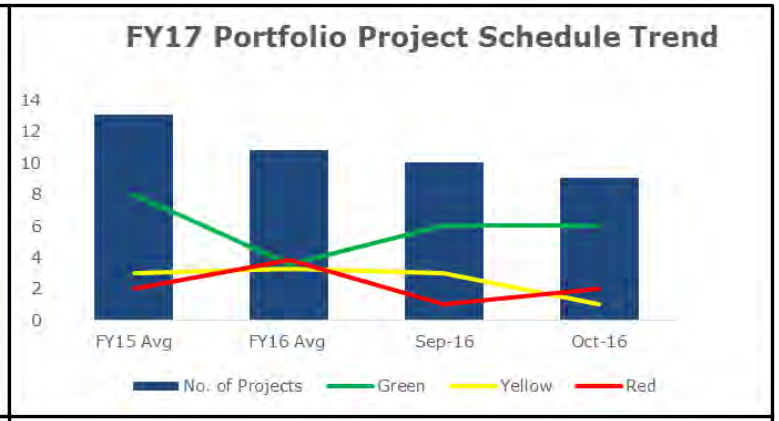
Enterprise Projects Update November 3, 2016

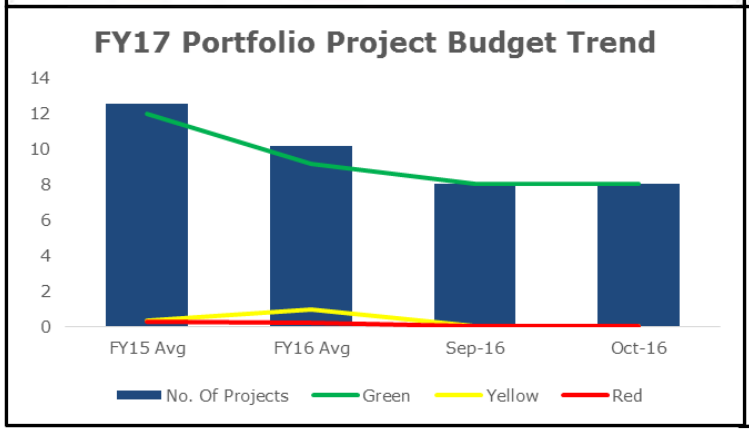
Texas Department *of* Motor Vehicles

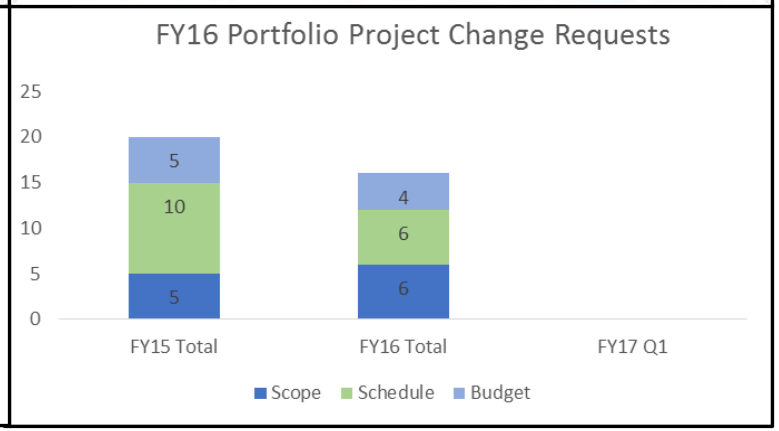
HELPING TEXANS GO. HELPING TEXAS GROW.

TXDMV Portfolio Trend









RTS Refactoring, TxDMV Fund and P&H Fee

RTS Refactoring will refresh the RTS technology by modernizing the core RTS system and provide business intelligence reporting capabilities.

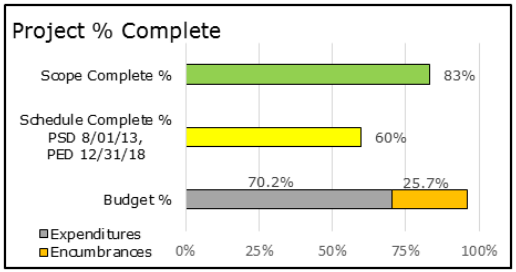
Project Manager – T. Beckley
Business Owner – J. Kuntz
Executive Sponsor– W. Brewster

Benefits to Public

- Improved Customer Service (system modernization provides opportunities for increased efficiency when implementing improvements).

Benefits to Agency

- Modernization of the RTS system.
- Business intelligence reporting capabilities.
- Transitions RTS from TxDOT to the TxDMV infrastructure.

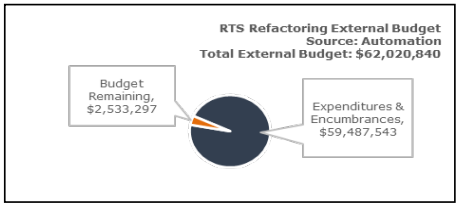


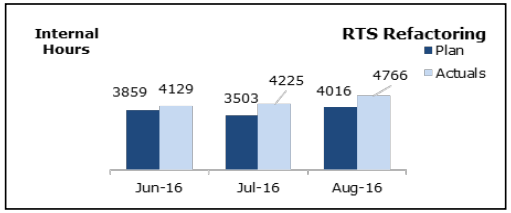
October 2016 Status

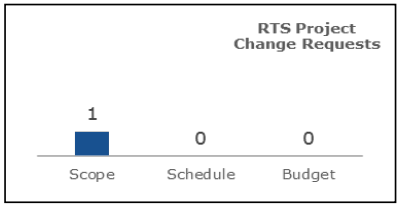
Overall	Schedule	Budget	Scope	Resources
Y	Y	G	G	Y

May2016 to September 2016 Trend Line

	WS1	WS2	WS4-2+	WS4 – 11	WS4 – P&H	WS4 – 13
Req	✓	✓	✓	✓	✓	✓
Des	✓	✓	✓	✓	✓	Y
Devel	✓	✓	✓	✓	✓	Y
Test	✓	✓	✓	✓	Y	
Deploy	✓	✓	✓	✓		







Accomplishments – Last 30 Days

- Completed Release 12 (8.7.0) (P&H Fee) System/UAT Testing.
- HEB completed code changes and conducted UAT Testing.
- Completed General Design for Release 13 (8.8.0).
- Approved content for Release 14 (8.9.0) scheduled for a release date of April 17, 2016.

Milestones – Next 30 Days

- Deploy Release 12 (P&H Fee) on October 29, 2016.
- Complete Technical Design and Development for Release 13 (8.8.0).
- Complete requirement gathering for Release 14 (8.9.0).

Risk/Issues	Mitigation/Corrective Action
I_1 – General and Technical design are 2 weeks behind schedule for Release 8.8.0. The October 21, 2016, coding complete date is at risk.	I_1 – Assess design metrics. Identify JIRA tasks at risk for non-completion. Identify resource issues, e.g. vacations, contracts, illness, etc. Continue coding items with complete technical design. Expedite closure on open design items.
I_2 – System Stability issues continue to cause sporadic system performance issues and down times.	I_2 – The team met with DCS and they agreed to expand Tiger team to include DCS and DIR.
R_1 – Resource constraints and COPYREC Tool performance issues may impact the availability of Test Records for System and User Acceptance Testing.	R_1 – Identified TxDMV and Deloitte resources to assist in making test records available. Additionally, requirements have been collected to improve the performance/capability of the COPYREC Tool.
R_2 – Release 13 (8.8.0) scope is at risk, specifically NVMTIS brand mapping and some plates because of resource constraints around admin table and design tasks.	R_2 – Monitor and control daily. Possibly recommend additional scope reduction (NMVTIS and some plates).

LACE Replacement

LACE will manage the licensing of dealers, motor vehicle converters, manufacturers etc.; track litigation and enforcement cases.

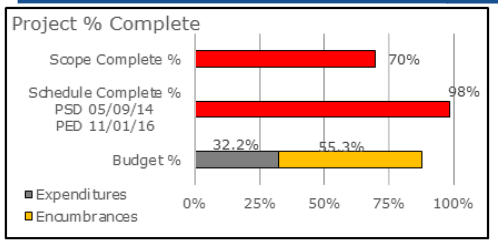
Project Manager – M. Lucas
Business Owners – D. Avitia, B. Harbeson, E. Sandoval
Executive Sponsor – S. Mellott

Benefits to Public

- Improved Customer Service with a Web based, self-service application.
- Online submittal of protests and complaints.
- Online tracking of licensee applications, protests, and complaints.

Benefits to Agency

- Reduced support costs and submission errors.
- Improved data sharing and accuracy.
- Integrated case management.

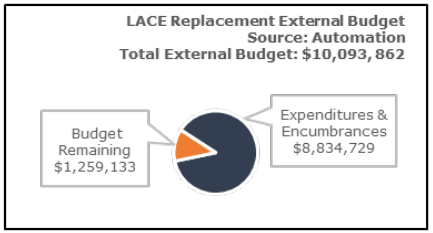


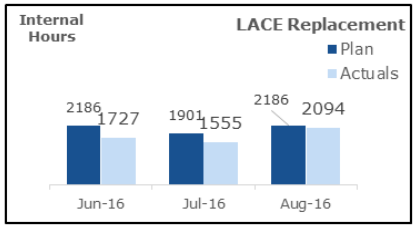
October 2016 Status

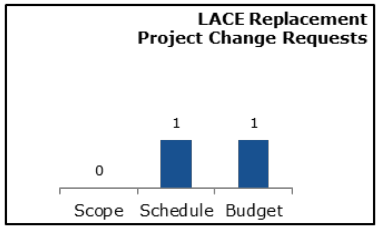
Overall	Schedule	Budget	Scope	Resources
R	R	G	R	Y

May 2016 to September 2016 Trend Line

Requirements	✓
Design	✓
Development	✓
Test	R
Deploy	







Accomplishments – Last 30 Days

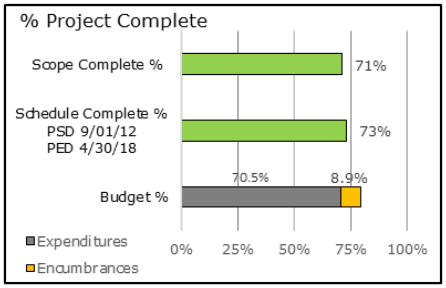
- Completed Disaster Recovery Plan September 7, 2016.
- Approved Application Design Specification Part 1 September 6, 2016.
- Started UAT & SAT of eLicensing and FOIAXpress

Milestones – Next 30 Days

- Complete UAT.
- Complete SAT.
- Continue Training.
- Continue External Communication.

Risk/Issues	Mitigation/Corrective Action
I_1 – Missed requirements for Enforcement's document generation requirements for notices of violation noted. Enforcement attorneys must be able to specify and/or remove certain violations from the letter if they determine that is required. This specification is essential for Enforcement operations.	I_1 – Request level of effort in hours from Deloitte.
I_2 – Planned Go-Live date of November 1, 2016, will be missed due to I_1.	I_2 – Based on LOE, determine new Go-Live date.
I_3 – Cost may be increased in order to complete I_1.	I_3 – Obtain cost estimate from Deloitte. Only accept cost if it is 10% of or less of original contract amount and within budget.
R_1 – Project success may be impacted due to abbreviated training schedule and lack of training schedule alignment between teams.	R_1 – Contractor trainers working with teams to gain understanding of new system.
R_2 – Inadequate time to perform required TxDMV testing covering SAT and UAT. Condensed testing may not allow all functions to be fully tested.	R_2 – Daily meetings to review defect and critical issues to mitigate possible delays in schedule.
R_3 – Call Center plan to support go live and post implementation.	R_3 – Assign 3 MVD FTEs to assist with calls for 60 - 90 days. Assign ENF FTEs to assist with calls. Work with VTR to assist with R/T calls temporarily.

webDEALER	Benefits to Public	Benefits to Agency
webDealer allows a vehicle title to be created, stored and transferred in electronic form, improving the accuracy of the titling process. Project Manager – G. Wessels Business Owner – T. Thompson Executive Sponsor – J. Kuntz	• Reduced costs for titling and registration services from motor vehicle sales. • Improved titling and registration time by reducing manual processes.	• Reduced costs for the county tax office and TxDMV to title and register vehicles. • Improved system to track and manage registration and title services from Motor Vehicle Sales. • Eliminates RSPS-DTA Processes.

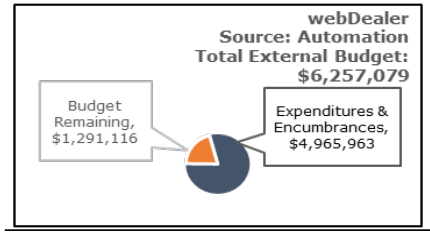


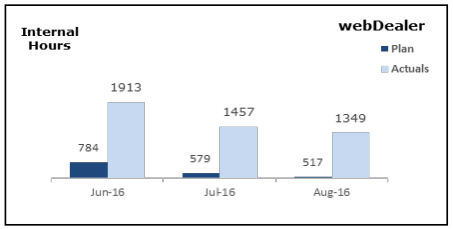
October 2016 Status

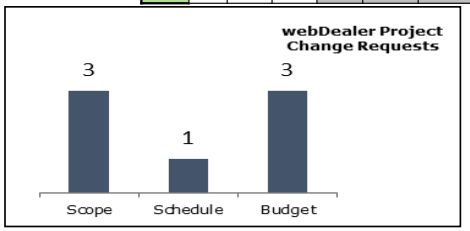
Overall	Schedule	Budget	Scope	Resources
G	G	G	G	G

May 2016 to September 2016 Trend Line

	New Car Used Car	CFB Adopt Sal	WD DMV Fund	WD P&H Fee	eTags	CP	eTitles
Req	✓	✓	✓	✓	✓	G	G
Design	✓	✓	✓	✓	✓		
Devel	✓	✓	✓	✓	G		
Test	✓	✓	✓	G			
Deploy	✓	✓	✓				





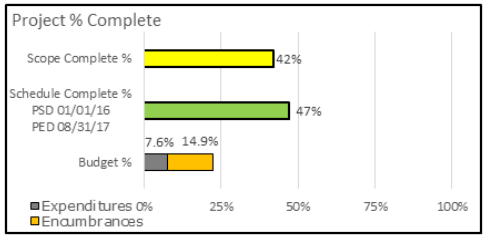


Accomplishments – Last 30 Days
• Resolved webDEALER Salvage file print issue. • Completed webDEALER P&H Fee SIT/SAT. • Started webDEALER P&H Fee UAT.

Milestones – Next 30 Days
• Expand webDEALER Salvage Pilot. • Complete webDEALER P&H Fee UAT. • Deploy webDealer P&H Fee with RTS Release 12.

Risk/Issues	Mitigation/Corrective Action
R_1 – Low transaction participation from the Salvage Pilot entity will cause a slower implementation of the Salvage application across the state. R_2 – RTS Release 15 capacity may not be enough to cover WD required items for the October 2017 release due to legislative actions and other priority items.	R_1 – Monitoring progress to meet the established success criteria prior to further implementation. Resolving a file print issue that is delaying further implementation. R_2 – Coordinate the release planning early and reserve hours for the legislative actions.

AMSIT	Benefits to Public	Benefits to Agency
AMSIT plans and implements the separation of TxDMV applications and related IT infrastructure components from TxDOT. Project Manager – R. Abdeladim Business Owner – T. Benavides Executive Sponsor – E. Obermier	• Improved agility to meet customers' needs with system autonomy. • Improved service quality with stabilized environment.	• Streamlined support processes and enhanced automation. • Improved information security. • Compliance with state mandates related to Data Center transformation.

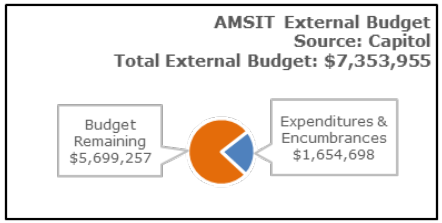


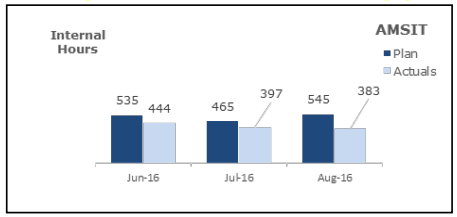
October 2016 Status

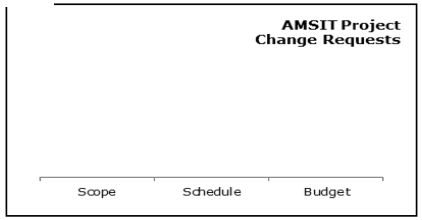
Overall	Schedule	Budget	Scope	Resources
Y	G	G	Y	G

May 2016 to September 2016 Trend Line

Initiating	✓
Planning	G
Executing	Y
Closing	







Accomplishments – Last 30 Days

- ForgeRock requirements sessions initiated.
- NSOC voice design and disaster recovery requirements completed.
- TxDMV provided response to vendor clarification questions.

Milestones - Next 30 Days

- POCN issued to vendor for change order.
- Receive final bill of materials/detailed design.
- NSOC final equipment recommendation to ESC.
- ForgeRock requirements/design complete.
- Move Groups work effort resumes.

Risk/Issues	Mitigation (M)/Corrective Action (CA)
I_1 Vendor scope did not include migration of file shares from Novell to Windows.	I_1 : Develop a high level scope; request vendor quote. In progress.
I_2 Vendor scope is to migrate FTP "as is" to TxDMV environment. Vendor scope did not include updates/enhancements to SFTP.	I_2 : Develop a high level scope; request vendor quote. In progress.
I_3 – Vendor underestimated NSOC & ForgeRock scope; now states scope increase.	I_3 . Executive Sponsor & PM engaged Purchasing & in discussion with vendor. Weekly meetings set with vendor leadership.
R_1 - Migration from Novell to Windows is an extensive effort, project timeline may be at risk if delays in approval of a change request.	R_1 – Engage Executive Sponsor & ESC; dependent on vendor estimate, funds available in AMSIT budget.
R_2 . Migration to ForgeRock for WebDealer/WebSub/e-tags must be coordinated with other projects to minimize to resources.	R_2 – AMSIT PM actively coordinate with WebDealer & eLicensing PMs on schedule and resources.

Enterprise Project Update - November 3, 2016

Single Sticker PII

Single Sticker Phase II has completed implementation of the 90 and 180 day rules in RTS and is now focused on Single Sticker rules within the TxIRP system.

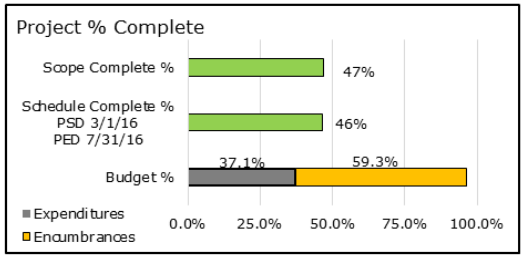
Project Manager – T. Beckley
Business Owners – J. Kuntz, J. Archer
Executive Sponsor – W. Brewster

Benefits to Public

- Provides a single "Registration and Safety Inspection" Sticker process.
- Aligns Safety Inspection and Registration time frames.
- Reduces unsafe and environmentally unfriendly vehicles on Texas roads.

Benefits to Agency

- Compliance with HB 2305 and HB 188
- Automates TxIRP solution for Motor Carrier Division .

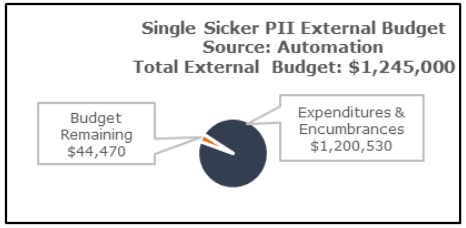


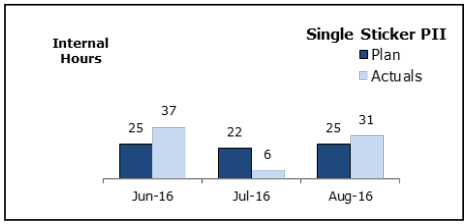
October 2016 Status

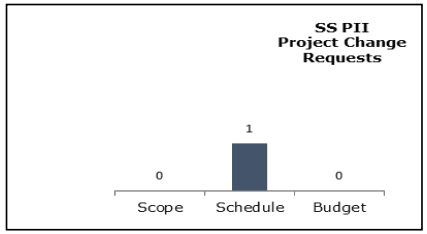
Overall	Schedule	Budget	Scope	Resources
G	G	G	G	G

May 2016 to September 2016 Trend Line

	RTS	TxIRP
Requirements	✓	G
Design	✓	G
Development	✓	G
Test	✓	
Deploy	✓	







Accomplishments – Last 30 Days
•Continue execution of TxIRP phase of the project.

Milestones – Next 30 Days
• Vendor will continue development and weekly status meetings.

Risk/Issues	Mitigation/Corrective Action
R_1 – The TxIRP project has an external dependency on an RTS web service, any delay in the December RTS release will have an impact on the TxIRP project.	R_1 – RTS development and test team attend weekly technical exchanges with Explore ensuring the teams stay in sync.

Facility Physical Security

The Facility Physical Security Project will install an integrated security management system for all 16 Regional Service Centers (RSC).

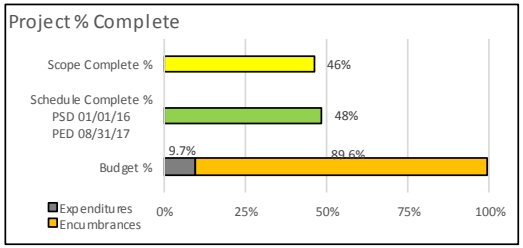
Project Manager – C. Archer
Business Owners – W. Diggs
Executive Sponsor – Eric Obermier

Benefits to Public

- Customer Safety and Security.

Benefits to Agency

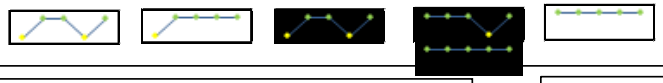
- Integrated security management system.
- On-site control panels, monitoring and communication consoles.
- 24-hour security system monitoring.



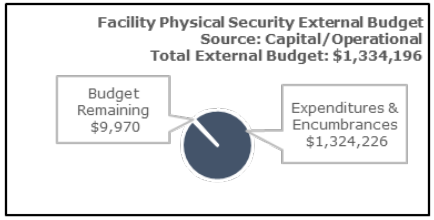
October 2016 Status

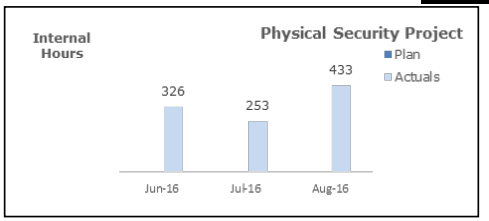
Overall	Schedule	Budget	Scope	Resources
G	G	G	Y	G

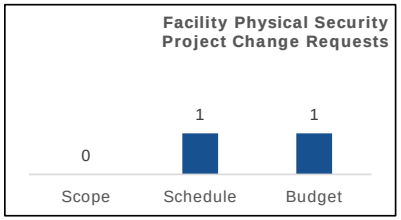
May 2016 to September 2016 Trend Line



Initiating	G
Planning	G
Executing	G
Closing	







Accomplishments – Last 30 Days

- ESC Approval of Abilene RSC Intrusion System.
- RSC #7 – Midland Fire Plan Submitted to Fire Marshal.
- Start RSC #7 – Midland Installation.
- Start RSC #8 – Lubbock Installation.

Milestones – Next 30 Days

- Complete RSC #5 – Abilene Installation.
- Complete RSC #6 – Wichita Falls Installation.
- Complete RSC #7 – Midland Installation.
- Complete RSC #8 – Lubbock Installation.
- Process and Analysis of data from 2nd Batch of RSC walkthroughs.
- Get approval on additional scope items.

Risk/Issues	Mitigation/Corrective Action
I_1 - RSC Facility upgrade issues during walkthroughs may impact project scope (i.e. Server Room A/C, Electrical Capacity, Fire Compliant Doors etc.) and schedule.	I_1 – Work with ESC to identify Solution, Strategy and Funds.
I_2 – Delay in decision on whether walkthrough issues are in scope may impact Schedule.	I_2 – Work with ESC to determine which walkthrough items are in scope by Friday October 21, 2016.
R_1 – Lack of new location for Pharr and San Antonio may impact on-time completion of Project end date.	R_1 – Establish last date when either new leases are signed or decision is made to install equipment in existing locations.

County Equipment Refresh Project

County Equipment Refresh Project (CERP) is a workstation and printer equipment upgrade to the 508 County offices in the state of Texas.

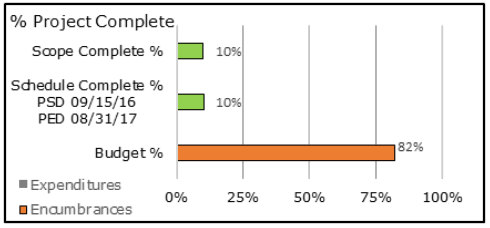
Project Manager – C. Sturm
Business Owner – J. Kuntz
Executive Sponsor – E. Obermier

Benefits to Public

- Improved Customer Service with workstation and printer reliability.

Benefits to Agency

- Improved workstation and printer reliability and reduced maintenance cost.

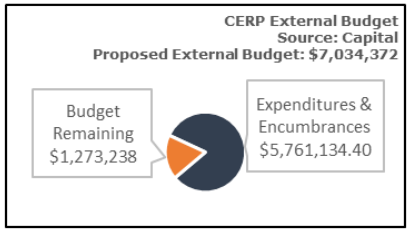


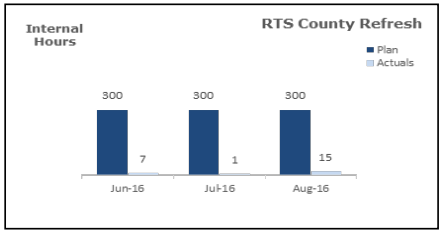
October 2016 Status

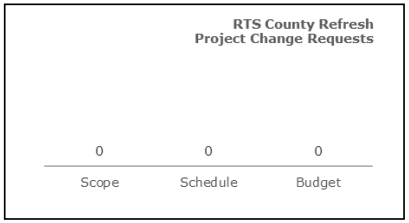
Overall	Schedule	Budget	Scope	Resources
G	G		G	G

May 2016 to September 2016 Trend Line

Initiating	G
Planning	G
Executing	
Closing	







Accomplishments – Last 30 Days

- Held Project Kickoff meeting on September 15, 2016.
- Vendor actively engaged to begin project planning activities.
- Approved Vendor Schedule

Milestones – Next 30 Days

- Approval of Project Charter.
- Approval of Project Budget.
- Approval of Project Planning Documents.

Risk/Issues	Mitigation/Corrective Action
R_1 –Image for the new workstations not finalized.	R_1 – TxDMV to complete testing of the workstations and finalize image by October 21, 2016.
R_2 – Multiple vendor deliverables have been received at one time.	R_2 – TxDMV is reviewing Vendor Deliverables.
R_3 – The Vendor's Communication Plan is pending TxDMV approval.	R_3 – TxDMV is working with the Vendor to finalize Communication Plan.

Closed Projects

- January 2016
  - Regional Office Project
- March 2016
  - RTS Name Parsing Project
- July 2016
  - Consolidated Call Center Project
- October 2016
  - CAPPS HR Project
  - FileNet Project

Glossary

API – Application Programming Interface
AMSIT – Application Migration Server Infrastructure Transformation
BA – Business Analyst
BAFO – Best and Final Offer
BRD - Business Requirements Document
C^3 – Consolidated Call Center
CA - Corrective Action
CCB - Courtesy Callback
DCS – Data Center Services
CAPPS - Centralized Accounting and Payroll/Personnel System
CERP – County Equipment Refresh Program
CIO - Chief Information Officer
CPO - Chief Projects Officer
CPA - Comptroller of Public Accounts
CPU – Central Processing Unit
CRD – Consumer Relations Division
DEV Development
DIR - Department of Information Resources
DPS - Department of Public Safety
DTA – Dealer Title Application
ENF - Enforcement
EPMO - Enterprise Project Management Office
ERQ – Enterprise Reporting Quarter
ESC – Executive Steering Committee
FAQ – Frequently Asked Questions
FTE – Full Time Equivalent
G – Green (Status)
GT – Governance Team
HB – House Bill
HEB - Howard E Butt Grocery Stores
HR – Human Resources
I – issue
IAM – Identity and Access Management
IT – Information Technology
ITSD – Information Technology Services Division
Jama - Product management software developed By Jama S/W Co.
JIRA – Issue Tracking Software developed By Atlassian
LACE - Licensing, Administration, Consumer Affairs, and Enforcement
LAST - Load and Stress Testing
LPAR – Logical Partition
M – Migration
MCD – Motor Carrier Division
M/CA – Migration/Corrective Action
MS - Mitigation Strategy
NIM – Nice Information Management
NSOC - Network Security Operations Center
MVD – Motor Carrier Division
OAG - Office of Attorney General
P&H – Process and Handling
PCR – Project Change Request
PED – Project End Date
PM - Project Manager
PMLC - Project Management Life Cycle
PMP - Project Management Professional
PO – Purchase Order
POCN - Purchase Order Change Notice
RQAT - Quality Assurance Team
PSD – Project Start Date
R – Red (Status)
R – Risk
R/I – Risk/Issue
RFO – Request For Offer
RO – Regional Office
RSPS – Remote Sticker Printing System
RRTS - Refactored RTS
RSC – Regional Service Center
QAT – Quality Assurance Team
QTR – Quarter
SIT – System Integration Test
SAT - System Acceptance Testing
SDLC - Systems Development Life Cycle
SDLC – Software Development Life Cycle
SMS – Security Management System
SOP – Standard Operating Procedures
SOW – Statement of Work
SS PII - Single Sticker Phase II
TCEQ - Texas Commission on Environmental Quality
TPDF - Texas Project Delivery Framework
TS - Registration and Titling System
TxIRP – Texas International Registration Plan
TxDOT – Texas Department of Transportation
UAT - User Acceptance Testing
VTR – Vehicle Title and Registration Division
WFM – Work Force Management
WS – Work Stream
WS2+ – Work Stream 2+
WS4 – Work Stream 4
Y – Yellow (Status)

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

DATE: **November 3, 2016**
Action Requested: **APPROVAL & ORDER**

To: **Board of the Texas Department of Motor Vehicles**
From: **Daniel Avitia, Director, Motor Vehicle Division**
Agenda Item: **10**
Subject: **Dealerships' complaint against Distributor under Texas Occupations Code §§2301.467, 2301.468, and 2301.478. *New World Car Nissan, Inc. D/B/A World Car Hyundai, World Car Nissan; and New World Car Imports San Antonio, Inc., D/B/A World Car Hyundai, Complainants v. Hyundai Motor America, Respondent;* MVD Docket No. 14-0006 LIC; SOAH Docket No. 608-14-1208.LIC**

RECOMMENDATION

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

PURPOSE AND EXECUTIVE SUMMARY

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

FINANCIAL IMPACT

None

BACKGROUND AND DISCUSSION

On November 20, 2013, New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports San Antonio, Inc. d/b/a World Car Hyundai (together, World Car) filed a complaint against Hyundai Motor America (Hyundai). World Car complained that Hyundai discriminates against World Car, uses disparate treatment against World Car, does not supply cars requested by World Car, and requires unreasonable sales standards of World Car. World Car complained that Hyundai violated Texas Occupations Code §2301.467, §2301.468, and §2301.478.

The Motor Vehicle Division (MVD) referred the contested case matter to the State Office of Administrative Hearings (SOAH) on December 6, 2013. The ALJ conducted the hearing on the merits on September 21 through 25, 2015; closed the administrative record on January 11, 2016; and issued the proposal for decision (PFD) on March 10, 2016.

The ALJ found that World Car (i.e., the dealership Complainant) failed to meet its burden of proof to show that any of Hyundai's programs violate the Occupations Code. The ALJ recommended that World Car's complaints be denied. The parties filed exceptions to the PFD and replies to the exceptions. On May 31, 2016, the ALJ issued an exceptions letter, providing that—after having reviewed the exceptions and reply pleadings—the ALJ was making no changes to the March 10, 2016, PFD. SOAH returned this contested case matter to the TxDMV. The Board has jurisdiction to consider the contested case and to enter a final Order.

The issue presented in this case is whether World Car established that Hyundai's actions or programs violate the Texas Occupations Code.

As the Complainant, World Car has the burden of proof to establish—by a preponderance of the evidence[1]—that Hyundai violated:

- Occ. Code §2301.467(a)(1), by requiring adherence to unreasonable sales or service standards;
- Occ. Code §2301.468(1), by directly or indirectly discriminating against a franchised dealer or otherwise treating franchised dealers differently as a result of a formula or other computation or process intended to gauge the performance of a dealership;
- Occ. Code §2301.468(2), by discriminating unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor; or
- Occ. Code §2301.478(b), by failing its duty of good faith and fair dealing owed to its franchisee.

Board Authority

The Board has authority over these parties and the decision in this contested case matter in accordance with Texas Occupations Code Chapter 2301, specifically §2301.151.

Government Code §2001.058(e) allows an agency to vacate or modify an order proposed by the ALJ only if the ALJ:

(1) misapplied or misinterpreted applicable law, agency rules, or prior agency decisions;

(2) relied on a prior agency decision that is incorrect or should be changed; or

(3) made a technical error in a finding of fact.

The agency must state in writing the specific reason and legal basis for a change made to a finding or fact or conclusion of law.

SOAH ALJ's Recommendation

The SOAH ALJ found that World Car (dealership) failed to meet its burden of proof to show that Hyundai violated the Occupations Code. The ALJ recommended the Board deny World Car's complaint.

Staff's Notes

Staff notes that the SOAH ALJ's PFD contains harmless error of legal *citation*. This citation mistake is a harmless error and correcting it does not change the overall outcome of the hearing. The ALJ considered the correct and applicable statutory *language*. The draft final Order, presented for Board consideration, includes the specific reason and legal basis required by Texas Government Code §2001.058(e) necessary for the Board to correct the PFD.

Documents

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

1.	Proposed Draft Final Order	
2.	SOAH ALJ's Proposal for Decision	03/10/2016
3.	World Car Hyundai's (Dealership) Exceptions to Proposal for Decision	04/08/2016
4.	Hyundai Motor America's (Distributor) Reply to World Car Hyundai's Exceptions to Proposal for Decision	05/09/2016
5.	World Car Hyundai's (Dealership) Reply in Support of Exceptions to Proposal for Decision	05/18/2016
6.	SOAH ALJ's Exceptions Letter	05/31/2016

[1] Black's Law Dictionary defines "preponderance of the evidence" to mean the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to include a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in a civil trial, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. Also termed preponderance of proof or balance of probability.

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC. D/B/A	**§**	
WORLD CAR HYUNDAI, WORLD CAR	**§**	
NISSAN; AND NEW WORLD CAR	**§**	**MVD DOCKET NO. 14-0006 LIC**
IMPORTS SAN ANTONIO, INC., D/B/A	**§**	**SOAH DOCKET NO. 608-14-1208.LIC**
WORLD CAR HYUNDAI,	**§**	
Complainants	**§**	
v.	**§**	
	§	
HYUNDAI MOTOR AMERICA,	**§**	
Respondent	**§**	

FINAL ORDER

The referenced contested case matter is before the Board of the Texas Department of Motor Vehicles (TxDMV) in the form of a Proposal for Decision (PFD) from the State Office of Administrative Hearings (SOAH) and involves the complaint by two World Car franchised dealerships against the distributor, Hyundai Motor America.

In accordance with Texas Government Code §2001.058(e), the specific reasons and legal basis for the Board's changes to the administrative law judge's (ALJ's) Findings of Fact and Conclusions of Law follow:

Findings of Fact 2A and 2B are added in accordance with Texas Government Code § 2001.058(e)(1) because the ALJ misapplied applicable law. In determining the applicable law in this proceeding, the date the complaint was filed and the date the parties renewed their agreement are necessary findings. New Finding 2A establishes the date World Car filed its complaint with TxDMV. New Finding 2B is quoted directly from the ALJ's PFD Footnote 2.

- ***Finding of Fact 2A*:** World Car filed its complaint on November 20, 2013.
- ***Finding of Fact 2B*:** "The franchise agreements between Hyundai and World Car were renewed in November 2010."

Conclusion of Law 3 is modified in accordance with Texas Government Code §2001.058(e)(1) because the ALJ misapplied applicable law. The modification merely corrects the typographical error in the Government Code chapter citation from 2011 to 2001 to correctly reflect the Texas Administrative Procedure Act.

- ***Conclusion of Law 3:*** The hearing was conducted pursuant to the Administrative Procedure Act and SOAH's procedural rules. Tex. Gov't Code ch. 2001 and 1 Tex. Admin. Code ch. 155.

Conclusion of Law 6 is modified in accordance with Texas Government Code §2001.058(e)(1) because the ALJ misapplied applicable law. The modification corrects the year of the applicable law from 2003 to 2009, through application of (a) Texas Occupations Code § 2301.263, (b) the date the complaint was filed, (c) the date the parties renewed their agreement, and (d) the nonamendatory provisions in Sections 10 & 11 of H.B. 2640, 81st Leg. R.S. (2009). This is harmless error. Although the 2009 version of Texas Occupations Code § 2301.467 applies, the text of § 2301.467(a)(1) and (a)(2) has not changed since 2003.

- ***Conclusion of Law 6:*** World Car failed to meet its burden of proof to show that Hyundai required adherence to unreasonable sales or service standards. Tex. Occ. Code § 2301.467(a)(l) (2009).

Conclusion of Law 8 is modified in accordance with Texas Government Code §2001.058(e)(1) because the ALJ misapplied applicable law. The modification merely corrects the typographical error in the Occupation Code chapter citation from § 2301.458(2) (which is a section inapplicable to this proceeding because it applies to dealership transfers) to § 2301.468(2). The version of § 2301.468(2) applicable in this contested case proceeding provides that a "manufacturer, distributor, or representative may not: . . . (2) discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor."

- ***Conclusion of Law 8:*** World Car failed to meet its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory because World Car did not participate in many of the programs that would have permitted additional discretionary allocation. Tex. Occ. Code § 2301.468(2).

The Board enters this Final Order, having considered the evidence, arguments, findings of fact and conclusions of law presented in the ALJ's PFD, exceptions to the PFD, replies to the exceptions to the PFD, and the ALJ's May 31, 2016, exceptions letter that makes no changes to the ALJ's March 10, 2016, PFD.

ACCORDINGLY, IT IS ORDERED:

1. That Findings of Fact numbers 1-53 and Conclusions of Law numbers 1-9 as set out in the ALJ's March 10, 2016, Proposal for Decision, as amended by this Order, are hereby adopted;

2. That World Car's requests for relief under the statute are denied and its complaints are dismissed;

3. That Findings of Fact and Conclusions of Law proposed by the parties that are not adopted in this Order are hereby rejected; and

4. That all remaining motions, exceptions, or objections, of any party, if any, are hereby denied.

Date: _____

_____
Raymond Palacios, Jr., Chairman
Board of the Texas Department of Motor Vehicles

ATTESTED:

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

Upload Date: 20160310150110 Account Number: 29 Upload Description: 608-14-1208.ProposalforDecision

State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

March 10, 2016

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

VIA INTERAGENCY MAIL

RE: **Docket No. 608-14-1208.LIC; MVD Docket No. 14-0006 LIC; New World Car Nissan, Inc., d/b/a World Car Hyundai and New World Car Imports, San Antonio, Inc., d/b/a World Car Hyundai**

Dear Mr. Avitia:

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

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

Sincerely,

Wendy K. L. Harvel
Administrative Law Judge

WKLH/ls
Enclosure

cc: Dan Downey, Dan Downey, P.C., 1609 Shoal Creek Blvd., Ste. #100, Austin, TX 78701 – **VIA REGULAR MAIL**
Lee L. Kaplan, Jarod R. Stewart, Smyser Kaplan & Veselka, L.L.P., 700 Louisiana, Ste. 2300, Houston, TX 77002 – **VIA REGULAR MAIL**
Kevin M. Young, David Prichard, Prichard Hawkins Young, 10101 Reunion Place, Ste. 600, San Antonio, TX 78216 – **VIA REGULAR MAIL**
Alice Carmona, Docket Clerk, Texas Department of Motor Vehicle, 4000 Jackson Avenue, Austin, Texas 78731 (with 1 - CD; Certified Evidentiary Record) - **VIA INTERAGENCY MAIL**

300 W. 15th Street, Suite 502, Austin, Texas 78701/ P.O. Box 13025, Austin, Texas 78711-3025
512.475.4993 (Main) 512.475.3445 (Docketing) 512.322.2061 (Fax)
www.soah.state.tx.us

SOAH DOCKET NO. 608-14-1208.LIC
MVD DOCKET NO. 14-0006 LIC

NEW WORLD CAR NISSAN, INC., D/B/A WORLD CAR HYUNDAI and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., D/B/A WORLD CAR HYUNDAI,	§	BEFORE THE STATE OFFICE
Complainants	§	OF
v.	§	
HYUNDAI MOTOR AMERICA, Respondent	§	ADMINISTRATIVE HEARINGS

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SOAH DOCKET NO. 608-14-1208.LIC
MVD DOCKET NO. 14-0006 LIC

NEW WORLD CAR NISSAN, INC., D/B/A WORLD CAR HYUNDAI and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., D/B/A WORLD CAR HYUNDAI,	§	**BEFORE THE STATE OFFICE**
Complainants	§	**OF**
v.	§	
HYUNDAI MOTOR AMERICA,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

New World Car Nissan, Inc. and New World Car Imports, San Antonio, Inc. (together, World Car) contend that Hyundai Motor America's (Hyundai) allocation system, sales efficiency metric, and advertising subsidies violate the Texas Occupations Code (Occupations Code) because they are discriminatory, discriminate among dealers, require World Car to adhere to unreasonable sales standards, and violate the duty of good faith and fair dealing.

The Administrative Law Judge (ALJ) finds that World Car failed to meet its burden of proof to show that any of Hyundai's programs violate the Occupations Code. Therefore, the ALJ recommends that World Car's complaint be denied.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The parties do not dispute jurisdiction, notice, or procedural history. Therefore, those matters are addressed in the findings of fact and conclusions of law without discussion.

The hearing convened on September 21, 2015, at the State Office of Administrative Hearings in Austin, Texas, with ALJ Wendy Harvel presiding. The record closed on January 11, 2016, following the submission of post-hearing briefs and an agreed record.[1]

III. APPLICABLE LAW

World Car alleges that Hyundai violated three sections of the Occupations Code. Under Section 2301.467, "a manufacturer or distributor . . . may not: (1) require adherence to unreasonable sale or service standards." Under Section 2301.468 (2003):

> A manufacturer, distributor, or representative may 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.[2]

Texas Occupations Code § 2301.478 imposes on vehicle manufacturers and distributors a duty of good faith and fair dealing in their relationships with franchisees.

World Car, as the complainant, has the burden of proof.[3]

IV. FACTUAL BACKGROUND

Ahmad Zabihian owns World Car in San Antonio, Texas. World Car has two Hyundai dealerships in San Antonio. One is in north San Antonio next to Interstate 35 (World Car

---

[1] The ALJ commends the parties on their use of technology during and after the hearing and the professionalism exhibited by all participants in the case.

[2] The 2003 version of the statute applies to this case because the 2011 version applies only to an agreement entered into or renewed after the September 1, 2011 version of the statute was enacted. The franchise agreements between Hyundai and World Car were renewed in November 2010.

[3] 1 Tex. Admin. Code § 155.427.

North); the other is in south San Antonio (World Car South). They are part of the World Car Auto Group, which is comprised of 10 dealerships in the San Antonio area. Mr. Zabihian owns all of the World Car Auto Group dealerships. In addition to Hyundai, World Car Auto Group maintains Kia, Mazda, and Nissan dealerships.

World Car's primary Hyundai competitor is Red McCombs Hyundai (Red McCombs). Red McCombs owns two Hyundai dealerships in San Antonio – Red McCombs Superior and Red McCombs Northwest.

Prior to the 2008 recession, World Car North and Red McCombs Superior performed at approximately equal levels in terms of the number of vehicles sold. World Car South performed less well. It is in a lower-income area than World Car North. Red McCombs Northwest did not perform as well prior to the 2008 recession, but improved its sales during 2008-2009. The chart below illustrates the sales for the four dealerships.[4]

Dealer	**2006**	**2007**	**2008**	**2009**	**2010 (Jan.-June)**
World Car North	663	512	664	476	284
Red McCombs Superior	675	510	445	462	318
World Car South	304	373	429	174	90
Red McCombs Northwest	193	314	410	485	227

World Car notes that it sold the same volume or out-sold Red McCombs during most of these years. World Car contends its good sales were helped by Hyundai's regional general manager at the time (Rick Lueders), who provided World Car with sufficient inventory and Co-Op advertising assistance.[5]

[4] World Car Exs. 10, 82.

[5] Co-Op advertising assistance is money provided from Hyundai to its dealers to cover part of the cost of dealership advertising.

In June 2010, Tom Hetrick replaced Mr. Lueders as Hyundai's regional general manager. World Car asserts that Mr. Hetrick did not provide inventory at the same level and was not as responsive to World Car as Mr. Lueders had been. Beginning in June 2010 through September 2013, World Car contends that Mr. Hetrick did not assist World Car with requests for additional inventory. World Car also contends that Mr. Hetrick provided substantially more assistance with Co-Op funds to the Red McCombs dealerships than to World Car. World Car alleges this practice continued from the beginning of Mr. Hetrick's tenure through the end of the third quarter of 2013, when World Car initiated litigation against Hyundai.[6]

World Car also alleges that Red McCombs dealerships were able to game Hyundai's allocation system, resulting in Red McCombs unfairly obtaining additional inventory even though it was not entitled to receive it.

Hyundai agrees with the sales numbers World Car presents. Hyundai argues that World Car's poor sales were not due to Mr. Hetrick's division of inventory, but rather to World Car voluntarily reducing inventory during the recession of 2008-2009 by turning down hundreds of cars offered to it through the allocation system. Additionally, Hyundai notes that World Car did not participate in many of the Hyundai programs that could have helped World Car increase its sales, including adding the Equus product, remodeling, becoming an exclusive Hyundai dealership, and using Hyundais as service loaner vehicles. Those practices allowed the Red McCombs dealerships to qualify for additional inventory.

Hyundai also notes that in March 2011, a large earthquake and tsunami hit Japan, which resulted in fewer Japanese cars being available on the market in the United States. As a result of the shortage of Japanese cars, Hyundais became more popular and were in short supply as the manufacturer had not and could not have anticipated the increased demand. Hyundai asserts that during the time of short supply, all dealers were asking for additional inventory, and Hyundai was unable to supply any of its dealers with as much inventory as requested.

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[6] The civil litigation is in Bexar County, Texas.

A. Allocation System

Hyundai's allocation system consists of formula allocations, discretionary allocations, and manual allocations. Formula allocations make up approximately 85% of the vehicles allocated and are allocated through a formula and computer program.[7] Hyundai uses a balanced days' supply system for its formula allocations.[8] The same formula is used for all Hyundai dealers nationwide.[9] Hyundai used the same formula allocation system from 2006 through 2013.[10] Under the allocation algorithm, vehicles are offered to dealers based on each dealer's inventory and the average number of vehicles sold by the dealer in the previous 90 days. The system allocates vehicles, one at a time, to the dealer in the region with the lowest days' supply for each respective model.[11] This system is not a pure "turn and earn" system because the turn and earn system considers only the number of vehicles sold and reported by each dealer, while the balanced days' supply considers the dealers' available inventories.[12] World Car is not challenging the mechanics of the formula allocation system. Rather, as part of its complaint that it was subject to unreasonable discrimination, World Car asserts that Red McCombs' dealerships were able to cheat and game the allocation system, which resulted in those dealerships improperly receiving additional allocation. Because World Car did not use the same methods of gaming the system, World Car alleges it was subject to unreasonable discrimination.[13]

Discretionary allocations are made by Hyundai's regional general manager, who may distribute up to 15% of total allocation. Manual allocations include turn downs, which are

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[7] Tr. at 760, 1062-63, 1066.

[8] Tr. at 824-25.

[9] Tr. at 708, 1155.

[10] Tr. at 820-21. The formula used to determine allocation was changed after 2013, but the new formula is not the subject of this proceeding.

[11] Tr. at 819.

[12] Tr. at 825.

[13] World Car Initial Brief at 21-25.

vehicles allocated to a dealer under the formula that the dealer rejects that are then made available to other dealers in the region, and vehicles that have been re-customized or modified.[14]

It should be noted that the discretionary allocation does not always equal 15%. Particularly, during times of short supply, there may not be as much discretionary allocation.[15] Discretionary allocation can be, and usually is, provided for particular events or milestones at a dealership, such as facility renovations, grand openings, turning a multi-manufacturer dealership into a Hyundai-exclusive dealership, or agreeing to sell Hyundai's luxury vehicle, the Equus.[16]

Within the San Antonio market, when analyzing discretionary allocation among the dealerships, World Car received similar percentages of discretionary allocation when compared to Red McCombs.

Year[17]	McCombs Superior	McCombs NW	World Car North	World Car South
2008	2%	3%	15%	19%
2009	2%	3%	5%	11%
2010	6%	14%	3%	4%
2011	16%	14%	12%	12%
2012	13%	15%	13%	3%
2013	1%	1%	1%	0%

The parties agree that Hyundai offers 12 different models of vehicles, with distinct trim levels, which results in at least 96 different configurations before options and paint colors are chosen.[18] World Car asserts that it (and any other dealership) needs a certain minimum level of

[14] Tr. at 685, 1103-04, 1146.

[15] Tr. at 840-41.

[16] Tr. at 1060-60, 1080.

[17] Data in this chart is aggregated from information in Hyundai Ex. 99, which contains confidential information.

[18] World Car Ex. 130.

inventory to offer choice and selection to customers and to maintain or increase its sales rate.[19] Hyundai does not disagree.[20]

The inventory, sales, and allocation cycle can spiral downward as a result of poor sales and low inventory. If a dealership has low inventory, it will result in a lower sales rate because there is less selection. With fewer cars sold, the allocation system will not allocate as many new cars to the faltering dealership. World Car asserts that it needed a significant increase in its inventory in order to be able to sell more cars. With the low inventory, caused by reduced sales and lack of new inventory, World Car's sales rate declined.

Again, World Car does not challenge the formula that performs the 85% system allocations.[21] Rather, World Car challenges the 15% discretionary and manual allocations and the ability of dealerships to game the allocation system at the expense of other dealerships.

B. Sales Efficiency

Sales efficiency is a metric that Hyundai uses to measure dealer sales performance.[22] Sales efficiency compares a dealer's total sales to sales the brand expects to achieve in the dealer's primary market area. Hyundai calculates expected sales by applying Hyundai's national average sales penetration in each vehicle segment in which Hyundai competes to the actual number of vehicles registered in that segment in the dealer's primary market area. Thus, if Hyundai sells 5% of the subcompact vehicles sold nationwide during a particular time period, then Hyundai would expect that 5% of the subcompacts sold in a dealer's primary market area during that same time period would be Hyundais.[23] Hyundai then compares the dealer's total

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[19] Tr. at 154, 650-51, 682-83.

[20] World Car Ex. 117 at 193; Tr. at 510, 512.

[21] World Car Initial Brief at 6.

[22] Almost every other car manufacturer uses the same or similar metric. Tr. at 73, 712, 453-54.

[23] Tr. at 1165-66.

sales to the expected sales number. So if expected sales are 200, and the dealer sold 200 cars, the dealer is 100% sales efficient.

C. Co-Op Advertising Funds

Hyundai's Co-op Advertising Commitment Program provides funds (Co-Op advertising funds) to dealers to assist with advertising. The funds do not pay for the total cost of advertisements the dealer purchases, but provide partial reimbursements.[24] Eligibility for the program and the amount of reimbursement are determined by a formula that considers sales and customer services scores.[25] Regional general managers also have some discretionary funds they can provide to dealers.[26]

V. ALLEGED VIOLATIONS

A. Discriminatory Treatment (Occupations Code § 2301.468 (2003))

1. World Car's Arguments

a. Discretionary allocation

i. Discrimination based on formula to gauge performance

World Car asserts that Hyundai violated Occupations Code § 2301.468(1) (2003) by treating World Car differently than Red McCombs in the discretionary allocation of vehicle inventory. World Car notes that Mr. Hetrick gave 98 discretionary allocations to Red McCombs Northwest and 36 to Red McCombs Superior during the first six months of his tenure as regional general manager. During the same time, he provided 10 cars through discretionary allocation to

[24] Tr. at 217-18.

[25] Tr. at 391.

[26] Tr. at 93.

each World Car dealership. Thus, Red McCombs two dealerships received a total of 134 discretionary cars, and World Car received a total of 20.[27] World Car further asserts that the large number of discretionary allocations to the Red McCombs dealerships allowed them to sell more cars because they had more inventory. Because they were able to sell more cars, they earned more through the 85% formula allocations. World Car characterizes the difference in allocation of vehicles by a comparative percentage. In other words, Hyundai allocated seven times more vehicles to the Red McCombs dealerships than it did to the World Car dealerships.[28]

ii. Unreasonable discrimination in sale of a motor vehicle

World Car contends that Hyundai unreasonably discriminated against World Car in violation of the second prong of Occupations Code § 2301.468(2) (2003) in the allocation of vehicle inventory. World Car alleges that the disparity in the discretionary allocation was unreasonable. World Car contends that it was not rational or fair for Mr. Hetrick to provide many more discretionary allocations to Red McCombs compared to World Car, particularly when World Car was making multiple requests for additional inventory from 2010 through 2013.[29] World Car also contends that Red McCombs received additional discretionary allocations when it renovated one of its facilities, whereas World Car did not receive discretionary allocation at its North Store when it was renovated.[30]

b. Gaming the formula allocation system

World Car argues that although the formula allocation system itself is not discriminatory, Red McCombs was able to game the system to its strategic advantage to improve formula allocations to its dealerships. World Car asserts that dealerships could game the allocation system by reporting vehicles as sold by submitting a Retail Delivery Report (RDR) even though

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[27] World Car Ex. 111.

[28] World Car Initial Brief at 37.

[29] World Car Initial Brief at 38.

[30] World Car Initial Brief at 39, citing Tr. at 495-97.

the vehicle had not been sold and by putting vehicles into the service loaner program and reporting them as sold without actually using the vehicles as loaners.[31]

c. Sales efficiency

World Car also alleges a violation of Occupations Code § 2301.458(1) (2003) through the use of sales efficiency. To support its allegation, World Car notes that Mr. Hetrick used sales efficiency to reward dealerships with discretionary allocation, but treated World Car differently than Red McCombs. World Car also notes that it did not have enough inventory to reach 100% sales efficiency in the market, and Hyundai did not help World Car with additional inventory. Secondly, World Car argues that Mr. Hetrick proposed the sale of the World Car Hyundai dealerships because of poor sales efficiency and performance. Because Mr. Hetrick did not attempt to have other dealers sell their dealerships, and because Mr. Hetrick did not give World Car any assistance or inventory to help World Car improve its sales, World Car alleges discrimination under Texas Occupations Code § 2301.458(1).

d. Co-Op advertising

World Car asserts an additional violation of Occupations Code § 2301.468 (2003) through distribution of discretionary Co-Op advertising funds.[32] World Car notes that Hyundai distributes approximately 85% of Co-Op advertising funds through a formula that is predicated on reported sales.[33] The remaining funds are distributed at the discretion of the regional general manager.[34]

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[31] World Car Initial Brief at 21.

[32] World Car Initial Brief at 40. World Car does not cite the specific subsection it is alleging was violated by the distribution of Co-Op advertising funds.

[33] World Car Ex. 120 at 19-20; Tr. at 93, 199-200.

[34] *Id.*

2. Hyundai's Response

a. Allocation

Hyundai argues that World Car cannot maintain its claim that the alleged discriminatory allocation of vehicles is a violation of the Occupations Code. Hyundai reads the statute narrowly to include only the sale of a motor vehicle. Thus, according to Hyundai, to prove a violation, the discrimination must have occurred in the sale of the vehicle, and not the allocation, measurement of sales efficiency, or the distribution of Co-Op funds.[35] Hyundai asserts that simply because a vehicle is allocated to a dealer, the dealer does not necessarily purchase it. The dealer may choose to purchase it or may turn it down. Allocation simply determines the number of vehicles the distributor offers the dealer.

Hyundai notes that the statute prohibits *unreasonable* discrimination, not discrimination for which Hyundai had a reasonable basis. Hyundai argues that unreasonable discrimination must be arbitrary, capricious, without substantial cause or reason, or lacking a legitimate business justification.[36] Hyundai argues that the formula allocations did not discriminate unreasonably. The formula is applied the same way to each dealer. Hyundai asserts that Red McCombs took advantage of optional programs that improved its position in the allocation system. Those programs were available to all dealers, including World Car, and World Car simply chose not to take advantage of the programs.[37] Those programs included: using Hyundais as service loaners; adding the luxury Equus line; remodeling; and making dealerships exclusively Hyundai-branded.[38] Another strategy to increase allocation was to report sales quickly. Some dealers submitted an RDR report after a spot delivery of a car, even if financing

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[35] Hyundai Initial Brief at 36.

[36] Hyundai Initial Brief at 37, citing *Star Motorcars v. Mercedes-Benz USA*, SOAH Docket No. 601-09-3665, citing *Mitchell's Inc. v. Nelms*, 454 S.W.2d 809, 813-14 (Tex. App.—Dallas 1970, writ ref'd n.r.e.); *Burlington Northern & Santa Fe Ry. Co. v. South Plains Switching, Ltd. Co.*, 174 S.W.3d 349, 352-54 (Tex. App.—Fort Worth 2005, no writ); *Buddy Gregg Motor Homes, Inc. v. Marathon Coach, Inc.*, 320 S.W.3d 912, 924 (Tex. App.—Austin 2010, no pet.).

[37] Hyundai Initial Brief at 38.

[38] Tr. at 1182-83.

was not approved.[39] Reporting the sale quickly reduced the days' supply of that model and would show that the dealer might need additional formula allocation to maintain its supply. World Car did not submit RDR reports until financing was approved, which delayed the reported sale and slowed allocations.[40]

With respect to discretionary allocations, Hyundai argues that during the shortage following the tsunami, Mr. Hetrick focused the discretionary allocation on dealers that were committed to the Hyundai brand. Because Red McCombs maintained its inventory level during the recession, renovated one store, added the Equus line, and because its other store became a Hyundai-exclusive dealership, it received more discretionary allocation.[41]

b. Sales efficiency

Hyundai argues that measuring sales efficiency is not unreasonable discrimination. It is calculated the same way for all dealers. And it is used to identify dealers that perform below average so they can improve their performance.[42]

c. Co-Op advertising

Hyundai asserts that the use of Co-Op advertising funds cannot violate Occupations Code § 2301.468 because it does not relate to the sale of a motor vehicle. Rather, it is simply a mechanism to allow Hyundai as the manufacturer to contribute some money to the dealers to help the dealers purchase more advertising for the brand.

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[39] Tr. at 101, 367.

[40] Tr. at 867.

[41] Tr. at 167, 1050-61.

[42] Hyundai Initial Brief at 45, 46.

3. Analysis

a. Discretionary allocation

The ALJ finds that the use of discretionary allocation did not violate the Occupations Code. World Car notes that in a six-month period Mr. Hetrick offered 134 cars through discretionary allocation for Red McCombs versus 20 for World Car.[43] World Car then makes the comparison that Red McCombs did not sell nearly seven times as many vehicles as World Car Hyundai.[44] World Car notes that at the time of the additional allocation, all four San Antonio Hyundai dealerships were considered by Hyundai to be underperforming.[45]

World Car's argument fails to take into account the differences between the Red McCombs' dealerships and World Car's dealerships. In 2010, Red McCombs Superior became an exclusive Hyundai dealer, whereas World Car South shares a dealership with Kia. Red McCombs' Northwest store added the luxury Equus line that required a facility upgrade, and then renovated the store. Red McCombs Superior also renovated its dealership in 2011-2012. World Car dealerships were not renovated during this time. It was not until 2014 that World Car North renovated its store. Red McCombs also participated in Hyundai's service loaner program. World Car did not participate in Hyundai's service loaner program.

World Car could have participated in all of these Hyundai programs, which would most likely have increased the sales rate and reduced the daily supply of vehicles, resulting in additional allocation. World Car chose not to participate. All dealers that chose to participate in the programs would have increased allocation and would have been eligible for discretionary allocation that was given by regional general managers to reward dealers for facility upgrades, renovations, and exclusivity. World Car's choice not to engage in those programs worked to its detriment in terms of receiving discretionary allocation. But Mr. Hetrick's decision to reward

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[43] World Car Ex. 111.

[44] World Car Initial Brief at 37.

[45] World Car Initial Brief at 39.

Red McCombs was not unreasonably discriminatory. Rather, it was his reasonable business judgment to reward the Red McCombs dealerships for remodeling, becoming exclusive, adding the Equus line, and participating in the service loaner program. For these reasons, the ALJ finds that World Car failed to meet its burden of proof to show that Hyundai unreasonably discriminated against it in providing discretionary allocation.

World Car also reduced its inventory in 2009. Mr. Zabihian testified in his deposition that he pulled back in inventory in 2008-2009. At the hearing he agreed that he reduced inventory in 2009.[46] Mr. Zabihian also indicated that the Red McCombs stores kept their inventory at about the same levels during the 2008-2009 recession.[47]

In 2010, World Car turned down many vehicles offered by Hyundai. In the first six months of 2010, World Car North turned down 173 of 423 vehicles. World Car South turned down 32 of 100 offered vehicles.[48] Beginning in the second half of 2010 and continuing through mid-2013, there was a shortage of Hyundais. At that point, World Car had voluntarily reduced its inventory, resulting in a slower sales rate, and there were insufficient available cars to meet overall demand.

Although it was an unfortunate coincidence that the worldwide shortage of cars happened shortly after World Car had voluntarily reduced its inventory, World Car made the decision to do that. It was not the result of any discrimination on the part of Hyundai.

b. Gaming the allocation system

World Car alleges that submitting an RDR report for a spot delivery is a way for dealers to game the allocation system. A "spot delivery" refers to the practice of allowing a purchaser to take delivery of a vehicle after a sales contract is signed but before all final payment

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[46] Tr. at 223-224, 228.

[47] Tr. at 228.

[48] Hyundai Ex. 47.

arrangements have been finalized.[49] World Car has decided not to record an RDR after a spot delivery because World Car thinks it does not constitute a sale until the sale is completed with approved financing.[50]

Spot deliveries are a common industry practice.[51] World Car spot delivers cars but does not submit an RDR report until the financing is approved. Because World Car does not immediately submit the RDR, the sale is reported later, thereby affecting the balanced days' supply of vehicles on its lot, and slowing formula allocation. Hyundai encouraged World Car to speed up its sales reporting by promptly submitting RDRs, but World Car chose not to do so.[52] Hyundai's dealer agreement requires dealers to report the delivery of each new motor vehicle to a purchaser by the end of the day the vehicle is delivered.[53]

World Car does not submit the RDR prior to the completed sale because once the RDR is submitted the warranty begins. So if the financing falls through, and the car is returned, the next purchaser would not have a full warranty.[54] World Car asserts that spot deliveries in Texas do not transfer ownership of the car from the dealer to the consumer, and thus submitting an RDR would be inaccurate.

Because spot deliveries are not illegal, and Hyundai had counseled World Car to submit RDR reports quickly once the car was delivered to the customer, World Car cannot now complain that not doing so was unreasonable discrimination. World Car had the same tools available to it as every other Hyundai dealer. In the event a warranty has started and the car is returned, World Car could sell the car to another purchaser at a reduced price to account for the shorter warranty period.

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[49] Tr. at 967, 267, 520.

[50] Tr. at 103-05, 267-68, 566, 602.

[51] Tr. at 269.

[52] Tr. at 241-42.

[53] World Car Ex. 1.

[54] Tr. at 105, 108.

Importantly, although two expert witnesses testified about whether Red McCombs was gaming the allocation system by submitting RDR reports and then backing them out when the financing fell through, there was no evidence that this happened, only speculation.[55]

World Car also asserts that Red McCombs reported vehicles sold to the dealerships for use in the service loaner program even though the dealerships did not use the vehicles in the service loaner program.[56] World Car's evidence is that some of the service loaners came out of the service loaner program with "not too many miles on them."[57] The ALJ finds that there is insufficient evidence to show that Red McCombs gamed the allocation system by either falsely submitting RDR reports or not using service loaners. The ALJ finds that World Car failed to meet its burden of proof to show that any "gaming" of the allocation system violated the Occupations Code.

c. Sales efficiency

In 2008, both World Car North and South were over 100% sales efficient. In 2009, the north store dropped to 96.8% and continued to drop over time. In 2014, it was 65.7% sales efficient. The south store fared worse. It dropped to 17.9% sales efficient in 2013 but rebounded in 2014 to 31.2% sales efficient.[58]

World Car asserts that it did not have sufficient inventory to meet 100% sales efficiency. It argues that the sales efficiency expectation for World Car South was unreasonable because the south store saw a large drop in sales due to the opening of a Toyota manufacturing plant in the vicinity of the south store. Thus, it contends that Hyundai's sales efficiency calculation was

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[55] Tr. at 732-33 (World Car expert Mr. Roesner testifying that he did not have any way to check whether spot deliveries were improper.)

[56] World Car Initial Brief at 22.

[57] Tr. at 782.

[58] Tr. at 1174; World Car Exs. 3, 4.

unfair because to achieve 100% sales efficiency, World Car would have had to have sold more cars than it was allocated.[59]

In 2009, Toyota opened a manufacturing plant and new dealership close to World Car South.[60] The manufacturing plant employs about 6,000 people. Those employees had incentives to purchase Toyota products.[61] World Car suggests that Hyundai should have recalculated its sales efficiency measures to account for the opening of the Toyota manufacturing plant and the resulting significant increase in Toyota sales in the area.

Because World Car was selling fewer cars out of the south store, it was receiving fewer cars through formula allocation. Combined with the shortage in supply due to the tsunami, it was difficult for World Car to maintain high enough inventory levels to be able to show customers a large selection. Hyundai was aware of the limited supply and knew that there was not enough manufacturing volume to provide dealers with sufficient inventory to allow the dealers to meet their sales targets. Hyundai's President and CEO testified that "[s]ome of the most difficult conversations that we had in 2011 and 2010 and – and 2013 were with dealers that couldn't get to their stated sales volumes with the inventory we were giving them. That's a tough conversation to have. It's a legitimate conversation, and there just isn't enough available volume – production volume to get to those numbers."[62]

World Car suggests that Hyundai had two choices to correct the issue, either sell more discretionary allocations to World Car or adjust the sales efficiency standard. Hyundai did neither.

Hyundai responds that sales efficiency was calculated in the same manner for World Car as it was for every other Hyundai dealer. The tsunami affected all dealers equally. Hyundai

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[59] World Car Initial Brief at 29.

[60] Tr. at 438-40.

[61] Tr. at 442.

[62] World Car Ex. 20 at 243-44.

admits that in 2013, it sent World Car South a "Notice of Failure of Performance" based on the dealership's poor sales efficiency.[63] The letter advised the dealership of its deficient sales efficiency and asked the dealership to reassess its commitment by either pursuing a sale of the dealership or providing a written plan to improve performance.[64] World Car has done neither, but Hyundai has not sought to terminate the World Car South store as a dealer.

The ALJ agrees with Hyundai that to find a violation, World Car must prove that Hyundai treated dealers differently by the use of a formula to gauge sales performance. World Car argues that Mr. Hetrick rewarded discretionary allocations by looking at sales efficiency but that Red McCombs received several times as many cars through discretionary allocation when compared to World Car, even though the sales difference between the two dealers was not that high.

World Car's argument fails because all dealerships were in the same situation with regard to high demand and low supply. It is undisputed that following the Japanese tsunami, Hyundai manufacturing could not keep up with demand for the product. As a result, dealerships were unable to receive the number of cars they wanted. As discussed above, there were steps World Car could have taken to increase its sales numbers, but World Car made the business decision not to do so. The ALJ finds that World Car failed to meet its burden of proof to show that the use of a sales efficiency measure violates the Code.

d. Co-Op Advertising

The ALJ finds that Hyundai did not violate the Code through the discretionary use of Co-Op advertising funds. Co-Op advertising funds are sometimes provided to dealers by the manufacturer to increase the amount of money the dealer is able to spend on advertising.

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[63] World Car Ex. 67.

[64] Tr. at 1124.

The Co-Op advertising funds must be used exclusively for advertising. Eligibility and the amount of reimbursement are determined by a formula that considers several factors including sales and customer service scores.[65] That formula does not discriminate in the sale of a motor vehicle. Rather it discriminates in the amount of money a dealership receives from Hyundai for advertising. The formula is not intended to gauge the performance of a dealership. It simply calculates how much additional advertising funding a particular dealership will receive. And notwithstanding the formula, the regional general manager has discretion to award additional Co-Op advertising funds. For example, in 2010, World Car South was not eligible under the formula to receive Co-Op advertising funds. However, Mr. Hetrick provided the store with $60,000 of discretionary Co-Op advertising funds over the third and fourth quarters of that year.[66] The Co-Op program formula is applied in the same manner to all dealers and is not intended as a way to gauge the dealer's performance. It is applied to determine which dealers are eligible for additional funding, and the amount of funding, but is unrelated to the sale of a motor vehicle. Above and beyond that funding, the regional general manager can award additional Co-Op dollars at his discretion. For these reasons, the ALJ finds that the Co-Op advertising program does not violate Occupations Code § 2301.468(1) or (2).

B. Unreasonable Sales Standards (Occupations Code § 2301.467(a)(1))

World Car alleges that Hyundai required World Car to adhere to unreasonable sales and service standards in violation of Occupations Code § 2301.467(a)(1). World Car asserts that the "sales efficiency requirements" for World Car South were unreasonable because World Car would have had to sell more cars than it was allocated. The facts that form the basis of this allegation are discussed above. World Car notes that Mr. Hetrick could have used his discretion to allocate more vehicles but chose not to do so.[67] Because Hyundai did not allocate additional inventory to World Car South or adjust the sales efficiency standard because of the increased

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[65] Tr. at 391.

[66] Tr. at 259-60.

[67] Tr. at 1079, 1101-02.

competition from Toyota, World Car argues that Hyundai required it to adhere to an unreasonable sales standard.

With respect to World Car North, World Car asserts that the sales efficiency requirements were also unreasonable. World Car asserts that it did not receive enough allocation to be able to reach 100% sales efficiency. Hyundai recognized that World Car North needed to add additional inventory to be able to achieve 100% sales efficiency. However, World Car asserts that Hyundai did not provide additional inventory and that at the same time, the Red McCombs dealerships had sufficient inventory because they were receiving discretionary allocation from Mr. Hetrick.[68] Because Hyundai did not provide additional inventory, World Car contends that Hyundai required adherence to an unreasonable sales efficiency requirement.

Hyundai responds that sales efficiency is not a standard that World Car (or any other dealer) is required to adhere to. Rather, it is a measurement to compare each dealer's performance to other dealers and to the national average. Hyundai argues it has no requirement that dealers be 100% sales efficient.

Hyundai further argues that World Car's allocations are lower than its expected sales because World Car had not sold vehicles at a sufficient rate to earn greater allocations. If World Car had maintained its rate from the time it was over 100% sales efficient in 2008, it would have continued to earn sufficient vehicles through the allocation system.[69] Neither World Car store has been 100% sales efficient for several years. Hyundai has not sought to terminate either dealership. Mr. Hetrick recommended a renewal of the Dealer Agreement with World Car South in 2010 when the store had an average sales efficiency of 42%.[70]

The ALJ finds that World Car failed to meet its burden to show that Hyundai required adherence to an unreasonable sales or service standard based on the sales efficiency calculation.

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[68] World Car Initial Brief at 45, *citing* World Car Ex. 109; at Tab 3; World Car Exs. 126, 127; Tr. at 1079.

[69] Hyundai Initial Brief at 50-51.

[70] Hyundai Ex. 41; Tr. at 261-62.

The word "require" is not defined in the statute. However, something is required when it is ordered or demanded as necessary.[71] There is no requirement in the Dealer Agreement between World Car and Hyundai that requires World Car to be 100% sales efficient.[72] There is a section in the standard provisions of the Dealer Agreement that identifies sales efficiency as a criterion that can be considered in evaluating dealer performance; it does not state that a dealer must be 100% sales efficient.[73] Thus, there is no requirement that World Car meet any standard for sales efficiency. Therefore, World Car failed to show that the sales efficiency metric requires it to meet an unreasonable sales standard.

C. Duty of Good Faith and Fair Dealing (Occupations Code § 2301.478(b))

World Car alleges that Hyundai violated the duty of good faith and fair dealing required by the Occupations Code by not supplying sufficient allocation and by evaluating World Car's sales performance based on sales efficiency. The allegations with respect to these claims are the same as those discussed above, and World Car alleges they also support a violation of the duty of good faith and fair dealing.[74]

Hyundai argues that it did not breach its duty of good faith and fair dealing because it did not violate any section of the Occupations Code. Hyundai asserts that World Car could have increased its allocation in the same manner as any other dealer – by recording spot deliveries, by participating in the service loaner program, by adding the Equus line, by renovating its dealerships, or by becoming an exclusive Hyundai dealer. Because World Car made the business decisions not to participate in those programs, any detriment to the allocation was caused by World Car's decisions.[75]

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[71] *See* Merriam-Webster Dictionary; Black's Law Dictionary.

[72] Hyundai Exs. 28, 39; World Car Ex. 1.

[73] World Car Ex. 1.

[74] *See* Tex. Occ. Code § 2301.478(b).

[75] And the Japanese tsunami, which was outside of everyone's control.

The sales efficiency standard is not a requirement, rather it is a measurement Hyundai uses to gauge dealer sales. Although World Car was not 100% sales efficient after 2009, Hyundai still allowed World Car's dealerships to remain Hyundai dealers. And both World Car dealerships are still in existence. Sales efficiency is determined the same way for all dealers. Treating some dealers differently, as World Car argues, could actually violate Hyundai's duty of good faith and fair dealing with respect to other dealers.

World Car argues that the duty of good faith and fair dealing should be defined as "requir[ing] the parties to deal fairly with one another."[76] Hyundai contends that a breach of the duty of good faith and fair dealing requires a showing of the "conscious doing of a wrong for a dishonest, discriminatory or malicious purpose."[77]

The ALJ finds that regardless of which standard is applied, Hyundai prevails. Even applying World Car's lower "not fair" standard, neither the allocation system nor the sales efficiency metric violate the provision in the Occupations Code that requires good faith and fair dealing. Although the discretionary allocation accounts for around 15% of the allocation any dealer receives, Hyundai informs dealers of how they can increase their allocation. World Car did not take advantage of many of those programs. Furthermore, Hyundai treats all dealers under the same sales efficiency formula and informs the dealers of how sales efficiency is calculated. There is no evidence Hyundai has any intent not to play fair with World Car or other dealers that did not meet 100% sales efficiency.

VI. CONCLUSION

Based on the evidence presented, World Car failed to prove any of its alleged violations of the Occupations Code.

---

[76] World Car Initial Brief at 46, *citing Humble Emergency Physicians, P.A. v. Mem'l Hermann Healthcare Sys., Inc.*, 01-09-00587-CV, 2011 WL 1584854, at *7 (Tex. App.—Houston [1st dist.] Apr. 1, 2011, no pet.).

[77] Hyundai Initial Brief at 56, *citing Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777, 780 (Tex. App.—Austin 2012, no pet.).

VII. FINDINGS OF FACT

1. New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports, San Antonio, Inc., d/b/a World Car Hyundai (together, World Car) are licensed, franchised dealers for Hyundai products and services.

2. Hyundai Motor America (Hyundai) is the wholesale distributor for Hyundai products and services in the United States.

3. On December 6, 2013, the Texas Department of Motor Vehicles (Department) issued a Notice of Hearing advising that World Car had filed a formal complaint with the Department.

4. The hearing on the merits convened on September 21, 2015, and concluded on September 25, 2016. The record closed on January 11, 2016, following the submission of written closing briefs and an agreed record.

Background

5. Ahmad Zabihian owns World Car in San Antonio, Texas. World Car owns two Hyundai dealerships in San Antonio.

6. World Car's primary Hyundai competitor is Red McCombs Hyundai. Red McCombs owns two Hyundai dealerships in San Antonio – Red McCombs Superior and Red McCombs Northwest.

7. Prior to the 2008 recession, World Car North and Red McCombs Superior performed at approximately equal levels in terms of the number of vehicles sold. World Car South performed less well. It is in a lower-income area than World Car North. Red McCombs Northwest did not perform as well prior to the 2008 recession, but improved its sales during 2008-2009.

8. Hyundai's allocation consists of formula allocations, discretionary allocations, and manual allocations.

9. Formula allocations make up approximately 85% of the vehicles allocated and are allocated through a formula and computer program.

10. Under the allocation algorithm, vehicles are offered to dealers based on each dealer's inventory and the average number of vehicles sold by the dealer in the previous 90 days. The system allocates vehicles, one at a time, to the dealer in the region with the lowest days' supply for each respective model.

11. Discretionary allocations are made by Hyundai's regional general manager, who may distribute up to 15%.

12. Manual allocations include turn downs, which are vehicles allocated to a dealer under the formula that the dealer rejects, which are then made available to other dealers in the region, and vehicles that have been re-customized or modified.

13. Sales efficiency is a metric that Hyundai uses to measure dealer sales performance.

14. Sales efficiency compares a dealer's total sales to sales the brand expects to achieve in the dealer's primary market area. Hyundai calculates expected sales by applying Hyundai's national average sales penetration in each vehicle segment in which Hyundai competes to the actual number of vehicles registered in that segment in the dealer's primary market area.

15. Hyundai's Co-Op Advertising Commitment Program (Co-Op) provides funds (Co-Op advertising funds) to dealers to assist with advertising. The funds do not pay for the total cost of advertisements the dealer purchases, but provide partial reimbursements.

16. Eligibility for Co-Op advertising funds and the amount of reimbursement are determined by a formula that considers sales and customer services scores. Regional general managers also have some discretionary funds they can provide to dealers.

17. In 2009, Hyundai's regional general manager responsible for the San Antonio region was Tom Hetrick, who replaced a different regional general manager that year.

Discrimination and gauging the performance of a dealership

Discretionary allocation

18. In 2009, during the first six months of Mr. Hetrick's tenure as regional general manager, he provided 134 cars through discretionary allocation to Red McCombs and 20 to World Car.

19. The differences in discretionary allocation between Red McCombs and World Car continued through 2013.

20. In 2009 and 2010, World Car voluntarily reduced its inventory.

21. Red McCombs dealerships maintained their high inventory levels during the 2008-2010 recession.

22. In 2010, Red McCombs Superior became an exclusive Hyundai dealership.

23. World Car South shares a dealership with the Kia brand.

24. Red McCombs Northwest added the luxury Equus line that required a facility upgrade and then renovated the store.

25. Red McCombs Superior renovated its dealership in 2011-2012.

26. Red McCombs participated in Hyundai's service loaner program.

27. World Car chose not to participate in the available programs provided by Hyundai that could have increased the allocation available to World Car.

28. World Car did not renovate a dealership until 2014, when it renovated World Car North.

29. World Car did not participate in Hyundai's service loaner program.

30. It was reasonable for Hyundai to reward dealers that participated in Hyundai-sponsored programs and renovated their facilities with extra discretionary allocation.

Gaming the formula allocation system

31. There was nothing improper or illegal about recording a Retail Delivery Report (RDR) for cars that had been spot delivered.

32. Hyundai encouraged World Car to speed up its sales reporting by promptly submitting RDRs once a car was delivered to a customer.

33. There was insufficient evidence to show that Red McCombs gamed the system by entering RDRs and then reversing them at a significantly higher rate than any other Hyundai dealership.

34. The service loaner program allowed dealerships to sell cars into the service loaner program, thereby reducing the inventory available for sale and increasing formula allocation.

35. The service loaner program was available to all Hyundai dealers.

36. World Car chose not to participate in the service loaner program.

37. Red McCombs participated in the service loaner program.

38. There was insufficient evidence to show that Red McCombs gamed the allocation system.

Sales efficiency

39. In 2008, both World Car North and South were over 100% sales efficient. In 2009, the north store dropped to 96.8% and continued to drop over time. In 2014, it was 65.7% sales efficient. The south store fared worse. It dropped to 17.9% sales efficient in 2013 but rebounded in 2014 to 31.2% sales efficient.

40. In 2009, Toyota opened a manufacturing plant and new dealership close to World Car South. The manufacturing plant employs about 6,000 people. Those employees had incentives to purchase Toyota products.

41. From 2010 until 2013, Hyundais were in short supply worldwide, primarily due to the high demand caused by the Japanese tsunami that devastated Japanese manufacturing.

42. Hyundai was aware that some dealers could not achieve 100% sales efficiency with the lower inventory.

43. Hyundai measured sales efficiency in the same manner for all dealers.

Co-Op Advertising Funds

44. Co-Op advertising funds must be used exclusively for advertising.

45. The distribution of Co-Op advertising funds is calculated by a formula that considers several factors including customer sales and service scores. The formula is not intended to gauge the performance of a dealership. It simply calculates how much additional advertising funding a particular dealership will receive.

46. The regional general manager has discretion to award additional Co-Op advertising funds.

47. In 2010, World Car South was not eligible under the formula to receive Co-Op advertising funds. Mr. Hetrick provided the store with $60,000 in Co-Op advertising funds over the third and fourth quarters of that year.

48. The Co-Op program formula is applied in the same manner to all dealers.

49. Co-Op advertising funds are unrelated to the sale of a motor vehicle.

Unreasonable Sales Standards

50. Maintaining 100% sales efficiency is not a requirement to be or to remain a licensed Hyundai dealer.

51. World Car stores have not been 100% sales efficient for several years, and both are operating under valid dealer agreements.

52. Measuring sales efficiency does not require adherence to unreasonable sales or service standards.

Duty of Good Faith and Fair Dealing

53. The allocation system and sales efficiency metric do not treat World Car unfairly.

VIII. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles has jurisdiction over this case. Tex. Occ. Code § 2301.001.

2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to the contested case hearing in this case, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 2301.704.

3. The hearing was conducted pursuant to the Administrative Procedure Act and SOAH's procedural rules. Tex. Gov't Code ch. 2011 and 1 Tex. Admin. Code ch. 155.

4. Proper and timely notice of the hearing was provided. Tex. Occ. Code § 2301.705.

5. World Car has the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.

6. World Car failed to meet its burden of proof to show that Hyundai required adherence to unreasonable sales or service standards. Tex. Occ. Code § 2301.467(a)(1) (2003).

7. World Car failed to meet its burden of proof to show that Hyundai discriminated against World Car by treating them differently as a result of a formula or other process intended to gauge the performance of a dealership though allocation of vehicle inventory, sales efficiency calculations, or distribution of discretionary Co-Op advertising funds. Tex. Occ. Code § 2301.468(1) (2003).

8. World Car failed to meet its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory because World Car did not participate in many of the programs that would have permitted additional discretionary allocation. Tex. Occ. Code § 2301.458(2).

9. World Car failed to meet its burden of proof to show that Hyundai violated its duty of good faith and fair dealing through allocations and sales efficiency because Hyundai

calculated sales efficiency in the same manner for all dealers, and World Car chose not to participate in many of the programs that could have led to additional discretionary allocation. Tex. Occ. Code § 2301.478(b).

SIGNED March 10, 2016.

WENDY K. L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC., d/b/a WORLD CAR HYUNDAI, and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., d/b/a WORLD CAR HYUNDAI	§	
Complainants,	§	
v.	§	**SOAH DOCKET NO. 608-14-1208 LIC**
	§	**MVD DOCKET NO. 14-0006 LIC**
HYUNDAI MOTOR AMERICA, Respondent.	§	

WORLD CAR HYUNDAI'S EXCEPTIONS TO PROPOSAL FOR DECISION

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I. Overview and Summary of Argument

You can't sell what you don't have. Yet from 2010 through 2013 Hyundai Motor America ("HMA") required World Car Hyundai to do exactly that—sell more cars than it was allocated in order to be considered 100% sales efficient and avoid "material breach" of the franchise agreement. Not only did HMA impose an unreasonable sales standard, HMA knew that it would be impossible for World Car Hyundai to meet that standard because HMA did not provide the dealership enough inventory. Although HMA could have allocated additional cars to World Car so that the dealership had at least a chance to achieve HMA's sales standard, HMA instead chose to discriminate against World Car by extremely lopsided allocations to World Car's nearest competitor in San Antonio, without a plausible excuse.

In Texas, a dealership should be allocated at least as many vehicles as it is expected to sell. The Texas Occupations Code sets this baseline by requiring a distributor like HMA to impose only reasonable sales standards, not to discriminate in allocation of inventory, and to treat dealerships fairly and in good faith.

The Administrative Law Judge ("ALJ") disagreed. The ALJ found that HMA did not "require" World Car Hyundai to sell more cars than it was allocated because the requirement to meet 100% sales efficiency is not stated explicitly in the franchise agreement (although it is the metric used by HMA to judge whether dealers are complying with their franchise agreement). The ALJ also found that HMA's disproportionate discretionary allocations of vehicle inventory within the San Antonio market (between three and seven times as many cars went to the nearest competitor) did not violate the Texas Occupations Code and were purportedly made fairly and in good faith. As a result, the ALJ recommended that the Board deny World Car Hyundai's complaint.

The Board should reject the ALJ's recommendation and sustain World Car's complaint because:

- The ALJ misinterpreted and misapplied Section 2301.467(a)(1) of the Texas Occupations Code. The statute is not limited to prohibiting an unreasonable sales standard that is stated in a franchise agreement, but rather prohibits a manufacturer or distributor from requiring adherence to any unreasonable sales standard wherever and however it is imposed. HMA required adherence to 100% sales efficiency because the consequence for non-compliance was to be in "material breach" of the franchise agreement and risk losing the dealership franchise. HMA's required sales standard was unreasonable in violation of Section 2301.467(a)(1) because World Car had to sell more vehicles than it was allocated in order to achieve 100% sales efficiency, making it an impossible standard to meet;

- The ALJ improperly applied the concept of unreasonable discrimination in Code Section 2301.468(2). HMA unreasonably discriminated against World Car Hyundai in allocating inventory to the San Antonio market because HMA gave between three and seven times as much discretionary inventory to World Car's nearest competitor during time periods of high demand, when all dealerships in San Antonio were similarly-situated and all were asking for more inventory;

- The ALJ misapplied the statutory duty of good faith and fair dealing in Code Section 2301.478. HMA did not act fairly or in good faith with World Car Hyundai because HMA did not use its best efforts to provide inventory to World Car (and instead gave that inventory to World Car's competitor) and required World Car to sell more vehicles than it was allocated, then accused World Car of material breach of its dealer agreement, which is the epitome of unfair dealing.

This is a case of first impression because there are no reported decisions interpreting what it means to "require adherence" to a sales standard, what it means to "unreasonably discriminate" in allocation of vehicle inventory, or how a distributor complies (or does not comply) with its duty of good faith and fair dealing when allocating vehicle inventory and imposing sales standards. The ALJ misinterpreted and misapplied the statutory language for all three provisions of the Code at issue in this case.

If the Board accepts the ALJ's recommendation, that means (1) a distributor could allocate to a Texas dealership only 50% of the inventory that the dealership needs to meet the distributor's sales standard and (2) the distributor could then use the dealership's inability to

meet that impossible standard against the dealership by claiming "material breach" of the franchise agreement, allowing the distributor to contend it has grounds for terminating the franchise. If the Board accepts the ALJ's recommendation, then fairness and good faith mandated by the Occupations Code will be effectively stripped from the Code and the balance of power between distributor and dealer is overturned.

The Board should not allow this case to set a new standard for treatment of Texas dealerships because it is in direct conflict with the purposes and provisions of the Texas Occupations Code. The Code was enacted, in part, to protect Texas dealerships from the inherent one-sided nature of the franchise relationship. If a manufacturer or distributor could set the bar and then make sure that it is impossible for the dealership to meet that bar, with the end result being that the dealership risks losing the franchise for failure to meet the bar, then all power would be placed in the hands of the manufacturer or distributor. The Board should ensure that the Code is upheld by affirming that it is not reasonable, not fair, and not in good faith for a manufacturer or distributor to set an impossibly high sales bar and then ensure that the dealership cannot achieve that bar by refusing to provide the dealership with sufficient inventory to sell. In other words, the Board should reject the ALJ's recommendation and uphold World Car Hyundai's complaint.[1]

II. Legal Standards

A. Standard of Review

A proposal for decision is a recommendation — the Board is "statutorily authorized to modify or reject it." *See Pierce v. Texas Racing Comm'n*, 212 S.W.3d 745, 751-52, 754 n.7 (Tex. App.—Austin 2006, pet. denied) (citing Tex. Gov't Code § 2001.058(e)). The Board may change a

[1] Appendix 1 contains several of World Car Hyundai's demonstrative exhibits, which were admitted into the record without objection, for the Board's review.

finding of fact or conclusion of law if the Board determines that the ALJ improperly applied or interpreted the law, agency rules or policies, or prior administrative decisions. Tex. Gov't Code § 2001.058(e).

The Board has complete discretion to change the ALJ's findings and conclusions and reject the ALJ's recommendation if the ALJ's "findings and conclusions reflect a lack of understanding or a misapplication of the existing laws, rules, or policies." *See Smith v. Montemayor*, No. 03-02-00466-CV, 2003 WL 21401591 *7 (Tex. App.—Austin 2003, no pet.) (upholding agency's changes to ALJ's findings and conclusions where the agency "determined that the ALJ failed to properly weigh the factors listed in chapter 53 and in the Department's rules"). The Board must explain its specific reason and the legal basis for each change made. *Granek v. Tex. State Bd. Of Med. Examiners*, 172 S.W.3d 761, 780-81 (Tex. App.—Austin 2005, no pet.).

B. Applicable Statutes

The purpose of the Texas Occupations Code ("Code") is to, among other things, prevent "unfair practices, discrimination, impositions, or other abuse of the people of this state." Tex. Occ. Code § 2301.001. The Code must 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." *Id.* In Section 2301.003, titled "Effect on Agreements," the Code also provides:

> (a) *The terms and conditions of a franchise are subject to this chapter.*
>
> (b) An agreement to waive the terms of this chapter is void and unenforceable. *A term or condition of a franchise inconsistent with this chapter is unenforceable.*

Tex. Occ. Code § 2301.003 (emphases added). Thus, the Texas Legislature enacted the Code to protect dealers from the inherently one-sided nature of the franchise relationship between dealer and manufacturer, and franchise agreements cannot override the Code.

There are three statutes at issue in this case, all of which fall under Subchapter J of Section 2301 of the Code:

1. Occupations Code § 2301.467 – Unreasonable Sales Standards

Under Section 2301.467 of the Code, "a manufacturer or distributor. . . may not: (1) require adherence to unreasonable sales or service standards." Tex. Occ. Code § 2301.467(a)(1). The Code does not define "unreasonable," but "[t]he use of legal or other well-accepted dictionaries is a permissible method of determining the ordinary meaning of certain words." *Learners Online, Inc. v. Dallas Indep. Sch. Dist.*, 333 S.W.3d 636, 641 (Tex. App.—Dallas 2009, no pet.). Such dictionaries define "unreasonable" to include: "not guided by or based on good sense,"[2] "beyond the limits of acceptability or fairness,"[3] and "not guided by reason" or "irrational."[4]

2. Occupations Code § 2301.468 – Discrimination Among Dealers

Section 2301.468 of the Code is titled "Discrimination Among Dealers or Franchisees." It says:

> A manufacturer, distributor, or representative may 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.

[2] Oxford English Dictionary.

[3] *Id.*

[4] Black's Law Dictionary (9th ed. 2009).

Tex. Occ. Code § 2301.468 (2003) (emphases added). The word "discriminate" is not defined in the statute, but the ordinary meaning is "to unfairly treat a person or group of people differently from other people or groups." *See* Merriam-Webster Dictionary.

3. Occupations Code § 2301.478 – Duty of Good Faith and Fair Dealing

Every vehicle manufacturer or distributor that is in a franchise relationship with a vehicle dealership has a statutory "duty of good faith and fair dealing that is actionable in tort." Tex. Occ. Code § 2301.478. "A duty of good faith and fair dealing requires parties to deal fairly with one another." *Humble Emergency Physicians, P.A. v. Mem'l Hermann Healthcare Sys.*, Inc., 01-09-00587-CV, 2011 WL 1584854, at *7 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.).

III. Facts

A. World Car Hyundai is Part of the World Car Auto Group, a Successful Family of Dealerships in San Antonio

There are two World Car Hyundai dealerships in San Antonio, the "North" store (opened in 1997) and the "South" store (opened in 1999). Tr. at 65; PTX 121. These two stores are part of the World Car Auto Group, which is a successful family of dealerships that also includes 4 Kia stores, 3 Mazda stores, and a Nissan store, all located throughout the greater San Antonio area. The owner, Ahmad "Nader" Zabihian, began World Car Auto Group in 1993 with just one dealership. Tr. at 65. Unique in the industry, all 10 World Car dealerships (Hyundai, Kia, Mazda, and Nissan) provide a lifetime warranty and lifetime road assistance on every vehicle they sell. Tr. at 66-67.

B. All Hyundai Dealerships, Including World Car Hyundai, Need a Critical Mass of Inventory to Succeed.

Hyundai offers 12 different models of vehicles, but each has distinct trim levels which results in at least 96 different Hyundai vehicle configurations in the United States, setting aside add-on options and paint color, etc. PTX 130. Every Hyundai dealership, especially a

dealership like World Car in a major metropolitan market in the seventh largest city in America, needs a certain minimum level of inventory in order to offer choice and selection to consumers and to keep its sales rate constant or growing. Tr. at 650-51, 682-83, 686 (Roesner). The witnesses for HMA and for World Car Hyundai agree on this key point. Tr. at 154 (Zabihian) (if customer does not see enough inventory on website, customer will not visit dealership); PTX 117, Hetrick Dep., at 193 (same); *see also* Tr. at 510, 512 (Willis) (same).

Having a critical mass of inventory on the lot (and available for website viewing) has become even more critical as customer behavior has shifted more and more toward online browsing of vehicle inventory before visiting a dealership to make a purchase. Tr. at 156 (Zabihian). Even HMA's expert witness agreed. Tr. at 1189-90 (Frith) (in-person shopping is influenced by selection available on internet); *see also* Tr. at 669 (Roesner) ("easier to attract more customers with larger inventories"). Before the prevalence of internet shopping, the average customer drove to almost 4 different dealerships before buying a car. Tr. at 156 (Zabihian). Now the average is only about 1.6 actual visits, meaning that customers shop online more and in person less. *Id.* The result is that a dealership's customer traffic levels at the store are greatly affected by what inventory is available and advertised for viewing online. Tr. at 512 (Willis). The website is a virtual showroom.

When a dealership has little inventory available on the lot—and for viewing on the internet—that unquestionably decreases customer traffic to the store. Tr. at 512 (Willis). Under HMA's inventory allocation system, dealerships "earn" additional inventory by selling their existing inventory. In other words, by selling cars and trimming inventory, a dealership theoretically has a lower "days' supply" of inventory on hand; that allows it to earn more cars to build inventory back up to have enough cars on the lot. Tr. at 516-17 (Willis); Tr. at 646-47

(Roesner). But persistent low inventory levels thus result in a lower sales rate and lower sales totals overall, which increases a dealership's "days' supply" as determined by HMA's allocation system. Tr. at 650-51 (Roesner). A higher days' supply will result in fewer and fewer system allocations to the dealership under the nondiscretionary formula. *See* Tr. at 650, 694 (Roesner). Some call this the "dealer death spiral," while many at HMA call it a "cycle" of "low inventory and low sales" that needs to be "broken." PTX 117, Hetrick Dep., at 23-24; PTX 120, Zuchowski Dep., at 76. If the cycle is not broken through an influx of inventory, the dealership will earn very little inventory from the HMA system allocations and will not have the inventory needed to drive customer traffic to the store and maintain or increase sales. *Id.* Conversely, if a dealership has the "critical mass" of inventory on its lot that will drive customer traffic and maintain or increase sales, then a dealership will make more sales and earn more inventory under HMA's formulaic portion of the allocation system. Tr. at 680-81 (Roesner).

C. As of Mid-2010, World Car Hyundai and its Nearest Competitor in San Antonio Had Similar Inventory Levels and Similar Sales, and Both Were in Need of Additional Inventory.

The two World Car Hyundai dealerships and their nearest competitors in the San Antonio market, Red McCombs Hyundai Northwest and Red McCombs Hyundai Superior, had similar inventory levels in mid-2010. Tr. at 80-81 (Zabihian). As of July 21-22, 2010, the World Car stores had a total of 200 cars available while the Red McCombs stores had a total of 240 cars available. Tr. at 1046-47 (Hetrick); *id.* at 643 (Roesner); PTX 18; DTX 175; DTX 181; DTX 188. All four dealerships (along with other dealers in the region) were low on inventory and all four dealerships were asking for additional inventory. *See, e.g.*, Tr. at 1033-34, 1037, 1046 (Hetrick). They were very similarly situated as of mid-2010.

At this same time, all four Hyundai dealerships in San Antonio (the World Car dealerships and the Red McCombs dealerships) were considered "underperforming" by HMA.

Tr. at 934 (Hetrick); *see also* PTX 117, Hetrick Dep., at 25-26; PTX 120, Zuchowski Dep., at 171-172. All four dealerships needed a "boost in inventory to break the cycle" of lower inventory and sales. *See* PTX 120, Zuchowski Dep., at 76. In that situation, one might have expected relatively equal treatment from HMA.

D. After Tom Hetrick Became HMA's Regional General Manager in June 2010, He Gave World Car Hyundai's Nearest Competitor Nearly Seven Times More Inventory Than World Car in His First Six Months on the Job, A Boost that Helped the Competitor and Hurt World Car.

The relative parity among the four Hyundai dealerships in San Antonio disappeared starting in mid-2010. Mr. Zabihian did not suddenly become a bad car dealer, and his subordinates at World Car Hyundai—managers and sales personnel—did not suddenly become incompetent. *See, e.g.*, Tr. at 193-94 (World Car succeeded in selling Kias because it had enough Kias in inventory). One thing changed: HMA appointed a new Regional Manager, Tom Hetrick in June 2010. After that, the level of support and inventory that World Car received from HMA plummeted, while the McCombs dealerships received far more favorable treatment.

Hetrick had three tools to help "underperforming dealers" like World Car Hyundai and Red McCombs Hyundai "break the cycle" of lower inventory and lower sales: (1) extra vehicles through discretionary allocations, (2) extra Co-Op advertising funds provided on a discretionary basis, and (3) extra training for dealership personnel. PTX 117, Hetrick Dep., at 18, 22-23. Hetrick, however, did not use <u>any</u> of his three tools with World Car in any material way. Instead, starting very early in his tenure, Hetrick favored the Red McCombs dealerships with extra inventory in a grossly lopsided fashion as compared to the World Car dealerships.

In his first 6 months as Regional Manager, from July to December 2010, Hetrick gave <u>134</u> vehicles to the Red McCombs dealerships while providing only <u>20</u> such vehicles to the

World Car dealerships. PTX 111. There were no rules, guidelines, or standards governing these discretionary allocations. PTX 117, Hetrick Dep., at 29-30.

Although Hetrick was not required to and did not document any reason for why he allocated vehicles to a particular dealership, someone from HMA did in fact document why Hetrick gave extra vehicles to Red McCombs in 2010. *Id.* In July 2010, Red McCombs dealership management complained that they could not hit their sales goals with only 98 vehicles on the lot. PTX 18. The very next month, Hetrick sent 47 extra cars to that dealership. PTX 21. In a contemporaneous written report, HMA District Manager Jim Thompson explained that the purpose of this "boost in inventory" was to allow Red McCombs to grow its inventory to a level where it would be able to sell more vehicles and thus earn more system allocations in order to further increase its sales. PTX 21. In other words, Hetrick provided the additional 47 cars to assist the Red McCombs dealership in reaching its sales goals. *Id.* Again, one would have expected this rationale would have applied at least equally to World Car.

No such boost in inventory was provided to World Car Hyundai, however, even though at the exact same time (July 2010), World Car Hyundai had a very similar number of cars in inventory [106 cars for North and 72 cars for South] and was asking Hetrick for more inventory at both stores. Tr. at 516 (Willis) ("I wouldn't classify that one or two cars as a boost of inventory."); Tr. at 652-53, 669 (Roesner) (did not see boosts like those provided to Red McCombs). Even Hetrick conceded that the World Car Hyundai South store was the one that "most needed to break the cycle," but he did not do anything about it. *See* Tr. at 1076 (Hetrick). Hetrick abandoned the World Car Hyundai South store because he thought they should just sell Kias and get out of the Hyundai business. *See* Tr. at 1080 (Hetrick) (he did not help World Car South because it had a "better opportunity with the other brand to continue on" i.e. Kia); *id.* at

1101 (Hetrick) ("didn't feel there was any need to help them break the cycle at World Car" at that time).

A "boost in inventory" from the Regional GM such as the one given to the McCombs dealerships has a multiplier effect because it will allow a dealership to earn even more inventory when it sells those vehicles, which will help the dealership get into a better inventory cycle. Tr. at 1060 (Hetrick); *see also* Tr. at 680-81 (Roesner) (discretionary allocations have a "multiplier effect"). If a "boost" had been provided to World Car Hyundai similar to what was provided to Red McCombs Hyundai, it would have allowed World Car Hyundai to grow its inventory and sell more vehicles in a time of high demand. Tr. at 80-81 (Zabihian); Tr. at 652-63 (Roesner). Without that boost, World Car Hyundai never had the opportunity to sell those discretionary allocations and thus earn more cars from HMA, and thereby increase its sales during 2010-2013. Tr. at 659-60 (Roesner).

There was no legitimate basis for the significant disparity in discretionary allocations during the second half of 2010, in which Red McCombs received nearly seven times as many vehicles as World Car—and HMA offered no plausible excuse for this. Historically World Car Hyundai had been on par with or better than the Red McCombs Hyundai dealerships in terms of sales. Tr. at 500-01 (Willis); *see also* PTX 10; PTX 82. There was not a huge disparity in sales as of mid-2010 between the World Car stores and the Red McCombs stores, and certainly not a multiple of nearly seven. PTX 10; PTX 82; Tr. at 678-79 (Roesner) (Red McCombs did not sell seven times as many cars as World Car Hyundai in 2010).

The only material difference between Red McCombs and World Car in mid-2010 is that Red McCombs had tried to sell all three of its Hyundai dealerships to World Car, Tr. at 88, and had recently surrendered one of those Hyundai dealerships (North Central), Tr. at 63 (Zabihian).

Losing that dealership in a major metro market was a "blow to Hyundai." *Id.* at 996-97 (Hetrick). In fact, it made Hetrick question Red McCombs's commitment to the Hyundai brand and become afraid that McCombs would give up the other two Hyundai dealerships, which would be a further blow to HMA and to Hetrick in his new role as Regional GM. *See id.* at 1005-06 (Hetrick). When McCombs' principal Marsha Shields told Hetrick in June 2010 that she wanted to build a network of Hyundai stores, Hetrick thought that the Red McCombs group had "recommitted" to Hyundai, indicating his belief that they had not been committed to Hyundai for a period of time before his meeting with Ms. Shields. *Id.* Hetrick immediately became very interested in doing whatever he could to please the Red McCombs Hyundai dealerships. *Id.* at 944, 1017 (Hetrick). That included providing the Red McCombs dealerships with boosts of extra inventory.

Hetrick's discretionary boosts in inventory to Red McCombs were much more valuable during the second half of 2010 than they would be today, because demand for Hyundai vehicles was very high, and continued to be high throughout all of 2011, 2012 and much of 2013. Tr. at 680 (Roesner); *id.* at 1211-12 (Frith). Discretionary allocations during 2011 through 2013 also had a <u>multiplier effect</u> because when sold they helped the dealership to earn additional allocations that the dealership would not have otherwise received, but for the discretionary allocations. Tr. at 680-81 (Roesner); *see also id.* at 1060 (Hetrick).

Moreover, Hetrick's discretionary boosts in inventory to Red McCombs during a period of high demand (like 2010-2013) were more harmful to World Car Hyundai than if Hetrick had allocated those vehicles to a different dealer in a market outside of San Antonio. HMA's President and CEO testified that extra allocations to the nearest competitor have more impact

because the competitor has more cars to offer for sale in the same market area. PTX 120, Zuchowski Dep. at 171; *see also* Tr. at 681 (Roesner) (same).

The effect of Hetrick's disparate treatment of the San Antonio dealerships was clear: Red McCombs's inventory grew while World Car's did not. *See, e.g.*, PTX 124. Inventory levels at the Red McCombs Hyundai dealerships grew throughout the second half of 2010 so that by Spring 2011 the Red McCombs stores had over 50% more inventory than the World Car dealerships. *See* PTX 109, Tab 3 pg. 2 (showing 305 cars in pipeline for Red McCombs and 197 cars in pipeline for World Car). The inventory levels went from being at 240 for Red McCombs and 200 for World Car in July 2010 (a 20% difference) to 305 for Red McCombs and 197 for World Car in May 2011 (a 50% difference). *Id.* That jump in inventory for the McCombs dealerships was attributable to the extra allocations provided by Hetrick and the multiplier effect. *Id.*; *see also* PTX 111, 126, 127. These extra allocations allowed the Red McCombs dealerships to grow their inventories so that they could hit the sales goals set by HMA. *See* PTX 21.

E. Hetrick Tried to Get Rid of World Car Hyundai in Late 2010 So that He Could Build a Network of Hyundai Dealerships with World Car's Nearest Competitor.

In late 2010, Hetrick came to World Car and offered to "assist" Mr. Zabihian in finding a buyer for the Hyundai dealerships. PTX 117, Hetrick Dep., at 77. According to Hetrick, he made this offer because it was a good time to sell a dealership and make a profit. *Id.*, at 77-78. Significantly, Hetrick did not make a similar offer to other Hyundai dealership owners like Red McCombs during this time frame. Tr. at 1086 (Hetrick). He told World Car's representatives that if they would not sell their dealership, he would attempt to have their franchises terminated. World Car declined the invitation to sell its dealerships. PTX 117, Hetrick Dep., at 78.

There is no good explanation for Hetrick's effort to single out Mr. Zabihian to sell his dealerships other than to make room for the Red McCombs network of dealerships. Tr. at 944,

1017 (Hetrick). Hetrick knew that World Car Hyundai held a contractual right of first refusal for the next dealership point that HMA added anywhere in the greater San Antonio area during the next three years. Tr. at 89-90 (Zabihian); Tr. at 944, 1037 (Hetrick). Thus, Hetrick could not add another Red McCombs Hyundai dealership without first giving the opportunity to World Car Hyundai. *Id.*

Hetrick testified about this extraordinary event:

> Q. You literally brought them a letter to get signed authorization to sell the dealerships in late 2010; isn't that right?
>
> A. To get assistance to help them find a buyer --
>
> Q. Right. That's right.
>
> A. -- if they wanted to.
>
> Q. So that you could go out and kind of help them find a buyer?
>
> A. Yes.
>
> Q. <u>And you can't think of anybody else you've ever done that for in the whole state of Texas?</u>
>
> A. <u>No.</u>
>
> Q. <u>Have you done it in the Region?</u>
>
> A. <u>I don't know.</u>

Tr. at 1086 (Hetrick) (emphasis added). World Car had never told Hetrick it was interested in selling—to the contrary, World Car Hyundai was asking to buy more inventory from HMA, seeking to build new facilities, spending a lot of money on advertising, floorplanning its vehicles with Hyundai Motor Finance, etc. *See, e.g.*, Tr. at 115-16, 142-47, 172-75 (Zabihian); *id.* at 498-99 (Willis); *id.* at 414 (Kiolbassa). The only explanation for Hetrick's extraordinary conduct is

that he saw this as an opportunity to get rid of World Car so that it would not interfere with his business plans to support Red McCombs in building a network of dealers.

F. HMA Gave About Three Times More Inventory to World Car Hyundai's Nearest Competitor From 2011 to 2013, While Ignoring World Car's Continual Requests to Buy Inventory.

Notwithstanding the advantage that Hetrick had provided Red McCombs just as demand for Hyundai vehicles was starting to surge in late 2010, which gave Red McCombs the "critical mass" of inventory it needed at just the right time, Hetrick's discretionary boosts in inventory to Red McCombs Hyundai did not stop. *See* PTX 126; *see also* PTX 109-110. The rich got richer throughout 2011, 2012, and most of 2013. Tr. at 1102 (Hetrick). For example, from January 2011 through September 2013, total manual allocations to Red McCombs were 1,635 vehicles, while World Car Hyundai received only 600 manual allocations (a multiple of roughly 2.75). PTX 126.

The disparity in allocations by Hetrick to the Red McCombs dealerships versus the World Car dealerships is all the more stark considering that World Car Hyundai was repeatedly asking Hetrick to buy more inventory during this entire period. *See, e.g.*, Tr. at 360 (Zabihian). Hetrick largely ignored those requests. *Id.*; *see also* Tr. at 950 (Hetrick). After no responses or communication from Hetrick throughout 2011, in November of that year Mr. Zabihian sent a letter to David Zuchowski, then Executive Vice President of Sales and Mr. Hetrick's direct supervisor, outlining the lack of support and communication from the Region and asking for his assistance. PTX 44. Mr. Zabihian said:

> "Over the past 20 years of being a franchised dealer, I have never encountered such a lack of communication, attention to matters, assistance or help as I have with your Regional General Manager. . . . [H]ow can I possibly achieve competitive sales numbers without inventory? I have never passed on any and every month, I beg for more. This is just 1 question, of the many that I would seek Tom [Hetrick]'s assistance on—if given the opportunity to do so."

Id. Although Mr. Zuchowski agrees that this was a very serious communication from a concerned dealership, at the time he received the letter he wrote a note on it to Hetrick: "Tom – Fan Mail! Can you please draft a response that I can then personalize and send? Thx DLZ." *Id.* That's all he did. Zuchowski said that he called the letter "fan mail" because Hetrick "obviously has a person that's not a fan of his." PTX 120, Zuchowski Dep., at 145. *But despite Zuchowski's modest instructions, nothing happened; neither Zuchowski nor Hetrick even responded to Mr. Zabihian's letter.* PTX 51; *see also* PTX 120, Zuchowski Dep., at 123; PTX 117, Hetrick Dep., at 71-73.

After three months of silence, Mr. Zabihian sent another letter to Mr. Hetrick in February 2012 because he had neither heard from Hetrick nor seen him in about one year.

> Despite my attempts to contact you, both by mail, voice and text, even going as far as conveying this to my DSM to have you contact me, I still haven't heard from you.... How can other dealers get product and we can't? Am I expected to sell 100% of my product each month and not grow? How can I possibly execute a business plan to grow, when there is no support, dialog or assistance from Regional?

PTX 51. Hetrick called Zabihian on February 17 and asked him to come to Dallas the following Monday. Tr. at 171-72 (Zabihian). He did not offer any answers to Zabihian's questions, nor did he offer any assistance or inventory. *Id.* Zabihian wanted Hetrick to come see the low inventory at the World Car stores for himself, so he declined to go to Dallas. *Id.* He then repeated his request in a letter, asking Hetrick to visit San Antonio to see in person the small amount of Hyundai inventory at two metro dealerships in the seventh largest city in the United States:

> **As I write this letter, I have 42 Hyundai's at the South store and 56 at the North store. Conversely, compared to the paltry 98 Hyundai's I have in stock at 2 stores, I have over 1000 Nissan, 800 Mazda's and 700 Kia's in stock.**

PTX 52 (emphasis added); *see also* Tr. at 172-74 (Zabihian). Hetrick did not respond to this letter either, nor did he provide any extra inventory or assistance to World Car Hyundai. Tr. at 176-77, 180 (Zabihian).

Mr. Zabihian was not the only World Car Hyundai employee asking HMA for more inventory. World Car's Managers were constantly asking to buy additional vehicles from HMA. *See, e.g.*, Tr. at 498-99 (Willis). For example, the General Manager of World Car Hyundai North told HMA's District Manager that he would take up to 500 turndowns in order to make clear that "if there was anything out there, we wanted it." Tr. at 499 (Willis). World Car Hyundai North's Sales Manager also repeatedly requested additional inventory from HMA. *See, e.g.*, PTX 13; PTX 22. The constant requests by World Car Hyundai to buy more inventory from HMA did not result in any substantial response by HMA. *See* Tr. at 548 (Willis). From 2010 through 2013, HMA did not respond to these requests by providing World Car Hyundai with additional inventory, as HMA did for Red McCombs Hyundai. *See* Tr. at 360 (Zabihian) ("[T]hey call it 'stimulus,' and I never got the stimulus inventory.").

G. HMA Required World Car Hyundai to Sell More Vehicles Than it was Allocated by HMA in Order to be Considered 100% Sales Efficient and Not in Material Breach of the Franchise Agreement.

HMA measures dealership performance in terms of "sales efficiency." It is calculated by taking the total number of new vehicle registrations (regardless of make) in a dealership's Primary Market Area ("PMA") and applying HMA's average market share expressed as a percentage, to derive the total number of "Expected Registrations." For example, if total vehicle registrations in a dealer's PMA were 10,000 vehicles for the year 2014 and HMA's average market share was 5%, then the dealership's Expected Registration would be 500 vehicles (5% of 10,000), and the dealership was required to sell 500 vehicles in order to be considered 100% sales efficient.

When a dealership does not achieve 100% sales efficiency, HMA considers the dealership to be failing in its sales responsibilities and thus in material breach of the franchise agreement. PTX 67; Tr. at 437 (Kiolbassa). HMA also chooses not to provide additional inventory to dealerships who are below 100% sales efficiency. *See, e.g.*, Tr. at 1114 (Hetrick).

HMA imposed unreasonable sales standards on World Car because World Car did not receive enough inventory from HMA to be 100% sales efficient *even after World Car sold every single vehicle it received.* In other words, World Car "turned," but it did not "earn." For example, in 2011 HMA expected World Car Hyundai North to sell 877 vehicles in order to be considered 100% sales efficient. HMA then allocated only 731 vehicles to World Car Hyundai North, and ignored requests for more vehicles. PTX 3; PTX 81. Although World Car Hyundai North sold more vehicles (766) than it received from HMA in 2011, HMA still deemed World Car Hyundai North to be only 87% sales efficient. PTX 3.

For each year between 2010 and 2013, HMA imposed on World Car a level of "expected registrations" that was higher than the number of vehicles World Car Hyundai actually was allowed to purchase from HMA. *Compare* PTX 3 and PTX 4 *with* PTX 81; *see also* Tr. at 74-75 (Zabihian); Tr. at 544, 547-48 (Willis); Tr. at 418-428 (Kiolbassa). The following table illustrates the unreasonableness of HMA's sales efficiency standards as applied to World Car Hyundai North:

Year	Expected Sales	Vehicles Allocated	Vehicles Sold	Actual Sales Efficiency	HMA Sales Efficiency
2010	656	532	548	103%	83%
2011	877	731	766	104.5%	87%
2012	995	717	681	95%	68%
2013	868	797	627	79%	68%

PTX 3, 10, 81. In each of these four years, World Car Hyundai North was not allocated enough cars to reach 100% sales efficiency. The table for World Car Hyundai South paints the same picture:

Year	Expected Sales	Vehicles Allocated	Vehicles Sold	Actual Sales Efficiency	HMA Sales Efficiency
2010	474	282	267	94%	56.33%
2011	727	313	310	99%	42.64%
2012	814	147	166	113%	20.39%
2013	884	256	158	61%	17.87%

PTX 4, 10, 81; *see also* Tr. at 423-26 (Kiolbassa).

HMA's CEO recognized the inherent "difficulty" in this way of measuring dealer performance in a time of constrained supply. When asked whether it was fair to judge a dealership on a standard that was impossible to reach due to tight inventory supply, Zuchowski said (actually, stammered):

> "It's – again, the – the – it's – it's – the sales efficiency measure is a – is a – is a very fair measure. . . . If I don't have the ability to help you get from 60 percent to a hundred percent sales efficient, then it's a difficult argument to have."

Id. at 244-245. The only "difficulty" was one created by HMA, by refusing to allocate more vehicles to World Car and requiring World Car to sell more vehicles than it received in order to be considered 100% sales efficient, all the while providing its nearest competing dealerships in San Antonio with extra allocations.

H. Because World Car Hyundai Did Not Have Sufficient Inventory to be 100% Sales Efficient, HMA Again Tried to Get Rid of World Car in July 2013.

Fully aware that HMA did not provide sufficient inventory for World Car to meet 100% sales efficiency, in July 2013 Hetrick sent Mr. Zabihian a letter faulting the World Car Hyundai South store for failing to meet its level of "expected registrations." PTX 67. The letter states:

"Based on Hyundai's average market share through April of this year, your dealership should have sold 282 Hyundai vehicles. However, World Car's total sales through April were just 40 units." *Id.* What Hetrick omitted from his letter was that World Car South received only 41 vehicles from HMA during that same time period. In other words, World Car South sold 98% of its allocations but HMA deemed World Car only "14.2%" sales efficient. *Id.*

Based on this "underperformance"—a self-fulfilling prophecy caused by Hetrick's refusal to help the World Car organization but instead to favor the Red McCombs dealerships—Hetrick again told World Car that he wanted them out. His letter said HMA could "assist you in locating a candidate who would pay a premium for a Hyundai franchise in south San Antonio." *Id.* World Car Hyundai again declined to sell its franchises.

I. HMA Broke its Promise to Provide World Car Hyundai With Extra Vehicles When it Renovated, While Rewarding World Car's Nearest Competitor With Extra Vehicles for its Renovation.

One of HMA's improbable excuses for the disproportionate discretionary allocations was that Red McCombs renovated its facilities, leading HMA to give it extra cars in return. But World Car renovated its North store and did not receive any discretionary allocations as a result.

Hetrick continually promised World Car that if it built a new facility or upgraded its existing facility, he would give the dealership extra discretionary allocations of inventory. *See, e.g.*, Tr. at 495-97 (Willis). However, in July 2013 Hetrick sent Mr. Zabihian a letter that said, "[a]pproval of your facility proposal by HMA does not, in any way or manner, constitute assurance by HMA that you will be sold or receive any minimum number of vehicles." PTX 72. In other words, after promising World Car extra inventory if it upgraded its facility, Hetrick then told World Car there was no guarantee of any extra inventory.

Tellingly, Hetrick did *not* send such a letter to Red McCombs, or to any other Hyundai dealership in the Region that renovated its facility. Tr. at 1113 (Hetrick). Instead, he simply

provided Red McCombs (and other Hyundai dealerships) extra inventory when they upgraded their facilities, in addition to financial assistance to help defray the cost of the renovations and advertise the additional vehicles that Hetrick had given them. *See* Tr. at 1062 (Hetrick). No such financial assistance was provided to World Car when it renovated its North store. Tr. at 345-46 (Zabihian).

World Car Hyundai completed the renovation of its North store in 2014, but HMA did not provide any additional inventory or financial assistance to World Car. Tr. at 184 (Zabihian); Tr. at 496-97 (Willis). HMA provided no legitimate explanation for giving extra inventory to Red McCombs when it renovated its facility but denying extra inventory to World Car after its renovation.

IV. Argument and Authorities

A. The Board should reject the ALJ's recommendation because the ALJ misinterpreted and misapplied Code Section 2301.467(a)(1) – HMA required World Car to sell more cars than it was allocated in order to avoid being in material breach of the franchise agreement.

HMA violated Code Section 2301.467(a)(1), which prohibits unreasonable sales standards, because HMA required World Car Hyundai to meet 100% sales efficiency to avoid material breach of the dealer agreement even though HMA withheld from World Car Hyundai the cars that it would need to have in order to meet this sales standard.

However, in Conclusion of Law #6 the ALJ stated that "World Car failed to meet its burden of proof that Hyundai required adherence to unreasonable sales or service standards." PFD, at 27. The ALJ stated there was no violation of Code Section 2301.467(a)(1) because "[t]here is no requirement in the Dealer Agreement between World Car and Hyundai that requires World Car to be 100% sales efficient." PFD, at 21. But the statute does not say that a distributor is prohibited from requiring adherence to an unreasonable sales standard only if that

standard is found "in the Dealer Agreement." *See* Tex. Occ. Code § 2301.467(a)(1). The statute does not limit violations only to those express requirements found in a franchise agreement. *Id.* Instead, it provides that "a manufacturer or distributor . . . may not: (1) require adherence to unreasonable sales or service standards." Tex. Occ. Code § 2301.467(a)(1).

Thus, the proper question is whether the manufacturer or distributor has "required adherence" to an "unreasonable sales or service standard," regardless of where or in what manner that standard is set. *See id.* By limiting the inquiry to whether there was an express requirement of 100% sales efficiency contained in the Dealer Agreement, the ALJ misinterpreted and misapplied Code Section 2301.467(a)(1). The statute prohibits <u>any</u> required adherence to an unreasonable sales standard, wherever it is found.

In construing statutes, the primary objective is to give effect to the intent of the legislature. Tex. Gov't Code § 312.005 (Vernon 1998); *Mitchell Energy Corp. v. Ashworth,* 943 S.W.2d 436, 438 (Tex.1997); *City of Houston v. Morua,* 982 S.W.2d 126, 129 (Tex. App.—Houston [1st Dist.] 1998, no pet.). When statutes are clear and unambiguous, the legislature's intent is discerned by giving the words chosen their plain and common meaning and by giving effect to all of the statute's terms. Tex. Gov't Code §§ 311.011(a), 311.021(2), 312.022(a) (Vernon 1998 and Supp.1999); *St. Luke's Episcopal Hosp. v. Agbor,* 952 S.W.2d 503, 505 (Tex.1997); *Morua,* 982 S.W.2d at 129. In construing statutes as a whole, all provisions of an act are considered and interpretations that produce absurd results or render terms meaningless are to be avoided. *See Chevron Corp. v. Redmon,* 745 S.W.2d 314, 316 (Tex.1987); *Lundy v. State,* 891 S.W.2d 727, 729 (Tex. App.—Houston [1st Dist.] 1994, no pet.).

The phrase "require adherence to" is not defined in the Code so it must be given its ordinary meaning. *St. Luke's Episcopal Hosp.,* 952 S.W.2d at 505. Under generally-accepted

dictionary definitions, something is "required" when it is "demanded as necessary." *See* Merriam-Webster Dictionary. "Adherence" means "the act of adhering; especially: the act of doing what is required by a rule, belief, etc." *See id.* Thus, a manufacturer or distributor can and does "require adherence to" a particular sales standard without spelling out that standard in the franchise agreement. The sales standard can be required—demanded as necessary—by any number of actions by the manufacturer or distributor without being stated in the franchise agreement. Adherence to a standard is "required" whenever there are consequences for non-compliance, wherever and however those consequences are spelled out.

HMA required adherence to 100% sales efficiency because HMA uses "sales efficiency" as the metric for whether a Hyundai dealership is complying with its sales responsibilities. Tr. at 1013. The consequences for non-compliance with the 100% sales efficiency standard are significant and serious. HMA has the right to terminate the franchise agreement for cause if "HMA determines that DEALER has failed to perform adequately its sales . . . responsibilities." PTX 1 at 16.B.3 (pg. 19). HMA decided whether World Car Hyundai had adequately performed its sales responsibilities by whether the dealership was above or below 100% sales efficiency. Tr. at 113; Tr. at 1013; PTX 67. That is the performance metric HMA used during the entire relevant time period, 2010 to 2013.

The ALJ's finding of fact #50—"Maintaining 100% sales efficiency is not a requirement to be or to remain a licensed Hyundai dealer"—is a *non sequitur*. *See* PFD, at 26. Because Code Section 2301.467(a)(1) does not connect "adherence to the sales standard" to "remaining a licensed dealer," the correct inquiry is not whether HMA merely allowed World Car to "remain a licensed Hyundai dealer." *See id.* Rather, the question must also include whether a dealership had to meet an unreasonable sales standard in order to (1) avoid being in material breach of the

franchise agreement, (2) qualify for support and assistance from HMA, and/or (3) receive support and assistance from HMA. *See* PTX 67; Tr. at 437 (Kiolbassa). If it was "necessary" to meet the sales standard in order to achieve any of the foregoing, then adherence was required by HMA.

Importantly, HMA's management told dealerships like World Car that they were in material breach of the franchise agreement when they did not meet 100% sales efficiency. PTX 67. Meeting 100% sales efficiency is thus a requirement imposed by HMA for a dealer to avoid "material breach" of the franchise agreement. *See* PTX 67; Tr. at 437 (Kiolbassa). HMA "demands" that it is "necessary" for dealers to be 100% sales efficient unless they want to be considered in breach of the franchise agreement. Tr. at 113, 190, 192 (Zabihian). Breach of the franchise agreement and not meeting sales responsibilities can be "good cause" for terminating a dealership's franchise under Texas law. *See* Tex. Occ. Code § 2301.455(a)(1), (6). Thus, as a matter of law, there are serious and significant consequences for not meeting 100% sales efficiency as dictated by HMA.

HMA also required World Car to meet 100% sales efficiency in order to receive a larger share of discretionary inventory than it otherwise would. *See, e.g.*, Tr. at 1114 (Hetrick). HMA gave dealers who met or exceeded 100% sales efficiency the opportunity to buy more discretionary inventory than dealers who did not. *Id.* It was thus necessary to meet 100% sales efficiency to obtain additional inventory.

The "100% sales efficiency" standard was an unreasonable sales standard as applied to World Car Hyundai during 2010 through 2013 because HMA knew that World Car did not have sufficient vehicles to meet 100% sales efficiency, even if it sold every vehicle in inventory. *See* PTX 3; PTX 4; PTX 81; PTX 120, Zuchowski Dep. at 180-81; Tr. at 1004, 1033-34 (Hetrick).

The ALJ did not find that this standard was not unreasonable, only that it was not "required." Importantly, the ALJ found that "Hyundai was aware that some dealers could not achieve 100% sales efficiency with the lower inventory." FOF #42. Although HMA was aware that it was *impossible* for World Car to reach 100% sales efficiency based on its inventory levels, HMA nonetheless told World Car that it was in material breach of the franchise agreement and tried to get World Car to sell its franchise or face termination based on its inability to achieve the impossible goal – one that HMA had made impossible. PTX 3; PTX 4; PTX 67; PTX 81; PTX 120, Zuchowski Dep. at 180-81; Tr. at 1004, 1033-34 (Hetrick). HMA also chose not to give World Car as much discretionary allocation as its competitors based on the same excuse that World Car was not achieving 100% sales efficiency, even though HMA had made that impossible. *See id.*; *see also* Tr. at 1114 (Hetrick). HMA held World Car to an unreasonable sales standard.

Accordingly, World Car respectfully requests that the Board modify the PFD as follows:

- Modify Finding of Fact # 50 to read: "Maintaining 100% sales efficiency is a requirement to avoid being in material breach of the franchise agreement with Hyundai."
- Modify Finding of Fact #52 to read: "Requiring World Car to meet 100% sales efficiency in order to avoid material breach of the franchise agreement was requiring adherence to an unreasonable sales standard because Hyundai was aware that World Car did not have sufficient inventory to meet 100% sales efficiency."
- Modify Conclusion of Law #6 to read that "World Car met its burden of proof to show that Hyundai required adherence to unreasonable sales standards."

B. The Board should reject the ALJ's recommendation because the ALJ misapplied Code Section 2301.468 – HMA unreasonably discriminated against World Car in allocations of inventory to the San Antonio market.

HMA violated Code Section 2301.468 because it unreasonably discriminated against World Car in allocation of vehicle inventory by providing nearly seven times as much

discretionary inventory to World Car's nearest competitors in 2010 and about three times as much in 2011-2013, without justification.

However, in Conclusion of Law #8, the ALJ stated that "World Car failed to meet its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory because World Car did not participate in many of the programs that would have permitted additional discretionary allocation." PFD, at 27. According to the ALJ, "World Car's argument fails to take into account the differences between the Red McCombs' dealerships and World Car's dealerships." PFD, at 13.

The ALJ misapplied the concept of "unreasonable discrimination" embedded in Code Section 2301.468 for several reasons:

First, there were *no* material differences between World Car Hyundai and Red McCombs during the latter half of 2010, the first six months of Hetrick's tenure as the new Regional General Manager, that would justify the ratio of nearly seven to one in discretionary allocations. The San Antonio Hyundai dealerships' inventory and sales levels were not materially different. *See, e.g.*, Tr. at 1046-47 (Hetrick); *see also* PTX 10, 17, 18, 82. The ALJ claimed that World Car "reduced its inventory in 2009" and "[i]n 2010, World Car turned down many vehicles offered by Hyundai." PFD at 14. But Red McCombs significantly reduced *its* inventory in 2009 by closing down an <u>entire</u> Hyundai dealership in 2009, going from three dealerships to two dealerships, an undisputed fact that the ALJ did not even mention in the PFD. Tr. at 726 (Roesner); Tr. at 1005-06 (Hetrick). Moreover, Red McCombs turned down <u>more</u> vehicles offered by Hyundai in 2010 than World Car. For January – June 2010, when these four dealerships had fairly close levels of inventory, the Red McCombs stores turned down a total of <u>598 vehicles</u> while the World Car stores turned down a total of <u>205 vehicles</u>. DTX 46, 47. So

the proffered excuse is directly contradicted by the record. World Car and Red McCombs had similar inventory levels when Hetrick started as Regional General Manager in mid-2010. Tr. at 80-81 (Zabihian); Tr. at 1046-47 (Hetrick); *id.* at 643 (Roesner); PTX 18; DTX 175; DTX 181; DTX 188. They were very similarly situated and there was no appropriate justification for the disparate treatment in allocation of vehicle inventory. Hetrick's disparate treatment turned the tide.

Second, the dealership's sales levels do not justify the disproportionate allocations from 2010 to 2013. During Hetrick's first six months as Regional GM he provided 134 vehicles to Red McCombs while providing just 20 vehicles to World Car. PTX 111. Red McCombs did not sell nearly seven times as many vehicles as World Car Hyundai during 2010. PTX 10; PTX 82. The large number of discretionary allocations to Red McCombs as compared to World Car had a multiplier effect for Red McCombs because it allowed Red McCombs to sell those vehicles in a time of high demand and thus earn more inventory than it otherwise would have without those discretionary allocations. Tr. at 680-81 (Roesner); *id.* at 1060 (Hetrick). Similarly, although Red McCombs had built up its inventory due to the extra allocations from Hetrick in the second half of 2010 and the attendant multiplier effect, for the years 2011 and 2012, Hetrick still provided Red McCombs with over three times as many discretionary allocations as World Car. PTX 110; PTX 123. Even with all of Hetrick's extra help, Red McCombs Hyundai did not sell over three times as many cars as World Car Hyundai in 2011 or 2012. *Id.*

Third, the ALJ improperly speculated about how much inventory World Car Hyundai might have received if it had participated in the service loaner program, renovated, and added the Equus line of vehicles, claiming that such actions "would most likely have increased the sales rate and reduced the daily supply of vehicles, resulting in additional allocation." PFD, at 13.

According to the ALJ, because World Car did not participate in these "programs," HMA was justified in giving between three (3) and seven (7) times as many discretionary allocations to Red McCombs as it did to World Car.

These conclusions by the ALJ are based on improper speculation and are contrary to the evidence. For one, the service loaner program does not justify the discriminatory allocations. According to HMA's expert, the number of cars that can be put in the service loaner program is minimal and thus participation in the service loaner program has a minimal impact on allocation. DTX 119; Tr. at 1182-84 (Frith). World Car Hyundai did not participate in the service loaner program because (1) it did not have sufficient inventory to devote to "true" service loaners that were actually used for that purpose and not just "punched" into the program and parked on the lot to be advertised for sale, and (2) HMA's service loaner program prematurely starts the customer's warranty on a vehicle. Tr. at 376-83 (Zabihian); *id.* at 534-35 (Willis); PTX 118, McLean Dep. at 34-35, 61-63. World Car was not interested in cheating customers out of a portion of the warranty advertised by HMA in order to help the dealership get more inventory from HMA. *See* Tr. at 382-83 (Zabihian); Tr. at 569-70 (Willis). But even if World Car had participated in HMA's service loaner program, the effect on allocation would have been minimal. DTX 119; Tr. at 1182-84 (Frith).

Nor do "renovation" or "being exclusive" justify the discriminatory treatment. World Car renovated its North store and yet HMA did not provide additional allocations, so there is no basis to claim that renovation would have meant additional inventory for World Car. Tr. at 495-97 (Willis). The World Car North store has always been exclusive and the World Car Hyundai South store asked to relocate to be exclusive on 11 acres next door to a Wal-Mart, but Hetrick rejected the request and did not provide either store with any boosts in inventory that were

comparable in any way to what he gave to Red McCombs Hyundai, *See* Tr. at 115, 121-23, 128-29, 199 (Zabihian). "Being exclusive" does not justify the differential treatment.

With respect to Equus, having one or two luxury vehicles at the $60,000+ price point in stock at a Hyundai dealership was not going to increase sales or inventory for World Car in any material respect. *See* Tr. at 945 (Hetrick). Moreover, the Equus issue was a post-hoc rationalization created by HMA that is contradicted by the contemporaneously-created documents about why Hetrick gave Red McCombs additional cars in the second half of 2010. *See* PTX 21; Tr. at 1057, 1060-61, 1077 (Hetrick). As documented at the time, Hetrick gave these cars to Red McCombs to help the dealership build its inventory at a critical time when new models were coming out, demand was high, and supply was tight, not because of the Equus progam. *Id.*

HMA unreasonably discriminated against World Car Hyundai by providing many times more discretionary allocations to World Car's nearest competitors during 2010 to 2013, when all San Antonio Hyundai dealerships were similarly situated and asking for more inventory. Accordingly, World Car respectfully requests that the Board modify the PFD as follows:

- Modify Finding of Fact # 20 to read: "In 2009 and 2010, World Car and Red McCombs voluntarily reduced their inventories, and in mid-2010 their inventories were at similar levels."
- Delete Finding of Fact #21.
- Delete Finding of Fact #27.
- Modify Conclusion of Law #8 to read: "World Car met its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory between 2010 and 2013 because Hyundai provided disproportionate discretionary allocations of inventory to World Car's nearest competitor in San Antonio that were not justified by any material differences between the dealerships."

C. The Board should reject the ALJ's recommendation because the ALJ misapplied Code Section 2301.478 – HMA's treatment of World Car was not fair and was not in good faith as the Code requires.

HMA violated Code Section 2301.478 because HMA did not act fairly and in good faith with World Car Hyundai in allocating vehicle inventory and in imposing sales requirements.[5] HMA did not use its best efforts to provide inventory to World Car (and instead gave that inventory to World Car's competitor) and required World Car to sell more vehicles than it had available to sell in order to avoid "material breach" of the franchise agreement.

However, in Conclusion of Law #9 the ALJ stated that "World Car failed to meet its burden of proof to show that Hyundai violated its duty of good faith and fair dealing through allocations and sales efficiency because Hyundai calculated sales efficiency in the same manner for all dealers, and World Car chose not to participate in many of the programs that could have led to additional discretionary allocation." PFD, at 27-28. According to the ALJ, "neither the allocation system nor the sales efficiency metric violate the provision of the Occupations Code that requires good faith and fair dealing." PFD at 22 (emphasis added).

The ALJ misapplied Section 2301.478 because HMA's (1) discriminatory inventory allocations and (2) requirement that World Car Hyundai sell more cars than it was allocated show that HMA was not acting fairly or in good faith with World Car Hyundai. It was not the "allocation system" and the "sales efficiency metric" standing alone that were unfair, it was HMA's application and use of discretionary allocations and sales efficiency with World Car that were unfair and not in good faith.

---

[5] "A duty of good faith and fair dealing requires parties to deal fairly with one another." *Humble Emergency Physicians, P.A. v. Mem'l Hermann Healthcare Sys.*, Inc., 01-09-00587-CV, 2011 WL 1584854, at *7 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.) (citing *Bank One*, 967 S.W. 2d at 441); *see also* Tex. Bus. & Com. Code § 1.201 (in commercial agreements under the UCC, defining good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing").

HMA ignored World Car Hyundai's multiple, repeated requests for additional inventory, instead favoring the Red McCombs dealerships with extra inventory at the same time as World Car's requests. There were in fact enough cars to respond to World Car Hyundai's repeated requests to buy more inventory from HMA, but HMA decided to provide those cars to Red McCombs Hyundai instead, even after the Red McCombs dealerships had already built up their inventory with Hetrick's assistance. PTX 110, 111, 126, 127. Indeed, rather than supply World Car Hyundai with inventory, Hetrick took the unique and outrageous step of soliciting World Car's authorization for him to find a buyer for the World Car dealerships, only a few months after he started as Regional GM and without any indication that World Car was interested in selling. Tr. at 1086 (Hetrick). Hetrick admittedly chose not to provide additional inventory to World Car Hyundai to help it "break the cycle" of lower inventory and lower sales. *See, e.g.*, Tr. at 1102 (Hetrick). Hetrick did not abide by his promise to World Car that he would provide it with extra inventory upon completion of the showroom renovation—no extra cars were provided as a result. PTX 72; Tr. at 496-97 (Willis). None of these actions constitute good faith or fair dealing.

With respect to sales efficiency, HMA could have provided World Car with additional inventory (so that the dealerships had a chance to reach 100% sales efficiency) but HMA chose not to. Tr. at 1079, 1102 (Hetrick). HMA could have measured World Car's performance in any number of different ways, but HMA chose not to. PTX 67 at 10.E (pg. 9); *see also* Tr. at 426 (Kiolbassa). By continuing to require World Car to sell more inventory than it received in order to avoid being in "material breach" of the franchise agreement, and by refusing to allocate additional inventory to give World Car Hyundai the chance to be 100% sales efficient, HMA did not act fairly and in good faith in its dealings with World Car.

Accordingly, World Car respectfully requests that the Board modify the PFD as follows:

- Modify Finding of Fact #53 to read: "Hyundai's discretionary allocations to the San Antonio market between 2010 and 2013 were unfair, and Hyundai's requirement that World Car meet 100% sales efficiency despite the dealerships' known lack of inventory was also unfair."

- Modify Conclusion of Law # 9 to read: "World Car met its burden of proof to show that Hyundai violated its duty of good faith and fair dealing through discretionary allocations and through requiring World Car to meet 100% sales efficiency between 2010 and 2013."

V. Conclusion

The ALJ did not properly apply the concepts of "required adherence," "unreasonable discrimination," or "good faith and fair dealing" in this case. HMA's treatment of World Car Hyundai from 2010 to 2013 violated Sections 2301.467(a)(1), 2301.468(2), and 2301.478 of the Occupations Code. If the Board accepts the ALJ's recommendation, then manufacturers and distributors will be able to treat Texas dealerships unfairly with impunity because (1) setting a high sales bar, (2) ensuring that the dealership cannot meet that sales bar by not providing the dealership with sufficient inventory, and then (3) claiming "material breach" of the franchise agreement when the dealership cannot meet the sales standard will be a perfectly legal business strategy that would allow manufacturers and distributors to extract unfair concessions from dealerships and/or seek to terminate their franchises. The Board should modify the ALJ's Proposal for Decision as requested herein and sustain World Car Hyundai's complaint.

Respectfully submitted,

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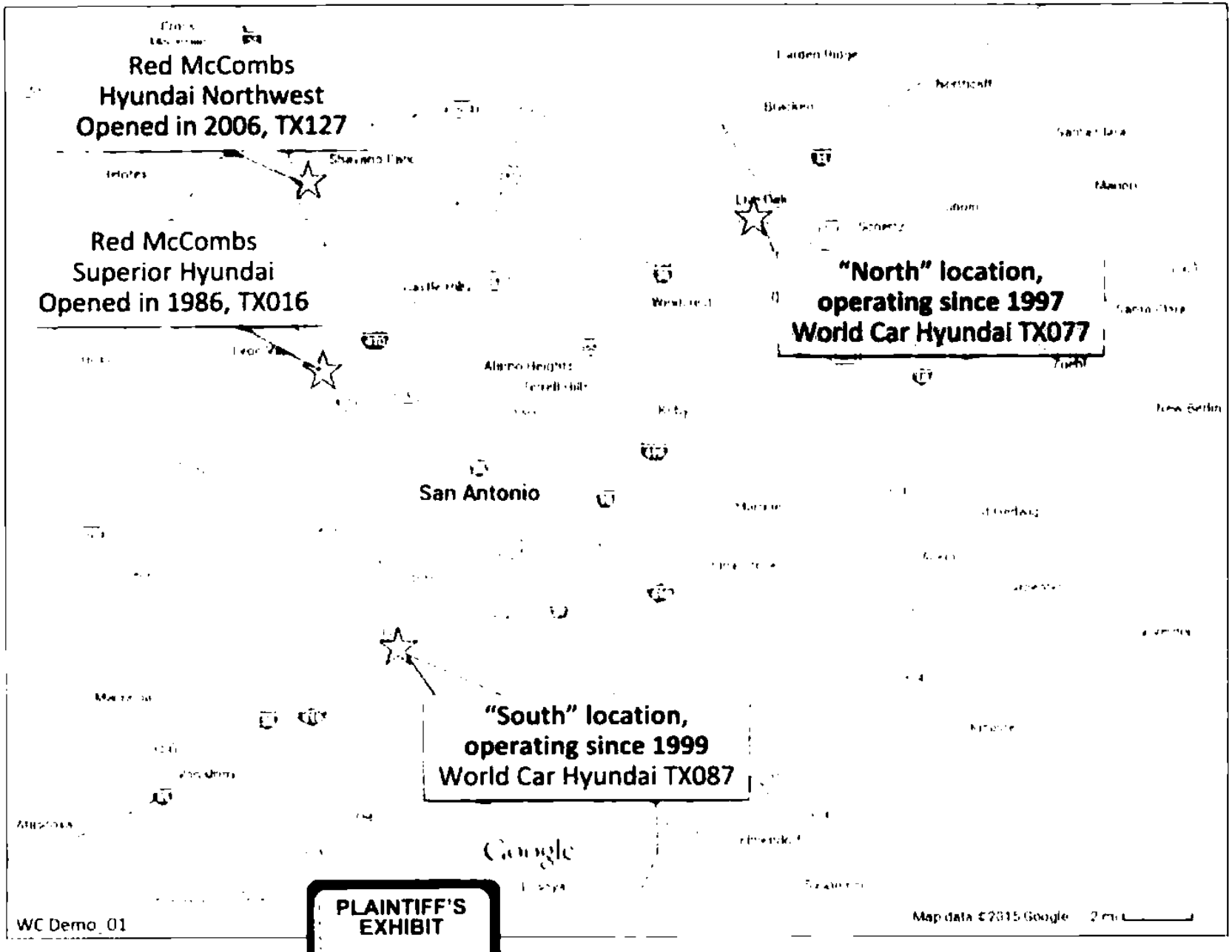
ATTORNEYS FOR COMPLAINANTS

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of April, 2016, a true and correct copy of the above and foregoing instrument has been served via email on all counsel of record.

/s/ Jarod R. Stewart
Jarod R. Stewart

APPENDIX 1



PLAINTIFF'S EXHIBIT
121

Timeline of Events: 2006 - 2010

World Car sales generally on pace with or greater than Red McCombs

2006-2009

2010

June, 2010
Hetrick becomes Regional General Manager

May 13, 2010
Red McCombs dealership caught falsifying customer satisfaction surveys

June 4, 2010
World Car asks for more inventory; no response

June 24, 2010
World Car asks for more inventory; Hetrick says punch cars and reverse RDRs 10 days later

July 20, 2010
Red McCombs asks for more inventory

Sept 1, 2010
World Car asks for inventory; no response

Aug 16, 2010
HMA provides Red McCombs with extra inventory

Oct 25, 2010
World Car letter to Hetrick asking for inventory; no response

Oct 12, 2010
Red McCombs' inventory almost doubled since July 20

Late 2010
Hetrick refuses World Car's offer to build a new, exclusive Hyundai facility for the South store and offers to find buyer for World Car franchises

July-Dec 2010	Extra Allocations	Extra Co-Op $$
Red McCombs	134	$15,000
World Car	20	$0

PLAINTIFF'S EXHIBIT
122

WC Demo_03A

Timeline of Events: 2011 - 2012

April, 2011
World Car asks Hetrick and Zuchowski for facility improvement funds and inventory; none provided

Nov 9, 2011
World Car letter to Zuchowski asking for assistance. Zuchowski calls it "fan mail"; no response

Jan 9, 2012
World Car asks for inventory; no response

Feb 13, 2012
World Car letter to Hetrick asking for inventory; none provided

Feb 23, 2012
World Car letter to Hetrick asking for inventory; none provided

Mar 8, 2012
Hetrick tells World Car that HMA will provide additional inventory if World Car improves facility

2011 — 2012

2011	Extra Allocations	Extra Co-Op $$
Red McCombs	364	$39,000
World Car	124	$5,000

2012	Extra Allocations	Extra Co-Op $$
Red McCombs	355	$37,604
World Car	100	$0

Extra Allocations Source: [illegible]
Extra Co-Op $ Source: [illegible]

WC Demo_03B

Timeline of Events: 2013 - 2014

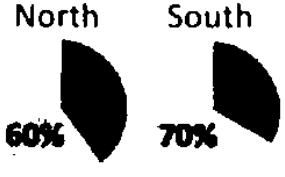
July 10, 2013
Hetrick letter to Zabihian offering to locate buyer for South store

July 31, 2013
Hetrick letter that HMA's approval of facility upgrade does not guarantee additional inventory

Sept 26, 2013
World Car sues HMA in Bexar County re: breach of right of first refusal for New Braunfels point and for failure to provide inventory

October, 2013
World Car begins renovations at North Store despite "no guarantee" letter from Hetrick

Oct – Dec 2013
Majority of HMA's 2013 manual allocations to World Car made after a lawsuit was filed



Oct 2014
World Car completes renovation; HMA does not provide additional inventory

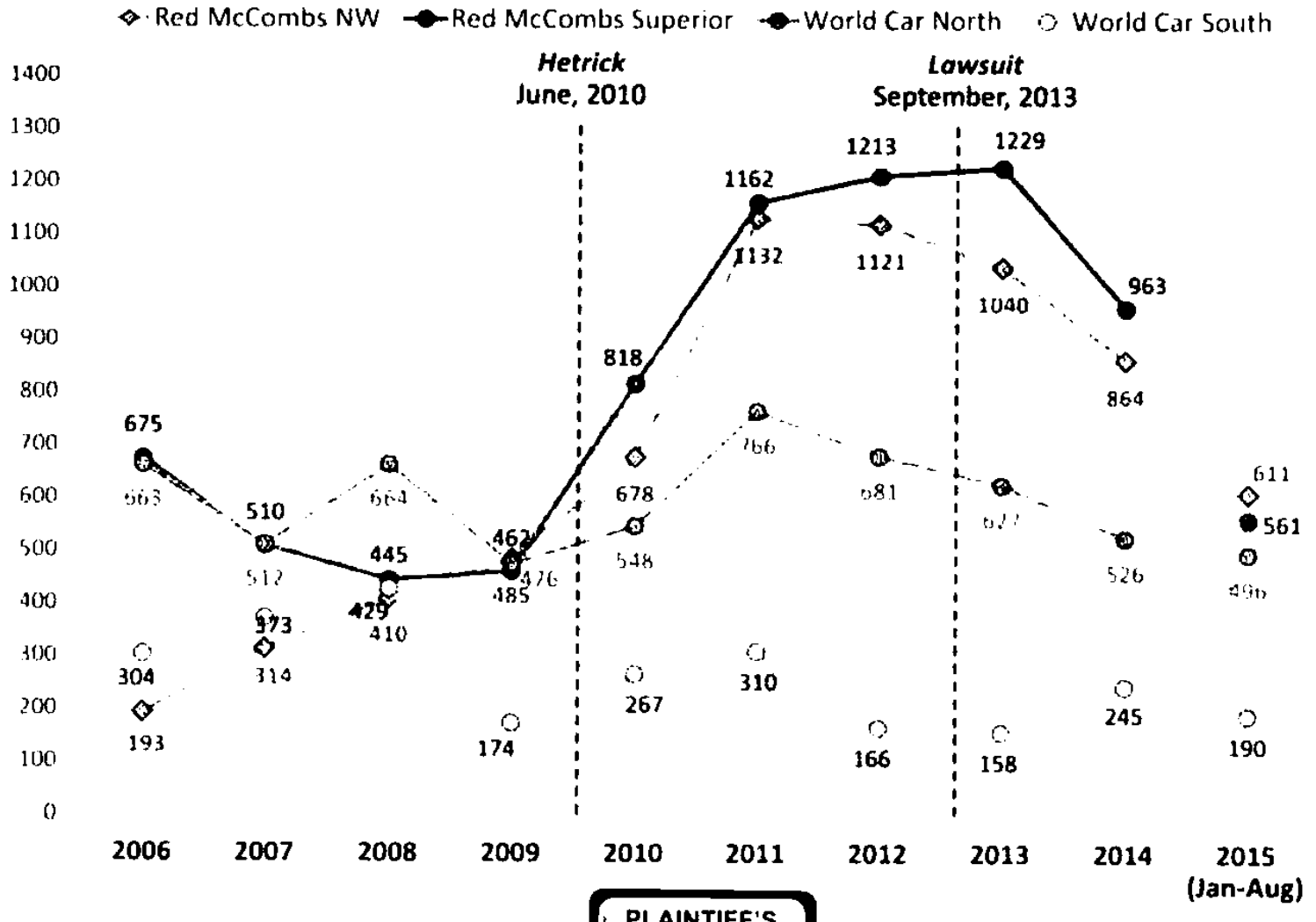
2013 — 2014

Jan – Sept 2013	Extra Allocations	Extra Co-Op $$	Oct – Dec 2013	Extra Allocations	Extra Co-Op $$
Red McCombs	21	$17,646	Red McCombs	0	$0
World Car	1	$0	World Car	4	$52,965

Extra Allocations Source: HMA st. Ad. 111
Extra Co-Op $$ Source: PTA [illegible]

WC Demo_03C

Sales by Dealer, 2006 – 2015 (YTD)

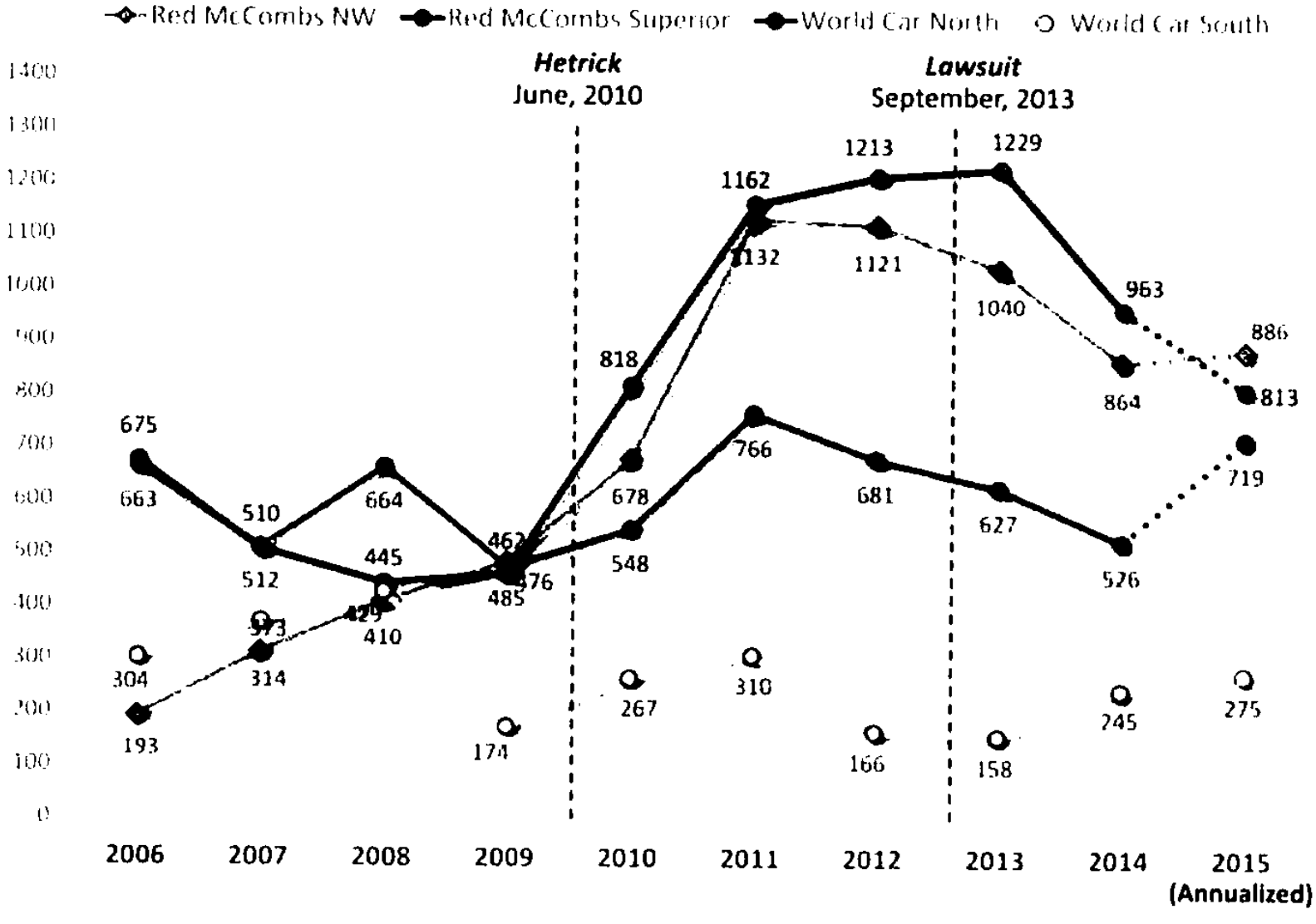


Source PTX 10, 109, 114, 115, 116

PLAINTIFF'S EXHIBIT 123

WC Demo_04A

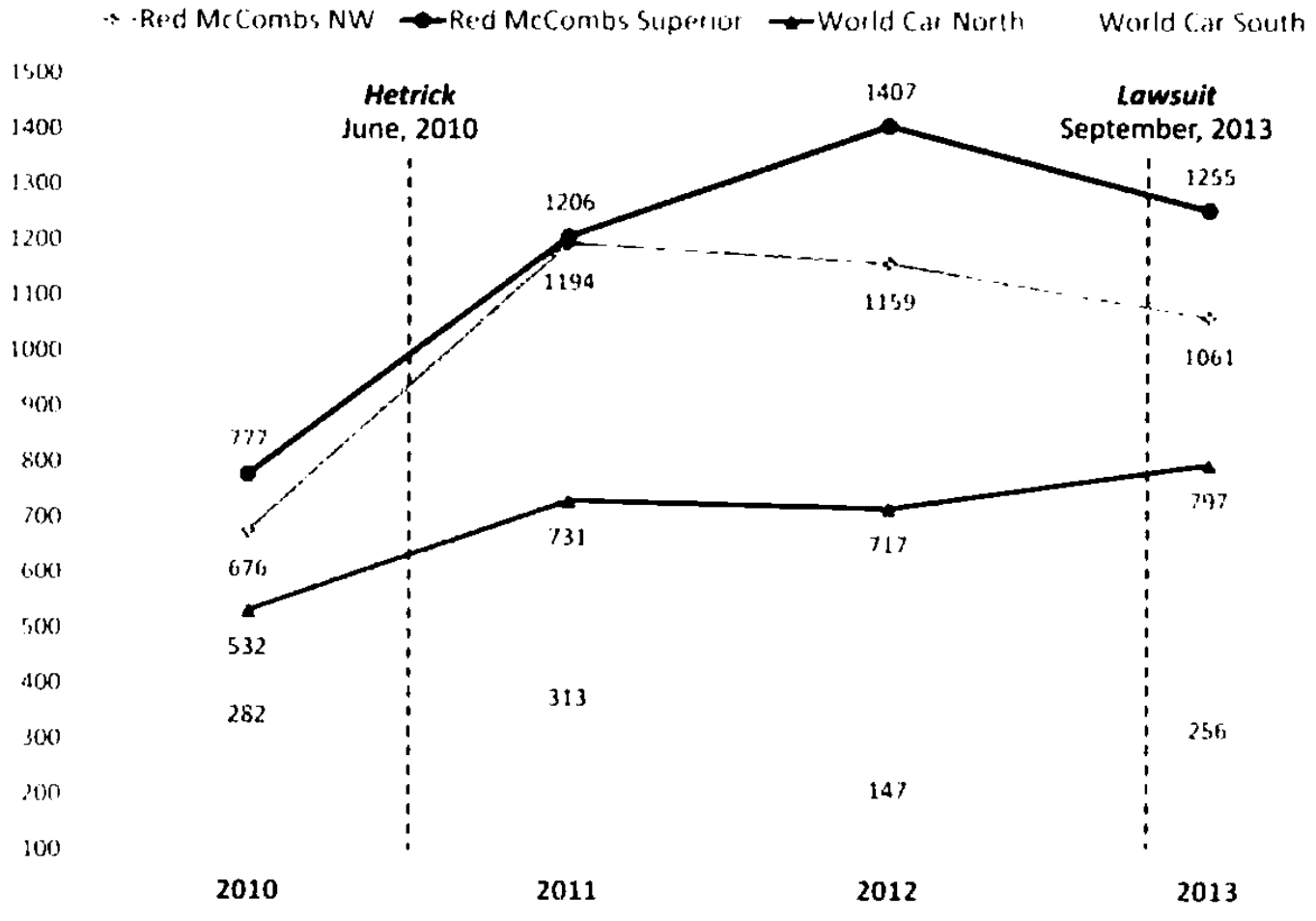
Sales by Dealer, 2006 – 2015 (Annualized)



Source: PTX 109, 114, 115, 116

WC Demo_048

Total Allocations by Dealer, 2010 - 2013

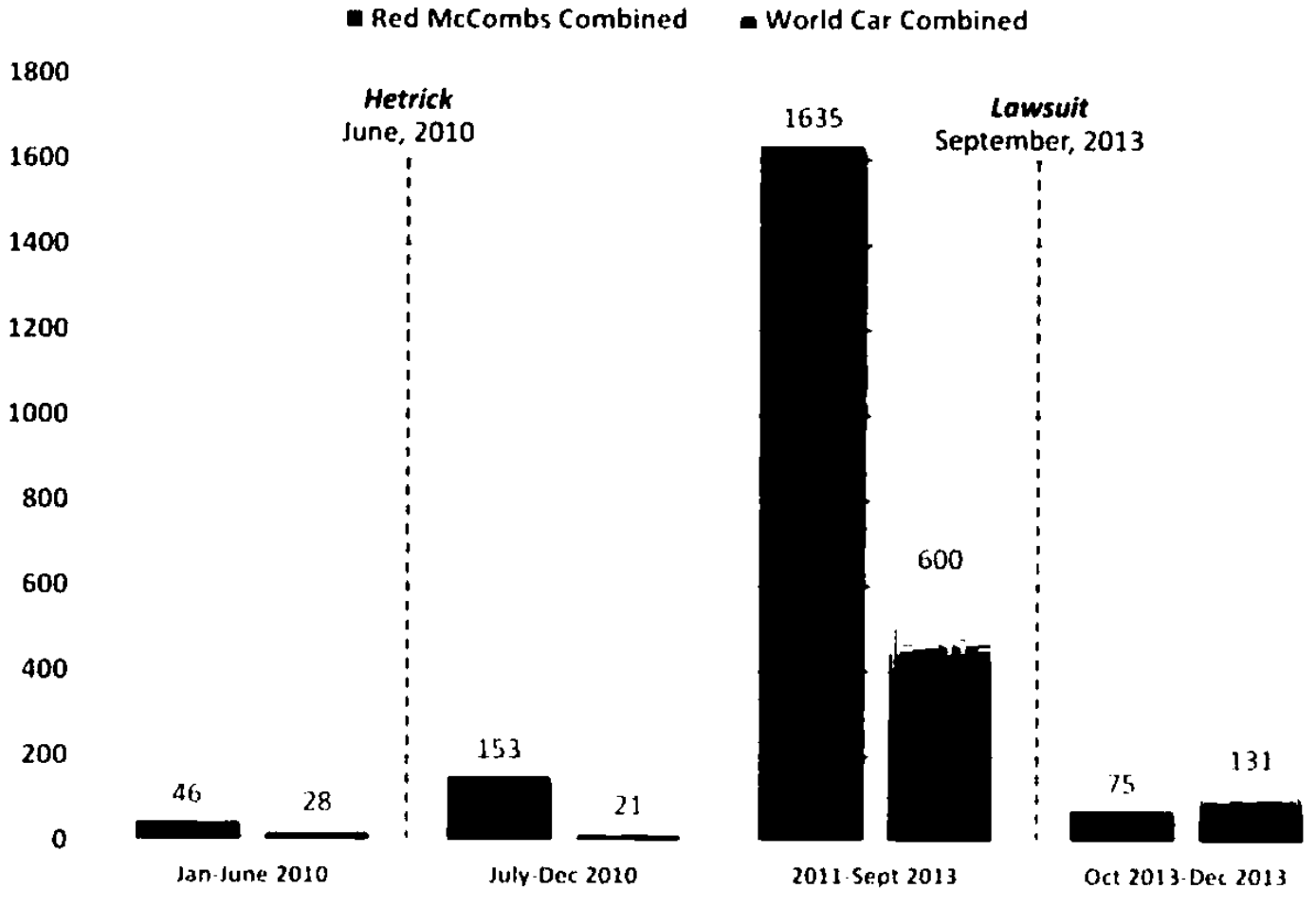


Source PTX 111, 81

PLAINTIFF'S EXHIBIT
124
SOAH No. 608-14-1208 LIC

WC Demo_05

Total Manual Allocations: 2010 - 2013

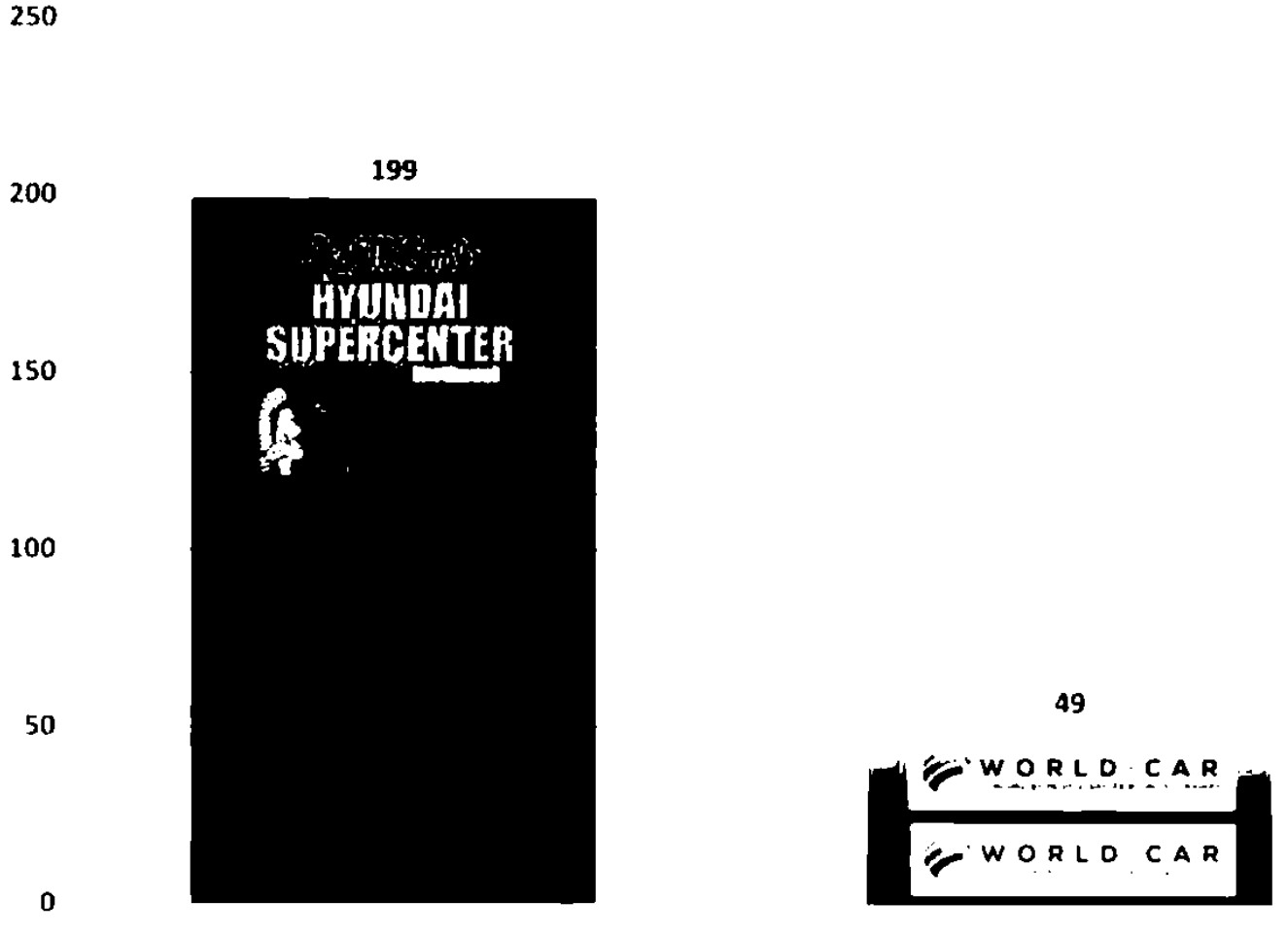


2010 Source: PTX 111
2011-2012 Source: PTX 110
2013 Source: PTX 109

PLAINTIFF'S EXHIBIT
126
OAH No. 608-11-1208 LIC

WC Demo_07A

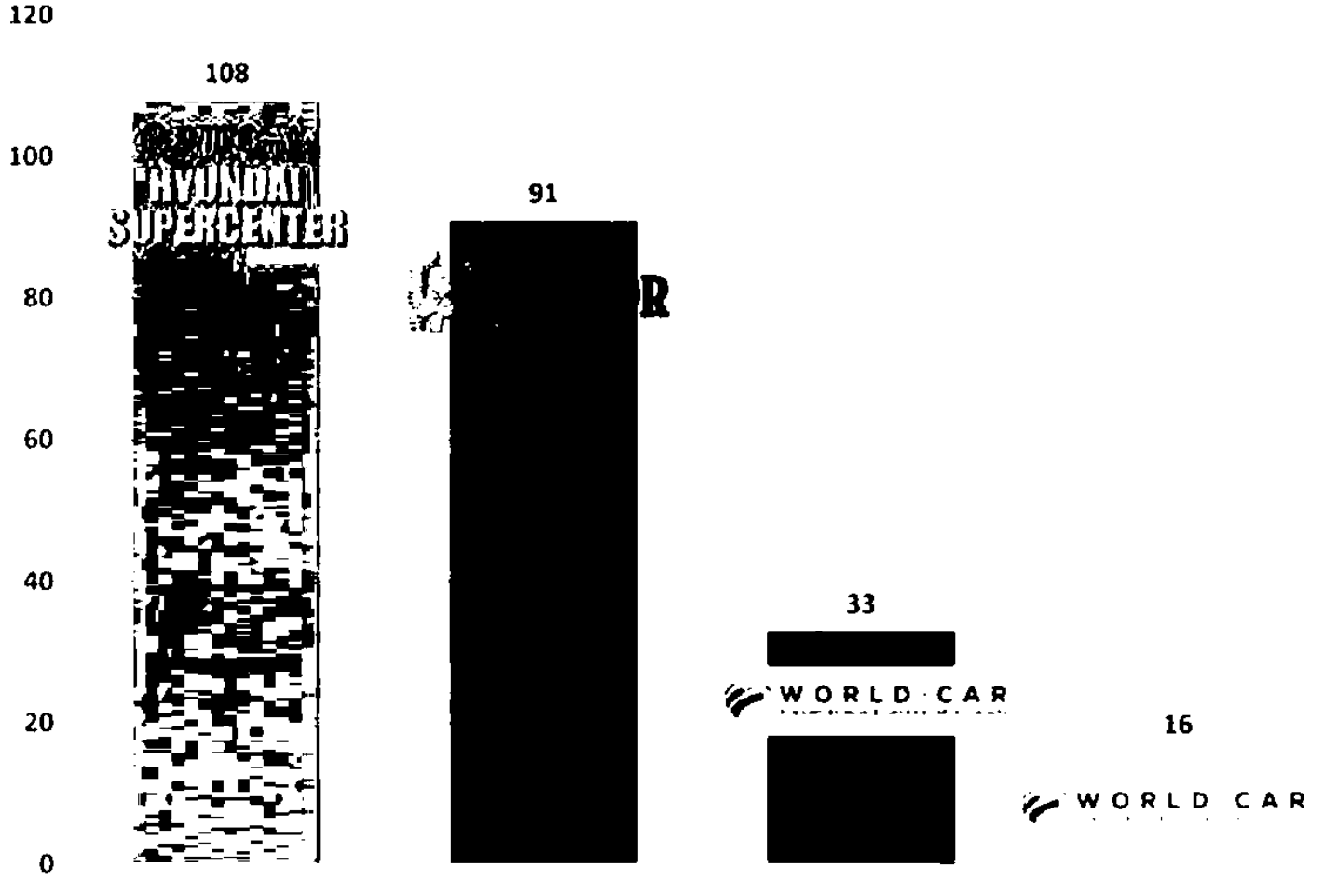
Total Manual Allocations: 2010



Source: PTX 111

WC Demo_07B

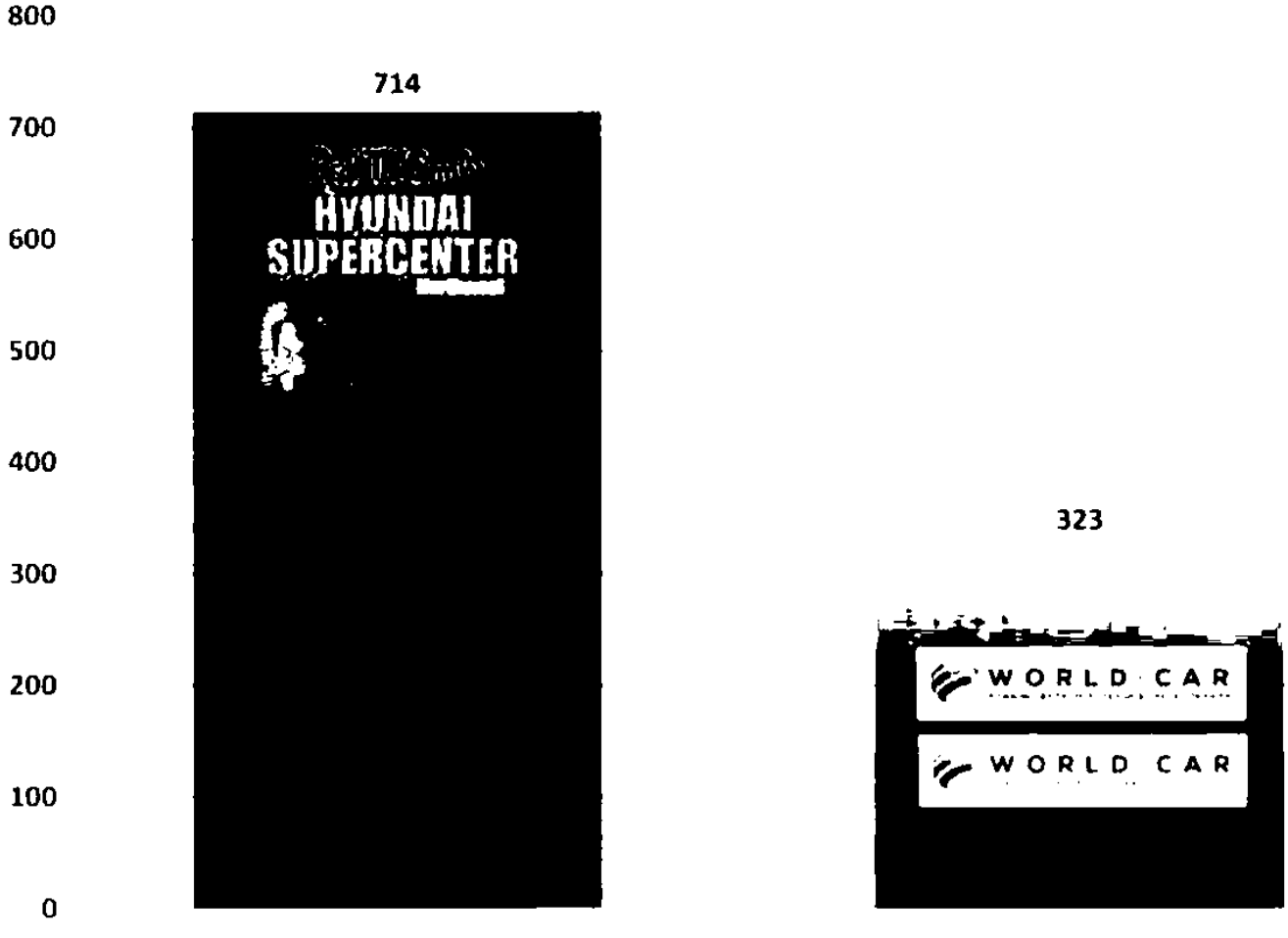
Total Manual Allocations: 2010



Source: PTX 111

WC Demo_070

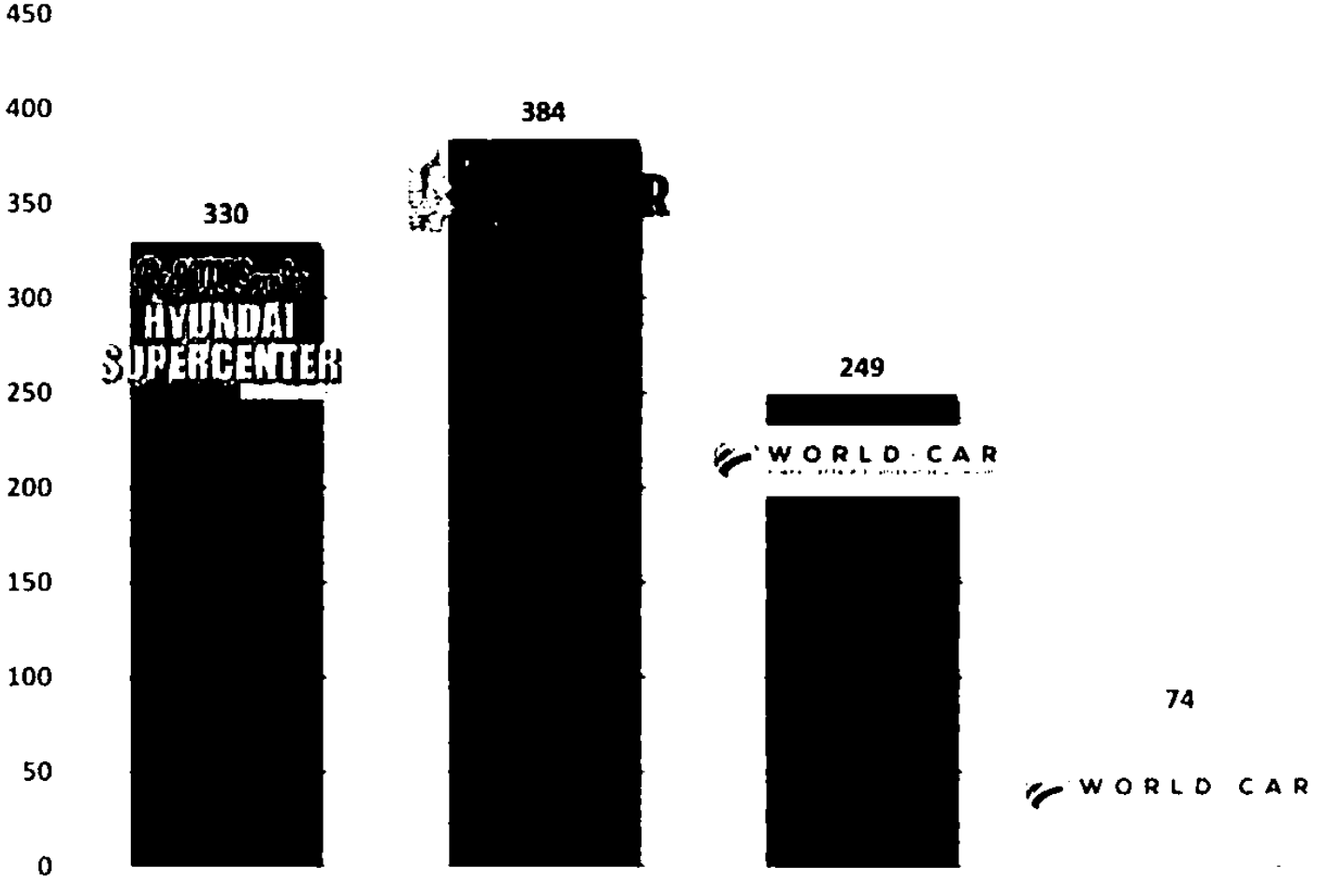
Total Manual Allocations: 2011



Source: PTX 110

WC Demo 07D

Total Manual Allocations: 2011



Source: PTX 110

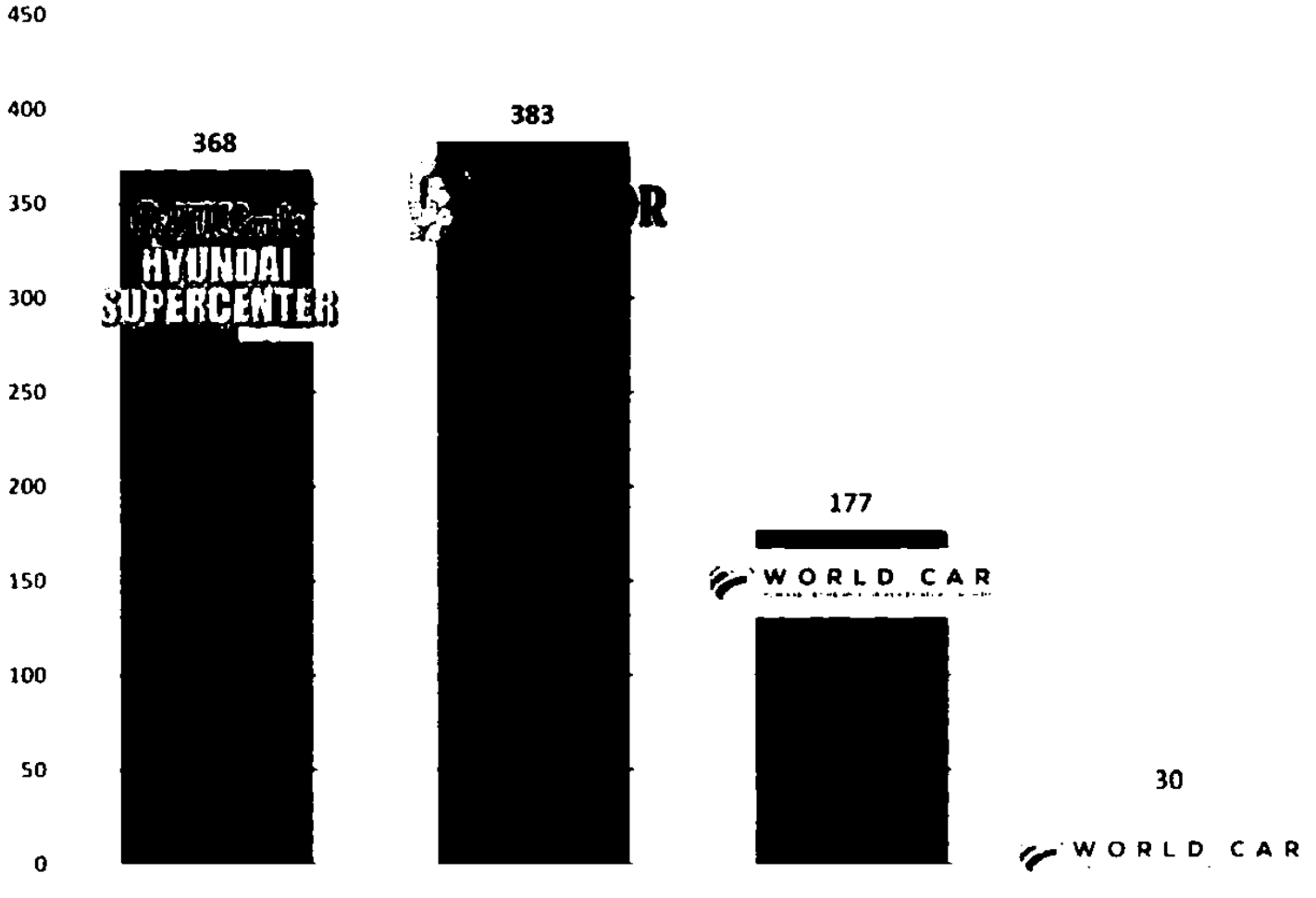
WC Demo_07E

Total Manual Allocations: 2012

Source: P1X 110

WC Demo_07F

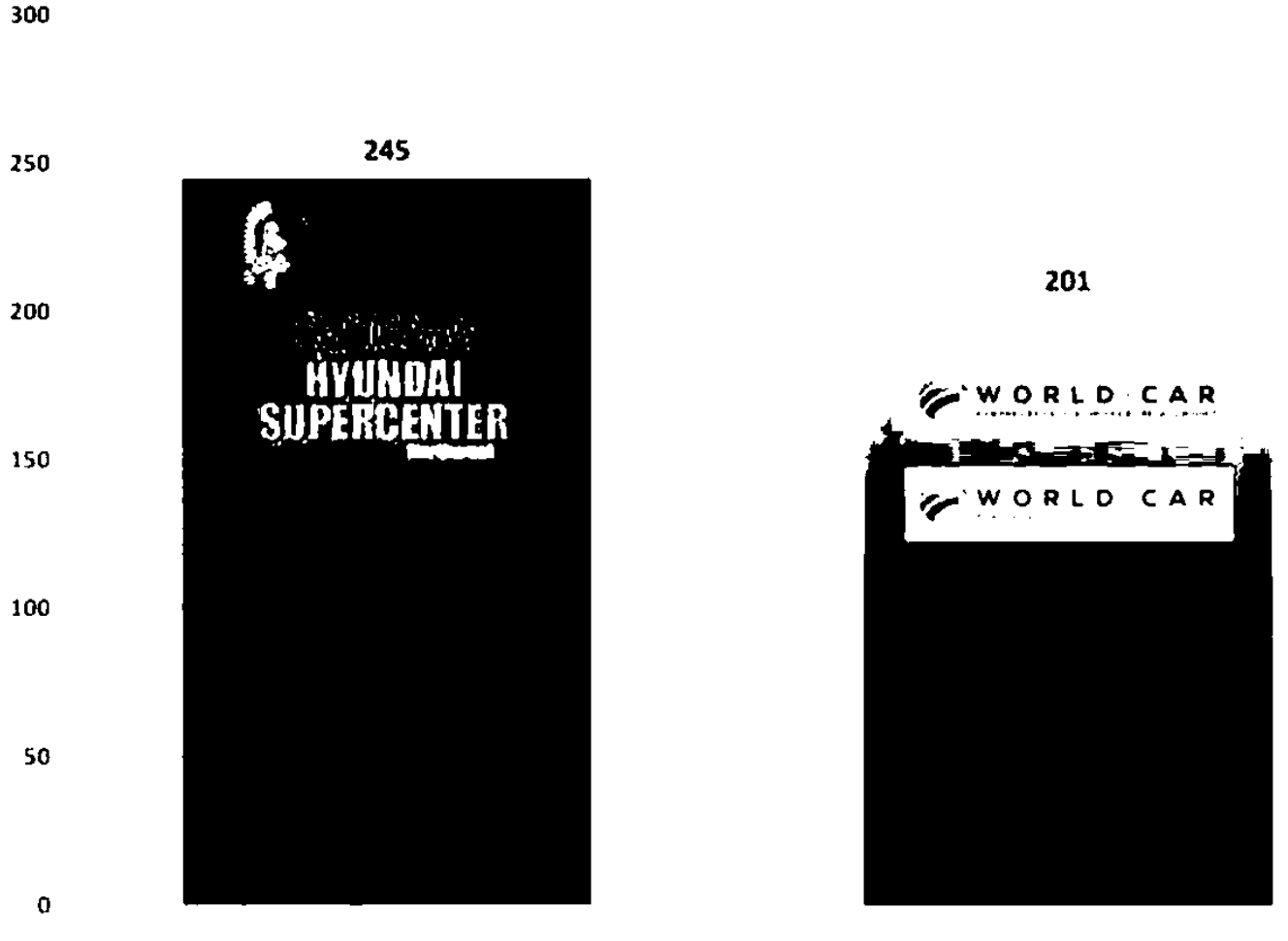
Total Manual Allocations: 2012



Source: PTX 110

WC Demo_076

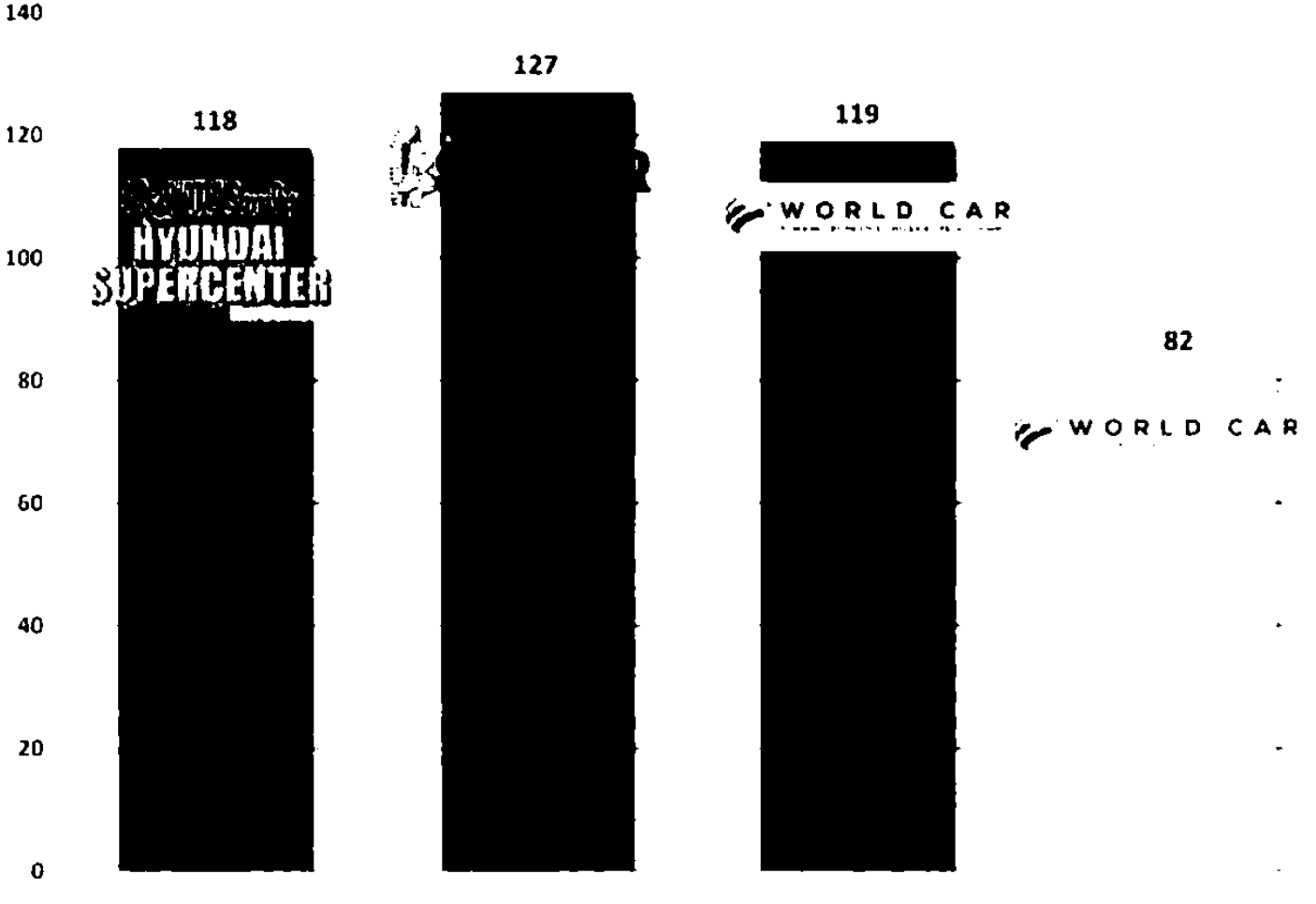
Total Manual Allocations: 2013



Source: PTX 110

WC Demo_07H

Total Manual Allocations: 2013



Source: PTX 110

WC Demo_071

Hyundai Vehicles

ACCENT (3)
GLS, GS, SPORT

ELANTRA (4)
SE, VALUE ED, SPORT, LIMITED

ELANTRA GT (1)

AZERA (1)

SONATA (4)
SE, SPORT, ECO, LIMITED

SONATA HYBRID (2)
BASE, LIMITED

GENESIS (2)
3.8L, 5.0L

GENESIS COUPE (3)
BASE, R-SPEC, ULTIMATE

VELOSTER (4)
1.6L, RE-FLEX, TURBO, TURBO R-SPEC

TUCSON (3)
GLS, SE, LIMITED

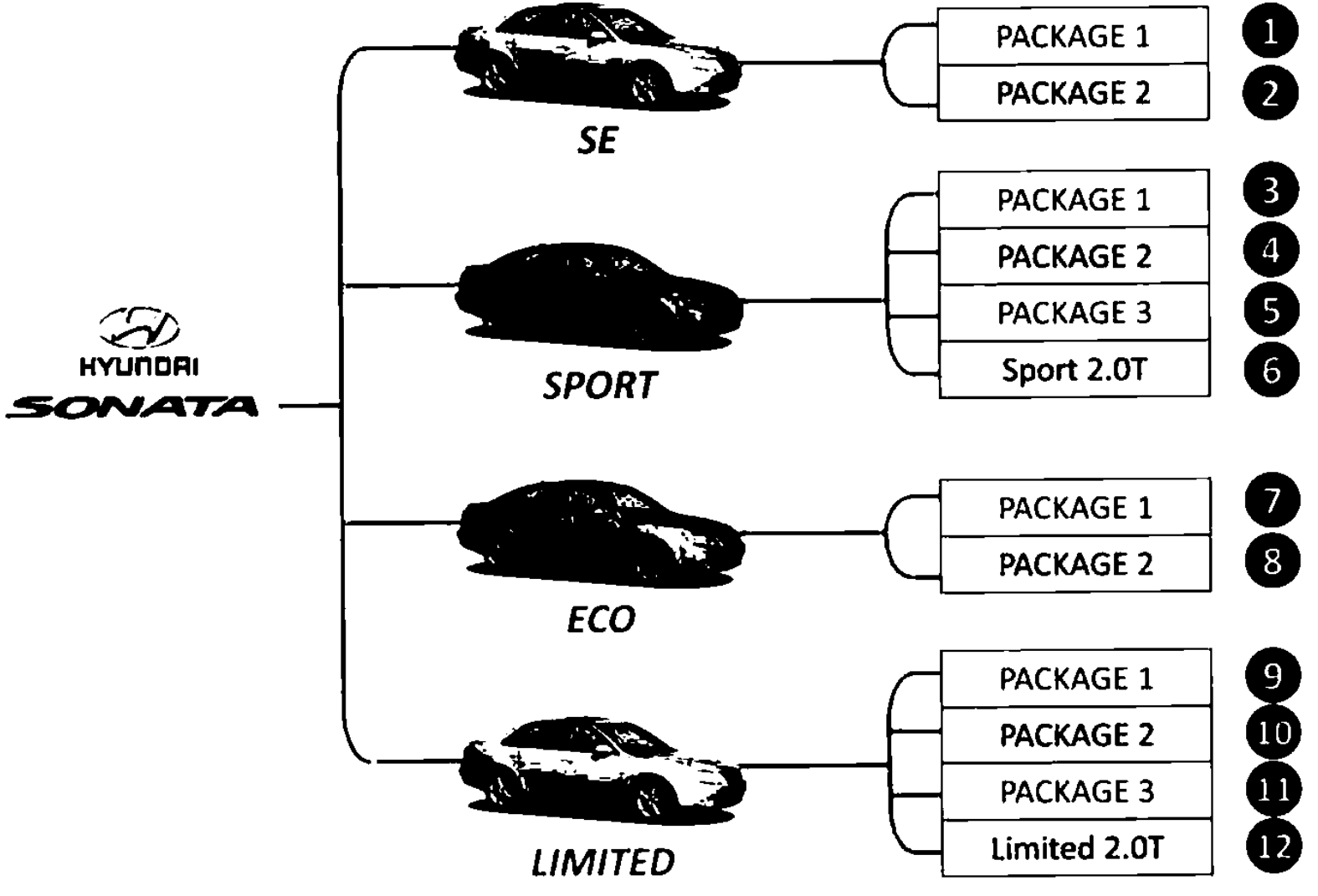
SANTA FE (2)
GLS, LIMITED

SANTA FE SPORT (2)
BASE, 2.0T

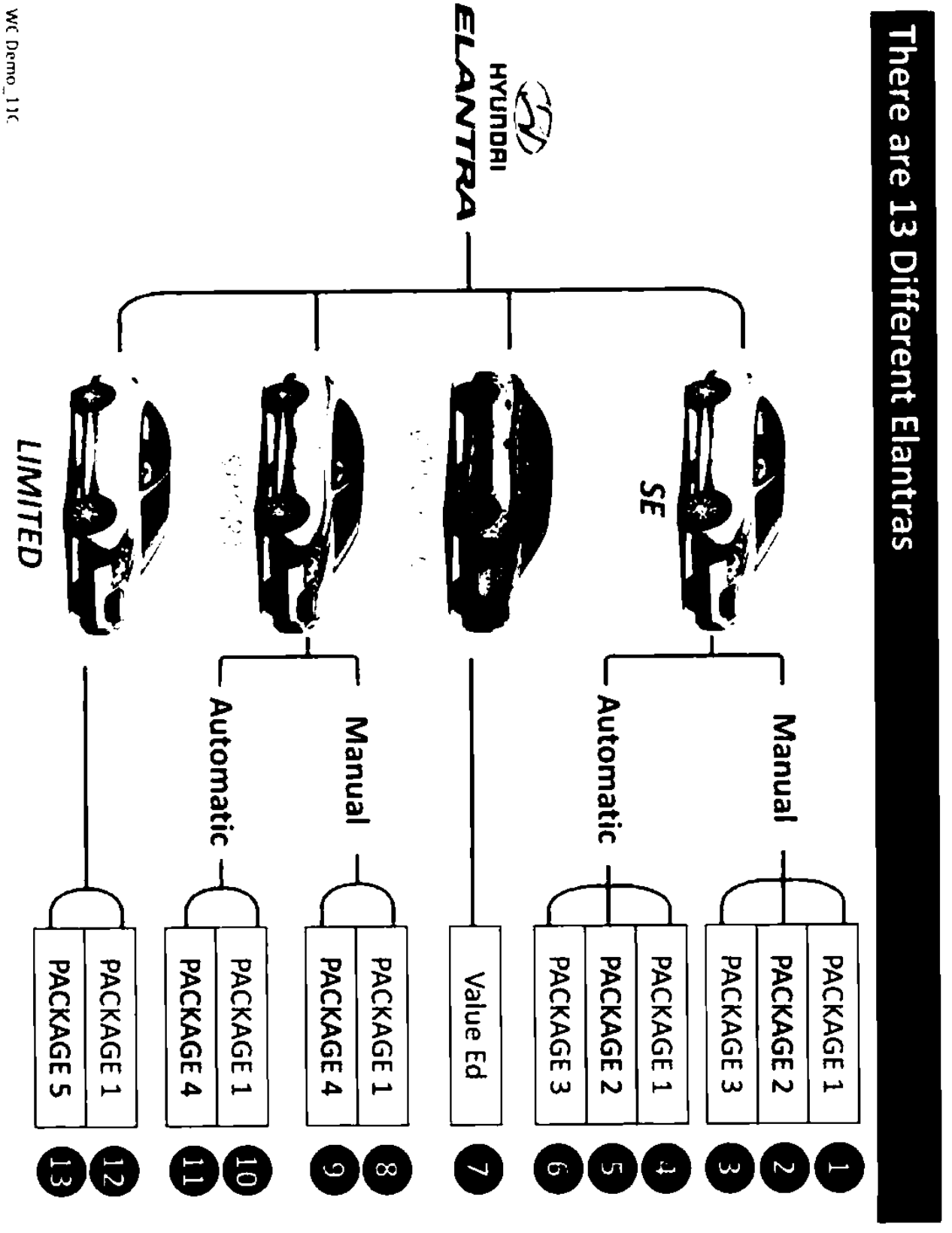
WC Demo 11A

PLAINTIFF'S EXHIBIT
130
OAH No. 608-14-1208-LIC

There are 12 Different Sonatas



WC Demo_11B


There are 13 Different Elantras
HYUNDAI
ELANTRA
SE
LIMITED
Manual
Automatic
Value Ed
Manual
Automatic
PACKAGE 1
PACKAGE 2
PACKAGE 3
PACKAGE 1
PACKAGE 2
PACKAGE 3
Value Ed
PACKAGE 1
PACKAGE 4
PACKAGE 1
PACKAGE 4
PACKAGE 1
PACKAGE 5
1
2
3
4
5
6
7
8
9
10
11
12
13

WC Demo_11C

Hyundai Offers a Total of 96 Different Vehicles

	Name	Trim Levels	Number of Vehicles
1.	Accent	GLS, GS, Sport	10
2.	Elantra	SE, Value Ed, Sport, Limited	13
3.	Elantra GT	Elantra GT	6
4.	Sonata	SE, Sport, Eco, Limited	12
5.	Sonata Hybrid	Base, Limited	4
6.	Genesis	3.8L, 5.0L	9
7.	Genesis Coupe	Base, R-Spec, Ultimate	5
8.	Veloster	1.6L, Re-Flex, Turbo, Turbo R-Sepc	12
9.	Azera	Azera	2
10.	Tucson	GLS, SE, Limited	8
11.	Santa Fe Sport	Base, 2.0T	9
12.	Santa Fe	GLS, Limited	6
		Total:	**96**

WC Demo_11D

Upload Date: 20160509145809 Account Number: 2113 Upload Description: WORLDCAR-SOAH-HMA'SREPLYTOWORLDCAR'SEXCEPTIONSTOPFD

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC., DBA WORLD CAR HYUNDAI, AND NEW WORLD CAR IMPORTS SAN ANTONIO, INC., DBA WORLD CAR HYUNDAI	§	
	§	SOAH DOCKET NO. 608-14-1208 LIC
Complainants,	§	MVD DOCKET NO. 14-0006 LIC
vs.	§	
HYUNDAI MOTOR AMERICA	§	
Respondent.	§	

HYUNDAI MOTOR AMERICA'S REPLY
TO WORLD CAR HYUNDAI'S EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES:

NOW COMES Respondent, Hyundai Motor America and submits its Reply to World Car Hyundai's Exceptions to the Administrative Law Judge's Proposal for Decision. Hyundai Motor America uses the following abbreviations in this brief:

"HMA"	Hyundai Motor America
"RM"	Red McCombs
"WC"	World Car Hyundai
"PFD"	Proposal for Decision
"FOF"	Finding of Fact
"COL"	Conclusion of Law
"TX077"	World Car Hyundai North
"TX087"	World Car Hyundai South
"TX016"	Red McCombs Superior
"TX127"	Red McCombs Northwest
"DSSA"	Dealer Sales and Service Agreement
"RDR"	Retail Delivery Report

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I.
OVERVIEW – SUMMARY OF THE ARGUMENT

Judge Harvel's Proposal For Decision ("PFD") is the culmination of her comprehensive review of the considerable evidence presented in this case. Over five days, Judge Harvel heard live testimony from ten witnesses (approximately 1,200 pages of hearing transcript testimony). She also reviewed deposition testimony from seven witnesses as well as nearly 80 exhibits, submitted at the hearing,[1] comprising hundreds of pages of documents. Further, Judge Harvel considered over 240 pages of pre- and post-hearing briefing from the parties. From all of this evidence and briefing, Judge Harvel provided a thoroughly-reasoned PFD with detailed findings of fact and conclusions of law explaining precisely why WC failed to carry its burden of proof on its three claims under Section 2301 of the Occupations Code. The Board should accept and adopt Judge Harvel's proposal as its final decision in this matter.

WC offers no new arguments with its exceptions, but simply re-urges its previous complaints that were not supported by the evidence. WC contends "this is a case of first impression", but that is not true. Nor will adopting the ALJ's recommendations lead to widespread upheaval of manufacturer/dealer contractual relationships, as WC claims. WC's Exceptions at 2-3. And while it contends Judge Harvel misapplied the statutes at issue, that allegation is completely misplaced. WC really just disagrees with the ALJ's reading of the evidence and has not demonstrated any basis for modifying Judge Harvel's findings of fact or conclusions of law.

[1] In addition, the parties agreed to pre-admit into the record more than 250 additional exhibits.

First, with respect to WC's claim that HMA violated Section 2301.467, by requiring "unreasonable adherence" to sales efficiency as a metric of dealer performance, sales efficiency is not an unreasonable standard. Administrative agencies across the country, including this Board, have recognized sales efficiency as a reasonable standard for measuring a dealer's sales performance. Regardless, HMA never required WC to be 100% sales efficient. HMA's DSSAs with WC contain no provision requiring a dealer to be 100% sales efficient. Nor did HMA require 100% sales efficiency in practice. HMA did not terminate, nor threaten to terminate, WC's DSSAs because of low sales efficiency. In fact, HMA continued to provide WC with inventory and advertising support even though neither of WC's dealerships has been 100% sales efficient since 2009. Moreover, WC continued to be less than 100% efficient even when it admittedly had all the inventory it needed. WC continues to complain that HMA's regional manager required dealers to be 100% sales efficient in order to receive discretionary allocations, but the testimony shows this is not true and evidence proved these allegations to be groundless. WC continues to have a distorted view of the world, and instead of playing by the same rules as all other Hyundai dealers, WC wants the Board to require HMA to use a different standard for measuring WC's sales performance.

Second, WC claims HMA violated Section 2301.468 of the Occupations Code by committing "unreasonable discrimination" in allocating discretionary vehicles to WC. Discretionary vehicle allocations comprise no more than 15% of vehicle allocations to a dealer. WC's unreasonable discrimination claim also fails. WC never pleaded a claim for "unreasonable discrimination" under this statute (although they want the Board to overlook that pleading error). Instead, WC asserted a claim for "unfair and inequitable treatment" under a later version of Section 2301.468 that does not apply to this case. But even if WC had asserted a claim under the

correct statute, it only prohibits discrimination "in the sale of motor vehicles" by a distributor; it does not prohibit discrimination with respect to allocations. Judge Harvel gave WC the benefit of the doubt and reviewed WC's claim as if: (1) it had pleaded the correct statute; and (2) it applied to claims concerning allocations. Judge Harvel reviewed the evidence and correctly concluded there was no unreasonable discrimination because there were legitimate reasons for HMA to provide more discretionary allocations to those dealers who demonstrated extra commitment to the Hyundai brand. This includes dealers who became exclusive Hyundai dealers, renovated their facilities, took on a new Hyundai vehicle line, and utilized HMA's service loaner program. WC did none of those things, as the evidence clearly showed.

WC essentially wants the Board to adopt a rule that competing dealers in the same market, who sell the same brand of vehicle, must get exactly the same number of vehicles from the distributor regardless of whether one dealership is selling more vehicles than another similarly-situated dealer. The Legislature did not abandon free-market capitalism in adopting Section 2301 of the Occupations Code. The Legislature does not require distributors to provide competing dealers with the same amount of vehicles. Were the Board to effectively create such an extra-legislative requirement for vehicle allocations, it would be inundated with claims from dealers every time a cross-town competitor received more allocations.

Finally, WC's claim under Section 2301.478, for breach of the duty of good faith and fair dealing, merely repackages its other statutory claims and, therefore, fails for the same reasons. The Board has adopted a rigorous standard for such claims. Judge Harvel gave WC the benefit of the doubt again and considered WC's claim under a more relaxed standard than WC advocated. However, even under that more lenient standard, Judge Harvel correctly concluded that WC clearly still failed to meet its burden of proof.

For the reasons set forth below, the Board should overrule all of WC's exceptions to Judge Harvel's PFD, and the Board should adopt the PFD as its final decision in this matter.

II.
LEGAL STANDARDS

A. The standard of review.

The Board's authority to review decisions by an Administrative Law Judge is established by Section 2001.058 of the Government Code which states:

> (e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:
>
> (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
>
> (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
>
> (3) that a technical error in a finding of fact should be changed.
>
> The agency shall state in writing the specific reason and legal basis for a change made under this subsection.

TEX. GOV'T CODE § 2001.058(e). WC only invokes sub-section (1) with its Exceptions.

If an agency changes an ALJ's finding of fact or conclusion of law, then "it is required to explain with particularity its specific reason and legal basis for each change made. The agency must 'articulate a rational connection between an underlying agency policy and the altered finding of fact or conclusion of law.'" *Sanchez v. Texas State Bd. of Med. Examiners*, 229 S.W.3d 498, 515-16 (Tex. App.—Austin 2007, no pet.); *Levy v. Texas State Bd. of Med.*

Exam'rs, 966 S.W.2d 813, 815 (Tex. App.—Austin 1998, no pet.). The term "*legal basis*" refers to the source from which the policy is derived. *Id.*

B. The applicable statutes.

WC asserts claims against HMA under Sections 2301.467, .468 and .478. HMA briefly recites those statutes here and discusses them in detail in Section IV.

1. Section 2301.467 – Adherence to unreasonable sales or service standards.

Section 2301.467(a) states:

> (a) 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 § 2301.467(a)(1).

2. Section 2301.468 – WC only pleaded a claim under the inapplicable 2011 version of this statute.

WC contends that HMA violated Section 2301.468's prohibition on discrimination among dealers and cites the 2003 version of the statute. WC's Exceptions at 5-6. This statute, titled "Discrimination among Dealers or Franchisees" states:

> A manufacturer, distributor, or representative may 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.

TEX. OCC. CODE § 2301.468 (2003). However, this is not the version of the statute that WC pleaded or argued at the hearing. WC actually pleaded that HMA violated the 2011 version of the statute. *See* WC's Second Amended Complaint, ¶ 36 (alleging unfair and inequitable conduct). That statute, titled "Inequitable Treatment of Dealers or Franchisees" 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 § 2301.468 (2011). The 2011 version of the statute that WC pleaded applies only to agreements entered into or renewed ***on or after*** the effective date of the amendment – September 1, 2011. *See* 2011 Tex. Sess. Law Serv. Ch. 137 (S.B. 529), § 16. The DSSAs for both of WC's dealerships (TX077 and TX087) were executed prior to 2011 (DTX28; DTX30) and, thus, the 2011 statute alleged by WC is inapplicable.

3. Section 2301.478(b) – Duty of good faith and fair dealing.

Section 2301.478(b) states:

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

TEX. OCC. CODE § 2301.478(b).

III.
FACTUAL BACKGROUND

A. HMA fairly allocates vehicle inventory to its dealers.

To respond to WC's exceptions regarding allocations, it is necessary to first explain HMA's vehicle allocation system and the steps dealers can take to improve allocations. WC's complaints concern only a small component of the allocation system, discretionary allocations. And the evidence demonstrates that WC "pulled back on inventory (*i.e.*, actively reduced its allocations beginning in 2009), and failed to take actions – available to all dealers – to improve allocations, while other dealers in the San Antonio area actively engaged in efforts to enhance the Hyundai brand, resulting in more discretionary allocations.

1. HMA's vehicle allocation system.

HMA's system for allocating vehicles to its hundreds of dealers consists of: (1) formula (or "system") allocations; (2) discretionary allocations; and (3) manual allocations. PFD at 5, 23 (FOF #8). Formula allocations make up a minimum of 85% of the vehicles allocated, with the other 15% distributed through discretionary allocations by the regional general managers. TR760; PFD at 5, 23 (FOF #9). Formula allocations can compromise up to 100% of an allocation if the regional general manager chooses to place discretionary allocations through the formula allocation process or if the formula allocation uses all available vehicles in times of short supply. TR760; TR835. Manual allocations involve vehicles that were originally allocated by the allocation formula, but that were subsequently reallocated because the dealer to whom the vehicles were first allocated declined to purchase them or changes were made to accessories installed on the vehicles. TR1103-04; TR1146; TR685.

a. Formula allocations.

HMA uses a "balanced days' supply system" for its formula allocations. TR824-25; PFD at 5. The same formula is used for all Hyundai dealers and is similar to that used by other automobile manufacturers. TR708; TR1155; PFD at 5. HMA used the same system from 2006 to 2009 (when WC was not complaining about allocations) as it did from 2010 to 2013 (when WC did complain about its allocations). TR820-21; PFD at 5.

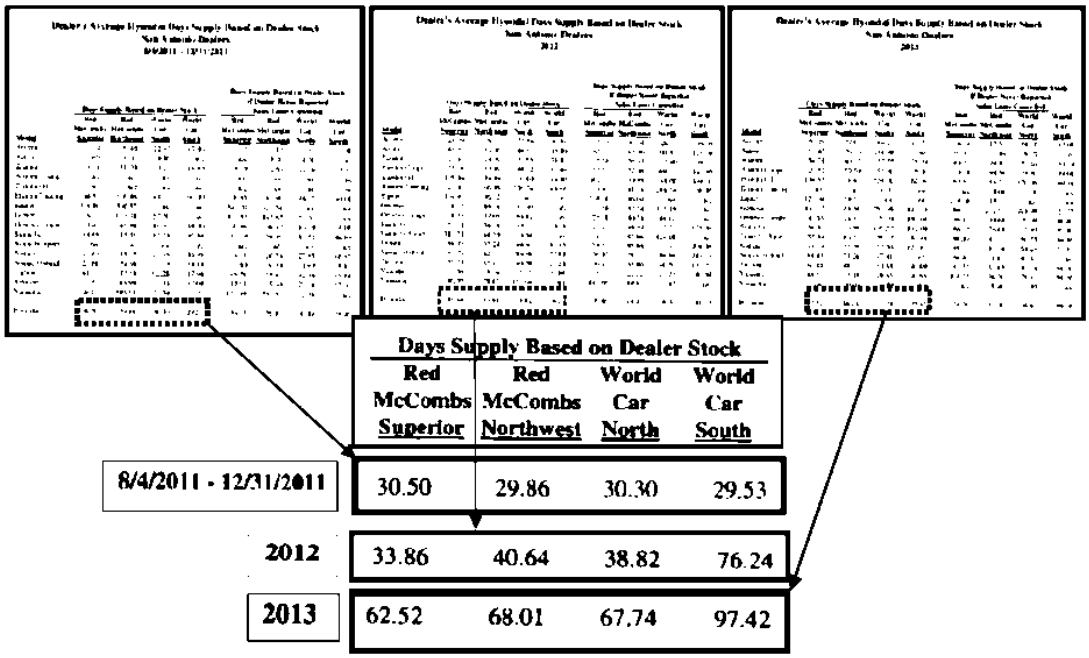
Under HMA's balanced days' supply algorithm, vehicles are offered to dealers based upon each dealer's inventory and the average number of vehicles sold by the dealer over the previous 90 days. PFD at 5, 23 (FOF #10). The system operates as a "poker chip method," allocating vehicles, one at a time, to the dealer in the region with the lowest days' supply for each respective model. TR819. Thus, for example, if vehicles were allocated between two

dealers, one with a 30-day supply and the other with a 60-day supply, the system would allocate one vehicle at a time to increase the days' supply rate of the first dealer until it reached the same rate as the second dealer or the system ran out of vehicles. TR824-25. The balanced days' supply system is not a pure "turn and earn" system because the latter considers only the number of vehicles sold and reported by each dealer, while the former also compares dealers' available inventories (both "on the lot" and in the supply pipeline).[2] TR825. The allocation system runs automatically and dealers cannot be excluded from the allocation formula. TR820. Sales efficiency, discussed below, is not a component of the formula allocation system. TR711-12.

There is no evidence that: (1) WC dealerships were not offered the vehicles they earned under the allocation formula; or (2) the allocation formula did not work as designed; namely, by balancing the days' supply of HMA's dealers. In fact, WC's own expert – Joseph Roesner – admitted that the WC dealerships' days' supply was either equivalent to or exceeded the days' supply of the RM dealerships. PTX109, (Tab 24, page 6); TR829. The actual days' supply figures from Mr. Roesner's report are summarized below:

[2] The "pipeline" refers to vehicles that have already been allocated to a dealer but that have not yet arrived at the dealership. TR1147.

Days' Supply Based on Dealer Stock



	Days Supply Based on Dealer Stock			
	Red McCombs Superior	Red McCombs Northwest	World Car North	World Car South
8/4/2011 - 12/31/2011	30.50	29.86	30.30	29.53
2012	33.86	40.64	38.82	76.24
2013	62.52	68.01	67.74	97.42

Source: PTX109, Tab 24, pages 1-3

HMA's formula did exactly what it was designed to do – allocate vehicles so that dealers in the region have roughly the same days' supply. Moreover, WC's days' supply was equivalent to, or in the case of TX087 in 2012 and 2013 exceeded, the total days' supply of the RM dealerships.[3] In short, the HMA system provided WC with cars to sell, but WC was not selling them.

b. Discretionary allocations.

The use of discretionary vehicle allocations is common in the industry and, as WC's expert admitted, "makes sense." TR760. Having a discretionary allocation pool of vehicles

[3] The components of HMA's allocation system depend upon regional, not district or local, metrics or comparisons. Thus, while WC may focus on the RM dealerships, such comparisons are not relevant to the way the HMA system works or is designed to work. That system involves comparisons and competition among all HMA dealers in a multi-state region. The evidence shows that HMA's allocation system worked fairly and as intended.

provides flexibility so that HMA's regional management may distribute up to 15% of allocations for events and circumstances that the formula does not and cannot consider. PFD at 24 (FOF #11). This percentage can be reduced in times of short supply. TR840-41. Discretionary allocations can, for example, be provided for facility renovations, grand openings, for a dealer's decision to devote a facility exclusively to Hyundai or for a dealer's agreement to sell HMA's luxury vehicle, the Equus. TR1060-61, TR1080.

HMA's expert, John Frith, summarized, on a percentage basis, how discretionary allocations were distributed among dealers in WC's district from 2010 to 2013. DTX128 - DTX131. The data shows that both TX077 and TX087 typically received discretionary allocations. In some years, WC received a greater percentage of discretionary allocations than other dealers in the same district (DTX128); in other years less (DTX131); and sometimes they were in the middle of the group (DTX128). In 2013, availability of vehicles through formula allocations was greatly improved, so discretionary allocations were way down across the board, and TX087 received no discretionary allocations. DTX131.

When comparing discretionary allocations to total allocations on a percentage basis, from 2008 to 2013, the data shows that the percentages between WC and RM often favored WC or were similar to RM.

Percentage of Discretionary Allocations from GM Pool Compared to Total Allocations				
	TX016	**TX127**	**TX077**	**TX087**
2008	2%	3%	15%	19%
2009	2%	3%	5%	11%
2010	6%	14%	3%	4%
2011	16%	14%	12%	12%
2012	13%	15%	13%	3%
2013	1%	1%	1%	0%

Source: DTX99[4]

[4] *See* PFD at 6.

c. Manual allocations.

Generally speaking, "manual allocations" consist of all allocations that do not come through system allocations. Manual allocations can include the subset of discretionary allocations in some cases, but there are manual allocations separate and apart from discretionary allocations. These include "turn downs" (vehicles allocated to a dealer via the formula, but rejected and turned back to the region) and vehicles that have been re-customized or modified at the port for some reason. TR1103-04; TR1146; TR685; PFD at 6, 24 (FOF #12).

As with discretionary allocations, manual allocations to WC, as a percentage of total allocations, were typically comparable to RM from 2009 to 2013.

Percentage of Manual Allocations Compared to Total Allocations				
	TX016	**TX127**	**TX077**	**TX087**
2008	13%	17%	42%	43%
2009	22%	31%	17%	24%
2010	5%	1.4%	3%	1.4%
2011	32%	28%	34%	24%
2012	27%	32%	25%	20%
2013	10%	11%	15%	32%

Source: DTX99

The same is true when looking at manual and discretionary allocations combined. WC's percentages were usually on a par with RM.

Percentage of Manual & Discretionary Allocations Compared to Total Allocations						
	2008	**2009**	**2010**	**2011**	**2012**	**2013**
RM - TX016	15%	24%	12%	48%	40%	11%
RM - TX127	20%	34%	16%	42%	47%	12%
WC – TX077	57%	22%	6%	46%	38%	16%
WC – TX087	62%	35%	6%	35%	24%	32%

Source: DTX99 & DTX99A

WC complains about discretionary allocations. WC's Exceptions at 2, 11, 20 and 25. WC does not complain about the formula used to allocate at least 85% of all inventory. *Id.*; PFD at 7.

2. WC could have taken steps to increase it system allocations.

WC could have taken – but failed to take – steps that would have generated increased vehicle allocations.

a. Prompt reporting of deliveries is important.

WC's decision to not report (or "RDR") a vehicle when it has a signed contract, as authorized by HMA, has potentially significant consequences because WC's reporting process typically takes 3 to 5 days to complete. TR104-05 (Zabihian). But such delay in reporting a sale can be detrimental to formula allocations. An RDR takes a vehicle out of inventory and reduces the dealers' days' supply. The more reported sales, the lower the dealers' days' supply and the greater opportunity for allocations when an allocation period opens. *See* TR819-25 (Ms. Bryant explaining formula allocation system). TR525-26 (Willis); *see* TR925 (HMA's regional general manager Tom Hetrick explaining the importance of prompt RDRing to allocation system).[5] Because dealers do not know the precise allocation open date, TR963 (Hetrick), it is important to promptly report sales, so as to maximize potential allocations. HMA repeatedly encouraged WC to speed up its reporting. *See* TR241-42 (Mr. Zabihian admitting that HMA encouraged WC, for a long time, to speed up its RDR process); *see* PTX15, PTX17 (dealer contact reports advising WC to speed up its sales reporting). Prompt reporting of all deliveries not only helps with allocations; it is also contractually required. PTX1 (DSSA Standard Provisions, ¶ 14(B)(1)).

[5] Moreover, HMA's regions compete for allocations. TR774. Thus, prompt reporting helps regions obtain more allocations for their dealers.

b. HMA's service loaner program helped dealers increase formula allocations.

Servicing vehicles is an important part of HMA's business. HMA wants its customers to be taken care of when their vehicles are being serviced by its dealers, including having access to service loaners. HMA wants those loaners to be new Hyundais because customers driving new Hyundais as loaners may like and buy them. TR947; TR1184. HMA offers incentives to dealers through its service loaner program to achieve these goals. A participating dealer is allowed to RDR vehicles placed into the program, thus reducing its inventory and its days' supply. *See* TR248 (Mr. Zabihian stating program helps with allocations); TR748-49 (Mr. Roesner stating the loaner program is a way for dealers to increase sales in times of short supply); TR1215; PFD at 25 (FOF #34). In addition, HMA also provided a monetary incentive to dealers – typically $750 for each vehicle put into the program. TR747.

HMA's service loaner program is voluntary. TR745. WC never participated in the program, choosing instead to participate in Nissan's program. TR247; TR267; TR746; TR947; PFD at 25 (FOF #29). Thus, when a Hyundai customer takes his or her vehicle to WC for service, he/she gets a Nissan service loaner. TR246; TR377; TR746; TR948. The evidence showed WC knew about the service loaner program, how it worked, and the benefits it provided dealers – WC just chose to favor Nissan over Hyundai. RM, however, participated in the Hyundai service loaner program. TR745; TR947; PFD at 25 (FOF #37).

HMA's service loaner program was available to all dealers and provided a mechanism to help increase formula allocations. PFD at 25 (FOF #35). To justify its decision not to participate in the program, WC insinuated that it was improper to RDR a service loaner because it starts a vehicle's warranty period. Thus, the ultimate buyer for the vehicle will not get a full warranty. TR383 (Zabihian); TR534-535 (Willis). Although this is a "red herring" issue at best,

WC offered no evidence that any Hyundai customer who purchased a service loaner vehicle complained about receiving a shorter warranty or even complained of not being told about getting a shorter warranty. Moreover, as Mr. Hetrick explained, if the vehicle's warranty had started prior to sale, then the dealer could sell the vehicle for less and the customer would get a good deal. TR972-73; *see* TR1216-17 (Mr. Frith explaining that if vehicles had shorter warranty from use as service loaners, then that would be basis for a discount).

WC could have increased its formula allocations by timely RDRing sales and participating in Hyundai's vehicle loaner program, but it chose differently. PFD at 31, 25 (FOF #27). With 20/20 hindsight, WC now realizes that its poor decisions negatively impacted its ability to receive both discretionary and formula allocations, and it seeks to blame HMA. The evidence did not support WC's allegations as Judge Harvel correctly ruled.

3. WC actively reduced its inventory in 2009 and 2010, placing itself at a disadvantage when demand for Hyundai products spiked beginning in 2011 and vehicles became scarce.

a. WC pulled back on its inventory in 2009.

The recession hit in 2008, and all automobile dealers had to decide if they would continue buying inventory at the same rate or cut back to save costs. In 2009, WC chose the latter as its dealer principal, Ahmad "Nader" Zabihian, confirmed:

> Q. . . . But for whatever reason, you pulled back on your Hyundai inventory, didn't you?
>
> A. I did – I did not pull out in a sense to get it to the level it cut to, but it seems that way, yes.
>
> Q. But you told me that in your deposition. You told me that you pulled back on your inventory in 2008 and 2009.
>
> A. We may have, yes.
>
> ***
>
> Q. I believe it's on Page 34 [of the deposition]. Have you found Page 34?

A. Yes, sir.

Q. If you look at answer that you gave me, it started on Line 12. Just take a look at it and you can tell me whether or not you told me under oath earlier this year that you pulled back on inventory in 2008 and 2009.

A. It says yes. But on your – according to 2008, what you just showed me, the numbers actually increased. I had a lot of inventory. So what I said and also conflicts the report you just showed me. In 2009, I did.

TR223-24 (emphasis added); *see also* TR723-24 (Mr. Roesner agreeing that WC pulled back inventory because of poor economy). WC pulled back inventory at both TX077 and TX087.

Q. All right. So 2009 was – that was the bottom, right?

A. Yes, sir.

Q. Because you pulled back in your inventory?

A. Not for the North store. Oh, for – yes. For – for North store for 2008. We are looking 2009. Yes, I pulled – yes. I'm sorry.

TR228; PFD at 14, 24 (FOF #20). In comparison, Mr. Zabihian admitted that both RM dealerships kept up the same level of inventory during this time. TR228. Sales for 2009 also confirm this fact, as both RM stores remained about the same as 2008, while both WC stores significantly decreased sales.

Annual Sales for Red McCombs and World Car Dealerships 2008-2010				
	TX016	**TX127**	**TX077**	**TX087**
2008	445	410	664	429
2009	462	485	476	174
2010	818	675	548	267

Source: DTX24

The effect of WC's decision was two-fold. First, pulling back on inventory contributed to its substantial sales drop in 2009, as Mr. Roesner conceded. TR723-24. Second, as HMA's Dee Dee Bryant explained, if a dealer chooses to reduce its inventory, it becomes harder to obtain future allocations under the system unless the dealer sells at an extremely high rate.

Q. Tell us what is the effect, from the allocation system perspective, what does the allocation system do in response to somebody who says, Hey, you know, I really don't want so much inventory anymore?

A. So if a dealer makes a conscious effort to pull back on inventory, meaning they're turning down cars, they can do one of two things. They can let their travel rate trickle away, also, and the allocation will respond to that scenario by offerings dwindling over time also.

If a dealer says, I'm going pull back on inventory just to stay lean but I'm still going to maintain my travel rate in relation to other dealers in the region, or I'm going to increase it, that at least forces the allocation to continue to see you as a dealer that needs replenishment.

So unless you're keeping that sales pace extremely high, you ultimately will not get offered cars eventually.

***

Q. And what if someone does that for 18 months or more, like World Car did?

A. Yeah, it could -- it can be devastating to a dealer where it's very difficult to -- to get back on track. And the allocation system, as many have said, it uses 90 days of historical sales. So to fight to get the allocation to respond to 18 months of a certain pattern is -- is very, very difficult to do. It takes awhile.

TR826-27.

b. WC turned down vehicles in 2010, just prior to the time of short supply.

After pulling back on inventory in 2009, WC continued that trend in the first half of 2010. Just prior to the beginning of the inventory shortage period, both WC dealerships turned down high percentages of vehicles offered by HMA. In the first six months of 2010, TX077 turned down 173 of 423 vehicles offered by HMA – approximately 41% of the offered vehicles. DTX47. Similarly, TX087 turned down 32 of 100 vehicles offered in the same period or 32%. *Id.* Mr. Zabihian acknowledged that WC turned down lots of vehicles in the first half of 2010, but could not explain why. TR231. Thus, in the span of 18 months, WC pulled back on its inventory, decreased sales, turned down large amounts of vehicles, and then an unprecedented

shortage of Hyundai vehicles began in the United States. Again, poor business decisions by WC led to predictable results.

c. The time of short supply.

It is undisputed that there was a shortage of Hyundai vehicles from the second half of 2010 through mid-2013. TR286; TR474; TR572; TR741; TR954; PFD at 4, 26 (FOF #41). The shortage was a result of increased demand for Hyundai vehicles and reduced demand and supply of competing products from Japan due to multiple factors, including the 2011 tsunami in Japan. TR956, PTX120, D. Zuchowski Dep., p. 29-30. As a result, for about two years, HMA did not have enough inventory to satisfy its dealers, all of whom wanted more inventory. *Id.* at 82, 169. While industry custom is to have a 60-days' supply of vehicles (TR742; TR1153), inventory levels were much tighter during this period. For example, in 2012, TX127 and TX077 had between 38- and 40-days' supply of vehicles, while slow-selling TX087 had a 76-days' supply (effectively twice the inventory of the others). TR1151-52 (Mr. Roesner discussing PTX109, Tab 24).

WC put itself in a position where it would receive far fewer allocations, and then the problem was compounded by a vehicle shortage everyone agrees affected all of HMA's dealers.

4. WC did not establish that it lacked a "critical mass" of inventory and, in any event, its own actions determined its inventory.

WC contends that it needed a "critical mass" of inventory to succeed. WC's Exceptions at 6. But the facts demonstrate that: (1) WC was selling its inventory at a much slower rate than other dealers and was, therefore, earning fewer vehicles under the allocation system; (2) WC had unreasonable expectations about the level of inventory it should have received from HMA; and (3) WC's decision to pull back on inventory in 2009, its decision to reject hundreds of vehicles

offered to it by HMA in 2010, its failure to promptly RDR vehicles, and its refusal to participate in HMA's service loaner program contributed to the inventory levels about which it complains.

Under HMA's "balanced days' supply" allocation system, a dealer earns vehicles based on its current inventory levels and the average number of vehicles it sold over the previous 90 days. *See* Section III(A)(1)(a), *supra*. WC was selling (*i.e.*, "turning") its inventory at a slower rate than RM in 2010-2012. When asked to explain WC's poor turn rate, Mr. Zabihian could only say, "I don't know." TR276.

Average of DAYS TO RETAIL FROM RECEIPT			
YEAR		DLR	Total
	2010	TX016	75.15
		TX077	78.31
		TX087	100.21
		TX127	69.74
2010 Total			80.85
	2011	TX016	35.46
		TX077	47.64
		TX087	49.71
		TX127	40.37
2011 Total			43.30
	2012	TX016	35.95
		TX077	43.41
		TX087	68.20
		TX127	49.43
2012 Total			49.25

Source DTX56, DTX56A

RM was selling its inventory faster than WC, improving its formula allocations, and earning more inventory than WC. WC's failure to turn its inventory faster dictated its inventory levels. WC had the appropriate amount of inventory based on its actual inventory levels and sales history.

Additionally, WC had unrealistic expectations about the amount of inventory it should have received from HMA. In its post-hearing brief, WC argued that HMA should have offered it as many of the "96 different Hyundai vehicle configurations … in order to offer choice and

selection to consumers and to keep its sales rate constant or growing." WC's Post Hearing Brief at 6. It goes on to state, for example, that in July 2010 "World Car Hyundai South management believed that the dealership could sell 40 cars a month with a 150 car inventory, but it could not sell 40 cars per month with only 68 cars available." *Id.* at 7-8. But a monthly sales rate of 40 vehicles based on 150-vehicle inventory would be a 112-day supply of vehicles.[6] WC's own expert testified that a typical dealer would "like to have" a 60-day supply of vehicles. TR742 (Roesner). Arguing that HMA should have provided WC with a 112-day supply of vehicles is unreasonable. Moreover, in the above example, WC had 68 vehicles in inventory, which would be a 51-day supply based on 40 sales per month.[7] While WC complains that it did not have a "critical mass" of inventory, the reality is that WC was demanding levels of inventory in excess of what it needed or had earned based on its performance.

Finally, assuming a "critical mass" of inventory is required to reach "certain" sales levels, the evidence showed that WC had that inventory in 2008 but gave it away when it pulled back on its inventory in 2009.

In 2008, WC sold more vehicles than RM, and both TX077 and TX087 were well above 100% sales efficiency for the year. TR1174; PTX3; PTX4. In 2009, however, WC deliberately pulled back on its inventory. TR223-24; TR228; TR723-24. WC had plenty of inventory but deliberately chose to shift focus away from Hyundai in 2009, making it more difficult to generate new inventory under the formula in subsequent years. TR826-27 (Bryant).

[6] Days' supply is calculated by dividing a dealer's inventory by its daily sales rate. A dealer selling 40 cars per month has a daily sales rate of 1.33 vehicles (40/30 = 1.33). If the dealer had 150 vehicles in inventory that would be a 112-day supply (150/1.3 = 112.8).
[7] 68 vehicles/1.33 daily sales rate = 51.1-day supply.

5. RM received more discretionary allocations because it showed brand commitment that WC did not show.

WC contends it did not receive the same amount of discretionary allocations as RM and that the "boost" of inventory RM received allowed it to build up its inventory and sales. WC's Exceptions at 9-10. There are legitimate business reasons for having discretionary allocations, as WC's expert admitted. TR760 (Roesner). During the time of shortage, Mr. Hetrick focused the bulk of his discretionary allocations on those dealers that were committed to the brand as shown by renovating facilities, becoming exclusive Hyundai dealers or taking on the Equus luxury line. TR1136-37; *see* PTX120; D. Zuchowski Dep., pp. 76-77 (stating additional allocations given when dealers show brand commitment with new locations, new facilities, and new management); *id.* at 177 (discussing ways dealers show brand commitment). RM demonstrated brand commitment during this period in several respects. *Id.* at 167.

RM spent $750,000 on renovations in 2012 at TX127. DTX203 (p. 110774). RM also started renovations of its facilities at TX016, at the cost of $1.8 million in 2011, and completed construction in 2012. DTX177 (p. 109983). In addition, RM took on the Equus line, and TX016 became an exclusive Hyundai dealership. TR1050-61; PFD at 24-25 (FOF #22, 24-26).[8] In comparison, WC acquired TX087 when it was "dualed" with the Kia franchise in 2002/2003. PFD at 24, (FOF #23). Although WC proposed a new, exclusive facility for TX087 to HMA's regional management as early at 2003, TX087 was still at the same, old facility twelve years later. TR353; TR878.

As for TX077, in 2001 WC relocated the dealership operations to the same location as WC's existing Nissan dealership. TR596. Jim Willis, general manager of TX077, admitted that

[8] Mr. Hetrick testified that it was RM's installation of the Equus showroom kit at TX0127 and TX016's decision to become an exclusive dealership, in the second half of 2010, that prompted him to provide the additional discretionary allocations to RM about which WC complains. *Compare* WC's Exceptions at 9-10 *with* TR1050, 1054-55, 1076.

by 2010 TX077's sales were being affected by its poor facilities. TR595-96. Messrs. Zabihian, Hetrick and David Zuchowski, HMA's president and CEO, discussed the possibility of a new facility to be constructed for TX077 in September 2010. TR141-43. However, WC dragged its feet. *See* DTX98A-98O (emails discussing the plans for new facility from December 2011 to July 2014). WC insisted on receiving financial assistance from HMA before construction of the facilities commenced, contrary to HMA's policy. *Compare* TR182, TR216 *with* TR941-42. WC did not begin construction of the new dealership facilities until October 2013, however, and the facilities were only completed in October or November of 2014. TR315; PFD at 25 (FOF #28). By that time, however, the supply shortage was over, and TX077 had sufficient inventory.

WC simply did not demonstrate brand commitment during the inventory shortage like RM did, as summarized below, that resulted in additional discretionary allocations.

BRAND COMMITMENT

Red McCombs	World Car
TX016 - Became Exclusive Hyundai dealer (2010)	TX087 – Not exclusive Hyundai dealer (dual with Kia)
TX127 – Exclusive Hyundai dealer prior to 2010	TX077 – Exclusive Hyundai dealer prior to 2010
Maintained/increased sales 2009	Decreased sales 2009
TX127 - Took on Equus Line that required facility upgrade	
TX016 - Renovated facility (2011-2012)	TX077 - Didn't renovate until 2014 (after lawsuit filed)
TX127 - Renovated facility (2011-2012)	TX087 - No renovation
Participated in Hyundai's service loaner program	Participated in Nissan's service loaner program (but not Hyundai's)

B. Mr. Hetrick did not threaten to terminate both DSSAs if WC refused to sell the dealerships; rather he recommended a renewal of TX087's DSSA.

WC contends that HMA's general manager proposed finding a buyer for WC's dealerships, in late 2010, in an attempt to get rid of WC and build a network of Hyundai dealers with other Hyundai dealers. WC's Exceptions at 13-15. Citing to his deposition, WC says Mr. Hetrick "told World Car's representatives that if they did not sell their dealership, he would attempt to have their franchises terminated." *Id.* at 13. This is patently false. Mr. Hetrick stated the exact opposite at his deposition.

> Q. Did you tell World Car that if they didn't sign the authorization to sell their dealership, that you'd terminate them?
>
> A. Definitely not.

PTX117, T. Hetrick Dep., p. 77 (emphasis added). Mr. Hetrick never threatened to terminate WC's DSSAs if they refused to sell. WC chose not to sell its dealerships and, five years later, it still has them.

Rather than attempt to terminate WC's DSSAs, in late 2010 Mr. Hetrick sought to help WC. In September 2010, Mr. Hetrick recommended HMA renew WC's TX087 DSSA "based on its longevity with Hyundai" and despite its below average sales efficiency. DTX41; TR261-62; PTX29. Moreover, at its request, Mr. Hetrick gave WC $30,000 in unearned co-op advertising to WC in Q4 of 2010. DTX54.

Finally, WC's assertion – that Mr. Hetrick's offer to help find a buyer for TX087 would somehow eliminate WC's right of first refusal – makes no sense (and is not part of any of the allegations in this case). WC's Exceptions at 14. WC's alleged right of first refusal was for a new point to be added to the "San Antonio area" (TR89), and even if WC had decided to sell its dealership (TX087), it would still have had the ability to exercise its first right of refusal through May 1, 2013. *Id.* Mr. Hetrick's offer to help find a buyer for the TX087 dealership was

intended to get WC out of a bad situation when the market would have brought the highest price. TR998, 1002, 1030. When WC declined, it became the goal of both Mr. Hetrick and WC to see the dealerships succeed. When that failed to happen, Mr. Hetrick sent a "Notice of Failure of Performance" to TX087, on July 10, 2013, and requested that WC provide a business plan for improving performance. PTX67. Mr. Hetrick was also concerned with the sales performance of another dealer in Texas (Frank Smith Hyundai in McAllen) and sent the dealer a separate "Notice of Failure of Performance". In stark contrast to WC's reaction – which was to ignore the request for a business plan and immediately file a lawsuit – the other dealer met with Mr. Hetrick to discuss its new business plan, enacted that plan, received assistance from HMA, and ultimately emerged with its sales performance improved. TR1121-24. Had Mr. Zabihian been similarly constructive and cooperative, by responding to Mr. Hetrick's letter, agreeing to meet with Mr. Hetrick and submitting a business plan, HMA had the desire and the resources to help improve TX087's situation. TR1125-26.

C. HMA never required WC to be 100% sales efficient, and WC's dealerships have been repeatedly less than 100% efficient even when there was plenty of inventory.

1. Sales efficiency is an objective measure of dealer performance used throughout the industry.

"Sales efficiency" (also known as "sales effectiveness") is a metric that HMA – and virtually every other car company – uses to measure dealer sales performance. TR712 (Mr. Roesner admits that "virtually every manufacturer" uses sales efficiency); TR73 (Mr. Zabihian testifies that "all other manufacturers" measure the dealer's performance by sales efficiency); TR453-54 (Art Kiolbassa, WC's COO, admits that all of the brands WC sells use sales efficiency as a metric); PFD at 7, 24 (FOF #13). As shown in Section IV(A)(2) below, sales efficiency has repeatedly been upheld by courts and administrative agencies as a fair and reasonable metric.

Sales efficiency compares a dealer's total sales (wherever made) to the sales the brand expects to achieve in the dealer's Primary Market Area ("PMA"). TR1164. HMA calculates expected sales by applying Hyundai's national average sales penetration in each vehicle segment in which Hyundai competes to the actual number of vehicles registered in that segment in the dealer's PMA. PFD at 7, 24 (FOF #14). Thus, if Hyundai captures 5% of the "subcompact" vehicles sold nationwide during a particular time period, then HMA would expect that 5% of the subcompacts sold in a dealer's PMA during that same time period would be Hyundais. TR1165-66; PFD at 7. HMA does this calculation for the PMA on a segment-by-segment basis and adds the expected numbers from each segment to calculate a total expected sales number. It then compares the dealer's total sales to the expected sales number. So, for example, if expected sales are 500 and the dealer's actual total sales are 500, then the dealer is "100% sales efficient." *See* TR1164-69; PFD at 8. Notably, 100% sales efficiency represents only "average" sales performance. TR930. Some dealers are above average and some are below average. HMA measures sales efficiency the same way for all of its dealers. TR1169-70; PFD at 26 (FOF #43).

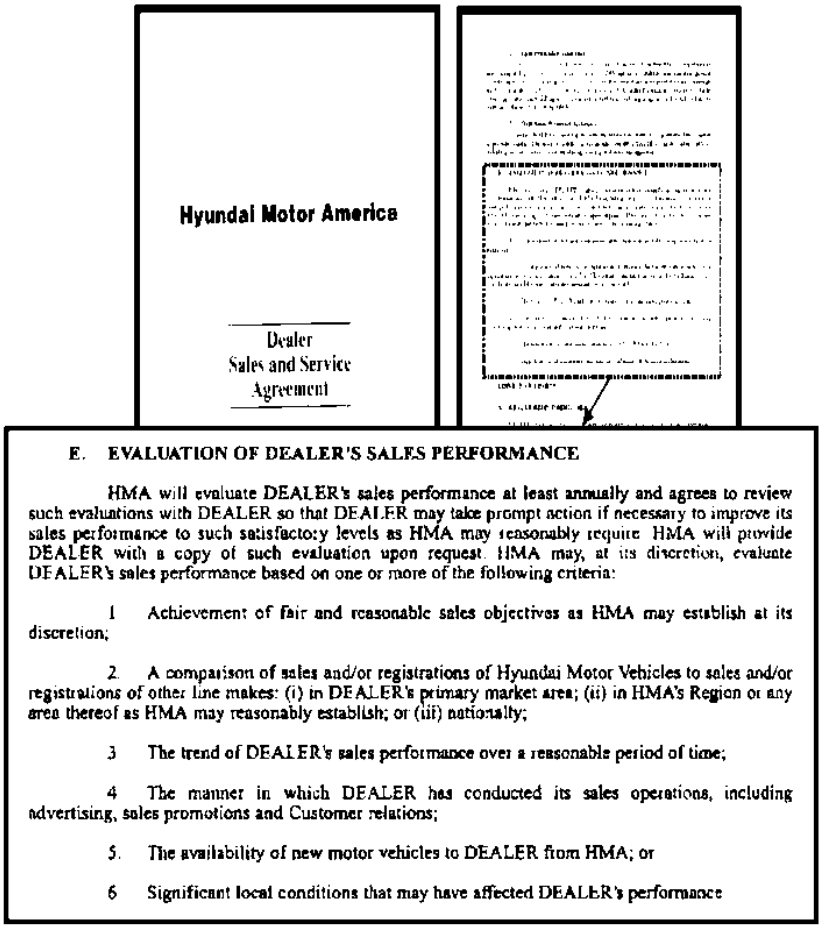
Sales efficiency information is also provided to individual dealers – including TX077 and TX087. TR1169; *see* DTX44 (example of MarketMaster report for TX077). The information allows dealers to compare their performance with other dealers. *See* TR1171 (Frith). Dealers can use sales efficiency data to target efforts to improve sales for specific models such as with increased training for sales staff or targeted advertising. TR1171-72; DTX44; *see* PTX91 (sales efficiency allows dealers to identify and quantify sales potential in their PMAs).

2. HMA's DSSAs with WC include no requirement that the dealerships be 100% sales efficient.

HMA has separate (but substantially the same) Dealer Sales and Service Agreements ("DSSAs") – with each Hyundai dealer. These agreements are the foundation of the parties'

relationship and bear directly on WC's statutory claims. A DSSA consists of an individual agreement with the respective dealer along with a set of Standard Provisions that are incorporated into the DSSA. *See* DTX28 (TX077 DSSA, ¶ 7); DTX30 (TX087 DSSA, ¶ 7); PTX1 (Standard Provisions).

The DSSAs obligate the dealer to "effectively promote and sell Hyundai Products . . . ." DTX28, ¶ 1; DTX30, ¶ 1. Paragraph 10(b)(1) of the Standard Provisions provides that the dealer "agrees to use its best efforts to effectively promote and sell Hyundai Products to Customers in DEALER's primary market area." PTX1. Paragraph 10(E) of the Standard Provisions, entitled "EVALUATION OF DEALER'S SALES PERFORMANCE", identifies sales efficiency as a criterion that can be considered in evaluating dealer performance. *Id.* However, as shown below, it does not state that a dealer must be 100% sales efficient.



Hyundai Motor America

Dealer
Sales and Service
Agreement

E. EVALUATION OF DEALER'S SALES PERFORMANCE

HMA will evaluate DEALER's sales performance at least annually and agrees to review such evaluations with DEALER so that DEALER may take prompt action if necessary to improve its sales performance to such satisfactory levels as HMA may reasonably require. HMA will provide DEALER with a copy of such evaluation upon request. HMA may, at its discretion, evaluate DEALER's sales performance based on one or more of the following criteria:

1. Achievement of fair and reasonable sales objectives as HMA may establish at its discretion;

2. A comparison of sales and/or registrations of Hyundai Motor Vehicles to sales and/or registrations of other line makes: (i) in DEALER's primary market area; (ii) in HMA's Region or any area thereof as HMA may reasonably establish; or (iii) nationally;

3. The trend of DEALER's sales performance over a reasonable period of time;

4. The manner in which DEALER has conducted its sales operations, including advertising, sales promotions and Customer relations;

5. The availability of new motor vehicles to DEALER from HMA; or

6. Significant local conditions that may have affected DEALER's performance

Source: PTX1, ¶ 10(E) of HMA DSSA Standard Provisions

Id.[9]

In sum, there is simply no contract provision in the DSSAs that requires WC to be 100% sales efficient. DTX28; DTX30; PTX1; PFD at 26 (FOF #50).

WC further cites to Mr. Hetrick's testimony and states that HMA "chooses not to provide additional inventory to dealerships who are below 100% sales efficiency." *See* WC's Exceptions at 18 (citing TR1114). But this assertion is misleading as Mr. Hetrick's actual testimony reveals:

[9] Mr. Hetrick testified that sales efficiency was used as a metric to evaluate dealers. TR1013. He did not testify that HMA required dealers to be 100% sales efficient. *Id.*

Q. Okay. Now, let's see if I understand part of this. You chose to use your discretion to reward dealers who meet sales efficiency targets, right?

A. Some.

Q. And those who don't, you don't reward?

A. Not necessarily.

TR1114.

3. WC's dealerships were less than 100% sales efficient even before the time of short supply and remained that way even when inventory was plentiful.

TX077 and TX087 each achieved above 100% sales efficiency in 2008. However, the sales efficiency of each dealership dropped below 100% in 2009 and has remained well below 100% through 2014 and beyond. PFD at 26 (FOF #39 and #51).

Sales Efficiency for WC Dealerships – 2008 to 2014

	TX077	**TX087**
2008	132.5%	110.3%
2009	96.8%	51.1%
2010	83.5%	58.0%
2011	87.3%	45.9%
2012	68.4%	21.3%
2013	71.2%	17.9%
2014	65.7%	31.2%

Source: TR1174; PTX3; PTX4

There is no evidence or allegation that HMA's calculation of sales efficiency for either TX077 or TX087 was inaccurate or was calculated differently from the way it was calculated for every other Hyundai dealer. There is also no claim that either dealership's PMA was

inappropriately constructed. Moreover, sales efficiency is not a component of the vehicle allocation formula. TR711; TR930.

a. WC failed to reach 100% sales efficiency when there was sufficient inventory in 2009, 2014 and 2015.

In 2009, there was no inventory shortage, but both WC dealerships were less than 100% sales efficient. TR1174; PTX3; PTX4. HMA's inventory shortage began in 2011 and then ended in 2013. After that time, there were sufficient vehicles available to satisfy dealer demand. In July 2014, Mr. Zabihian told Mr. Hetrick that TX087 had "received the inventory in new Hyundai's [sic] to meet the demand." PTX89; TR322 (Mr. Zabihian confirming statement). Mr. Zabihian also told Larry Caudill, HMA's regional Market Representation Manager, in October 2014, that "inventory isn't a problem now" and that he could get anything he needed from Andrea Webb, HMA's District Manager. TR875. Yet, despite having sufficient inventory, TX087's sales efficiency for 2014 was only 31% ***of average*** (PTX45 (p. 111905)), which was dead last in its district. *Id.* (p. 111906). Similarly, even though TX077 had "enough inventory to meet all the demand" (TR475), its sales efficiency in 2014 was only 65.7% ***of average***. DTX44 (p. 111884). As shown above, sales efficiency at both WC stores was better in 2013 (when WC claims to have been inventory deficient) than in 2014 (when WC had "sufficient" inventory). *See also* TR560 (Mr. Willis stating sales efficiency was still low in 2015 despite more inventory).

While WC blames its poor sales efficiency on its lack of inventory, this explanation is false, and Judge Harvel saw through this argument. WC suffered from poor sales efficiency when inventory was abundant in 2009, 2014 and 2015. WC has reversed cause and effect. Its inventory was low because it made and reported sales slower than the average dealer in its region and because it failed to take advantage of brand loyalty and investment opportunities that would

have boosted its allocation entitlement (at least temporarily; WC would still have had to reverse its slow sales and reporting or the advantage such programs would have afforded would have quickly been lost).

4. HMA did not state that WC was in material breach of the DSSA because it failed to achieve 100% sales efficiency.

WC states that HMA considers a dealership to be in material breach of its franchise agreement if it is not 100% sales efficient. WC's Exceptions at 18. HMA did send TX087 a "Notice of Failure of Performance," dated July 10, 2013, based on the dealership's poor sales performance. PTX67. HMA cited multiple factors in concluding that WC was in breach of its DSSA. *Id.* HMA did not state, however, that being less than 100% sales efficient constitutes a material breach of the DSSA, because the DSSA includes no such requirement. *Compare id. with* DTX28; DTX30; PTX1. Moreover, the letter simply advised TX087 of its deficient sales performance and asked the dealership to "reassess" its commitment to Hyundai by either (1) pursuing a sale of its store or (2) providing a written plan to improve its performance. TX087 did not respond to the letter and took neither action. TR1124. Nevertheless, there is no evidence that HMA has taken any adverse action against TX087 as a result. TX087 remains a Hyundai dealer and has not received a notice of termination from HMA.

5. "Actual" sales efficiency is a misleading metric created by WC.

WC invents a standard, "actual sales efficiency," to show the "unreasonableness" of HMA's sales efficiency standards. WC's Exceptions at 18. WC concludes that HMA had two choices with its "unreasonable" sales efficiency standard: (1) provide more discretionary allocations to WC so that it had sufficient inventory to meet the standard; or (2) adjust the sales efficiency standard for WC. WC's Exceptions at 31.

As an initial matter, "actual sales efficiency" is WC's own creation that measures the difference between the amount of vehicles allocated to a dealer and the amount it sells. WC's Exceptions at 18.[10] HMA has been unable to identify any motor vehicle administrative agency that uses the formula advocated by WC, and WC certainly presented no evidence that any other agency uses this formula. Moreover, WC's math is backwards because HMA's system uses a methodology, which "replenishes" a dealer's inventory once a sale is reported. HMA does not stock a dealer based on anticipated sales, as WC's theory suggests.[11] Accordingly, it is misleading and meaningless for WC to say it was 94% sales efficient because it sold 267 of the 288 cars allocated. *Id.* at 19. Not surprisingly, WC's "actual sales efficiency" is not a recognized dealer metric, and WC cites no legal or expert authority that adopts, endorses or even acknowledges it as a standard. *Id.* at 18-19, 31.

Additionally, neither of WC's proposed "choices" for addressing its low sales efficiency numbers is reasonable. WC's first option is that HMA should have allocated a sufficient number of vehicles for WC to be 100% sales efficient. This argument misses the point. HMA's allocation algorithm, which WC is not challenging, distributes vehicles to dealers based on each dealer's actual inventory and 90-day sales history. The system is reasonable and not designed to allocate vehicles based on any specified sales target. Moreover, considering WC's decision to pull back its inventory and its low turn rate, providing additional discretionary allocations to WC would have increased WC's days' supply of vehicles, which in turn would have hurt WC's vehicle earning under the allocation formula.

[10] Notably, this is not a metric adopted or even mentioned by WC's expert, Joe Roesner.

[11] Thus, when WC argues a dealership should be allocated "at least as many vehicles as it is expected to sell" (WC's Exceptions at 1), its argument is founded on the mistaken assumption that HMA allocates vehicles based on anticipated sales rather than on its past sales, to replenish sold inventory. *See* PFD at 23 (FOF #10) (finding that formula allocations are based on vehicles sold by dealer in previous 90 days, not on expected future sales).

As for the second option, WC suggests that, in order to treat it "fairly," HMA had to devise a special sales efficiency metric for WC different from the one it uses for its other 830 Hyundai dealers. In other words, rather than using the same methodology for all Hyundai dealers, WC is claiming that an exception should be made in its case – *and that such discrimination is fair.* WC's Exceptions at 31. Needless to say, there is no justification for extending special treatment to a poorly performing dealer that has rejected legitimate means of improving its sales performance. WC did not present any proof that HMA's sales efficiency standard is unfair or unreasonable or has been applied to them in a discriminatory way, or that they have suffered any real-world harm from HMA's use of this well-accepted industry metric.

D. WC broke its 2003 promise to timely renovate its facilities at TX087, and when it finally renovated its facilities at TX077 in 2014, WC no longer needed extra inventory.

WC claims HMA broke its promise to provide WC with inventory when it renovated its facilities. WC's Exceptions at 20. However, as a matter of policy, HMA does not make "promises" regarding facility assistance until the dealer submits a formal request in writing. TR882-85, 893, 941-42, 1093-94, 1096 (no up-front money or commitments). In contravention of HMA's policy, WC demanded that it be treated differently from all other Hyundai dealers and that HMA provide the dealer with financial assistance up front without having to submit a formal request. PTX15, PTX17. In sharp contrast, with no upfront funds from HMA, RM completed ***two*** renovations to Hyundai-exclusive dealerships by 2012. TR882, 892-93, 977; DTX177 (p. 109983); DTX203 (p. 110774).

It was, in fact, WC that broke its promise. In 2003, WC advised HMA in writing that it was going to build a new facility for TX087 "within the next 2 years" to create an exclusive Hyundai dealership. DTX91. In the letter, WC sought HMA's permission to relocate its

Hyundai operations from its current location in San Antonio and "temporarily house Hyundai" at the relocation site, along with its existing Kia operations, "until the new [Hyundai] facility has been completed to our mutual agreement." *Id.* Twelve years later, WC had not even submitted the plans to do so. Likewise, TX077 needed a new facility for a long time. TX077's general manger (Mr. Willis) admitted that, by 2010, he realized that WC was losing sales because of the poor facility there. TR595-96. WC finally offered to build a new facility for TX077 in 2011 (TR284-286), but later changed its mind and decided to renovate the existing facility, which it did not complete until near the end of 2014. TR305; TR197. Of course, by 2014 the inventory shortage had ended, and WC advised HMA it had all the inventory it needed for both dealerships. PTX89; TR322 (Zabihian); TR875 (Caudill); TR475 (Kiolbassa). Thus, WC did not need any additional inventory by the time it completed renovating the facilities at TX077.

IV.
ARGUMENTS AND AUTHORITIES

A. Judge Harvel correctly concluded that WC failed to meet its burden of proof to show that HMA required WC to adhere to an unreasonable sales standard in violation of Section 2301.467(a)(1).

WC argues that Judge Harvel misapplied Section 2301.467(a)(1) by: (1) finding that maintaining 100% sales efficiency is not a requirement to be or remain a licensed Hyundai dealer; (2) finding that measuring sales efficiency does not require adherence to an unreasonable sales standard; and (3) concluding that WC failed to meet its burden under Section 2301.467(a)(1). *Compare* WC's Exceptions at 21-25 *with* PFD (FOF #50 and #52; COL #6). Judge Harvel got it right. She properly applied the statute and, based on the evidence, correctly found there was no violation. Sales efficiency is an industry-accepted metric for evaluating dealer performance. Moreover, HMA never required WC to be 100% sales efficient under either the parties' DSSAs or in practice.

1. Section 2301.467(a)(1) prohibits requiring adherence to an unreasonable sales standard.

Section 2301.467(a)(1) states a manufacturer or distributor may not "require adherence to unreasonable sales or service standards". TEX. OCC. CODE § 2301.467(a)(1) (emphasis added). The Legislature did not define "require" or "unreasonable" in Section 2301.467. *Id.* A matter is generally "required" when it is ordered or demanded as necessary. *See* PFD at 21, n. 71 (citing MERRIAM-WEBSTER DICTIONARY and *Black's Law Dictionary*). A matter is "unreasonable" if it is "arbitrary, capricious, without substantial cause or reason, or lacking a legitimate business justification." *Star Houston, Inc. v. Mercedes-Benz* USA, LLC, SOAH Docket No. 601-09-3665.LIC at 45 (June 13, 2014) (proposal for decision) (defining "unreasonable" in applying Section 2301.468). Sales efficiency is not an unreasonable standard. Moreover, even if it was an unreasonable standard, HMA did not require adherence to it.

2. Sales efficiency is not an unreasonable standard.

Sales efficiency has repeatedly been held to be a fair and reasonable way to measure dealer performance for the legitimate business purpose of determining whether a dealer is complying with its sales performance obligations. *See, e.g., Brown Motor Sales Co. v. Hyundai Motor America*, No. 09-06-MVDB-358-D (Ohio Motor Veh. Dealers Bd. Jan. 15, 2010) (finding HMA's use of sales efficiency metric fair and reasonable and upholding termination of a dealer whose efficiency was approximately 46.3% over a 5-1/2 year period), *aff'd*, No. 10CVF-02-2816 (Ohio Common Pleas, Franklin Co. July 2, 2010), *aff'd*, 2011 Ohio 5053 (Ohio Ct. App. Sept. 30, 2011); *Superior Pontiac Buick GMC, Inc. v. Nissan North America, Inc.*, 2012 WL 1079719 (E.D. Mich. Mar. 30, 2012) (upholding termination based on low sales efficiency); *Hampton Auto Group v. Nissan North America, Inc.*, No. HSMV-12-853-FOF-MS (Fla. DHSMV Oct. 24, 2012) (same); *In the Matter of Ralph Gentile, Inc. v. Nissan North America, Inc.*, No. TR-07-

0001 (Wis. Div. of Hearings and Appeals, Feb. 4, 2010) (same), *aff'd sub nom. Ralph Gentile, Inc. v. State of Wisconsin Div. of Hearings & Appeals*, No. 10-cv-1050 (Wis. Cir. Ct. Sept. 13, 2010), *aff'd*, 800 N.W.2d 555 (Wis. App. 2011); *In the Matter of Seacoast Imported Auto, Inc. d/b/a Nissan of Stratham*, No. 04-06 (N.H. Motor Veh. Ind. Bd. Apr. 12, 2010) (same), *aff'd*, *Seacoast Imported Auto, Inc. v. Nissan North America, Inc.*, No. 218-2010-CV-471 (N.H. Super. Ct. Nov. 29, 2010). Thus, while Judge Harvel correctly found that HMA never required WC to adhere to a 100% sales efficiency standard, even if she had, such an industry standard is certainly reasonable.[12]

3. HMA did not "require" WC to be 100% sales efficient – in the parties' DSSAs or in practice.

a. There is no contractual requirement of 100% sales efficiency.

As shown above in Section III(C)(2), neither the DSSAs, nor the Standard Provisions incorporated by reference therein, include any requirement that demands or orders dealers be 100% sales efficient. DTX28 (TX077 DSSA); DTX30 (TX087 DSSA); PTX1 (Standard Provisions). While Paragraph 10(E) of the Standard Provisions identifies sales efficiency as a criterion that can be considered in evaluating dealer performance, it does not state that a dealer must be 100% sales efficient. *Id.*; PFD at 21. Sales efficiency is just one of several ways that dealer performance is measured. PTX120, D. Zuchowski Dep., p. 172; TR1013 (Mr. Hetrick indicating customer service scores also used to evaluate dealer performance); *see* PTX1, ¶ 10(E) (listing factors used to measure performance).[13] Accordingly, there is no provision in the DSSA that requires WC to be 100% sales efficient.

[12] WC states Judge Harvel "did not find that this standard [sales efficiency] was not unreasonable, only that it was not required." WC's Exceptions at 25. In fact, the ALJ expressly found that "[m]easuring sales efficiency does not require adherence to unreasonable sales or service standards." PFD at 27 (FOF #52).

[13] Among other factors HMA considered is customer service satisfaction. PTX1, § 11(D) ("Evaluation of Dealer's Service..."); TR1013 (Hetrick). From 2010 to the first quarter of 2014, TX077 was below average on its Hyundai Purchase Index ("HPI"), that measures customer satisfaction in the purchasing process, for 16 of 17 quarters.

WC contends Judge Harvel misapplied Section 2301.467 by limiting the inquiry to whether there was an express requirement of 100% sales efficiency in the DSSAs. WC's Exceptions at 21-22. WC accuses the ALJ of improperly narrowing her focus to just the language contained in the DSSAs. However, Judge Harvel is considering the DSSAs' provisions only because of WC's allegations. WC argues that HMA violated the statute because HMA required WC to be 100% sales efficient "to avoid a material breach of the dealer agreement." *Id.* at 21 (emphasis added); *id.* at 23 (stating HMA requires 100% sales efficiency to comply with the contractual responsibilities). Because WC is basing its claim on whether 100% sales efficiency is required to avoid a material breach of the parties' DSSAs, then the ALJ has to consider the DSSA's terms. Put differently, World Car's own theory of liability requires the ALJ to determine whether the DSSAs require 100% sales efficiency. Judge Harvel correctly found that there is no such requirement in the DSSAs. PFD at 21. Moreover, the ALJ did not limit her findings to just the terms of the DSSAs. Judge Harvel found that "[m]aintaining 100% sales efficiency is not a requirement to be or remain a licensed Hyundai dealer" (PFD at 26, FOF #50), and this finding is supported by the evidence.

b. There is no other requirement of 100% sales efficiency.

HMA never required WC to be 100% sales efficient. Certainly, 100% sales efficiency is not a *per se* requirement to keep a dealership. Neither TX077 nor TX087 have been 100% efficient since 2009, but HMA has not terminated, nor threatened to terminate, either DSSA. *See* Section III(C)(3), *supra* (sales efficiency history); PFD at 26 (FOF #50 and #51). Again, 100% sales efficiency represents an average, so there will often be dealers above and below this level.

DTX55. TX087 was below average for 14 of 17 quarters. *Id.* TX077 was below average on its Hyundai Service Index ("HSI"), that measures customer satisfaction with a dealer's service department, for all 17 quarters during the same period. *Id.*; *see* TR456-58 (Mr. Kiolbassa acknowledging WC's below average customer service scores).

Moreover, Mr. Hetrick recommended a renewal of TX087's DSSA in 2010 despite its below average sales efficiency of 42% at the time. DTX41; TR261-62.

One hundred percent sales efficiency is also not a requirement for vehicle allocations. Sales efficiency is not considered in the formula allocations that account for at least 85% of all allocations. TR711; TR930. As for discretionary and manual allocations, TX077 and TX087 continued to receive such allocations from 2009 to 2013 even though neither was 100% efficient during this period. *Compare* PTX81 (summary of allocations) *with* TR1174; PTX3; PTX4 (sales efficiency history). WC's own expert confirmed that neither WC nor any other dealer had to be 100% efficient in order to receive vehicles. TR712-13. WC states that HMA "chooses not to provide additional inventory to dealerships who are below 100% sales efficiency." WC's Exceptions at 18. This assertion is false. In addition to providing TX077 and TX087 with discretionary allocations despite being less than 100% efficient, HMA provided discretionary allocations to other dealers in the region that did not reach this level.[14]

Finally, 100% sales efficiency is not required to obtain co-op advertising funds. TX077 and TX087 received co-op funds from 2009 through 2014, despite neither being 100% efficient. *Compare* DTX54 (summary of co-op payments) *with* TR1174; PTX3; PTX4 (sales efficiency history).

c. The evidence WC cites does not support its argument.

Misstating Tom Hetrick's testimony – <u>three times</u> – WC contends that HMA required dealers to be 100% sales efficient "in order to receive a larger share of discretionary inventory

[14] *Compare* DTX154 (p. 110022) *with* DTX99 (showing Frank Smith Hyundai in McAllen (TX027) receiving discretionary allocations in 2011 while being only 73% efficient for the year). *Compare* DTX160 (p. 110320) *with* DTX99 (showing Champion Hyundai in Corpus Christi (TX081) receiving discretionary allocations in 2011 while not being 100% sales efficient). DTX154 and DTX160 were not discussed during the hearing, but the parties agreed they would be pre-admitted into the record. *See* Joint List of Final Hearing Exhibits Pre-Admitted by Agreement of the Parties.

than it otherwise would." WC's Exceptions at 24; *see also id.* at 18, 25. However, as HMA previously noted, Mr. Hetrick did not state this. Instead he stated:

> Q. Okay. Now, let's see if I understand part of this. You chose to use your discretion to reward dealers who meet sales efficiency targets, right?
>
> A. Some.
>
> Q. And those who don't, you don't reward?
>
> A. Not necessarily.

TR1114 (emphasis added). Mr. Hetrick never testified that 100% sales efficiency was a requirement to get additional discretionary allocations.

WC's other evidence is also lacking. WC quotes Mr. Hetrick's testimony that sales efficiency is a metric that HMA considers to determine if a dealer is complying with its dealer agreement, but he never stated that a dealer is required to be 100% sales efficient to comply with its DSSA. TR1013. The "cure" letter that Mr. Hetrick sent to TX087 (PTX67) also includes no such requirement. While Mr. Hetrick noted TX087's extremely low sale efficiency performance, he never stated that WC was required to be 100% sales efficient. PTX67. Similarly, none of the remaining evidence cited by WC states that it is required to be 100% sales efficient.[15]

Since HMA did not require WC to adhere to 100% sales efficiency as a sales standard, there can be no violation of Section 2301.467(a)(1).

4. The allocation system does not make the sales efficiency metric unreasonable.

WC contends that HMA's use of the sales efficiency metric was unreasonable because HMA did not allocate WC enough cars to be 100% sales efficient. WC's Exceptions at 24. According to WC, the allocation system must provide sufficient inventory to allow a dealer to be 100% sales efficient. But this agreement fundamentally misunderstands the allocation system.

[15] *See* WC's Exceptions at 25 (citing PTX3, PTX4, PTX81, PTX120 (Zuchowski Dep. at 243-45), TR113 (Zabihian) and TR423-25 (Kiolbassa).

Formula allocations, which comprise the majority of allocations, are based on ***historical sales***, not ***projected sales***. TR817, TR827. WC lacked inventory to be 100% sales efficient because of its own actions, including its decision to pull back on inventory in 2009. *Id.* *See* Section III(A)(3)(a), *supra*.

WC essentially argues the allocation system should be designed to give each dealer the number of vehicles it needs to achieve an average sales performance. Any such formula would be harmful to HMA, its dealers and its customers. It would deprive strong sales performers of vehicles that they have demonstrated they can sell (and which their customers are demanding) while providing additional vehicles to poorly-performing dealers which they cannot sell and which would sit on their lots (and cause them to incur substantial interest on their floor plans).

As the undisputed evidence demonstrated, HMA's allocation formula is similar to that used by other manufacturers and is designed so that all Hyundai dealers are offered, based on their own rate of sales, sufficient vehicles to "even out" their days' supply of vehicles. WC did not present any evidence that any manufacturer allocates vehicles in the manner they now suggest, because no manufacturer does. Any such system would be unfair and unreasonable because it would deprive dealers of vehicles that they have earned and it would create a mismatch between supply and demand.

a. WC had poor sales efficiency even after the inventory shortage ended.

WC argues that 100% sales efficiency was an unreasonable standard, as applied to it during the time of short supply, because HMA did not supply WC with enough inventory to reach that level, even if it sold all its inventory. WC's Exceptions at 24. Again, WC's argument wrongly presumes that HMA allocates vehicles based on anticipated sales rather than historical sales. Moreover, WC overlooks the fact that even when it had sufficient inventory – both before

and after the shortage – it still was not 100% sales efficient. Lack of inventory does not explain WC's poor sales performance. In 2009, there was no shortage of inventory (and WC actually reduced its inventory), but both its dealerships were less than 100% sales efficient. *See* Section III(C)(3)(a), *supra*. After the nationwide short supply situation ended in 2013, there were sufficient vehicles available to satisfy dealer demand. In July 2014, Mr. Zabihian advised Mr. Hetrick that TX087 had "received the inventory in new Hyundais to meet the demand." PTX89; TR322 (Mr. Zabihian confirming statement). Yet, despite having sufficient inventory, TX087's sales efficiency for 2014 was only 31%. PTX45 (p. 111905). By its own admission, TX087 had sufficient inventory in 2014 but it was last in the district for sales efficiency. *Id.* (p. 111906). Similarly, Mr. Willis admitted that TX077 had sufficient inventory in 2014. TR474. But in 2014, TX077's sales efficiency was only 65.7%. DTX44 (p. 111884); *see also* TR560 (Mr. Willis conceding sales efficiency went down in 2015 despite more inventory). Thus, the evidence demonstrates that even when WC has had plenty of inventory; it still has been far below 100% sales efficient.

Judge Harvel correctly found and concluded that HMA did not require WC to adhere to any unreasonable sales standards, and the Board should reject WC's request to modify the PFD.

B. Judge Harvel correctly concluded that WC failed to meet its burden of proof to show that HMA unreasonably discriminated against WC, in allocating vehicles, in violation of Section 2301.468(2)(2003).

WC contends that HMA unreasonably discriminated against it, through allocations of discretionary inventory, in violation of Section 2301.468(2) (2003). WC's Exceptions at 25-26. WC argues Judge Harvel misapplied the concept of "unreasonable discrimination" under that statute. *Id.* at 26. WC argument fails for multiple reasons. First, WC never pleaded a violation of Section 2301.468(2) (2003); it pleaded a violation of a later, inapplicable version of the statute

with a different standard. Second, even if WC had pleaded the correct statute, it only prohibits unreasonable discrimination, "in the sale of a motor vehicle" owned by the distributor and does not apply to vehicle allocations. Finally, even if vehicle allocations are covered by the statute, there was no unreasonable discrimination by HMA.

1. WC never pleaded a violation of the applicable statute – Section 2301.468(2) (2003).

The current version of Section 2301.468, titled "Inequitable Treatment of Dealers or Franchisees," prohibits manufacturers and distributors from treating dealers "unfairly or inequitably in the sale of a motor vehicle owned by the manufacturer or distributor." TEX. OCC. CODE § 2301.468 (2011) (emphasis added). This statute only applies to agreements entered or renewed after September 1, 2011. *See* 2011 Tex. Sess. Law Serv. Ch. 137 (S.B. 529), § 16 ("An agreement entered into or renewed before the effective date of this Act is governed by the law in effect on the date of the agreement was entered into or renewed, and the former law is continued in effect for that purpose."). The parties executed the DSSAs before September 1, 2011. DTX28; DTX30. Accordingly, this case is governed by the prior (2003) version of the statute, titled "Discrimination among Dealers or Franchisees," that states:

> A manufacturer, distributor, or representative may 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.

TEX. OCC. CODE § 2301.468 (2003) (emphasis added).

WC did not plead a violation of the 2003 statute. In its Original, First Amended and Second Amended Complaints, WC asserted the same "Count 2 – Unfair and Inequitable Treatment" and alleged that HMA violated Section 2301.468 (2011) by providing WC "unfair

and inequitable vehicle inventory allocations . . . ." WC's Second Amended Complaint, ¶ 36. WC never alleged that HMA violated Section 2301.468 (2003) by unreasonably discriminating against a dealer in the sale of a motor vehicle. *Id.*[16] Judge Harvel, however, gave WC the benefit of the doubt. She correctly concluded that the 2003 statute applied (PFD at 2, n. 2) but then analyzed WC's claims as if it had actually pleaded a violation of that statute (which it had not). *Id.* at 13-14. However, Judge Harvel could have simply rejected WC's Section 2301.468 claim as a matter of law because WC only asserted a claim under the inapplicable 2011 statute.

2. Section 2301.468(2) (2003) is limited to "unreasonable discrimination" "in the sale of a motor vehicle" owned by a distributor and, thus, does not apply to allocations of vehicles.

WC contends HMA violated Section 2301.468(2) (2003) "because it unreasonably discriminated against [WC] in allocations of vehicle inventory . . . ." WC's Exceptions at 25 (emphasis added). But the scope of Section 2301.468(2) is limited. The statute does not govern all aspects of the relationship between automobile distributors and dealers. Rather, the narrowly-tailored provision states a distributor may not "discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor." TEX. OCC. CODE § 2301.468(2) (2003) (emphasis added). The "in the sale of a motor vehicle" clause in Section 2301.468(2) has been interpreted to relate to whether dealers pay the same wholesale price for vehicles. *See Star* at 44 ("any alleged discrimination would not involve the sale of a motor vehicle at the wholesale level … because all dealerships pay MBUSA the same invoice price paid by every other dealer for the same model configuration."). Accordingly, in order to constitute a violation of Section 2301.468(2) (2003), the alleged unreasonable discrimination

[16] WC never sought a post-hearing, pleading amendment to allege a violation of the 2003 statute, and the applicable rules preclude such an amendment now absent agreement of all parties. 1 TEX. ADMIN. CODE § 155.301(b).

must occur in the sale – not in the allocation – of a vehicle by the manufacturer/distributor to the dealer.

Allocating vehicles and selling vehicles are not the same thing. The allocation process merely determines the number of vehicles a dealer is offered by a distributor; an allocation does not mandate a purchase by a dealer or necessarily involve a sale by the manufacturer or distributor to the dealer. Just because HMA allocated a vehicle to a dealer, that did not mean that the vehicle was actually bought by the dealer or sold by HMA. Mr. Zabihian testified that he chose to reduce his inventory, at both dealerships, in 2009 by buying fewer cars in 2009. *See* TR225, 228 (Mr. Zabihian stating he chose to purchase fewer vehicles in 2009 and that it was better for him but not for HMA). This continued into the first half of 2010, when WC turned down (*i.e.*, chose not to purchase) over 200 vehicles that HMA allocated to WC. DTX47. Alleged "unreasonable discrimination" in allocating vehicles does not satisfy the requirements of the statute that the discrimination occur "in the sale of a vehicle."[17] "Allocating" and "selling" vehicles are not synonymous. Section 2301.468(2) is inapplicable to WC's claims.

Judge Harvel could have rejected WC's unreasonable discrimination claim as a matter of law because Section 2301.468(2) (2003) only prohibits unreasonable discrimination in the sale of vehicles not in the allocation of vehicles. Instead, Judge Harvel gave WC the benefit of the doubt that the statute applies to WC's claim. She then examined the evidence and found that WC failed to carry its burden, even assuming it could assert a claim under the statute based on allocations rather than sales.

[17] Discrimination in the "sale of a vehicle" could, for example, occur if a vehicle were sold to one dealer at a price different from the sale of an identical vehicle to another dealer. There is no evidence in this case that any such discrimination ever occurred.

3. There was no evidence of unreasonable discrimination, and there were legitimate business reasons for providing more discretionary allocations to RM.

Under Section 2301.468(2) (2003), discrimination is "unreasonable" when it is arbitrary, capricious, without substantial cause or reason, or lacking a legitimate business justification." *Star* at 44-45 (citing *Burlington N. & Santa Fe Ry. Co. v. S. Plains Switching, Ltd. Co.*, 174 S.W.3d 349, 352-54 (Tex. App.—Fort Worth 2005, no writ) and *Buddy Gregg Motor Homes, Inc. v. Marathon Coach, Inc.*, 320 S.W.3d 912, 924 (Tex. App.—Austin 2010, no pet.)). With respect to discretionary and manual allocations, there was no unreasonable discrimination against WC. The evidence showed that, from 2008 to 2013, TX077 and TX087 received discretionary and manual allocations. DTX128; DTX131. In some years, WC received a greater percentage of discretionary allocations than RM, and in some years WC received less. *Id.* TX087 received no discretionary allocations in 2013. DTX131. However, it was not uncommon for other dealers not to receive discretionary allocations during this period. *E.g.*, DTX128; DTX130 and DTX131.

Again, as discussed above in Section III(A)(5), RM received more discretionary allocations because of the numerous steps it took to show brand commitment to Hyundai – steps that WC did not take during the same period. TX016 became an exclusive Hyundai dealer in 2010. TX127 took on the Equus luxury line that required additional facility upgrades. Both TX016 and TX127 renovated their facilities in 2011 and 2012, and both participated in Hyundai's service loaner program. *See generally* Section III(A)(5). WC did not take comparable actions. TX087 remained (and still is) a dual dealership, and it has not renovated its facility. TX077 did not complete its renovations until 2014, after many delays, and by which time the inventory shortage had ended. Further, WC did not participate in Hyundai's service

loaner program. *Id.* WC simply did not demonstrate brand commitment during the inventory shortage as RM did. Judge Harvel correctly ruled that HMA's decision to allocate more discretionary vehicles to RM, compared to WC, had a legitimate basis and was not unreasonable. Accordingly, the Board should reject WC's request to modify the PFD.

C. Judge Harvel correctly concluded that WC failed to meet its burden of proof to show that HMA breached its duty of good faith and fair dealing in violation of Section 2301.478.

WC re-urges its allegations about discretionary vehicle allocation and sales efficiency, under Section 2301.468 and 2301.467, respectively, and argues that these allegations also constitute a breach of the duty of good faith and fair dealing under Section 2301.478. WC's Exceptions at 30. WC vaguely maintains Judge Harvel misapplied Section 2301.478. WC's arguments fail because there was no violation of the statute – even applying WC's improper standard for the duty of good faith and fair dealing. Moreover, applying the correct standard, there was no evidence that HMA consciously committed a wrong for a dishonest, discriminatory or malicious purpose.

1. WC applies the wrong standard.

Section 2301.478 states: "Each party to a franchise owes to the other party a duty of good faith and fair dealing that is actionable in tort." TEX. OCC. CODE § 2301.478(b). The statute lists no specific acts that constitute a violation of the statutory duty of good faith and fair dealing. *Id.* WC contends that the statutory duty "requires parties to deal fairly with one another." WC's Exceptions at 30, n. 5. However, this is not the standard the Board has adopted.

In *Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777, 780 (Tex. App.—Austin 2012, no pet.), a dealer accused a distributor of violating Section 2301.478(b) by requiring the dealer to be 100%

sales efficient. The ALJ rejected the dealer's claim for breach of good faith and fair dealing, and the Board accepted that recommendation.

> The ALJ rejected Tejas' claim that Gulf States violated the statutory duty of good faith and fair dealing on the ground that there was insufficient evidence that Gulf States engaged in "conscious doing of a wrong for a dishonest, discriminatory or malicious purpose."
>
> The Division adopted the ALJ's recommendation regarding disposition of the good faith and fair dealing claim . . . .

Id. at 782 (emphasis added).[18] Thus, the Board construed Section 2304.478 to require a conscious doing of a wrong for a dishonest, discriminatory or malicious purpose. *Id.*

A mere violation of a contract term or careless business practices does not constitute a violation of Section 2301.478. It is only when a party engages in intentional conduct – the conscious doing of a wrong for dishonest, discriminatory or malicious purposes – that liability will be found under that section. It is a two-part standard that requires: (1) the existence of a wrong; (2) that is consciously done for a dishonest, discriminatory or malicious purpose. If the activity complained of is not itself wrong, then there can be no "conscious doing" of a wrong.

In the PFD, Judge Harvel did not decide which standard applied. PFD at 22. Rather, the ALJ gave WC the benefit of the doubt – once again – and determined that even under WC's liberal interpretation of the statute, WC still failed to meet its burden of proof. There was no evidence that WC breached its statutory duty in either its allocation of discretionary vehicles or in its use of sales efficiency to measure dealer performance.

2. HMA did not violate Section 2301.478(b) through allocations of discretionary vehicle inventory.

WC is unable to establish a violation of Section 2301.478(b) because HMA did nothing wrong with respect to its allocations as previously shown. *See* Section IV(B)(3), *supra*. HMA

[18] The dealer challenged this standard on appeal, but the court found the argument was waived. *Id.* at 787.

did not unreasonably discriminate against WC in the sale of a motor vehicle owned by HMA under any version of Section 2301.468. HMA used discretionary allocations to incentivize dealers into taking actions that enhanced the Hyundai brand including renovating facilities, becoming exclusive Hyundai dealers, adding the Equus line and participating in HMA's service loaner program. *See* Section III(A)(5), *supra*; PFD at 21-22; 27-28 (COL # 9).[19] In short, WC did nothing wrong with regard to allocating discretionary vehicles.

WC argues HMA violated Section 2301.478(b) because it did not use its "best efforts" to provide WC with inventory. WC's Exceptions at 30. This is a reference to Paragraph 10(A)(1) of the Standard Provisions that states "HMA will use its best efforts to provide Hyundai products to DEALER subject to available supply . . . ." PTX1, ¶ 10(A)(1). WC maintains that the statute aims to effectuate the parties' agreement and, that because HMA did not use its best efforts in supplying discretionary vehicles, HMA violated the statute. WC Post-Hearing Brief at 46. In short, WC argues that the DSSAs should be enforced as written and the failure to do so amounts to a statutory violation. WC fails to note, however, that the same provision also states that when there is a short supply of inventory, as there was from 2011 through 2013, the parties agree that HMA will endeavor to allocate inventory in a "fair and reasonable manner" as HMA "may determine in its sole discretion." PTX1, ¶ 10(A)(1).

3. HMA did not violate Section 2301.478(b) by using sales efficiency as a dealer metric.

WC is also unable to establish an underlying wrong to support its claim that HMA's use of sales efficiency amounts to a breach of the duty of good faith and fair dealing. HMA did nothing wrong by using sales efficiency as a metric for dealer performance. *See* Section IV(A),

[19] WC again argues HMA broke its "promise" to provide WC with additional inventory upon completing renovations at TX077. HMA made no such promise and, even if it had, by the time WC completed its renovations in 2014, the inventory shortage was over and WC admittedly had all the inventory it needed. *See* Section III(D), *supra*.

supra; PFD at 21-22; 27-28 (COL # 9). Sales efficiency is a standard industry metric for evaluating dealer performance. It is determined the same way for all dealers based on objective data. It is not wrong to use such a metric nor does using it amount to a conscious doing of a wrong for a dishonest, discriminatory or malicious purpose. *Bray* confirms this. In *Bray*, the ALJ rejected the dealer's complaint that a requirement of 100% sales efficiency violated Section 2301.478(b). *Bray,* 363 S.W.3d at 786. The Board agreed with this decision. *Id.* Here, HMA never required WC to be 100% sales efficient. *See* Section III(C), *supra*. *Bray* demonstrates that HMA's use of a standard industry metric to measure sales performance cannot be a breach of the duty of good faith and fair dealing.

4. There is no evidence that HMA consciously engaged in any conduct for a dishonest, discriminatory or malicious purpose.

Under the Board-adopted construction of "good faith and fair dealing," WC is unable to satisfy the second requirement for Section 2301.478(b) claim. WC sought to demonstrate malicious and dishonest intent through extraneous and irrelevant evidence. Failing to respond to a dealer letter, referring to a dealer letter as "fan mail," and merely offering to assist a dealer in finding a potential buyer does not demonstrate that HMA acted for a dishonest, discriminatory or malicious purpose.[20] In fact, the evidence established the opposite. HMA did not engage in any policy or practices to discriminate or harm WC. TR988-89. Mr. Hetrick testified that he dealt fairly with WC and that it was in his best interests to do so.

> Q. I want you to tell Judge Harvel why you believe it's in Tom Hetrick and HMA's best interest to see that Mr. Zabihian fails as a dealership.
>
> A. There is no best interest for Hyundai to have a dealer fail. It doesn't matter if it's World Car or any other dealership. A failure is a failure.

[20] WC ignores the fact that Mr. Zabihian failed to respond to several letters from HMA. TR301.

Q. If Mr. Zabihian and Mr. Deltang and his dealerships fail, do you, as the regional general manager, fail?

A. Absolutely. I'm judged on dealerships that are struggling.

TR989-90. HMA did not engage in any conscious wrongdoing against WC for dishonest, discriminatory or malicious purpose. Accordingly, WC cannot prevail on its Section 2301.478 claim, and the Board should reject WC's request to modify the PFD.

V.
CONCLUSION

For all the reasons set forth above, Hyundai Motor America respectfully requests the Board overrule World Car's exceptions to the Proposal for Decision, and that it accept and adopt Judge Harvel's Proposal for Decision as its final ruling in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that ***Hyundai Motor America's Reply to World Car Hyundai's Exceptions to Proposal for Decision*** has been forwarded to all counsel of record, via email, on this **9th day** of **May 2016.**

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TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC., d/b/a WORLD CAR HYUNDAI, and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., d/b/a WORLD CAR HYUNDAI	§	
Complainants,	§	
v.	§	**SOAH DOCKET NO. 608-14-1208 LIC**
	§	**MVD DOCKET NO. 14-0006 LIC**
HYUNDAI MOTOR AMERICA, Respondent.	§	

WORLD CAR HYUNDAI'S REPLY IN SUPPORT OF EXCEPTIONS TO PROPOSAL FOR DECISION

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I. Introduction

HMA's reply contains numerous misstatements of fact that are critical to its position and the legal underpinnings of the ALJ's proposal for decision. The most egregious are addressed in Section II below.

HMA's position, and the PFD which supports its misconduct, would lead to adverse results for auto dealerships and for the public. If the Board accepts the PFD without modification, there will be no limits on what a distributor can do when setting sales standards and allocating vehicles, regardless of how the distributor's actions affect dealerships or consumers. Out of 48 pages of briefing (more than double the page limit[1]), HMA provided a single conclusory sentence addressing this point when it said—without any evidence or argument—that "adopting the ALJ's recommendations" will not "lead to widespread upheaval of manufacturer/dealer contractual relationships." Reply at 5. To the contrary, if a distributor like HMA can use sales efficiency as the measuring stick for dealerships' sales but then claim that adherence to that standard is somehow not "required," then Section 2301.467 of the Occupations Code will be gutted. If a distributor like HMA can allocate vehicles on a discretionary basis to favor one dealership over another by a huge margin, but not be considered "unreasonably discriminating" as long as the distributor comes up with any reason for the discrimination (no matter how pretextual), then Section 2301.468 of the Code will also be meaningless.

Accepting the PFD would also harm the consuming public because when a manufacturer or distributor is allowed to favor one out of two dealerships in the same market with significantly more inventory, that leads to (1) fewer choices for consumers (who have to drive farther to see the cars they want) and (2) decreased competition on price.

[1] *See* Tex. Admin. Code § 215.57(a) (replies to exceptions are limited to three-fourths of the total number of pages of the proposal for decision).

HMA argues–without explanation, let alone citation—that this is "not a case of first impression." Then where is the precedent allowing a distributor to require 100% sales efficiency when the dealership has not been allocated sufficient inventory to meet that standard? What case says that it is acceptable for a distributor to favor one dealership over another similarly-situated dealership in the same market with triple the discretionary allocations? HMA cannot identify such a case because these statutory concepts of "unreasonable sales standard" and "unreasonable discrimination" have not been specifically reviewed in Texas. As a result, the Board's decision in this case will set a standard, good or bad, that will apply to future cases involving the relationship between manufacturer/distributor and dealership. The standard that the Board promulgates should not be that a manufacturer or distributor can do whatever it pleases, just so long as it comes up with any justification for its actions when they are challenged. The Board should reject the PFD and adopt a standard that maintains the competitive balance between distributor and dealer by holding that discriminatory, unfair conduct like HMA's is not reasonable or acceptable under Texas law. A proposed Final Order is attached.

II. Factual Background

HMA's brief relies on factual misstatements, addressed below.

A. World Car Hyundai did not "pull back" on inventory any more than Red McCombs did—both had similar inventory levels when Hetrick became HMA's Regional General Manager in June 2010.

HMA argues that World Car Hyundai "actively reduced its inventory in 2009 and 2010, placing itself at a disadvantage when demand for Hyundai products spiked." Reply, at 18. Although HMA is wrong, if HMA were correct then this exact same argument would apply to Red McCombs, which significantly reduced its inventory in 2009 and turned down <u>more</u> cars

than World Car Hyundai in 2010.[2] But Red McCombs was not disadvantaged on inventory because Hetrick gave Red McCombs multiple "boosts" of vehicles that allowed Red McCombs to double its inventory in the second half of 2010, right when the demand for Hyundais was beginning to spike.

First, Red McCombs "pulled back substantially" on inventory because Red McCombs closed down an entire Hyundai dealership in 2009. Tr. at 726 (Roesner). By closing one of its three Hyundai dealerships, Red McCombs did not have "the inventory and fixed expenses and all the economic costs associated with three dealerships" but could instead "serve the same market with two dealerships." *Id.*; *see also* Tr. at 95 (Zabihian). Red McCombs was able to "cut back to save costs" because it did not have to buy inventory for that third store any longer.

Second, Red McCombs turned down almost three times as many vehicles as World Car Hyundai did between January and June 2010. During that time period, when inventory levels were fairly similar at all four Hyundai dealerships in San Antonio, the Red McCombs stores turned down a total of 598 vehicles while the World Car stores turned down a total of 205 vehicles. DTX 46, 47. Who pulled back more?

Third, and most important, World Car and Red McCombs had similar inventory levels when Hetrick started as Regional General Manager in mid-2010. Tr. at 80-81 (Zabihian). As of

[2] World Car Hyundai did not "actively reduce its inventory." To the contrary, sales at the South store dropped from 2008 to 2009, resulting in lower inventory, because during that time period Toyota sales in World Car's Primary Market Area ("PMA") exploded from 404 to 2,028 cars. PTX 4; Tr. at 438 (Kiolbassa). Toyota had built a manufacturing plant inside World Car's PMA and began pumping in money, advertising, and support to boost Toyota sales in that area of San Antonio. Tr. at 439-42 (Kiolbassa). HMA recognized that this was a real and unique challenge for World Car Hyundai South to be competing directly against big money and support from Toyota, as opposed to just another dealership ("the Toyota challenge"). Tr. at 997-98 (Hetrick). Yet HMA did nothing to assist World Car Hyundai South in maintaining its sales levels or market share in its PMA, let alone something similar to Toyota, despite repeated pleas from World Car. Tr. at 442 (Kiolbassa).

July 21-22, 2010, the World Car stores had a total of 200 cars available while the Red McCombs stores had a total of 240 cars available. Tr. at 1046-47 (Hetrick); *id.* at 643 (Roesner); PTX 18; DTX 175; DTX 181; DTX 188. All four dealerships were low on inventory and all four dealerships were asking for additional inventory. *See, e.g.*, Tr. at 1033-34, 1037, 1046 (Hetrick). They were very similarly situated as of June 2010.

B. Hetrick did not assist World Car Hyundai, instead favoring Red McCombs with disproportionate allocations even though the dealerships were similarly-situated.

HMA asserts that when World Car declined Hetrick's invitation to sell their dealerships in late 2010, it became Hetrick's "goal" to "see the dealerships succeed." Reply, at 27. The objective record directly contradicts that.

Hetrick did not assist World Car Hyundai; instead, he ignored World Car's repeated requests to buy more inventory from HMA. The evidence in the record shows constant and repeated, but unanswered, requests for more inventory. *See* PTX 122; *see also* Tr. at 171-77, 180, 360 (Zabihian); PTX 44; PTX 51; PTX 52; Tr. at 498-99, 548 (Willis); PTX 13; PTX 22. Hetrick did not respond to these requests and did not provide any "boosts" in inventory to World Car Hyundai. *Id.; see also* Tr. at 516 (Willis) ("I wouldn't classify that one or two cars as a boost of inventory."); Tr. at 652-53, 669 (Roesner) (did not see boosts like those provided to Red McCombs).

Hetrick conceded that between 2010 and 2013 the World Car Hyundai South store was the one that "most needed to break the cycle," but he admitted that he did not do anything about it. *See* Tr. at 1076 (Hetrick). Hetrick abandoned the World Car Hyundai South store because he thought they should get out of the Hyundai business. *See* Tr. at 1080 (Hetrick) (he did not help World Car South because it had a "better opportunity with the other brand to continue on" i.e. Kia); *id.* at 1101 (Hetrick) ("didn't feel there was any need to help them break the cycle at World

Car" at that time); *id.* at 1110 (Hetrick) (thought that World Car was "deliberately selling Kias" and "not selling Hyundais" in order to "spite" him).

Instead, Hetrick favored the Red McCombs dealerships with extra inventory that allowed those dealerships to increase their sales and get into a better inventory cycle. *See* PTX 21 (extra cars provided to Red McCombs so that it could grow its inventory and increase its sales). Hetrick's discretionary boosts in inventory to Red McCombs Hyundai did not stop after he helped McCombs double their inventory in 2010, but continued throughout 2011, 2012, and most of 2013. *See* PTX 126; *see also* PTX 109-110; Tr. at 1102 (Hetrick). Curiously, even though the McCombs stores already had more inventory than the World Car stores, HMA starved the World Car stores and gave their closest competitor, the McCombs stores, extra allocations—three times more. World Car Hyundai was not so lucky, and since its nearest competitor was getting the extra inventory, it was doubly prejudiced. PTX 120, Zuchowski Dep. at 171 (discretionary allocations to nearest competitor more harmful because competitor has more cars to sell in same market); *see also* Tr. at 681 (Roesner) (same).

C. HMA's "brand commitment" argument is groundless—World Car Hyundai was and has always been committed to the Hyundai brand.

HMA asserts that the disproportionate allocations to Red McCombs were justified because Red McCombs showed more "brand commitment" than World Car. Even if this were true, which it is not, HMA did not explain or provide a policy back in the real time that said "brand commitment" would get a dealership more inventory.

The objective record directly refutes HMA's claim. Red McCombs did not demonstrate commitment to the brand—it closed down an entire Hyundai dealership in 2009. Tr. at 63 (Zabihian). Hetrick conceded that the closure of this Red McCombs dealership was a "blow to Hyundai" that made Hetrick question Red McCombs' commitment to the Hyundai brand and

become afraid that McCombs would give up the other two Hyundai dealerships, which would be a further blow to HMA and to Hetrick in his new role as Regional GM. *See id.* at 1005-06 (Hetrick). The disproportionate favorable treatment by Hetrick happened because HMA feared losing more McCombs dealerships, not because of some alleged "brand commitment."

World Car Hyundai demonstrated its commitment to the Hyundai brand in many ways, including for example (1) continually asking to buy more inventory from Hyundai, PTX 22, PTX 28, PTX 44, PTX 45, PTX 51, PTX 52, PTX 77, Tr. at 172-74 (Zabihian), *id.* at 498-99 (Willis); (2) spending millions of dollars on advertising of Hyundai products and outspending Red McCombs on advertising by a 3-1 margin, even during the recession and even when HMA did not allocate sufficient inventory, PTX 104, Tr. at 414-15, 434 (Kiolbassa); (3) buying 11 acres of land next to a Wal-Mart for the purpose of building an exclusive Hyundai facility (which HMA rejected), Tr. at 127-28 (Zabihian); and (4) floorplanning its vehicles with Hyundai Motor Finance Company, resulting in an extra $500,000 per year in interest that World Car paid to Hyundai, Tr. at 174-76 (Zabihian). These are objective facts that directly contradict HMA's assertions. Not only that, they show a commitment to the consuming public that HMA disdained in order to drive a dealer out of business.

Despite all this, HMA argues that World Car was not "committed" to Hyundai because it did not participate in Hyundai's service loaner program. World Car did not participate in that program because (1) it did not have sufficient inventory to devote to "true" service loaners, and (2) HMA's service loaner program deceives the public by prematurely starting the customer's warranty on a vehicle. Tr. at 376-83 (Zabihian); *id.* at 534-35 (Willis); PTX 118, McLean Dep. at 34-35, 61-63. World Car refused to participate in a program that effectively cheated

customers out of a portion of the warranty advertised by HMA. *See* Tr. at 531-35 (Willis); *id.* at 1067-70 (Hetrick); PTX 60.

D. World Car Hyundai could not have reported sales any faster because it did not want to engage in fraud or cheat customers out of warranty.

HMA contends that World Car Hyundai did not report its sales fast enough and that this negatively affected its inventory levels. Reply, at 16. However, World Car Hyundai could not have reported sales any faster unless it falsely or prematurely reported sales. Tr. at 366-370 (Kiolbassa); *id.* at 523-26, 585-86 (Willis); *see also* PTX 2. World Car declined to do this because that would be a violation of HMA's Rules and Regulations and it would also cheat the customer out of a portion of the warranty. Tr. at 105, 108 (Zabihian); *id.* at 1074-75 (Hetrick).

Although HMA rationalizes that a customer "presumably" would get a price discount on a vehicle that was prematurely reported as sold, HMA has no policy and does nothing to ensure that the dealership even discloses to the customer that a prematurely-reported vehicle has less than a full 10-year warranty remaining. Tr. at 1074-75 (Hetrick); PTX 120, Zuchowski Dep. at 217-18, 222. In sum, HMA is aware that its own system for reporting sales and allocating inventory allows dealerships to start the warranty clock prematurely, and knows that dealerships are doing this, but yet HMA does nothing about that. This shows a disturbing indifference not only to dealerships, but to the ultimate consumers. The PFD would reward HMA for this deceptive conduct.

Moreover, HMA's arguments about the speed of sales reporting are irrelevant because, as HMA has conceded, it does not matter whether a vehicle is reported sold one day or ten days after the sales contract is executed as long as it is reported before an allocation event. *See* PTX 117, Hetrick Dep., at 127. World Car Hyundai completes an RDR as soon the sale is final and completed with all elements required by HMA's policies, including a <u>completed</u> finance

contract. Tr. at 366-370 (Kiolbassa); *id.* at 523-26, 585-86 (Willis); *see also* PTX 2. Submitting RDRs any faster than World Car Hyundai does would be reporting a vehicle as sold when the sale is not yet completed. *Id.* World Car was thus penalized by not engaging in these practices.

E. World Car is successful when it has sufficient inventory, but it still needed inventory in 2014 and 2015.

HMA asserts that World Car Hyundai had "all the vehicles it needed" but still did not reach 100% sales efficiency. Not true.

The World Car organization has been successful in selling vehicles, but only when it has them in inventory. *See, e.g.*, Tr. at 444-45 (Kiolbassa) (selling a lot of Kias "out of that same ratty store that Hyundai is complaining about" because "I have the inventory in Kias"); PTX 120, Zuchowski Dep., at 118 (assumed that World Car was doing "very well" as Mazda dealers because "they were supported by the regional manager from Mazda"). As Mr. Zabihian testified:

> Q. And he's complaining that you're outselling Hyundai by 6 to 1 with your Kias.
>
> A. Yes.
>
> Q. Did you suddenly, like, walk to a different showroom and become a bad dealer, be a good Kia dealer and a bad Hyundai dealer?
>
> A. No. No.
>
> Q. What was going on here?
>
> A. Difference of inventory. I've always had inventory with Kia.

Tr. at 193-94 (Zabihian). World Car Hyundai's "close" rate has historically been, on average, between 28 and 32 percent. Tr. at 514-15 (Willis). That means approximately 30 percent of people who show up on the lot at a World Car Hyundai store end up buying a car from World Car Hyundai. *Id.* That is two-thirds higher than the national average "close" rate of 18 percent. *Id.*

From 2006 to 2008, the World Car Hyundai dealerships had similar sales levels (some years better) as Red McCombs Hyundai. PTX 10; *see also* Tr. at 500 (Willis). Of course, World Car Hyundai did not have problems getting inventory during that time frame, which was prior to Hetrick's arrival. Tr. at 501 (Willis); *id.* at 635 (Roesner).

World Car Hyundai has improved its sales efficiency recently, but it still does not have "plenty of inventory" to meet 100%, as HMA asserts. *See* DTX 97 (June 2015 YTD sales efficiency of 78.34% for North); *id.* (June 2015 YTD sales efficiency of 29.76% for South). When asked about inventory from October 2014 going forward, Willis testified that "we've never been in a position where we said we didn't want cars." Tr. at 496-97. And Kiolbassa did not, as HMA asserts, say that World Car South had sufficient inventory to meet 100% sales efficiency, because it did not. *See* PTX 4 (2014's expected registrations were 784); PTX 97 (June 2015's YTD expected registrations were 410). HMA did not allocate 784 vehicles to World Car Hyundai South in 2014 nor did it allocate over 400 vehicles to World Car South in the first six months of 2015—as it did to Red McCombs.

III. Argument and Authorities

HMA's first argument is that the sales efficiency measure has been widely recognized as a valid measurement tool. This is a red herring. World Car does not challenge the concept of sales efficiency in general or using sales efficiency in a vacuum, but rather HMA's use of sales efficiency as applied to World Car.

A. The ALJ misapplied the legal test for Section 2301.467(a)(1)—HMA unreasonably required World Car to sell more cars than it was allocated.

1. HMA required 100% sales efficiency.

HMA insists that there is no requirement of 100% sales efficiency because the dealer sales and service agreement does not contain the magic words "dealer is required to achieve

100% sales efficiency." Reply at 28-30. According to HMA, the ALJ limited the inquiry to whether the dealer sales and service agreement contains such a requirement "only because of WC's allegations." Reply, at 39. HMA is wrong on both accounts. Its position ignores the definition of franchise under Texas law and the actual language used in HMA's communications to World Car Hyundai where it alleged "material breach."

First, Texas law defines "franchise" to include "a written communication from a franchisor to a franchisee in which a duty is imposed on the franchisee, under which . . . any right, duty, or obligation granted or imposed by this chapter is affected." Tex. Occ. Code § 2301.002(15). Thus, a franchise agreement is broader than the dealer sales and service agreement. It includes Hetrick's letter to World Car claiming "material breach" of the dealer agreement because that letter imposed a duty on World Car to sell a specific number of vehicles for a specific time period in order to meet its sales performance obligations—or face the real prospect of termination. PTX 67.

Second, Hetrick's "material breach" letter shows that HMA required adherence to 100% sales efficiency. Hetrick told World Car Hyundai that the dealership had not met its obligation to "effectively promote and sell Hyundai products," specifically because of its "sales efficiency." *Id.* Hetrick specified the sales efficiency obligation by stating that "through April of this year, your dealership <u>should have sold</u> 282 Hyundai vehicles." *Id.* (emphasis added). In other words, World Car needed to sell 282 Hyundai vehicles during that time period to be 100% sales efficient and comply with its sales obligations to HMA. Because World Car did not, Hetrick said that World Car Hyundai was in "material breach" of the dealer agreement for failing to comply with its sales obligations. *Id.*

Third, the testimony of witnesses for both sides shows that HMA required 100% sales efficiency to avoid being in material breach of the franchise. Art Kiolbassa, World Car's Vice President, testified:

> Q. [D]o you know about a letter that was sent by Mr. Hetrick to World Car that said your sales efficiency numbers were so bad that it was a violation of the agreement -- of the franchise agreement?
>
> A. Yes.
>
> Q. Are you aware of that? That's a pretty serious allegation, isn't it?
>
> A. Yes.
>
> Q. Isn't it true, if you know, isn't it true that that can be grounds for terminating a dealer, violation of the dealer service agreement, right?
>
> A. Yes, sir.

Tr. at 437 (emphasis added); *see also* Tr. at 547-48 (Willis) (testifying that HMA managers spoke with World Car about not meeting 100% sales efficiency every month during relevant time period). Hetrick also testified:

> Q. [S]ales efficiency is right there in the column for a dealer?
>
> A. Yes, it is.
>
> Q. Every year --
>
> A. Yes.
>
> Q. -- you-all look at that, and you talk about it?
>
> A. Yes, we do.
>
> Q. You talk about it with every dealer?
>
> A. Yes.
>
> Q. Okay. And you use it for a metric as to whether they're abiding by their contractual obligations?
>
> A. Yes, we do.

Tr. at 1013 (emphasis added).

Based on all of the above, it is indisputable that HMA focuses on sales efficiency as the metric for sales performance under the franchise and that HMA claims material breach when a dealership's sales efficiency is below 100%. The magic words "dealer must be 100% sales efficient" are not required, as HMA claims. Nor is World Car Hyundai supposed to have its franchise terminated in order for 100% sales efficiency to be a requirement. The facts and evidence show that World Car Hyundai was required to meet 100% sales efficiency in order to avoid being considered in material breach of the franchise agreement. HMA required adherence to this sales standard.

2. HMA's requirement was unreasonable.

It is undisputed that to be considered 100% sales efficient in each year from 2010 through 2013, World Car Hyundai had to sell more cars than it was allocated by HMA. *Compare* PTX 3-4 *with* PTX 81; *see also* Tr. at 544 (Willis); *id.* at 423-25 (Kiolbassa). That is the very definition of unreasonable. HMA, however, argues that the number of vehicles that were allocated to World Car was entirely within World Car's control, so any failure to achieve 100% sales efficiency was World Car's fault. Reply, at 22-23. Not so.

Just like Red McCombs in mid-2010, World Car did not have the "critical mass" of inventory required to attract customers, grow sales, and build inventory. Tr. at 80-81 (Zabihian); Tr. at 1046-47 (Hetrick); *id.* at 643 (Roesner); PTX 18; DTX 175; DTX 181; DTX 188. Notwithstanding a supposed lack of supply of Hyundai inventory, Hetrick provided the Red McCombs dealerships with plenty of extra inventory that allowed Red McCombs to meet 100% sales efficiency, but he did not for World Car. *See* PTX 126; *see also* PTX 109-110; Tr. at 1102 (Hetrick). When World Car Hyundai continually requested to buy more inventory from HMA, Hetrick repeatedly ignored or rejected the requests. *See, e.g.*, Tr. at 360 (Zabihian); *id.* at 950 (Hetrick). HMA knew that World Car Hyundai did not have sufficient inventory to reach 100%

sales efficiency during 2010 through 2013, and HMA knew that the Toyota challenge continually raised the bar for World Car Hyundai South's sales efficiency. PTX 53; Tr. at 489-95 (Willis); Tr. at 997-98 (Hetrick). HMA's district manager even told World Car Hyundai that the expected sales levels were "unrealistic." Tr. at 425 (Kiolbassa). However, HMA never allocated more cars so that World Car could meet the required standard. Tr. at 426, 442 (Kiolbassa). Hetrick conceded that he could have allocated more vehicles to World Car Hyundai but did not do so because he did not have an interest in helping it "break the cycle" in order improve its sales efficiency during 2010-2013. *See, e.g.*, Tr. at 1079, 1101-02 (Hetrick).

Based on HMA's knowledge of World Car's inventory situation and the Toyota challenge, it was unreasonable for HMA not to sell World Car at least enough vehicles to meet 100% sales efficiency (if it sold all of its inventory) while at the same time requiring adherence to 100% sales efficiency.

B. The ALJ misapplied the legal test for Section 2301.468—HMA unreasonably discriminated against World Car in allocations of inventory to the San Antonio market.

1. World Car Hyundai pleaded a claim for unreasonable discrimination.

HMA first contends that World Car "never pleaded a claim for 'unreasonable discrimination.'" Reply, at 6. This argument is frivolous. World Car Hyundai pleaded violations of Section 2301.468 of the Occupations Code and provided fair notice to HMA of the violations.[3]

Texas follows a "fair notice" standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896-87

[3] The ALJ used the 2003 version of the statute to analyze World Car's claims, and HMA did not file any exceptions to the PFD on that basis.

(Tex. 2000) (holding that trial court correctly applied previous version of statute even though pleading referred to inapplicable current version of statute that had been amended). "A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense." *Roark v. Allen,* 633 S.W.2d 804, 810 (Tex. 1982).

Here, World Car Hyundai pleaded (and proved) sufficient facts to give adequate and fair notice to HMA of its claim that HMA violated Section 2301.468 through disparate and discriminatory allocations of inventory as compared to other Hyundai dealerships. *See, e.g.*, 2nd Am. Compl. at ¶ 8 ("HMA discriminated against World Car Hyundai by consistently providing more than sufficient inventory to similar Hyundai dealerships."); *id.* at ¶ 11 ("There is no reason for the disparate treatment in inventory."); *id.* at ¶ 13 ("HMA's disparate treatment of World Car Hyundai was compounded . . . ."); *id.* at pgs. 11-12 (HMA violated Section 2301.468 by "providing World Car Hyundai with much less inventory than World Car Hyundai needed and much less inventory than HMA provided to other Hyundai dealers in the competitive market area."). The entire thrust of the facts pleaded in the Second Amended Complaint is that HMA treated World Car Hyundai differently from other Hyundai dealerships (especially Red McCombs) by giving those dealerships additional allocations or other benefits and not giving them to World Car Hyundai, without a legitimate basis. *See generally* 2nd Am. Complaint. World Car Hyundai satisfied the fair notice pleading standard for a violation of Occupations Code Section 2301.468 (2003) and HMA had fair notice.[4]

[4] In addition, HMA did not specially except to World Car Hyundai's pleading of Section 2301.468. When a party fails to specially except, the pleadings must be construed liberally in favor of the pleader. *See Boyles v. Kerr,* 855 S.W.2d 593, 601 (Tex. 1993).

2. The discrimination happened "in the sale of a motor vehicle" because every allocation at issue was a sale of a motor vehicle.

HMA next argues that it did not violate Section 2301.468 because the discrimination between World Car and Red McCombs did not happen "in the sale of a motor vehicle." According to HMA, "[a]llocating vehicles and selling vehicles are not the same thing." Reply, at 46. These arguments are frivolous. Every time a vehicle is allocated to a dealership and that allocation is accepted, HMA sells the vehicle to the dealership. *See, e.g.*, Tr. at 73, 173-76 (Zabihian). Thus, every accepted allocation is a sale of a motor vehicle.

World Car Hyundai does not challenge unaccepted offers of inventory that were never sold to a dealership. This case is about the number of vehicles that World Car Hyundai was able to purchase from HMA as compared to the number of vehicles that other Hyundai dealerships were able to purchase from HMA, especially Red McCombs. Those vehicles were actually sold by HMA and actually purchased by dealerships. In this case, all of the allocations that World Car Hyundai challenges as unreasonably discriminatory were in fact sales of vehicles by HMA to Hyundai dealerships.

3. HMA's discrimination in allocating inventory was irrational and unfair, and disserves the public.

Next, HMA proposes that the "discrimination" prohibited by Occupations Code Section 2301.468 must be "arbitrary, capricious, without substantial cause or reason, or lacking a legitimate business justification." Using that proposed definition of "unreasonable" in this case is not supported by Texas law.

The ALJs in *Star Motor Cars v. Mercedes Benz USA, LLC* adopted the definition of "unreasonable" as proposed by counsel for Mercedes Benz, who cited as support *Mitchell's Inc. v. Nelms*, 454 S.W.2d 809, 813-14 (Tex. App.—Dallas 1970, writ ref'd n.r.e.) and *Burlington Northern & Santa Fe Ry. Co. v. South Plains Switching, Ltd. Co.*, 174 S.W.3d 349, 352-54 (Tex.

App.—Fort Worth 2005, no writ). Counsel for Mercedes Benz was mistaken. Neither of those cases used or adopted HMA's (or Mercedes Benz's) proposed definition of "unreasonable." Neither of those cases involved the Occupations Code. In fact, *Burlington* recognized that "no legal definition of 'unreasonable' has been adopted or approved by Texas courts," including the *Mitchell's* court. 174 S.W.3d at 354; *see also B.M.B. Corp. v. McMahan's Valley Stores*, 869 F.2d 865, 868 (5th Cir. 1989) (discussing *Mitchell's*).

"Unreasonableness is relative, and every case must be judged on its own particular facts." *Burlington*, 174 S.W.3d at 353. Because no legal definition of "unreasonable" has been adopted by Texas courts, the finder of fact must be "free to consider the ordinary meaning of [unreasonable] in light of the evidence presented." *Id.* at 354 (holding that trial court properly refused to instruct jury with legal definition of unreasonable).

As set forth in World Car Hyundai's Exceptions, the proper standard, which the ALJ should have applied to the facts, is the ordinary meaning of unreasonable—whether HMA's discrimination was not guided by reason, irrational, or beyond the limits of acceptability or fairness. *See* Exceptions, at 5-6.

4. The "reasons" that HMA now uses to justify the discrimination are after-the-fact excuses not supported by the record.

HMA's discriminatory inventory allocation to the San Antonio Hyundai dealerships was unreasonable—it was both irrational and unfair to provide Red McCombs with triple the discretionary allocations as were provided to World Car Hyundai, when there were no material differences between the dealerships.[5] This discrimination hurt competition and the consuming

[5] Even if the appropriate definition of "unreasonable" in Section 2301.468 "arbitrary and capricious," HMA's discrimination met that standard. It was arbitrary for Hetrick to provide over 6 ½ times as many discretionary allocations to Red McCombs as he did to World Car Hyundai during his first six months on the job. The justification that was documented at the time—giving Red McCombs additional cars as a boost to help Red McCombs meet its sales

public by creating disproportionate Hyundai inventory in San Antonio, concentrating the available selection of Hyundai vehicles at fewer stores thus creating less competition on price.

HMA claims that there were "legitimate reasons" for the disproportionate allocations, but all of these "reasons" are pretextual excuses that were not documented contemporaneously but surfaced for the first time during the hearing.

There was not one scrap of documentation showing that Hetrick gave Red McCombs between three and seven times as much discretionary allocation as he did to World Car because of (1) the Equus line, (2) the service loaner program, or (3) being exclusive. HMA did not provide any policy, memo, or email that showed Hetrick was providing these extra allocations to Red McCombs because it added Equus, participated in the service loaner program, or became exclusive. The documents created at the time of the allocations showed that Hetrick was providing Red McCombs with boosts in inventory to help the dealership meet its sales goals. PTX 18; PTX 21. Hetrick's oral explanations for his discriminatory treatment first appeared during the hearing and were contradicted by the documentary evidence. The ALJ improperly speculated that if World Car Hyundai had also added the Equus line, participated in the service loaner program, or became exclusive (at South store) then World Car Hyundai would have received more allocations as well. There was no basis for that speculation.

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goals—would have applied equally to World Car Hyundai because both Red McCombs and World Car (1) were underperforming according to HMA, (2) had similar levels of inventory, and (3) were asking for more inventory. World Car Hyundai was in need of a "boost in inventory" just like Red McCombs, but Hetrick did not provide one at any time between 2010 and 2013. It was arbitrary and without substantial cause for Hetrick to continue to provide Red McCombs with over three times as many discretionary allocations as World Car when World Car did not even have enough inventory to meet 100% sales efficiency, was continually asking to buy more inventory, and had demonstrated a history of success when it was provided sufficient inventory. Regardless of the definition used, HMA unreasonably discriminated against World Car Hyundai.

HMA also argues that the discretionary allocations by Hetrick were fair because the *percentages* were "similar." Reply, at 14-15. These percentages are misleading and not an appropriate measuring stick, however, because they are based on denominators created by prior discriminatory allocations. The dealerships did not have similar-sized inventories in 2011-2013 due to the boosts in inventory that Hetrick provided to Red McCombs in 2010 that allowed Red McCombs to nearly double its inventory in the second half of 2010 and beyond. *See* PTX 18, 21. As Hetrick testified:

> Q. So if somebody is already doing really well and you're just doing it on percentages, the rich are going to get richer, right?
>
> A. Sometimes, yes.
>
> Q. Well, of course. If they're selling 1,000 cars a year and somebody is selling 400 a year and you say you're doing the same ratio, the other guys will get two and a half times as much allocation?
>
> A. Yes.
>
> Q. Even the extra allocation that you have the discretion to use, right?
>
> A. Yes.
>
> Q. To break the cycle?
>
> A. Yes.

Tr. at 1102. Thus, even though Hetrick acknowledged that World Car Hyundai most needed to "break the cycle" in 2010-2013, he provided Red McCombs with at least 3 times as many discretionary allocations as World Car Hyundai during 2010-2012. HMA's disparate allocations to the Hyundai dealerships in San Antonio were unreasonable and unfair.

C. The ALJ misapplied the legal test for Section 2301.478—HMA did not meet its duty of good faith and fair dealing.

1. The Code requires good faith and fair dealing—it does not merely prohibit bad faith.

HMA first argues that the question of whether HMA violated its statutory duty of good faith and fair dealing should be decided by whether World Car Hyundai proved that HMA acted in bad faith. That is wrong. Occupations Code Section 2301.478(b) does not prohibit "bad faith" practices, it requires "good faith and fair dealing." While a showing of "bad faith" would certainly demonstrate a lack of "good faith and fair dealing," it is merely a subset. The definition of "bad faith" that HMA proposes, which was used in the context of Rule 13 sanctions and the Deceptive Trade Practices Act ("DTPA"), does not apply to whether a party to a franchise agreement complied with its statutory duty of good faith and fair dealing.

HMA's reliance on *Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777 (Tex. App.—Austin 2012, no pet.) is misplaced. The *Tejas Toyota* court did not rule on the propriety of using a "bad faith" standard to define the duty of "good faith and fair dealing." As such, the Board is not bound by *Tejas Toyota* to determine the appropriate standard here.

Regardless, the ALJ's proposal for decision in *Tejas Toyota* was legally flawed. That ALJ relied on *Campos v. Ysleta Gen. Hosp.*, 879 S.W.2d 67 (Tex. App.—El Paso 1994, writ denied) to propose that the statutory duty of good faith and fair dealing should be defined in terms of bad faith. *Campos* was a case involving Rule 13 sanctions for filing a lawsuit in bad faith. *See* Tex. R. Civ. P. 13. The court in *Campos* defined "bad faith" in the Rule 13 context as "the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose," citing *Elbaor v. Sanderson*, 817 S.W.2d 826, 829 (Tex. App.—Fort Worth 1991, no writ) for that definition. *Campos*, 879 S.W.2d at 71. *Elbaor* was a case filed under the DTPA, which also explicitly prohibits bringing an action "in bad faith." 817 S.W.2d at 829 (citing Tex. Bus. &

Com. Code § 17.50(c)). *Campos* and *Elbaor* do not provide any support for applying the "bad faith" standard to Section 2301.478(b) (which expressly requires "good faith") because the rule and statute involved in those two cases actually used the express term "bad faith."

The statute in this case uses the words "good faith and fair dealing." Tex. Occ. Code § 2301.478(b). Those are the words that must define the duty—not "bad faith." If the Legislature wanted to create a more limited duty by prohibiting only "bad faith" conduct under a franchise agreement, and thus requiring proof of bad faith, it could have drafted Section 2301.478(b) using the words "bad faith," as it has in other statutes where a showing of bad faith is required. *See, e.g.*, Tex. Bus. & Com. Code § 17.952 (bad faith claim of patent infringement); Tex. Ins. Code § 1467.101 (bad faith mediation); Tex. Prop. Code § 92.204 (bad faith disclosure of incorrect information); Tex. Labor Code § 61.053 (bad faith withholding of wages). The Legislature did not. The Board should use the plain meaning of the actual words used in the statute.[6]

2. HMA did not act fairly or in good faith with World Car Hyundai.

HMA argues that the "sole discretion" standard in the dealer agreement means that HMA did not do anything wrong in allocating vehicles. HMA is wrong on the law and the facts.

First, the "sole discretion" standard in the dealer agreement cannot trump the law of the State of Texas. One purpose of the Occupations Code, including Section 2301.478(b), is to prevent "fraud, unfair practices, discrimination, impositions, or other abuse of the people of this

[6] The Board can also look to the closest analogue, the duty of good faith and fair dealing in commercial agreements under the U.C.C. *See* Tex. Bus. & Com. Code § 1.304 ("Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement."); *Merrill Lynch, Pierce, Fenner & Smith, P.C. v. Greystone Servicing Corp.*, Inc., 3:06-CV-0575-P, 2007 WL 2729935, at *13-14 (N.D. Tex. Sept. 18, 2007) ("[T]he parties to the Loan Agreement were bound to perform their obligations thereunder in good faith."); *Brookside Farms v. Mama Rizzo's, Inc.*, 873 F. Supp. 1029, 1034 (S.D. Tex. 1995) ("[S]tandard of good faith performance requires honesty in fact and observance of reasonable commercial standards of fair dealing in the trade.").

state." Tex. Occ. Code § 2301.001(2). That is why the Texas Legislature chose to expressly impose a statutory duty of "good faith and fair dealing" on the parties to a franchise (a duty that is not present in every contractual relationship). Thus, the Occupations Code requires good faith and fair dealing and makes the Board the ultimate arbiter of what constitutes good faith and fair dealing—not HMA acting in its "sole discretion." *See Jankowiak v. Allstate Prop. & Cas. Ins. Co.*, 201 S.W.3d 200, 205 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("[Contract] provisions that are inconsistent with express statutory requirements or purposes are invalid.").

Second, HMA's allocations were disproportionate and discriminatory. Given World Car Hyundai's repeated requests to buy more inventory and HMA's continual choices to reject those requests and allocate the inventory to World Car's competitor instead, HMA did not comply with its duty to act fairly and in good faith to World Car Hyundai.

Citing *Tejas Toyota*, HMA also argues that requiring 100% sales efficiency, given World Car Hyundai's inventory levels and HMA's choice not to provide it with substantial discretionary allocations, was not a breach of its duty to act fairly and in good faith. Reply, at 50. But *Tejas Toyota* did <u>not</u> involve a determination whether "a requirement of 100% sales efficiency violated § 2301.478(b)." *See* HMA Brief, at 58. Instead, the issue in *Tejas Toyota* was whether by <u>proposing</u> a franchise agreement that contained certain sales performance requirements, the distributor violated the statutory duty of good faith and fair dealing. 363 S.W.3d at 786. *Tejas Toyota* provides no support for the notion that HMA's sales efficiency requirements for World Car Hyundai were reasonable, or that HMA acted fairly and in good faith.

HMA violated its duty of good faith and fair dealing by continuing to use the same sales efficiency standards for World Car Hyundai while at the same time refusing to help World Car

"break the cycle" through additional discretionary allocations of inventory. *See* Exceptions, at 24-25, 31. The ALJ's failure to find that is a legal error.

IV. Conclusion

The ALJ misapplied the legal tests of "unreasonable sales standards," "unreasonable discrimination," and "good faith and fair dealing." From 2010 through 2013, HMA required World Car Hyundai to sell more vehicles than it received from HMA in order to be considered 100% sales efficient and not in breach of the franchise agreement. That was unreasonable. What made this unreasonable requirement even more egregious is that, notwithstanding the purported lack of supply, HMA in fact had the vehicles and could have supplied enough inventory to World Car Hyundai so that it had the chance to be 100% sales efficient by selling that inventory. That was unfair. HMA chose not to sell those vehicles to World Car Hyundai but instead decided to favor World Car Hyundai's closest competitor, Red McCombs Hyundai, through significant and lopsided discretionary allocations to Red McCombs between 2010 and 2013. That was discrimination.

If the PFD is accepted without modification, it will give manufacturers and distributors free rein to treat dealers unreasonably and unfairly in allocation and sales efficiency because there will be no floor, no minimum baseline of fairness that all manufacturers and distributors have to meet in order to comply with Texas law. Accordingly, the Board should reject the PFD. A proposed Final Order is attached for the Board's consideration.

Respectfully submitted,

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ATTORNEYS FOR COMPLAINANTS

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of May, 2016, a true and correct copy of the above and foregoing instrument has been served via email on all counsel of record.

/s/ Jarod R. Stewart
Jarod R. Stewart

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC., d/b/a WORLD CAR HYUNDAI, and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., d/b/a WORLD CAR HYUNDAI	§	
Complainants,	§	
v.	§	**SOAH DOCKET NO. 608-14-1208 LIC**
	§	**MVD DOCKET NO. 14-0006 LIC**
HYUNDAI MOTOR AMERICA, Respondent.	§	

FINAL ORDER

The above-referenced matter is before the Board of the Texas Department of Motor Vehicles (Board) in the form of a Proposal for Decision (PFD) from the State of Office of Administrative Hearings (SOAH).

Overview

This case involves a complaint filed by New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports, San Antonio Inc. d/b/a World Car Hyundai (collectively "World Car") against the United States distributor of Hyundai vehicles, Hyundai Motor America (HMA). World Car alleges that HMA violated Texas Occupations Code: (i) Section 2301.467(a)(1) by requiring adherence to unreasonable sales standards, (ii) Section 2301.468 by engaging in unreasonable discrimination, and (iii) Section 2301.478(b) by not acting fairly or in good faith.

Issues Presented

The issue before the Board is whether World Car has shown that HMA required adherence to unreasonable sales standards, unreasonably discriminated against World Car, and failed to comply with its duty of good faith and fair dealing.

Summary of Board's Decision

On March 10, 2016, an administrative law judge (ALJ) at SOAH issued a PFD in this matter. The Board considered the PFD during an open meeting held on _____, 2016. Based on a review of the PFD, the parties' exceptions and replies, and oral argument, the Board concludes that the ALJ misinterpreted and misapplied applicable law in the following ways:

1. The ALJ incorrectly assumed that Section 2301.467(a)(1) of the Texas Occupations Code limits the required adherence to a sales standard that is expressly stated in a dealer agreement.

2. The ALJ improperly applied the concept of unreasonable discrimination because HMA gave nearly three times the amount of discretionary allocations to World Car's closest competitor, even though the dealerships were similarly situated and all wanted more inventory.

3. The ALJ misapplied the statutory duty of good faith and fair dealing because HMA did not act fairly or in good faith in allocating inventory to World Car or in requiring World Car to meet 100% sales efficiency.

The ALJ's misapplication and misinterpretation of the applicable law so flawed her decision that the Board finds it cannot accept the ALJ's proposal for decision. The Board finds that World Car met its burden to show that HMA required adherence to unreasonable sales standards, unreasonably discriminated against World Car, and failed to comply with its duty of good faith and fair dealing.

Specific Reasons & Legal Bases for Changes to Findings of Fact and Conclusions of Law

- **Finding of Fact Numbers 20 and 21** are rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. Central to whether HMA's different treatment of World Car versus Red McCombs constitutes unreasonable discrimination in violation of Occupations Code Section 2301.468(2) is whether the dealerships were similarly-situated when the different treatment began. The ALJ improperly disregarded and failed to mention in the PFD the undisputed facts that Red McCombs closed an entire dealership in 2009, turned down more allocations than World Car did during the first six months of 2010, and had a similar level of inventory as World Car in mid-2010. By ignoring these facts, the ALJ misinterpreted and misapplied the concept of unreasonable discrimination because the ALJ did not consider that the dealerships were similarly-situated when the different treatment began.

- **Finding of Fact Number 27** is rejected under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. The inquiry under Occupations Code Section 2301.468(2) is whether HMA unreasonably discriminated against World Car. Whether World Car "chose to participate" in the "programs" mentioned by the ALJ would not excuse HMA's discriminatory treatment and is therefore irrelevant. Moreover, the ALJ improperly speculated about the inventory that World Car might have received if it had participated in the "programs" mentioned by the ALJ. The ALJ's misapplication and misinterpretation of the test for "unreasonable discrimination" led to the ALJ's misplaced emphasis on possible inventory that World Car "might have" received rather than properly focusing on HMA's allocations to World Car as compared to Red McCombs.

- **Finding of Fact Number 30** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law, i.e. the statutory concept of "unreasonable discrimination." HMA's discretionary inventory allocations to World Car as compared to Red McCombs between 2010 and 2013 were not rational, sensible, acceptable, or fair.

- **Finding of Fact Number 50** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. The ALJ improperly assumed that Occupations Code Section 2301.467(a)(1) is limited to unreasonable sales standards that are expressly stated in the dealer agreement. This statute is not so limited but rather prohibits a manufacturer or distributor from requiring adherence to any unreasonable sales standard wherever and however it is imposed. HMA "required adherence" to 100% sales efficiency as contemplated by Section 2301.467(a)(1) because the consequence for non-compliance was to be in "material breach" of the franchise and risk losing the dealership franchise.

- **Finding of Fact Number 52** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. As seen in the Board's change to Finding of Fact Number 50 above, World Car's complaint is not that "measuring sales efficiency" was unreasonable, but rather that requiring 100% sales efficiency was unreasonable. This requirement was unreasonable because HMA knew that World Car did not have sufficient inventory to meet 100% sales efficiency and HMA ignored or rejected World Car's repeated requests to buy more inventory so that it could achieve 100% sales efficiency.

- **Finding of Fact Number 53** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. The ALJ did not properly apply the concepts of fairness and good faith. HMA's discretionary inventory allocations to Red McCombs were nearly triple the amount provided to World Car, which was unfair based on the circumstances, i.e. similarly-situated dealerships all asking for more inventory. It was also unfair for HMA to know that World Car did not have enough inventory to meet 100% sales efficiency, to turn down World Car's requests for more inventory so that it could achieve 100% sales efficiency, and then tell World Car that it was in breach of the franchise for not meeting 100% sales efficiency.

- **Conclusion of Law Number 6** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. Based on the Board's adoption of Finding of Fact Numbers 50A and 52A, the Board finds that World Car met its burden to show HMA violated Occupations Code Section 2301.467(a)(1) by requiring adherence to an unreasonable sales standard.

- **Conclusion of Law Number 8** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable

law. Based on the Board's adoption of Finding of Fact Numbers 20A and 30A, the Board finds that World Car met its burden to show HMA violated Occupations Code Section 2301.468(2) by unreasonably discriminating against World Car.

- **Conclusion of Law Number 9** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. Based on the Board's adoption of Finding of Fact Number 53A, the Board finds that World Car met its burden to show HMA violated Occupations Code Section 2301.478(b) by not acting fairly or in good faith with World Car.

Having considered the evidence, the arguments, and the findings of fact and conclusions of law presented in the PFD, the Board enters these findings of fact and conclusions of law. The ALJ's Findings of Fact 20, 21, 27, 30, 50, 52, and 53 and Conclusions of Law 6, 8, and 9 are rejected. The ALJ's Findings of Fact 1-19, 22-26, 28, 29, 31-49, and 51 and Conclusions of Law 1-5, and 7 are adopted.

FINDINGS OF FACT

1. New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports, San Antonio, Inc., d/b/a World Car Hyundai (together, World Car) are licensed, franchised dealers for Hyundai products and services.

2. Hyundai Motor America (Hyundai) is the wholesale distributor for Hyundai products and services in the United States.

3. On December 6, 2013, the Texas Department of Motor Vehicles (Department) issued a Notice of Hearing advising that World Car had filed a formal complaint with the Department.

4. The hearing on the merits convened on September 21, 2015, and concluded on September 25, 2015. The record closed on January 11, 2016, following the submission of written closing briefs and an agreed record.

Background

5. Ahmad Zabihian owns World Car in San Antonio, Texas. World Car owns two Hyundai dealerships in San Antonio.

6. World Car's primary Hyundai competitor is Red McCombs Hyundai. Red McCombs owns two Hyundai dealerships in San Antonio-Red McCombs Superior and Red McCombs Northwest.

7. Prior to the 2008 recession, World Car North and Red McCombs Superior performed at approximately equal levels in terms of the number of vehicles sold. World Car South performed less well. It is in a lower-income area than World Car North. Red McCombs Northwest did not perform as well prior to the 2008 recession, but improved its sales during 2008-2009.

8. Hyundai's allocation consists of formula allocations, discretionary allocations, and manual allocations.

9. Formula allocations make up approximately 85% of the vehicles allocated and are allocated through a formula and computer program.

10. Under the allocation algorithm, vehicles are offered to dealers based on each dealer's inventory and the average number of vehicles sold by the dealer in the previous 90 days. The system allocates vehicles, one at a time, to the dealer in the region with the lowest days' supply for each respective model.

11. Discretionary allocations are made by Hyundai's regional general manager, who may distribute up to 15%.

12. Manual allocations include turn downs, which are vehicles allocated to a dealer under the formula that the dealer rejects, which are then made available to other dealers in the region, and vehicles that have been re-customized or modified.

13. Sales efficiency is a metric that Hyundai uses to measure dealer sales performance.

14. Sales efficiency compares a dealer's total sales to sales the brand expects to achieve in the dealer's primary market area. Hyundai calculates expected sales by applying Hyundai's national average sales penetration in each vehicle segment in which Hyundai competes to the actual number of vehicles registered in that segment in the dealer's primary market area.

15. Hyundai's Co-Op Advertising Commitment Program (Co-Op) provides funds (Co-Op advertising funds) to dealers to assist with advertising. The funds do not pay for the total cost of advertisements the dealer purchases, but provide partial reimbursements.

16. Eligibility for Co-Op advertising funds and the amount of reimbursement are determined by a formula that considers sales and customer services scores. Regional general managers also have some discretionary funds they can provide to dealers.

17. In 2009, Hyundai's regional general manager responsible for the San Antonio region was Tom Hetrick, who replaced a different regional general manager that year.

Discrimination and gauging the performance of a dealership

Discretionary allocation

18. In 2009, during the first six months of Mr. Hetrick's tenure as regional general manager, he provided 134 cars through discretionary allocation to Red McCombs and 20 to World Car.

19. The differences in discretionary allocation between Red McCombs and World Car continued through 2013.

~~20. In 2009 and 2010, World Car voluntarily reduced its inventory.~~

20A. In 2009 and 2010, World Car and Red McCombs voluntarily reduced their inventories, and in mid-2010 their inventories were at similar levels.

~~21. Red McCombs dealerships maintained their high inventory levels during the 2008-2010 recession.~~

22. In 2010, Red McCombs Superior became an exclusive Hyundai dealership.

23. World Car South shares a dealership with the Kia brand.

24. Red McCombs Northwest added the luxury Equus line that required a facility upgrade and then renovated the store.

25. Red McCombs Superior renovated its dealership in 2011-2012.

26. Red McCombs participated in Hyundai's service loaner program.

~~27. World Car chose not to participate in the available programs provided by Hyundai that could have increased the allocation available to World Car.~~

28. World Car did not remove a dealership until 2014, when it renovated World Car North.

29. World Car did not participate in Hyundai's service loaner program.

~~30. It was reasonable for Hyundai to reward dealers that participated in Hyundai sponsored programs and renovated their facilities with extra discretionary allocation.~~

30A. It was not reasonable for Hyundai to provide nearly three times as many discretionary allocations to Red McCombs as to World Car between 2010 and 2013.

Gaming the formula allocation system

31. There was nothing improper or illegal about recording a Retail Delivery Report (RDR) for cars that had been spot delivered.

32. Hyundai encouraged World Car to speed up its sales reporting by promptly submitting RDRs once a car was delivered to a customer.

33. There was insufficient evidence to show that Red McCombs gamed the system by entering RDRs and then reversing them at a significantly higher rate than any other Hyundai dealership.

34. The service loaner program allowed dealerships to sell cars into the service loaner program, thereby reducing the inventory available for sale and increasing formula allocation.

35. The service loaner program was available to all Hyundai dealers.

36. World Car chose not to participate in the service loaner program.

37. Red McCombs participated in the service loaner program.

38. There was insufficient evidence to show that Red McCombs gamed the allocation system.

Sales efficiency

39. In 2008, both World Car North and South were over 100% sales efficient. In 2009, the north store dropped to 96.8% and continued to drop over time. In 2014, it was 65.7% sales efficient. The south store fared worse. It dropped to 17.9% sales efficient in 2013 but rebounded in 2014 to 31.2% sales efficient.

40. In 2009, Toyota opened a manufacturing plant and new dealership close to World Car South. The manufacturing plant employs about 6,000 people. Those employees had incentives to purchase Toyota products.

41. From 2010 until 2013, Hyundais were in short supply worldwide, primarily due to the high demand caused by the Japanese tsunami that devastated Japanese manufacturing.

42. Hyundai was aware that some dealers could not achieve 100% sales efficiency with the lower inventory.

43. Hyundai measured sales efficiency in the same manner for all dealers.

Co-Op Advertising Funds

44. Co-Op advertising funds must be used exclusively for advertising.

45. The distribution of Co-Op advertising funds is calculated by a formula that considers several factors including customer sales and service scores. The formula is not intended to gauge the performance of a dealership. It simply calculates how much additional advertising funding a particular dealership will receive.

46. The regional general manager has discretion to award additional Co -Op advertising funds.

47. In 2010, World Car South was not eligible under the formula to receive Co-Op advertising funds. Mr. Hetrick provided the store with $60,000 in Co-Op advertising funds over the third and fourth quarters of that year.

48. The Co-Op program formula is applied in the same manner to all dealers.

49. Co-Op advertising funds are unrelated to the sale of a motor vehicle.

Unreasonable Sales Standards

~~50. Maintaining 100% sales efficiency is not a requirement to be or to remain a licensed Hyundai dealer.~~

50A. Maintaining 100% sales efficiency is a requirement to avoid being in material breach of the franchise agreement with Hyundai

51. World Car stores have not been 100% sales efficient for several years, and both are operating under valid dealer agreement.

~~52. Mearing sales efficiency does not require adherence to unreasonable sales or service standards.~~

52A. Requiring World Car to meet 100% sales efficiency in order to avoid material breach of the franchise agreement was requiring adherence to an unreasonable sales standard because Hyundai was aware that World Car did not have sufficient inventory to meet 100% sales efficiency.

Duty of Good Faith and Fair Dealing

~~53. The allocation system and sales efficiency metric do not treat World Car unfairly.~~

53A. Hyundai's discretionary allocations to the San Antonio market between 2010 and 2013 were unfair, and Hyundai's requirement that World Car meet 100% sales efficiency despite the dealerships' known lack of inventory was also unfair.

CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles has jurisdiction over this case. Tex. Occ. Code § 2301.001.

2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to the contested case hearing in this case, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 2301.704.

3. The hearing was conducted pursuant to the Administrative Procedure Act and SOAH's procedural rules. Tex. Gov't Code ch. 2011 and 1 Tex. Admin. Code ch. 155.

4. Proper and timely notice of the hearing was provided. Tex. Occ. Code § 2301.705.

5. World Car has the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.

6. ~~World Car failed to meet its burden of proof to show that Hyundai required adherence to unreasonable sales or service standards. Tex. Occ. Code § 2301.467(a)(1)(2003).~~

6A. World Car met its burden of proof to show that Hyundai required adherence to unreasonable sales standards. Tex. Occ. Code § 2301.467(a)(1).

7. World Car failed to meet its burden of proof to show that Hyundai discriminated against World Car by treating them differently as a result of a formula or other process intended to gauge the performance of a dealership though allocation of vehicle inventory, sales efficiency calculations, or distribution of discretionary Co-Op advertising funds. Tex. Occ. Code § 2301.468(1) (2003).

8. ~~World Car failed to meet its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory because World Car did not participate in in many of the programs that would have permitted additional discretionary allocation. Texas Occ. Code § 2301.458(2.~~

8A. World Car met its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory between 2010 and 2013 because Hyundai provided disproportionate discretionary allocations of inventory to World Car's nearest competitor in San Antonio that were not justified by any material differences between the dealerships. Tex. Occ. Code § 2301.468(1) (2003).

9. ~~World Car failed to meet it burden of proof to show that Hyundai violated its duty of good faith and fair dealing through allocations and sales efficiency because Hyundai calculated sales efficiency in the same manner for all dealers, World Car chose not to participate in many of the programs that could have led to additional discretionary allocation. Tex. Occ. Code § 2301.478(b).~~

9A. World Car met its burden of proof to show that Hyundai violated its duty of good faith and fair dealing through discretionary allocations and through requiring World Car to meet 100% sales efficiency between 2010 and 2013. Tex. Occ. Code § 2301.478(b).

ACCORDINGLY, IT IS ORDERED:

1. That the findings of fact and conclusions of law in this Order are hereby adopted; and

2. That World Car's complaints under Occupations Code Sections 2301.467(a)(1), 2301.468(2), and 2301.478(b) are hereby upheld.

Dated: _____

_____
Laura Ryan
Chair, Board of Texas Department of Motor Vehicles

ATTESTED:

_____

Upload Date: 20160531134720 Account Number: 10 Upload Description: 14-1208EXCEPTIONSLETTER

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

DATE: **5/31/2016**

NUMBER OF PAGES INCLUDING THIS COVER SHEET: **5**

REGARDING: **EXCEPTIONS LETTER (BY ALJ)**

DOCKET NUMBER: **608-14-1208.LIC**

JUDGE WENDY KL HARVEL

FAX TO:	FAX TO:
DAN DOWNEY (DAN DOWNEY, P.C.)	(512) 477-4470
DAVID M. PRICHARD (PRICHARD, HAWKINS, MCFARLAND & YOUNG, LLP)	(210) 477-7450
KEVIN M. YOUNG (PRICHARD, HAWKINS, MCFARLAND & YOUNG, LLP)	VIA EMAIL
LEE L. KAPLAN	VIA EMAIL
JAROD R. STEWART (SMYSTER KAPLAN & VESELKA, L.L.P)	VIA EMAIL
DOCKET CLERK (TEXAS DEPARTMENT OF MOTOR VEHICLES)	(512) 465-3666

Docket Clerk, Fax Number 512/465-3666
NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT MELISSA ETHRIDGE(met) (512) 475-4993

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State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

May 31, 2016

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

VIA FACSIMILE NO. (512) 465-3666

RE: Docket No. 608-14-1208.LIC; New World Car Nissan, Inc. dba World Car Hyundai and New World Car Imports, San Antonio, Inc. dba World Car Hyundai v. Hyundai Motor America

Dear Mr. Avitia:

On April 8, 2016, World Car Hyundai (World Car) filed exceptions to the Proposal for Decision (PFD). On May 9, 2016, Hyundai Motor America (Hyundai) filed replies to the exceptions. ON May 18, 2016, World Car filed a reply to Hyundai's reply.

I have reviewed the exceptions and replies and do not recommend any changes to the PFD. The arguments presented in the exceptions and replies address the same issues that are discussed in the PFD. Importantly, as noted in the replies, the applicable law in this case is not the 2011 version of Texas Occupations Code § 2301.468, but rather the 2003 version of the statute, because the dealer agreements between Hyundai and World Car were entered into prior to 2011. The facts in the record were analyzed under the 2003 statute.

Sincerely,

Wendy K. L. Harvel
Administrative Law Judge

300 W. 15th Street, Suite 502, Austin, Texas 78701/ P.O. Box 13025, Austin, Texas 78711-3025
512.475.4993 (Main) 512.475.3445 (Docketing) 512.322.2061 (Fax)
www.soah.texas.gov

SOAH Docket No. 608-14-1208.LIC
ALJ's Response to Exceptions
May 31, 2016
Page 2

cc: Dan Downey, Dan Downey, P.C., 1609 Shoal Creek Blvd., Ste. #100, Austin, TX 78701 – **VIA FACSIMILE NO. (512) 569-3400**
Lee L. Kaplan, Jarod R. Stewart, Smyser Kaplan & Veselka, L.L.P., 700 Louisiana, Ste. 2300, Houston, TX 77002 – **VIA FACSIMILE NO. (713) 221-2320**
Kevin M. Young, David Prichard, Prichard Hawkins Young, 10101 Reunion Place, Ste. 600, San Antonio, TX 78216 – **VIA FACSIMILE NO. (210) 477-7450**
Alice Carmona, Docket Clerk, Texas Department of Motor Vehicle, 4000 Jackson Avenue, Austin, TX 78731 (with 1 CD; Certified Evidentiary Record) - **VIA FACSIMILE NO. (512) 465-3666**

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY:	**Motor Vehicles, Texas Department of (TDMV)**
STYLE/CASE:	**NEW WORLD CAR NISSAN, INC. dba WORLD CAR HYUNDAI, WORLD CAR NISSAN AND NEW WORLD CAR IMPORTS SAN ANTONIO, INC.**
SOAH DOCKET NUMBER:	**608-14-1208.LIC**
REFERRING AGENCY CASE:	**14-0006 LIC**

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**ADMINISTRATIVE LAW JUDGE** **ALJ WENDY KL. HARVEL**
REPRESENTATIVE / ADDRESS	**PARTIES**
DAN DOWNEY DAN DOWNEY, P.C. 1609 SHOAL CREEK, #100 AUSTIN, TX 78701 (512) 569-3400 (PH) (512) 477-4470 (FAX) (713) 907-9700 (CELL)	NEW WORLD CAR NISSAN, INC. D/B/A WORLD CAR HYUNDAI
JAROD R. STEWART SMYSTER KAPLAN & VESELKA, L.L.P 700 LOUISAIANA SUITE 2300 HOUSTON, TX 77002 (713) 221-2300 (PH) (713) 221-2320 (FAX) jstewart@skv.com	NEW WORLD CAR NISSAN, INC. D/B/A WORLD CAR HYUNDAI

LEE L. KAPLAN
ATTORNEY
SMYSER KAPLAN & VESELKA, LLP
700 LOUISIANA ST., SUITE 2300
HOUSTON, TX 77002
(713) 221-2323 (PH)
(713) 221-2320 (FAX)
lkaplan@svk.com

NEW WORLD CAR NISSAN, INC. D/B/A WORLD CAR HYUNDAI

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MOTOR VEHICLE DIVISION
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MOTOR VEHICLE DIVISION

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HYUNDAI MOTOR AMERICA

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kyoung@phy-law.com

HYUNDAI MOTOR AMERICA

---

xc: Docket Clerk, State Office of Administrative Hearings
Docket Clerk TDMV, Fax No. 512-465-3666

Melissa Ethridge

From: XMediusFAX@soah.state.tx.us
Sent: Tuesday, May 31, 2016 1:30 PM
To: Melissa Ethridge
Subject: Broadcast Completed: EXC. LET; 608-14-1208
Attachments: 59922F28-2124-41E6-82D1-09CC4EBE55E5-4027-BR.pdf

Time Submitted : Tuesday, May 31, 2016 1:27:36 PM Central Daylight Time
Time Completed : Tuesday, May 31, 2016 1:30:25 PM Central Daylight Time
Nb of Success Items : 3
Nb of Failed Items : 0

Status	Time Sent	Pages Sent	Duration	Remote CSID	Destination	Error Code
Success	Tuesday, May 31, 2016 1:28:47 PM Central Dayli	5	70	5123208906	5124774470	0
Success	Tuesday, May 31, 2016 1:30:07 PM Central Dayli	5	149		12104777450	0
Success	Tuesday, May 31, 2016 1:30:15 PM Central Dayli	5	157	5124654135	5124653666	0

Texas Department *of* Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

DATE: November 3, 2016
Action Requested: APPROVAL

To: Texas Department of Motor Vehicles Board (TxDMV)
From: Jeremiah Kuntz, Director, Vehicles Titles and Registration Division
Agenda Item: 11.1 Adoption of Rule under Title 43, Texas Administrative Code, Chapter 217, Vehicle Titles and Registration, Amendment, §217.9, Bonded Titles

---

RECOMMENDATION

Approval to publish the adoption of the amendment to §217.9, Bonded Titles, in the *Texas Register*.

PURPOSE AND EXECUTIVE SUMMARY

A person who has an interest in a motor vehicle in which the department has refused to issue a title or has suspended or revoked a title under Transportation Code, §501.051, may, under certain conditions, obtain a title to the motor vehicle by filing a bond with the department.

The purpose of this amendment will be accuracy, clarity, and consistency in the department's rules.

FINANCIAL IMPACT

There will be no major fiscal implications related to the adopted amendment.

BACKGROUND AND DISCUSSION

The amendment is to clarify the following:

- The value of the bond will be at an established value of $4,000 if the motor vehicle is 25 years or older and the appraised value is less than $4,000.
- The documentation required to apply for a bonded title must be on a form specified by the department and include proof of the vehicle identification number inspection.

The proposal was published in the *Texas Register* on September 23, 2016. The comment period closed on October 24, 2016. Comments were received from the following:

- Bryan P. Sudan, Tarrant Regional Auto Crimes Task Force
- Joey Canady, Burnet County
- Jeff Parsons, City of Victoria, Texas
- J. E. Sclider, Lieutenant Montgomery County Auto Theft Task Force
- Pete Olivares, City of El Paso, Texas
- Ruben Barrow, Commander, Galveston County Auto Theft Task Force
- Richard Hale, Travis County Sheriff's Combined Auto Theft Task Force
- Stan Davis, City of Mansfield, Texas
- Wynn Reynolds, Texas Department of Public Safety
- Doug Clements, Commander, South Plains Auto Theft Task Force
- David Mitchell, Captain, North Texas Auto Theft Task Force
- Lance Fisher, Sergeant, Harris County Auto Theft Unit
- Brian Johns, Detective, Williamson County Sheriff's Office, CID-Auto Theft
- Tommy Hansen, Lieutenant, Galveston County Sheriff's Office

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

The comments were focused on two areas:

- The Federal Bureau of Investigation (FBI) should be removed as an agency who is authorized to complete vehicle inspections
- Vehicle inspection stations should not be allowed to conduct vehicle identification number inspections.

Staff recommends changes to the proposed rule based on the comments received. Regarding the comments related to qualified individuals from the FBI being able to conduct VIN inspections, staff believes that the issue of adding to the list of eligible organizations that can conduct VIN inspections warrants additional evaluation and study. Staff does not recommend changes to specify which individuals may perform the inspection and recommends leaving the existing language unchanged.

Regarding the conducting of VIN inspections by vehicle inspection stations, the rule change does not allow for vehicle inspection stations to conduct the VIN inspection for department Form VTR-68-A, as these inspections can only be conducted by qualified law enforcement personnel. VIN verification is included in the vehicle safety inspection for out of state vehicles and is conducted by qualified vehicle inspection stations.

If the Board adopts the amended rule during its November 3, 2016 open meeting, staff anticipates:

- publication of the adoption in the November 25, 2016 issue of the *Texas Register;*
- an effective date of December 4, 2016; and
- system implementation by the department immediately thereafter.

From: Bryan P. Sudan
To: Zz - Resource - GCO_Rules
Subject: Adoption of Rule under Title 43, Texas Administrative Code, Chapter 217, Vehicle Titles and Registration, Amendment, §217.9, Bonded Titles
Date: Thursday, October 20, 2016 4:02:25 PM
Attachments: ~~217.pdf~~
~~270 to 302.pdf~~

Sir:
In reference to the issuance of a bonded title, all vehicles without should be required to have a physical inspection by a law enforcement officer specialized in the field of auto theft, referred to as a 68A inspection. The inspection should not rely on the verification by a Texas licensed Safety Inspection Station. Those document can be forged or manipulated. Only a hands on inspection by an authorized investigator can determine the true identity of the vehicle.

Other aspects of the process of obtaining a bonded title are at the discretion of DMV.

Thank you for the opportunity to comment on this Texas Administrative Rule adoption.

Sincerely,

Bryan P. Sudan
Commander
Tarrant Regional Auto Crimes Task Force
2400 Circle Dr. #100
Fort Worth, TX 76119
Office – 817.560.6560 ext. 11
Fax – 817.560.6566
bpsudan@tarrantcounty.com
-

From: Joey Canady
To: Zz - Resource - GCO_Rules
Cc: Wilson, Bryan; Steve Savoy
Subject: Proposed rule change as it relates to bonded titles
Date: Thursday, October 20, 2016 2:37:28 PM

Amendment to 217.9 (d)

Should verification of a VIN number by a licensed Safety Inspection Station be accepted? My concerns are more with vehicles that have identification numbers that do not conform to current standards. Many vehicles that persons seek to obtain a bonded title on are more than 35 years old and have an identification number that does not conform to current standards. The numbers may be less than 17 characters, may not be affixed to the vehicle at a common location, may not be affixed to a vehicle in a location visible or accessible to the safety inspector, and there may be different numbers affixed to or stamped on the vehicle. DMV uses identification plates, or stamped frame numbers depending on the year and make of vehicles. The use of the incorrect number could result in the titling of a vehicle with an incorrect number. Investigators assigned to an auto theft unit either have the knowledge or the resources to contact in determining the correct identification number to utilize and also to determine the validity of the identification numbers located. It's not a question of the knowledge or expertise of a safety inspector, but rather the training or resources available to the inspector as it relates to altered or obliterated numbers.

Thank you

Joey Canady
Burnet County

From: Jeff Parsons
To: Menoskey, Mary
Subject: RE: Bonded Title Rules w. Attachments (See Highlighted)
Date: Thursday, October 20, 2016 10:48:55 AM

I looked it over and I don't see any issues with it that would cause us any problems here in Victoria.

From: Menoskey, Mary [mailto:Mary.Menoskey@txdmv.gov]
Sent: Thursday, October 20, 2016 7:40 AM
To: Wilson, Bryan
Cc: Gonzales, Dominic
Subject: Bonded Title Rules w. Attachments (See Highlighted)

Dear Program Managers and Directors,

Bryan Wilson asked me to send this to you ASAP. As a reminder, you have until Monday to comment on the proposed rules to the location indicated in the posting. The bonded title rules tie to the big case out of Harris in today's webinar. Also the term auto theft unit is included (see highlights on page 4 of 5 of 278 to 282) .

Thanks,

Dominic Gonzales
Grant Coordinator

From: Sclider, Joseph
To: Zz - Resource - GCO_Rules
Cc: jallen@nicb.org; SMorris@nicb.org; flohmann@nicb.org; Menoskey, Mary
Subject: FW: Bonded Title Rules w. Attachments (See Highlighted)
Date: Thursday, October 20, 2016 4:21:53 PM
Attachments: 27[illegible].pdf
279 [illegible].pdf

To: The Office of General Counsel

Dear Sir,

Upon reading the proposed changed to the bonded title bill it reads:

Page 278

Line 20 Amendment to §217.9(d) clarifies that the vehicle identification
Line 21 number inspection can be verified by a Texas licensed Safety
Line 22 Inspection Station or, a member of the National Insurance Crime
Line 23 Bureau, the Federal Bureau of Investigation, or law enforcement

Page 279

Line 1 auto theft unit.

I believe that Safety Inspection Station **should not** be allowed to conduct the VIN inspection for a bonded title. This may lead to inappropriate behavior on the stations part and may cause bonded titles to be issued on vehicles without the VIN being properly vetted.

After the vehicle has had the VIN verified, a safety Inspection is should be required if vehicle is going to be titled and to use on the roadway.

I further sent a copy of the above documents to Sammy Morris and Jerry Allen, Special Agents with NICB and they were in agreement with my interpretation of the wording in this change.

If you would like to discuss this matter further I can be reached at the number listed below. Thank you for your time and consideration of this matter.

Joe Sclider

J.E. Sclider, Lieutenant
Montgomery County Sheriff's Office
Commander Montgomery County Auto Theft Task Force
102 Academy Drive
Conroe, Texas 77355
(936) 760-5847 Office
(936) 760-5877 Fax

From: Menoskey, Mary [mailto:Mary.Menoskey@txdmv.gov]
Sent: Thursday, October 20, 2016 12:15 PM
To: Wilson, Bryan <Bryan.Wilson@txdmv.gov>
Cc: Gonzales, Dominic <Dominic.Gonzales@txdmv.gov>
Subject: FW: Bonded Title Rules w. Attachments (See Highlighted)

This is a follow up to the email you received below. Please send your comments on the proposed amendments to our Office of General Counsel (OGC) at rules@txdmv.gov. The deadline for receipt of comments is 5:00 p.m. on October 24, 2016. If you have already sent in your comments they have been forwarded on to the OGC.

Bryan Wilson asked me to send this to you ASAP. As a reminder, you have until Monday to comment on the proposed rules to the location indicated in the posting. The bonded title rules tie to the big case out of Harris and the term auto theft unit is included (see highlights on page 4 of 5 of 278 to 282) .

Thanks,

Marybeth Menoskey
Automobile Burglary & Theft Prevention Authority
4000 Jackson Avenue
Austin, Texas 78731
(512) 465-4011
(512) 465-3775 (Fax)
mary.menoskey@txdmv.gov

From: Olivares, Peter S
To: Menoskey, Mary
Subject: RE: Bonded Title Rules w. Attachments (See Highlighted)
Date: Thursday, October 20, 2016 11:10:33 AM

Good morning Mary,

I reviewed the attachments and I see no problem with the adoption of the rules other than I do not see a need for the FBI to be listed on the VTR-68A form.

Pete Olivares

From: Olivares, Peter S
Sent: Thursday, October 20, 2016 8:59 AM
To: Olivares, Peter S
Subject: FW: Bonded Title Rules w. Attachments (See Highlighted)

From: Menoskey, Mary [mailto:Mary.Menoskey@txdmv.gov]
Sent: Thursday, October 20, 2016 7:14 AM
To: Wilson, Bryan
Subject: Bonded Title Rules w. Attachments (See Highlighted)

Good morning-Bryan Wilson has asked that I forward this information onto you for your review. You have until Monday to comment on the proposed rules to the location indicated in the posting. The bonded title rules tie to the big case out of Harris and the term auto theft unit is included (see highlights on page 4 of 5 of 278 to 282) .

Thank you,

Marybeth Menoskey
Automobile Burglary & Theft Prevention Authority
4000 Jackson Avenue
Austin, Texas 78731
(512) 465-4011
(512) 465-3775 (Fax)
mary.menoskey@txdmv.gov

From: Barrow, Ruben
To: Menoskey, Mary
Subject: RE: Bonded Title Rules w. Attachments (See Highlighted)
Date: Thursday, October 20, 2016 10:15:42 AM

Good Morning,

After reviewing this rule change it appears this will not fix the total issue with bonded titles. I feel that that the inspection station should not sign off on vin verifications. They are not trained or have access to C-vin locations. Any vehicle requesting a bonded title should have a 68-A inspection done by an auto theft unit. This should resolve any vin switches requesting bonded titles because the vin's would be verified by C-vin locations by an auto theft unit.

Lt. Hal Barrow
Commander
Galveston County Auto Theft Task Force
409-766-4501

From: Menoskey, Mary [mailto:Mary.Menoskey@txdmv.gov]
Sent: Thursday, October 20, 2016 7:40 AM
To: Wilson, Bryan <Bryan.Wilson@txdmv.gov>
Cc: Gonzales, Dominic <Dominic.Gonzales@txdmv.gov>
Subject: Bonded Title Rules w. Attachments (See Highlighted)

Dear Program Managers and Directors,

Bryan Wilson asked me to send this to you ASAP. As a reminder, you have until Monday to comment on the proposed rules to the location indicated in the posting. The bonded title rules tie to the big case out of Harris in today's webinar. Also the term auto theft unit is included (see highlights on page 4 of 5 of 278 to 282) .

Thanks,

Dominic Gonzales
Grant Coordinator

From: Richard Hale
To: Menoskey, Mary; Wilson, Bryan
Cc: Gonzales, Dominic
Subject: RE: {EXTERNAL} Bonded Title Rules w. Attachments (See Highlighted)
Date: Thursday, October 20, 2016 11:42:48 AM

Director Wilson,

Our concerns are that removing the certified auto theft investigators opens up the field to any auto theft unit to be able to certify a 68A without the proper training. On page 3 of 3 line 2 a form specified by the department is not clear. Unless I'm misreading the entirety of the Chapters we feel this would cause bonded title vehicle slipping through the process.

Richard Hale

From: Menoskey, Mary [mailto:Mary.Menoskey@txdmv.gov]
Sent: Thursday, October 20, 2016 7:40 AM
To: Wilson, Bryan
Cc: Gonzales, Dominic
Subject: {EXTERNAL} Bonded Title Rules w. Attachments (See Highlighted)

Dear Program Managers and Directors,

Bryan Wilson asked me to send this to you ASAP. As a reminder, you have until Monday to comment on the proposed rules to the location indicated in the posting. The bonded title rules tie to the big case out of Harris in today's webinar. Also the term auto theft unit is included (see highlights on page 4 of 5 of 278 to 282) .

Thanks,

Dominic Gonzales
Grant Coordinator

From: Richard Hale
To: Zz - Resource - GCO_Rules
Subject: Bonded title
Date: Thursday, October 20, 2016 12:18:34 PM
Attachments: ~~image001.png~~
~~image002.png~~

Our concerns are that removing the certified auto theft investigators opens up the field to any auto theft unit to be able to certify a 68A without the proper training. On page 3 of 3 line 2 a form specified by the department is not clear. Unless I'm misreading the entirety of the Chapters we feel this would cause the process of bonded title vehicles to slip through the process of proper inspections.

Sergeant Richard A. Hale # 564
Travis County Sheriff's Office
Sheriff's Combined Auto Theft Task Force
512-854-7423 (Office)
512-854-7410 (Fax)
John 3:16

From: Menoskey, Mary
To: Stan Davis; Zz - Resource - GCO_Rules
Cc: Wilson, Bryan
Subject: RE: Bonded Title Rules w. Attachments (See Highlighted)
Date: Thursday, October 20, 2016 2:28:50 PM

Thank you,

Mary

From: Stan Davis [mailto:stan.davis@mansfield-tx.gov]
Sent: Thursday, October 20, 2016 2:26 PM
To: Menoskey, Mary <Mary.Menoskey@txdmv.gov>
Subject: RE: Bonded Title Rules w. Attachments (See Highlighted)

Bryan,

The rules state that a Certified Safety Inspection Station may verify the VIN. This should not be allowed. All this will allow stations to be bribed into and commit fraud as to the true identity. I believe we should keep VIN inspections standard throughout the State and only allow certain, trained and certified law enforcement to conduct VIN inspections.

From: Menoskey, Mary [mailto:Mary.Menoskey@txdmv.gov]
Sent: Thursday, October 20, 2016 12:15 PM
To: Wilson, Bryan
Cc: Gonzales, Dominic
Subject: FW: Bonded Title Rules w. Attachments (See Highlighted)

This is a follow up to the email you received below. Please send your comments on the proposed amendments to our Office of General Counsel (OGC) at rules@txdmv.gov. The deadline for receipt of comments is 5:00 p.m. on October 24, 2016. If you have already sent in your comments they have been forwarded on to the OGC.

Bryan Wilson asked me to send this to you ASAP. As a reminder, you have until Monday to comment on the proposed rules to the location indicated in the posting. The bonded title rules tie to the big case out of Harris and the term auto theft unit is included (see highlights on page 4 of 5 of 278 to 282) .

Thanks,

Marybeth Menoskey
Automobile Burglary & Theft Prevention Authority
4000 Jackson Avenue
Austin, Texas 78731
(512) 465-4011

(512) 465-3775 (Fax)
mary.menoskey@txdmv.gov

Like us on facebook.com/CityMansfieldTx
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From: Reynolds, Wynn
To: Zz - Resource - GCO_Rules
Cc: Wilson, Bryan
Subject: FW: Bonded Title Rules w. Attachments (See Highlighted)
Date: Thursday, October 20, 2016 3:54:48 PM
Attachments: 27[illegible].pdf
278 [illegible].pdf

The Federal Bureau of Investigation should be removed as an agency who is authorized to complete the vehicle inspection identification form. This would eliminate the frustration citizens have after contacting their local FBI office and asking for a service the federal government does not provide. If the DMV decides to keep the FBI as an authorized agency to complete the vehicle identification inspection form the DMV should considering informing Texas FBI offices of that decision to eliminate further confusion.

Respectfully,

Wynn

From: Menoskey, Mary [mailto:Mary.Menoskey@txdmv.gov]
Sent: Thursday, October 20, 2016 12:15 PM
To: Wilson, Bryan
Cc: Gonzales, Dominic
Subject: FW: Bonded Title Rules w. Attachments (See Highlighted)

This is a follow up to the email you received below. Please send your comments on the proposed amendments to our Office of General Counsel (OGC) at rules@txdmv.gov. The deadline for receipt of comments is 5:00 p.m. on October 24, 2016. If you have already sent in your comments they have been forwarded on to the OGC.

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Thanks,

Marybeth Menoskey
Automobile Burglary & Theft Prevention Authority
4000 Jackson Avenue
Austin, Texas 78731
(512) 465-4011
(512) 465-3775 (Fax)
mary.menoskey@txdmv.gov

From: Doug Clements
To: Zz - Resource - GCO_Rules
Subject: Chapter 217, Vehicles Titles and Regulations
Date: Friday, October 21, 2016 2:06:31 PM

After reading the proposed changes to Chapter 217 (3d), Vehicle Titles and Registration Rule, I would like to comment.

The training or certification requirement ensures that only properly trained auto theft investigators are conducting these inspections. Due to the complexity of some these inspections, it would be a mistake to take this out of the requirements. In an effort to safeguard against fraud, altered VIN's and cloned vehicles, this will ensure that everything is properly identified by a trained officers. An auto theft unit could be established within an agency without any training provided, which would allow these vehicles to go undetected. Criminals would then begin taking vehicles to these untrained investigators to avoid detection.

Doug Clements
Commander, South Plains Auto Theft Task Force

From: David Mitchell
To: Zz - Resource - GCO_Rules
Cc: Wilson, Bryan; Gonzales, Dominic; Menoskey, Mary; MLupe Garza
Subject: Proposed Bonded Title Rule Amendments
Date: Friday, October 21, 2016 9:45:08 AM

The North Texas Auto Theft Task Force has reviewed the proposed rule changes for Bonded Titles and has the following response. We recommend that the language which would allow an inspection station to verify a VIN be removed. We feel that the VIN Verification must be performed by the NICB, FBI, or local law enforcement auto theft unit in order to preserve the integrity of the process.

Thank you.

David Mitchell
Captain
North Texas Auto Theft Task Force
214-653-3433

From: Wilson, Bryan
To: Zz - Resource - GCO_Rules
Cc: Menoskey, Mary; Richards, David
Subject: Fw: Comments on Proposed adoption of Rule pertaining to Bonded Titles
Date: Friday, October 21, 2016 10:25:14 AM
Attachments: image002.png image003.png image004.png image005.png image006.png image007.png image008.png image009.png image010.png

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Forward Harris County rule comment.
Thanks
BW

From: Fisher, Lance H. (HCSO) <Lance.Fisher@sheriff.hctx.net>
Sent: Friday, October 21, 2016 10:14 AM
To: Wilson, Bryan
Cc: Ordonez, Angela (HCSO); Garcia, Daniel C. (HCSO); Stamper, John (HCSO); Ritchie, David (HCSO)
Subject: Comments on Proposed adoption of Rule pertaining to Bonded Titles

Mr. Wilson,

Lieutenant Ordonez is out of the office and asked that I respond to your request asking for comments on the proposed adoption of rule under Title 43, Texas Administrative Code, Chapter 217, Vehicle Titles and Registration, Amendment, 217.9, Bonded Titles.

Supervisors within the Harris County Auto Theft Unit are against allowing any civilian entity or person from completing a vehicle identification number (VIN) inspection for a bonded title other than investigators assigned to a Law Enforcement Auto Theft Unit. Our position is, and will continue to be, that allowing civilians or any "non-law enforcement" entities to conduct bonded title inspections is wrought with the potential for liability issues and goes against the best practices we have used and established for years. The vehicle identification number (VIN) inspection is, undoubtedly, a Law Enforcement function, as the inspection's goal is to verify the vehicle in question was obtained through legal means and no criminal laws were broken and/or the vehicle was not fraudulently obtained. As such, the person or entity conducting the inspection should be, in our opinion, a trained Auto Theft Investigator, who has the training and experience to detect not only fraudulent vehicle irregularities, but also possible deception and untruthfulness from the individual presenting the vehicle for inspection.

Lance H. Fisher
Sergeant, Auto Theft Unit
Asset Forfeiture/Title Fraud/Public Awareness

Criminal Investigations Bureau, Special Investigations Division
17427 Village Green, Houston, Texas 77040
Off. (713) 849-3293 Cell. (832) 438-0774
Lance.fisher@sheriff.hctx.net

HARRIS COUNTY
HCSO
SHERIFF'S OFFICE
SHERIFF RON HICKMAN
www.sheriff.hctx.net | www.hcsojobs.com

HCSO Core Values
Merit and maintain the public's trust
Embrace and deliver professional service
Protect our citizens with honor and courage
Exemplify ethical conduct at all times
Develop, encourage, and care for our Sheriff's Office family

From: Brian Johns
To: Zz - Resource - GCO_Rules
Subject: Bonded Title Changes
Date: Monday, October 24, 2016 9:52:26 AM

To Whom it may concern,

The following are my thoughts in regards to the proposed changes to bonded title legislation.

I do not think that a safety inspector should be inspecting VIN's on bonded titles. They do not have access to the purged stolen files that auto theft investigators have and know nothing about public VINS, secondary VINs, and Confidential VIN's. This will allow more stolen vehicles to have bonded titles issued for them.

In regards to the entire bonded title procedure, this needs to change. Stolen vehicles are being issued bonded titles. Currently, a vehicle with a Texas title history do not require an auto theft inspection in order to be issued a bonded title. I have had several cases where a bonded title was issued to the applicant and then letters from the dmv were sent out to the registered owner. The registered owner then contacted me because the vehicle was stolen from them, but purged from the system (after 5 years) and a person was getting a bonded title issued. The registered owner became a Victim again by having numerous hoops to jump through with DMV legal in order to get the situation resolved when it could have been resolved by having an auto theft inspection and seized at the time of inspection if it was stolen. All bonded titles should require a VTR 68a inspection.

Detective Brian Johns
Williamson County Sheriff's Office
CID-Auto Theft
508 Rock St
Georgetown, Texas 78626
512-943-1494 (office)
512-943-1344 (fax)

From: Hansen, Tommy
To: Zz - Resource - GCO_Rules
Subject: Bonded title concerns
Date: Monday, October 24, 2016 1:08:01 PM

VEHICLE IDENTIFICATION NUMBER:
The document states that the VIN may be verified by a Licensed Safety Inspection Station. Safety stations are in no way law enforcement nor are they trained to recognize a fraudulent VIN. They do not have access by law to confidential number locations to verify a VIN. On vehicles that do not conform to current VIN standards (pre 1981) will be VINs with less than 17 characters. Only an experienced Vehicle Theft investigator will have the resources to validate and trace these older VIN's. It is not a question of knowledge or expertise on the part of the safety inspector, but the training and resources that are not available to them.

Inspections by the FBI. It has been decades since the FBI has been involved in the types of cases that gave many of their staff the training, experience or resources to carry out this task. I have personally worked with the FBI for many years and also assigned to a FBI Task Force for many years. I can tell you first hand that you will not find any FBI office that would help a citizen with this. They should be removed from these documents. This would eliminate the frustration for citizens calling them about a service they do not provide and also eliminate the call to the FBI that they do not need to be dealing with.

These inspections, much like the 68A inspections should only be performed by a certified experienced vehicle crimes investigator.

Respectfully,
Lt. Tommy Hansen
Galveston County Sheriff's Office
Past President – Intl. Assoc. of Auto Theft Investigators
Past President – Texas Assoc. of Vehicle Theft Investigators

From: Brian Johns
To: Zz - Resource - GCO_Rules
Subject: Bonded Title Changes
Date: Monday, October 24, 2016 9:52:26 AM

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In regards to the entire bonded title procedure, this needs to change. Stolen vehicles are being issued bonded titles. Currently, a vehicle with a Texas title history do not require an auto theft inspection in order to be issued a bonded title. I have had several cases where a bonded title was issued to the applicant and then letters from the dmv were sent out to the registered owner. The registered owner then contacted me because the vehicle was stolen from them, but purged from the system (after 5 years) and a person was getting a bonded title issued. The registered owner became a Victim again by having numerous hoops to jump through with DMV legal in order to get the situation resolved when it could have been resolved by having an auto theft inspection and seized at the time of inspection if it was stolen. All bonded titles should require a VTR 68a inspection.

Detective Brian Johns
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CID-Auto Theft
508 Rock St
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512-943-1494 (office)
512-943-1344 (fax)

BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES

RESOLUTION APPROVING ADOPTION OF AMENDMENT
43 TAC SECTION 217.9, BONDED TITLES

The Board of the Texas Department of Motor Vehicles (board) finds it necessary to adopt the amendment to Chapter 217, Vehicle Titles and Registration, Subchapter A, §217.9, Bonded Titles.

The preamble and the amendment are attached to this resolution as Exhibits A-B, and are incorporated by reference as though set forth verbatim in this resolution, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the board that the attached amended rule is adopted.

The department is directed to take the necessary steps to implement the actions authorized in this order pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

_____
Raymond Palacios, Jr., Chairman
Board of the Texas Department of Motor Vehicles

Recommended by:

_____
Jeremiah Kuntz, Director
Vehicle Titles and Registration Division

Order Number: _____ Date Passed: November 3, 2016

Texas Department of Motor Vehicles
Chapter 217, Vehicles Titles and Registration

Adoption Preamble

The Texas Department of Motor Vehicles (department) adopts amendments to Chapter 217, Subchapter A, §217.9, Bonded Titles. The amendment is adopted with changes to the proposed text as published in the September 23, 2016, issue of the *Texas Register* (41 TexReg 7467) and will be republished.

EXPLANATION OF ADOPTED AMENDMENTS

A person who has an interest in a motor vehicle in which the department has refused to issue a title or has suspended or revoked a title under Transportation Code, §501.051, may, under certain conditions, obtain a title to the motor vehicle by filing a bond with the department.

Amendment to §217.9(c)(3) clarifies the value of the bond. If the motor vehicle is 25 years or older and the appraised value is less than $4000, then the bond amount will be established from a value of $4000.

Amendment to §217.9(e)(1) clarifies the documentation required to apply for a bonded title. The verification of the vehicle identification number must be on a form specified by the department as well as proof of the vehicle identification number

inspection as proposed in §217.9(d).

COMMENTS

The department received comments from the Texas Department of Public Safety (DPS), the Galveston County Auto Theft Task Force, the Harris County Auto Theft Unit, the South Plains Auto Theft Task Force, the Montgomery County Auto Theft Task Force, the North Texas Auto Theft Task Force, the Tarrant Regional Auto Crimes Task Force, the Travis County Sheriff’s Office Combine Auto Theft Task Force, Burnet County, the City of El Paso, the City of Mansfield, the City of Victoria, the Williamson County Sheriff’s Office, and the Galveston County Sheriff’s Office.

COMMENT – Federal Bureau of Investigation

The Texas Department of Public Safety, the Galveston County Sheriff’s Office and the City of El Paso requested the Federal Bureau of Investigation (FBI) be removed as an agency who is authorized to complete the vehicle inspection identification form because the FBI offices do not provide this service.

RESPONSE

The department believes that the issue of specifying which

individuals may perform VIN inspections warrants additional evaluation and study, and recommends leaving the existing rule language unchanged.

COMMENT – Vehicle Inspection Stations

Most of the comments were concerned with allowing vehicle inspection stations to conduct VIN verifications for bonded titles. Galveston County Auto Theft Task Force noted that vehicle inspection stations are not trained and do not have access to C-vin locations.

The Harris County Sheriff's Office Auto Theft Unit, opposes allowing any civilian entity or person from completing a vehicle identification number inspection for a bonded title other than investigators assigned to a law enforcement auto theft unit.

The South Plains Auto Theft Task Force commented that only properly trained auto theft investigators should be conducting VIN inspections. Training and certification for these complex inspections safeguards against fraud, altered VIN's and cloned vehicles.

The Montgomery County Sheriff's Office, Montgomery County Auto

Theft Task Force stated that safety inspection stations should not be allowed to conduct the VIN inspection for a bonded title, as this may lead to inappropriate behavior on the station's part and may cause bonded titles to be issued on vehicles without the VIN being properly vetted.

The North Texas Auto Theft Task Force recommended that the language that would allow an inspection station to verify a VIN be removed, as VIN verification should be performed by the National Insurance Crime Bureau (NICB), FBI, or local law enforcement auto theft unit in order to preserve the integrity of the process.

The Tarrant Sheriff's Office, Regional Auto Crimes Task Force opposes the rule change stating that for bonded titles all vehicles should be required to have a physical inspection by a law enforcement officer specialized in the field of auto theft. The inspection should not rely on the verification by a Texas licensed safety inspection station, as documents can be forged or manipulated.

The Travis County Sheriff's Office, Sheriff's Combined Auto Theft Task Force expressed concern that removing the certified

auto theft investigators opens up the field to any auto theft unit to be able to certify a 68A without the proper training. They also express concern that the text "a form specified by the department" is not clear and that this would cause the process of bonded title vehicles to slip through the process of proper inspections.

Burnet County expressed concern that many vehicles that persons seek to obtain a bonded title on are more than 35 years old and have an identification number that does not conform to current standards. Investigators assigned to an auto theft unit either have the knowledge or the resources to contact in determining the correct identification number to utilize and also to determine the validity of the identification numbers located. It is not a question of the knowledge or expertise of a safety inspector, but rather the training or resources available to the inspector as it relates to altered or obliterated numbers.

The Williamson County Sheriff’s Office commented that vehicle safety inspectors should not be inspecting VINs on bonded titles, as they do not have access to the purged and stolen files that auto theft investigators have, and are not knowledgeable about public, secondary, and confidential VINs.

The City of Mansfield commented that certified Safety Inspection Stations should not be allowed to verify the VIN, as this will allow stations to be bribed and commit fraud.

RESPONSE

Transportation Code Section 501.030 requires the vehicle to pass a vehicle safety inspection which includes a VIN verification if the vehicle is from out of state. The VIN verification is completed on the inspection station’s report and verified by the department by using the Texas Department of Public Safety Vehicle Inspection Report. The department assumes the vehicle is from out of state if there is no record of the vehicle in its system. In some situations, these vehicles may be exempt from the vehicle safety inspection requirement; therefore, an alternative VIN inspection is necessary. The law enforcement VIN inspection is the alternative. Law enforcement, and only law enforcement, verifies the VIN on the Form VTR-68-A and this form is not used by anyone not specifically authorized on that form to complete that form. The department does not believe the most restrictive form of a VIN inspection is necessary to verify the VIN of these vehicles, when the inspection is not required for all other vehicles entering from out of state. Further,

requiring a law enforcement VIN inspection would result in a substantial increase in these inspections and unduly burden law enforcement.

COMMENT

The City of Victoria stated they do not see any issues with the proposed rule change.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically, Transportation Code, §501.0041, which provides the department may adopt rules to administer Chapter 501, Certificate of Title.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 501 and 520, and §§502.041, 502.042, and 502.192.

SUBCHAPTER A. MOTOR VEHICLE TITLES

§217.9. Bonded Titles.

(a) Who may file. A person who has an interest in a motor vehicle to which the department has refused to issue a title or has suspended or revoked a title may request issuance of a title from the department on a prescribed form if the vehicle is in the possession of the applicant; and

(1) there is a record that indicates a lien that is less than ten years old and the surety bonding company ensures lien satisfaction or release of lien;

(2) there is a record that indicates there is not a lien or the lien is ten or more years old; or

(3) the department has no previous motor vehicle record.

(b) Administrative fee. The applicant must pay the department a $15 administrative fee in addition to any other required fees.

(c) Value. The amount of the bond must be equal to one and one-half times the value of the vehicle as determined using the Standard Presumptive Value (SPV) from the department's Internet website. If the SPV is not available, then a national reference guide will be used. If the value cannot be determined by either source, then the person may obtain an appraisal.

(1) The appraisal must be on a form specified by the department [~~form~~] from a Texas licensed motor vehicle dealer for the categories of motor vehicles that the dealer is licensed to sell or a Texas licensed insurance adjuster who may appraise any type of motor vehicle.

(2) The appraisal must be dated and be submitted to the department within 30 days of the appraisal.

(3) If the motor vehicle is 25 years or older and[~~,~~] the appraised value of the vehicle is [~~cannot be~~] less than $4,000, then the bond amount will be established from a value of $4,000.

(d) Vehicle identification number [~~Out-of-state vehicle~~]inspection. If the department has no motor vehicle record for the vehicle, [~~applicant is a Texas resident, but the evidence indicates that the vehicle is an out-of-state vehicle,~~] the vehicle identification number must be verified by a Texas licensed Safety Inspection Station or a law enforcement officer who holds an auto theft certification.

(e) Required documentation. An applicant may apply for a bonded title if the applicant submits:

(1) verification of the vehicle identification number on a form specified by the department [~~a pencil tracing or photo of the vehicle identification number, or if unable then a~~

~~Statement of Physical Inspection, Form VTR-270~~];

(2) any evidence of ownership;

(3) the original bond within 30 days of issuance;

(4) the rejection letter within one year of issuance and the receipt for $15 paid to the department;

(5) the documentation determining the value of the vehicle;

(6) proof of the [~~an~~ ~~out-of-state~~] vehicle identification number inspection [~~certificate~~], as described in subsection (d) of this section, if the department has no motor vehicle record for the vehicle [~~there is no Texas record~~];

(7) a weight certificate if there is no title or the vehicle is an out of state commercial vehicle;

(8) a certification of lien satisfaction by the surety bonding company or a release of lien if the rejection letter states that there may be a lien less than ten years old; and

(9) any other required documentation and fees.

(f) Report of Judgment. The bond must require that the surety report payment of any judgment to the department within 30 days.

DATE: November 3, 2016
Action Requested: APPROVAL

To: **Texas Department of Motor Vehicles Board (TxDMV)**
From: **Jeremiah Kuntz, Director, Vehicle Titles and Registration Division**
Agenda Item: **11.2 217 Corrections**

RECOMMENDATION

Approve adoption of amendments and publication in the *Texas Register*.

PURPOSE AND EXECUTIVE SUMMARY

This order adopts amendments to §§217.3, 217.28, 217.40, 217.42, 217.45, 217.47, 217.52, 217.54, 217.56, 217.82, 217.84, 217.86, 217.103, and 217.163.

FINANCIAL IMPACT

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

BACKGROUND AND DISCUSSION

The amendments correct statutory and rule citations, correct one error, and update rule language, capitalizations, and style for consistency throughout.

- §217.3(4)(C), changed the word "forty" to the numeral "40."
- §217.3(4)(C)(i), the word "body" is deleted for consistency with the language in §217.3(4)(C)(ii).
- §217.28(e)(2), changed the word "percent" to the symbol "%."
- §217.28(e)(3), changed the word "twelve" to the numeral "12."
- §217.40(b)(1)(C), changed the word "percent" to the symbol "%" in three instances. Also changed the word "semi-trailers" to "semitrailers."
- §217.42, changed "$5.00" to "$5."
- §217.45, changed "Board" to "board" multiple times.
- §217.47, corrected an incorrect statutory citation in the Health & Safety Code.
- §217.52, changed "Board" to "board" multiple times.
- §217.54, changed the word "semi-trailers" to "semitrailers" and changed the word "twenty five" to the numeral "25."
- §217.56, changed the word "semi-trailer" to "semitrailer" in three instances.
- §217.82, corrected the citation for the definition of "motor vehicle" in Transportation Code, Chapter 501.
- §217.84, updated incorrect statutory citations to the Transportation Code.
- §217.86, updated an incorrect rule citation.
- §217.103(e), changed "$5.00" to "$5."
- §217.163(a), updated an incorrect reference to subsection (j) due to the addition of a subsection during adoption that resulted in renumbering of the subsections. Also updated the reference to an agreement to an addendum to reflect the rule language as adopted.

The proposed amendments were published in the *Texas Register* for public comment on September 23, 2016. The comment period closed on October 24, 2016. No comments were received.

If the board adopts the amendments during its November 3, 2016, open meeting, staff anticipates:

- publication of the adoption in the November 25, 2016 issue of the *Texas Register;* and
- an effective date of December 4, 2016.

BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES

RESOLUTION APPROVING ADOPTION OF AMENDMENTS TO
43 TAC SUBCHAPTERS A, B, D, E, AND H,
RELATING TO VEHICLE TITLES AND REGISTRATION

The Board of the Texas Department of Motor Vehicles (board) finds it necessary to adopt amendments to Subchapter A, §217.3, Motor Vehicle Titles; Subchapter B, §217.28, Vehicle Registration Renewal; §217.40, Special Registrations; §217.42, Construction Machinery Criteria; §217.45, Specialty License Plates, Symbols, Tabs, and Other Devices; §217.47, Vehicle Emissions Enforcement System; §217.52, Marketing of Specialty License Plates Through A Private Vendor; §217.54, Registration of Fleet Vehicles; §217.56, Registration Reciprocity Agreements; Subchapter D, §217.82, Definitions (relating to Non-repairable and Salvage Motor Vehicles); §217.84, Application for Non-repairable or Salvage Vehicle Title; §217.86, Dismantling, Scrapping, or Destruction of Motor Vehicles; Subchapter E, §217.103, Restitution Liens; and Subchapter H, §217.163, Full Service Deputies.

The preamble and amendments are attached to this resolution as Exhibits A-F, and are incorporated by reference as though set forth verbatim in this resolution, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the board that the attached amendments are adopted.

The department is directed to take the necessary steps to implement the actions authorized in this order pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

_____
Raymond Palacios, Jr., Chairman
Board of the Texas Department of Motor Vehicles

Recommended by:

_____
Jeremiah Kuntz, Director
Vehicle Titles and Registration Division

Order Number: _____ Date Passed: November 3, 2016

Texas Department of Motor Vehicles
Chapter 217, Vehicle Titles and Registration

Adoption Preamble

The Texas Department of Motor Vehicles (department) adopts amendments to Chapter 217, Subchapter A, Motor Vehicle Titles: §217.3, Motor Vehicle Titles; Subchapter B, Motor Vehicle Registration: §217.28, Vehicle Registration Renewal; §217.40, Special Registrations; §217.42, Construction Machinery Criteria; §217.45, Specialty License Plates, Symbols, Tabs, and Other Devices; §217.47, Vehicle Emissions Enforcement System; §217.52, Marketing of Specialty License Plates through a Private Vendor; §217.54, Registration of Fleet Vehicles; and §217.56, Registration Reciprocity Agreements; Subchapter D, Non-repairable and Salvage Motor Vehicles: §217.82, Definitions; §217.84, Application for Non-repairable or Salvage Vehicle Title; and §217.86, Dismantling, Scrapping, or Destruction of Motor Vehicles; Subchapter E, Title Liens and Claims: §217.103, Restitution Liens; and Subchapter H, Deputies: §217.163, Full Service Deputies, without changes to the proposed text as published in the September 23, 2016, issue of the *Texas Register* (41 TexReg 7444). The rules will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

These nonsubstantive amendments throughout Chapter 217, Subchapters A, B, D, E, and H correct statutory and rule

citations, correct one error, and update rule language; and allow for consistency with capitalization and style throughout department rules.

SECTION BY SECTION ANALYSIS

The amendment to §217.3(2)(A) adds quotes to the term "motor vehicle." The amendments to §217.3(4)(C) change the word "forty" to the numeral "40." The amendments also delete the word "body" from §217.3(4)(C)(i) for consistency with the language in §217.3(4)(C)(ii).

The amendment to §217.28(e)(2) changes the word "percent" to the symbol "%" for consistency with other sections within the chapter. The amendment to §217.28(e)(3) changes the word "twelve" to the numeral "12."

The amendments to §217.40(b)(1)(C) change the word "percent" to the symbol "%" in four instances. The amendments also change the word "semi-trailers" to "semitrailers" for consistency with statute.

The amendment to §217.42 changes "$5.00" to "$5."

The amendments to §217.45 change "Board" to "board" multiple times for consistency.

The amendment to §217.47 updates an incorrect statutory citation to the Health and Safety Code.

The amendments to §217.52 change "Board" to "board" multiple times and change the word "twenty-four" to the numeral "24."

The amendments to §217.54 change "semi-trailers" to "semitrailers" for consistency with statute and change the word "twenty-five" to the numeral "25" in three instances.

The amendments to §217.56 change the word "semi-trailer" to "semitrailer" in three instances and change "Board" to "board" throughout.

The amendment to §217.82 corrects the citation for the definition of "motor vehicle" in Transportation Code, Chapter 501.

The amendments in §217.84 update incorrect statutory citations to the Transportation Code.

The amendment to §217.86 updates an incorrect rule citation.

The amendment to §217.103(e) changes "$5.00" to "$5" for consistency. The proposed amendment to §217.103(g) corrects the section title of §217.106.

The amendments to §217.163(a) update incorrect references to subsection (j) due to the addition of a subsection during adoption of the rule that resulted in a renumbering of the subsections and also updates the reference to an agreement to an addendum to reflect the rule language as adopted.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) the authority to adopt rules necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §501.0041, which provides the department

may adopt rules to administer Transportation Code, Chapter 501, Certificate of Title Act; Transportation Code, §502.0021, which provides the department may adopt rules to administer Transportation Code, Chapter 502, Registration of Vehicles; and Transportation Code, §520.0071, which provides the board by rule shall prescribe the classification types of deputies performing titling and registration duties, the duties and obligations of deputies, the type and amount of any bonds that may be required by a county tax assessor-collector for a deputy to perform titling and registration duties, and the fees that may be charged or retained by deputies.

CROSS REFERENCE TO STATUTE

Health and Safety Code, §382.202 and §382.203; and Transportation Code, §§501.002, 501.091, 501.1001, and 501.1002.

SUBCHAPTER A. MOTOR VEHICLE TITLES

§217.3. Motor Vehicle Titles.

Unless otherwise exempted by law or this chapter, the owner of any motor vehicle that is required to be registered in accordance with Transportation Code, Chapter 502, shall apply for a Texas title in accordance with Transportation Code, Chapter 501.

(1) Motorcycles, motor-driven cycles, autocycles, and mopeds.

(A) The title requirements of a motorcycle, motor-driven cycle, autocycle, and moped are the same requirements prescribed for any motor vehicle.

(B) A vehicle that meets the criteria for a moped and has been certified as a moped by the Department of Public Safety will be registered and titled as a moped. If the vehicle does not appear on the list of certified mopeds published by that agency, the vehicle will be treated as a motorcycle for title and registration purposes.

(2) Farm vehicles.

(A) The term "motor vehicle" [~~motor vehicle~~]does not apply to implements of husbandry, which may not be titled.

(B) Farm tractors owned by agencies exempt from registration fees in accordance with Transportation Code,

§502.453, are required to be titled and registered with "Exempt" license plates issued in accordance with Transportation Code, §502.451.

(C) Farm tractors used as road tractors to mow rights of way or used to move commodities over the highway for hire are required to be registered and titled.

(D) Farm semitrailers with a gross weight of more than 4,000 pounds that are registered in accordance with Transportation Code, §502.146, may be issued a Texas title.

(3) Neighborhood electric vehicles. The title requirements of a neighborhood electric vehicle (NEV) are the same requirements prescribed for any motor vehicle.

(4) Trailers, semitrailers, and house trailers. Owners of trailers and semitrailers shall apply for and receive a Texas title for any stand alone (full) trailer, including homemade or shopmade full trailers, or any semitrailer having a gross weight in excess of 4,000 pounds. Owners of trailers having a gross weight of 4,000 pounds or less may apply for and receive a Texas title. House trailer-type vehicles must meet the criteria outlined in subparagraph (C) of this paragraph to be titled.

(A) The rated carrying capacity will not be less than one-third of its empty weight.

(B) Mobile office trailers, mobile oil field

laboratories, and mobile oil field bunkhouses are not designed as dwellings, but are classified as commercial semitrailers and must be registered and titled as commercial semitrailers if operated on the public streets and highways.

(C) House trailer-type vehicles and camper trailers must meet the following criteria in order to be titled.

(i) A house trailer-type vehicle designed for living quarters and that is eight body feet or more in width and 40 [~~forty body~~] feet or more in length (not including the hitch), is classified as a manufactured home or mobile home and is not eligible for a Texas title under Transportation Code, Chapter 501.

(ii) A house trailer-type vehicle that is less than eight feet in width or less than 40 [~~forty~~] feet in length is classified as a travel trailer and shall be registered and titled.

(iii) A camper trailer shall be titled as a house trailer and shall be registered with travel trailer license plates.

(iv) A recreational park model type trailer that is primarily designed as 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.

(A) An assembled vehicle is a vehicle assembled from the three basic component parts (motor, frame, and body), except that a motorcycle must have a frame and motor, and a trailer or travel trailer will have no motor, and that is:

(i) assembled from new or used materials and parts by someone not regulated as a motor vehicle manufacturer;

(ii) altered or modified to the extent that it no longer reflects the original manufacturer's configuration; or

(iii) assembled from a kit even if a Manufacturer's Certificate of Origin or Manufacturer's Statement of Origin is provided.

(B) A newly assembled vehicle, for which a title has never been issued in this jurisdiction or any other, may be titled if:

(i) it is assembled and completed with a body, motor, and frame, except that a motorcycle must have a frame and motor, and a trailer or travel trailer will have no motor;

(ii) it is not created from different vehicle classes, (as established by the Federal Highway Administration, except as provided by subparagraph (C) of this paragraph), that were never engineered or manufactured to be combined with one another;

(iii) it has all safety components required by federal law during the year of assembly, unless the vehicle qualifies and is registered as a custom vehicle or street rod in accordance with Transportation Code, §504.501;

(iv) it is not a vehicle described by paragraph (6) of this section;

(v) for a vehicle assembled with a body, motor, and frame, the applicant provides proof, on a form prescribed by the department, of a safety inspection performed by an Automotive Service Excellence (ASE) technician with valid certification as a Certified Master Automobile and Light Truck Technician, certifying that the vehicle:

(I) is structurally stable;

(II) meets the necessary conditions to be operated safely on the roadway; and

(III) is equipped and operational with all equipment required by statute or rule as a condition of sale during the year the vehicle was assembled unless it is being

inspected pursuant to Subchapter G of this chapter;

(vi) for a vehicle assembled with a body, motor, and frame, the applicant submits a copy of the Certified Master Automobile and Light Truck Technician's ASE certification;

(vii) the applicant submits a Rebuilt Vehicle Statement; and

(viii) the applicant submits the following to establish the vehicle's vehicle identification number:

(I) an Application for Assigned or Reassigned Number, and Notice of Assigned Number or Installation of Reassigned Vehicle Identification Number, on forms prescribed by the department; or

(II) acceptable proof, as established by the department, of a vehicle identification number assigned by the manufacturer of the component part by which the vehicle will be identified.

(C) Component parts from the following vehicle classes may be interchanged with one another or used in the creation of an assembled vehicle:

(i) 2-axle, 4-tire passenger cars;

(ii) 2-axle, 4 tire pickups, panels and vans;

(iii) 6-tire dually pickups, of which the rear tires are dual tires.

(D) The ASE inspection for a newly assembled vehicle required under subparagraph (B) of this paragraph is in addition to the inspection required by Transportation Code, Chapter 548, except a vehicle that qualifies and is registered as a custom vehicle or street rod in accordance with Transportation Code, §504.501, is exempt from the inspection required under Transportation Code, Chapter 548, for the duration the vehicle is registered as such.

(E) An assembled vehicle which has previously been titled and/or registered in this or any other jurisdiction is subject to subparagraph (B)(i) - (iv) of this paragraph, but is not subject to subparagraph (B)(v) - (viii); however, it is subject to the inspection required by Transportation Code, Chapter 548, except a vehicle that qualifies and is registered as a custom vehicle or street rod in accordance with Transportation Code, §504.501.

(F) An assembled vehicle will be titled using the year it was assembled as the model year and "ASSEMBLED" or "ASVE" as the make of the vehicle unless the body of the vehicle is established to the department's satisfaction to be an original body from a particular year and make. An assembled

vehicle utilizing an original body may be titled by the year and the make of the original body but must reflect a "RECONSTRUCTED" remark. An assembled vehicle not utilizing an original body may obtain a title with a "REPLICA" remark featuring the year and make of the replica if the vehicle resembles a prior model year vehicle. This subparagraph applies regardless of how the vehicle's model year or make was previously identified in this or any other jurisdiction.

(6) Not Eligible for Title. The following are not eligible for a Texas title regardless of the vehicle's previous title and/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 it materially alters the manufacturer's original design or makes the vehicle unsafe for on-road operation as determined by the department;

(B) vehicles designed or determined by the department to be a dune buggy;

(C) vehicles designed or determined by the department to be for on-track racing, unless such vehicles meet Federal Motor Vehicle Safety Standards (FMVSS) for on-road use and are reported to the National Highway Traffic Safety Administration;

(D) vehicles designed or determined by the

department to be for off-road use only, unless specifically defined as a "motor vehicle" in Transportation Code, Chapter 501; or

(E) 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.

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

§217.28. Vehicle Registration Renewal.

(a) To renew vehicle registration, a vehicle owner must apply, prior to the expiration of the vehicle's registration, to the tax assessor-collector of the county in which the owner resides.

(b) The department will send a license plate renewal notice, indicating the proper registration fee and the month and year the registration expires, to each vehicle owner prior to the expiration of the vehicle's registration.

(c) The license plate renewal notice should be returned by the vehicle owner to the appropriate county tax assessor-collector or to the tax assessor-collector's deputy, either in person or by mail, unless the vehicle owner renews via the Internet. The renewal notice must be accompanied by the following documents and fees:

(1) registration renewal fees prescribed by law;

(2) any local fees or other fees prescribed by law and collected in conjunction with registration renewal; and

(3) evidence of financial responsibility required by Transportation Code, §502.046, unless otherwise exempted by law.

(d) If a renewal notice is lost, destroyed, or not received by the vehicle owner, the vehicle may be registered if the owner

presents personal identification acceptable to the county tax assessor-collector. Failure to receive the notice does not relieve the owner of the responsibility to renew the vehicle's registration.

(e) Renewal of expired vehicle registrations.

(1) In accordance with Transportation Code, §502.407, a vehicle with an expired registration may not be operated on the highways of the state after the fifth working day after the date a vehicle registration expires.

(2) If the owner has been arrested or cited for operating the vehicle without valid registration then a 20% [~~20 percent~~] delinquency penalty is due when registration is renewed, the full annual fee will be collected, and the vehicle registration expiration month will remain the same.

(3) If the county tax assessor-collector or the department determines that a registrant has a valid reason for being delinquent in registration, the vehicle owner will be required to pay for 12 [~~twelve~~] months' registration. Renewal will establish a new registration expiration month that will end on the last day of the eleventh month following the month of registration renewal.

(4) If the county tax assessor-collector or the department determines that a registrant does not have a valid

reason for being delinquent in registration, the full annual fee will be collected and the vehicle registration expiration month will remain the same.

(5) If a vehicle is registered in accordance with Transportation Code, §§502.255, 502.431, 502.435, 502.454, 504.315, 504.401, 504.405, 504.505, or 504.515 and if the vehicle's registration is renewed more than one month after expiration of the previous registration, the registration fee will be prorated.

(6) Evidence of a valid reason may include receipts, passport dates, and military orders. Valid reasons may include:

(A) extensive repairs on the vehicle;

(B) the person was out of the country;

(C) the vehicle is used only for seasonal use;

(D) military orders;

(E) storage of the vehicle;

(F) a medical condition such as an extended hospital stay; and

(G) any other reason submitted with evidence that the county tax assessor-collector or the department determines is valid.

§217.40. Special Registrations.

(a) Purpose and scope. Transportation Code, Chapter 502, Subchapters C and I, charge the department with the responsibility of issuing special registration permits which shall be recognized as legal registration for the movement of motor vehicles not authorized to travel on Texas public highways for lack of registration or for lack of reciprocity with the state or country in which the vehicles are registered. For the department to efficiently and effectively perform these duties, this section prescribes the policies and procedures for the application and the issuance of temporary registration permits.

(b) Permit categories. The department will issue the following categories of special registration permits.

(1) Additional weight permits. The owner of a truck, truck tractor, trailer, or semitrailer may purchase temporary additional weight permits for the purpose of transporting the owner's own seasonal agricultural products to market or other points for sale or processing in accordance with Transportation Code, §502.434. In addition, such vehicles may be used for the transportation without charge of seasonal laborers from their place of residence, and materials, tools, equipment, and supplies from the place of purchase or storage, to a farm or ranch exclusively for use on such farm or ranch.

(A) Additional weight permits are valid for a

limited period of less than one year.

(B) An additional weight permit will not be issued for a period of less than one month or extended beyond the expiration of a license plate issued under Transportation Code, Chapter 502.

(C) The statutory fee for an additional weight permit is based on a percentage of the difference between the owner's annual registration fee and the annual fee for the desired gross vehicle weight computed as follows:

(i) one-month (or 30 consecutive days)--10% [~~10 percent~~];

(ii) one-quarter (three consecutive months)--30% [~~30 percent~~];

(iii) two-quarters (six consecutive months)--60% [~~60 percent~~]; or

(iv) three-quarters (nine consecutive months)--90% [~~90 percent~~].

(D) Additional weight permits are issued for calendar quarters with the first quarter to begin on April 1st of each year.

(E) A permit will not be issued unless the registration fee for hauling the additional weight has been paid prior to the actual hauling.

(F) An applicant must provide proof of the applicant's Texas Agriculture or Timber Exemption Registration Number issued by the Texas Comptroller of Public Accounts. Proof of the registration number must be:

(i) legible;

(ii) current;

(iii) in the name of the person or dba in which the vehicle is or will be registered; and

(iv) verifiable through the online system established by the Comptroller.

(2) Annual permits.

(A) Transportation Code, §502.093 authorizes the department to issue annual permits to provide for the movement of foreign commercial vehicles that are not authorized to travel on Texas highways for lack of registration or for lack of reciprocity with the state or country in which the vehicles are registered. The department will issue annual permits:

(i) for a 12-month period designated by the department which begins on the first day of a calendar month and expires on the last day of the last calendar month in that annual registration period; and

(ii) to each vehicle or combination of vehicles for the registration fee prescribed by weight

classification in Transportation Code, §502.253 and §502.255.

(B) The department will not issue annual permits for the importation of citrus fruit into Texas from a foreign country except for foreign export or processing for foreign export.

(C) The following exemptions apply to vehicles displaying annual permits.

(i) Currently registered foreign semitrailers having a gross weight in excess of 6,000 pounds used or to be used in combination with commercial motor vehicles or truck tractors having a gross vehicle weight in excess of 10,000 pounds are exempted from the requirements to pay the token fee and display the associated distinguishing license plate provided for in Transportation Code, §502.255. An annual permit is required for the power unit only. For vehicles registered in combination, the combined gross weight may not be less than 18,000 pounds.

(ii) Vehicles registered with annual permits are not subject to the optional county registration fee under Transportation Code, §502.401; the optional county fee for transportation projects under Transportation Code, §502.402; or the optional registration fee for child safety under Transportation Code, §502.403.

(3) 72-hour permits and 144-hour permits.

(A) In accordance with Transportation Code, §502.094, the department will issue a permit valid for 72 hours or 144 hours for the movement of commercial motor vehicles, trailers, semitrailers, and motor buses owned by residents of the United States, Mexico, or Canada.

(B) A 72-hour permit or a 144-hour permit is valid for the period of time stated on the permit beginning with the effective day and time as shown on the permit registration receipt.

(C) Vehicles displaying 72-hour permits or 144-hour permits are subject to vehicle safety inspection in accordance with Transportation Code, §548.051, except for:

(i) vehicles currently registered in another state of the United States, Mexico, or Canada; and

(ii) mobile drilling and servicing equipment used in the production of gas, crude petroleum, or oil, including, but not limited to, mobile cranes and hoisting equipment, mobile lift equipment, forklifts, and tugs.

(D) The department will not issue a 72-hour permit or a 144-hour permit to a commercial motor vehicle, trailer, semitrailer, or motor bus apprehended for violation of Texas registration laws. Apprehended vehicles must be registered

under Transportation Code, Chapter 502.

(4) Temporary agricultural permits.

(A) Transportation Code, §502.092 authorizes the department to issue a 30-day temporary nonresident registration permit to a nonresident for any truck, truck tractor, trailer, or semitrailer to be used in the movement of all agriculture products produced in Texas:

(i) from the place of production to market, storage, or railhead not more than 75 miles from the place of production; or

(ii) to be used in the movement of machinery used to harvest Texas-produced agricultural products.

(B) The department will issue a 30-day temporary nonresident registration permit to a nonresident for any truck, truck tractor, trailer, or semitrailer used to move or harvest farm products, produced outside of Texas, but:

(i) marketed or processed in Texas; or

(ii) moved to points in Texas for shipment from the point of entry into Texas to market, storage, processing plant, railhead or seaport not more than 80 miles from such point of entry into Texas.

(C) The statutory fee for temporary agricultural permits is one-twelfth of the annual Texas

registration fee prescribed for the vehicle for which the permit is issued.

(D) The department will issue a temporary agricultural permit only when the vehicle is legally registered in the nonresident's home state or country for the current registration year.

(E) The number of temporary agricultural permits is limited to three permits per nonresident owner during any one vehicle registration year.

(F) Temporary agricultural permits may not be issued to farm licensed trailers or semitrailers [~~semi-trailers~~].

(5) One-trip permits. Transportation Code, §502.095 authorizes the department to temporarily register any unladen vehicle upon application to provide for the movement of the vehicle for one trip, when the vehicle is subject to Texas registration and not authorized to travel on the public roadways for lack of registration or lack of registration reciprocity.

(A) Upon receipt of the $5 fee, registration will be valid for one trip only between the points of origin and destination and intermediate points as may be set forth in the application and registration receipt.

(B) The department will issue a one-trip permit

to a bus which is not covered by a reciprocity agreement with the state or country in which it is registered to allow for the transit of the vehicle only. The vehicle should not be used for the transportation of any passenger or property, for compensation or otherwise, unless such bus is operating under charter from another state or country.

(C) A one-trip permit is valid for a period up to 15 days from the effective date of registration.

(D) A one-trip permit may not be issued for a trip which both originates and terminates outside Texas.

(E) A laden motor vehicle or a laden commercial vehicle cannot display a one-trip permit. If the vehicle is unregistered, it must operate with a 72-hour or 144-hour permit.

(6) 30-day temporary registration permits. Transportation Code, §502.095 authorizes the department to issue a temporary registration permit valid for 30 days for a $25 fee. A vehicle operated on a 30-day temporary permit is not restricted to a specific route. The permit is available for:

(A) passenger vehicles;

(B) motorcycles;

(C) private buses;

(D) trailers and semitrailers with a gross weight not exceeding 10,000 pounds;

(E) light commercial vehicles not exceeding a gross weight of 10,000 pounds; and

(F) a commercial vehicle exceeding 10,000 pounds, provided the vehicle is operated unladen.

(c) Application process.

(1) Procedure. An owner who wishes to apply for a temporary registration permit for a vehicle which is otherwise required to be registered in accordance with this subchapter, must do so on a form prescribed by the department.

(2) Form requirements. The application form will at a minimum require:

(A) the signature of the owner;

(B) the name and complete address of the applicant; and

(C) the vehicle description.

(3) Fees and documentation. The application must be accompanied by:

(A) statutorily prescribed fees;

(B) evidence of financial responsibility:

(i) as required by Transportation Code, Chapter 502, Subchapter B, provided that all policies written for the operation of motor vehicles must be issued by an insurance company or surety company authorized to write motor

vehicle liability insurance in Texas; or

(ii) if the applicant is a motor carrier as defined by §218.2 of this title (relating to Definitions), indicating that the vehicle is registered in compliance with Chapter 218, Subchapter B of this title (relating to Motor Carrier Registration); and

(C) any other documents or fees required by law.

(4) Place of application.

(A) All applications for annual permits must be submitted directly to the department for processing and issuance.

(B) Additional weight permits and temporary agricultural permits may be obtained by making application with the department through the county tax assessor-collectors' offices.

(C) 72-hour and 144-hour permits, one-trip permits, and 30-day temporary registration permits may be obtained by making application either with the department or the county tax assessor-collectors' offices.

(d) Receipt for permit in lieu of registration. A receipt will be issued for each permit in lieu of registration to be carried in the vehicle during the time the permit is valid. A one-trip or 30-day trip permit must be displayed as required by

Transportation Code, §502.095(f). If the receipt is lost or destroyed, the owner must obtain a duplicate from the department or from the county office. The fee for the duplicate receipt is the same as the fee required by Transportation Code, §502.058.

(e) Transfer of temporary permits.

(1) Temporary permits are non-transferable between vehicles and/or owners.

(2) If the owner of a vehicle displaying a temporary permit disposes of the vehicle during the time the permit is valid, the permit must be returned to the county tax assessor-collector office or department immediately.

(f) Replacement permits. Vehicle owners displaying annual permits may obtain replacement permits if an annual permit is lost, stolen, or mutilated.

(1) The fee for a replacement annual permit is the same as for a replacement number plate, symbol, tab, or other device as provided by Transportation Code, §502.060.

(2) The owner shall apply directly to the department in writing for the issuance of a replacement annual permit. Such request should include a copy of the registration receipt and replacement fee.

(g) Agreements with other jurisdictions. In accordance with Transportation Code, §502.091, and Chapter 648, the executive

director of the department may enter into a written agreement with an authorized officer of a state, province, territory, or possession of a foreign country to provide for the exemption from payment of registration fees by nonresidents, if residents of this state are granted reciprocal exemptions. The executive director may enter into such agreement only upon:

(1) the approval of the governor; and

(2) making a determination that the economic benefits to the state outweigh all other factors considered.

(h) Border commercial zones.

(1) Texas registration required. A vehicle located in a border commercial zone must display a valid Texas registration if the vehicle is owned by a person who:

(A) owns a leasing facility or a leasing terminal located in Texas; and

(B) leases the vehicle to a foreign motor carrier.

(2) Exemption for trips of short duration. Except as provided by paragraph (1) of this subsection, a foreign commercial vehicle operating in accordance with Transportation Code, Chapter 648 is exempt from the display of a temporary registration permit if:

(A) the vehicle is engaged solely in the

transportation of cargo across the border into or from a border commercial zone;

(B) for each load of cargo transported the vehicle remains in this state for:

(i) not more than 24 hours; or

(ii) not more than 48 hours, if:

(I) the vehicle is unable to leave this state within 24 hours because of circumstances beyond the control of the motor carrier operating the vehicle; and

(II) all financial responsibility requirements applying to this vehicle are satisfied;

(C) the vehicle is registered and licensed as required by the country in which the person that owns the vehicle is domiciled or is a citizen as evidenced by a valid metal license plate attached to the front or rear exterior of the vehicle; and

(D) the country in which the person who owns the vehicle is domiciled or is a citizen provides a reciprocal exemption for commercial motor vehicles owned by residents of Texas.

(3) Exemption due to reciprocity agreement. Except as provided by paragraph (1) of this subsection, a foreign commercial motor vehicle in a border commercial zone in this

state is exempt from the requirement of obtaining a Texas registration if the vehicle is currently registered in another state of the United States or a province of Canada with which this state has a reciprocity agreement that exempts a vehicle that is owned by a resident of this state and that is currently registered in this state from registration in the other state or province.

§217.42. Construction Machinery Criteria.

Construction machinery must meet the following criteria in order to qualify for the $5 [~~$5.00~~] machinery license plate: it must be an unconventional machine, such as those built from the ground up, designed and fabricated to perform a job relating to that type of construction. It is a vehicle that is not designed or used to tow or transport property or persons, other than those persons who may be required to operate such machinery in the function of its design and purpose. Machinery vehicles are vehicles which are actually designed for special construction purposes.

§217.45. Specialty License Plates, Symbols, Tabs, and Other Devices.

(a) Purpose and Scope. Transportation Code, Chapters 504

and 551 charge the department with providing specialty license plates, symbols, tabs, and other devices. For the department to perform these duties efficiently and effectively, this section prescribes the policies and procedures for the application, issuance, and renewal of specialty license plates, symbols, tabs, and other devices, through the county tax assessor-collectors, and establishes application fees, expiration dates, and registration periods for certain specialty license plates. This section does not apply to military license plates except as provided by §217.43 of this title (relating to Military Specialty License Plates).

(b) Initial application for specialty license plates, symbols, tabs, or other devices.

(1) Application Process.

(A) Procedure. An owner of a vehicle registered as specified in this subchapter who wishes to apply for a specialty license plate, symbol, tab, or other device must do so on a form prescribed by the director.

(B) Form requirements. The application form shall at a minimum require the name and complete address of the applicant.

(2) Fees and Documentation.

(A) The application must be accompanied by the

prescribed registration fee, unless exempted by statute.

(B) The application must be accompanied by the statutorily prescribed specialty license plate fee. If a registration period is greater than 12 months, the expiration date of a specialty license plate, symbol, tab, or other device will be aligned with the registration period and the specialty plate fee will be adjusted to yield the appropriate fee. If the statutory annual fee for a specialty license plate is $5 or less, it will not be prorated.

(C) Specialty license plate fees will not be refunded after an application is submitted and the department has approved issuance of the license plate.

(D) The application must be accompanied by prescribed local fees or other fees that are collected in conjunction with registering a vehicle, with the exception of vehicles bearing license plates that are exempt by statute from these fees.

(E) The application must include evidence of eligibility for any specialty license plates. The evidence of eligibility may include, but is not limited to:

(i) an official document issued by a governmental entity; or

(ii) a letter issued by a governmental

entity on that agency's letterhead.

(F) Initial applications for license plates for display on Exhibition Vehicles must include a photograph of the completed vehicle.

(3) Place of application. Applications for specialty license plates may be made directly to the county tax assessor-collector, except that applications for the following license plates must be made directly to the department:

(A) County Judge;

(B) Federal Administrative Law Judge;

(C) State Judge;

(D) State Official;

(E) U.S. Congress--House;

(F) U.S. Congress--Senate; and

(G) U.S. Judge.

(4) Gift plates.

(A) A person may purchase general distribution specialty license plates as a gift for another person if the purchaser submits an application for the specialty license plates that provides:

(i) the name and address of the person who will receive the plates; and

(ii) the vehicle identification number of

the vehicle on which the plates will be displayed.

(B) To be valid for use on a motor vehicle, the recipient of the plates must file an application with the county tax assessor-collector and pay the statutorily required registration fees in the amount as provided by Transportation Code, Chapter 502 and this subchapter.

(c) Initial issuance of specialty license plates, symbols, tabs, or other devices.

(1) Issuance. On receipt of a completed initial application for registration, accompanied by the prescribed documentation and fees, the department will issue specialty license plates, symbols, tabs, or other devices to be displayed on the vehicle for which the license plates, symbols, tabs, or other devices were issued for the current registration period. If the vehicle for which the specialty license plates, symbols, tabs, or other devices are issued is currently registered, the owner must surrender the license plates currently displayed on the vehicle, along with the corresponding license receipt, before the specialty license plates may be issued.

(2) Classic Motor Vehicles, Classic Travel Trailers, Custom Vehicles, Street Rods, and Exhibition Vehicles.

(A) License plates. Texas license plates that were issued the same year as the model year of a Classic Motor

Vehicle, Travel Trailer, Street Rod, or Exhibition Vehicle may be displayed on that vehicle under Transportation Code, §504.501 and §504.502, unless:

(i) the license plate's original use was restricted by statute to another vehicle type;

(ii) the license plate is a qualifying plate type that originally required the owner to meet one or more eligibility requirements; or

(iii) the alpha numeric pattern is already in use on another vehicle.

(B) Validation stickers and tabs. The department will issue validation stickers and tabs for display on license plates that are displayed as provided by subparagraph (A) of this paragraph.

(3) Number of plates issued.

(A) Two plates. Unless otherwise listed in subparagraph (B) of this paragraph, two specialty license plates, each bearing the same license plate number, will be issued per vehicle.

(B) One plate. One license plate will be issued per vehicle for all motorcycles and for the following specialty license plates:

(i) Antique Vehicle (includes Antique Auto,

Antique Truck, Antique Motorcycle, and Antique Bus);

(ii) Classic Travel Trailer;

(iii) Rental Trailer;

(iv) Travel Trailer;

(v) Cotton Vehicle;

(vi) Disaster Relief;

(vii) Forestry Vehicle;

(viii) Golf Cart;

(ix) Log Loader; and

(x) Military Vehicle.

(C) Registration number. The identification number assigned by the military may be approved as the registration number instead of displaying Military Vehicle license plates on a former military vehicle.

(4) Assignment of plates.

(A) Title holder. Unless otherwise exempted by law or this section, the vehicle on which specialty license plates, symbols, tabs, or other devices is to be displayed shall be titled in the name of the person to whom the specialty license plates, symbols, tabs, or other devices is assigned, or a title application shall be filed in that person's name at the time the specialty license plates, symbols, tabs, or other devices are issued.

(B) Non-owner vehicle. If the vehicle is titled in a name other than that of the applicant, the applicant must provide evidence of having the legal right of possession and control of the vehicle.

(C) Leased vehicle. In the case of a leased vehicle, the applicant must provide a copy of the lease agreement verifying that the applicant currently leases the vehicle.

(5) Classification of neighborhood electric vehicles. The registration classification of a neighborhood electric vehicle, as defined by §217.3(3) of this title (relating to Motor Vehicle Titles) will be determined by whether it is designed as a 4-wheeled truck or a 4-wheeled passenger vehicle.

(6) Number of vehicles. An owner may obtain specialty license plates, symbols, tabs, or other devices for an unlimited number of vehicles, unless the statute limits the number of vehicles for which the specialty license plate may be issued.

(7) Personalized plate numbers.

(A) Issuance. The department will issue a personalized license plate number subject to the exceptions set forth in this paragraph.

(B) Character limit. A personalized license plate number may contain no more than six alpha or numeric characters

or a combination of characters. Depending upon the specialty license plate design and vehicle class, the number of characters may vary. Spaces, hyphens, periods, hearts, stars, the International Symbol of Access, or silhouettes of the state of Texas may be used in conjunction with the license plate number.

(C) Personalized plates not approved. A personalized license plate number will not be approved by the executive director if the alpha-numeric pattern:

(i) conflicts with the department's current or proposed regular license plate numbering system;

(ii) would violate §217.27 of this title (relating to Vehicle Registration Insignia), as determined by the executive director; or

(iii) is currently issued to another owner.

(D) Classifications of vehicles eligible for personalized plates. Unless otherwise listed in subparagraph (E) of this paragraph, personalized plates are available for all classifications of vehicles.

(E) Categories of plates for which personalized plates are not available. Personalized license plate numbers are not available for display on the following specialty license plates:

(i) Amateur Radio (other than the official

call letters of the vehicle owner);

(ii) Antique Motorcycle;

(iii) Antique Vehicle (includes Antique Auto, Antique Truck, and Antique Bus);

(iv) Apportioned;

(v) Cotton Vehicle;

(vi) Disaster Relief;

(vii) Farm Trailer (except Go Texan II);

(viii) Farm Truck (except Go Texan II);

(ix) Farm Truck Tractor (except Go Texan II);

(x) Fertilizer;

(xi) Forestry Vehicle;

(xii) Log Loader;

(xiii) Machinery;

(xiv) Permit;

(xv) Rental Trailer;

(xvi) Soil Conservation; and

(xvii) Texas Guard.

(F) Fee. Unless specified by statute, a personalized license plate fee of $40 will be charged in addition to any prescribed specialty license plate fee.

(G) Priority. Once a personalized license plate

number has been assigned to an applicant, the owner shall have priority to that number for succeeding years if a timely renewal application is submitted to the county tax assessor-collector each year in accordance with subsection (d) of this section.

(d) Specialty license plate renewal.

(1) Renewal deadline. If a personalized license plate is not renewed within 60 days after its expiration date, a subsequent renewal application will be treated as an application for new personalized license plates.

(2) Length of validation. With the following exceptions, all specialty license plates, symbols, tabs, or other devices shall be valid for 12 months from the month of issuance or for a prorated period of at least 12 months coinciding with the expiration of registration.

(A) Five-year period. Antique Vehicle (includes Antique Auto, Antique Truck, and Antique Bus) and Antique Motorcycle license plates, Antique tabs, and registration numbers are issued for a five-year period.

(B) Seven-year period. Foreign Organization license plates and registration numbers are issued for a seven-year period.

(C) March expiration dates. The registration for Cotton Vehicle and Disaster Relief license plates expires each

March 31.

(D) June expiration dates. The registration for the Honorary Consul license plate expires each June 30.

(E) September expiration dates. The registration for the Log Loader license plate expires each September 30.

(F) December expiration dates. The registration for the following license plates expires each December 31:

(i) County Judge;

(ii) Federal Administrative Law Judge;

(iii) State Judge;

(iv) State Official;

(v) U.S. Congress--House;

(vi) U.S. Congress--Senate; and

(vii) U.S. Judge.

(G) Except as otherwise provided in this paragraph, if a vehicle's registration period is other than 12 months, the expiration date of the specialty license plate, symbol, tab, or other device will be set to align it with the expiration of registration.

(3) Renewal.

(A) Renewal notice. Approximately 60 days before the expiration date of a specialty license plate, symbol, tab, or other device, the department will send each owner a renewal

notice that includes the amount of the specialty plate fee and the registration fee.

(B) Return of notice. The owner must return the fee and any prescribed documentation to the tax assessor-collector of the county in which the owner resides, except that the owner of a vehicle with one of the following license plates must return the documentation and specialty license plate fee, if applicable, directly to the department and submit the registration fee to the county tax assessor-collector:

(i) County Judge;

(ii) Federal Administrative Law Judge;

(iii) State Judge;

(iv) State Official;

(v) U.S. Congress--House;

(vi) U.S. Congress--Senate; and

(vii) U.S. Judge.

(C) Expired plate numbers. The department will retain a specialty license plate number for 60 days after the expiration date of the plates if the plates are not renewed on or before their expiration date. After 60 days the number may be reissued to a new applicant. All specialty license plate renewals received after the expiration of the 60 days will be treated as new applications.

(D) Issuance of validation insignia. On receipt of a completed license plate renewal application and prescribed documentation, the department will issue registration validation insignia as specified in §217.27 unless this section or other law requires the issuance of new license plates to the owner.

(E) Lost or destroyed renewal notices. If a renewal notice is lost, destroyed, or not received by the vehicle owner, the specialty license plates, symbol, tab, or other device may be renewed if the owner provides acceptable personal identification along with the appropriate fees and documentation. Failure to receive the notice does not relieve the owner of the responsibility to renew the vehicle's registration.

(e) Transfer of specialty license plates.

(1) Transfer between vehicles.

(A) Transferable between vehicles. The owner of a vehicle with specialty license plates, symbols, tabs, or other devices may transfer the specialty plates between vehicles by filing an application through the county tax assessor-collector if the vehicle to which the plates are transferred:

(i) is titled or leased in the owner's name; and

(ii) meets the vehicle classification

requirements for that particular specialty license plate, symbol, tab, or other device.

(B) Non-transferable between vehicles. The following specialty license plates, symbols, tabs, or other devices are non-transferable between vehicles:

(i) Antique Vehicle license plates (includes Antique Auto, Antique Truck, and Antique Bus), Antique Motorcycle license plates, and Antique tabs;

(ii) Classic Auto, Classic Truck, Classic Motorcycle, Classic Travel Trailer, Street Rod, and Custom Vehicle license plates;

(iii) Forestry Vehicle license plates; and

(iv) Log Loader license plates.

(C) New specialty license plates. If the department creates a new specialty license plate under Transportation Code, §504.801, the department will specify at the time of creation whether the license plate may be transferred between vehicles.

(2) Transfer between owners.

(A) Non-transferable between owners. Specialty license plates, symbols, tabs, or other devices issued under Transportation Code, Chapter 504, Subchapters C, E, and F are not transferable from one person to another except as

specifically permitted by statute.

(B) New specialty license plates. If the department creates a new specialty license plate under Transportation Code, §504.801, the department will specify at the time of creation whether the license plate may be transferred between owners.

(3) Simultaneous transfer between owners and vehicles. Specialty license plates, symbols, tabs, or other devices are transferable between owners and vehicles simultaneously only if the owners and vehicles meet all the requirements in both paragraphs (1) and (2) of this subsection.

(f) Replacement.

(1) Application. When specialty license plates, symbols, tabs, or other devices are lost, stolen, or mutilated, the owner shall apply directly to the county tax assessor-collector for the issuance of replacements, except that Log Loader license plates must be reapplied for and accompanied by the prescribed fees and documentation.

(2) Temporary registration insignia. If the specialty license plate, symbol, tab, or other device is lost, destroyed, or mutilated to such an extent that it is unusable, and if issuance of a replacement license plate would require that it be remanufactured, the owner must pay the statutory replacement

fee, and the department will issue a temporary tag for interim use. The owner's new specialty license plate number will be shown on the temporary tag unless it is a personalized license plate, in which case the same personalized license plate number will be shown.

(3) Stolen specialty license plates.

(A) The department or county tax assessor-collector will not approve the issuance of replacement license plates with the same personalized license plate number if the department's records indicate either the vehicle displaying the personalized license plates or the license plates are reported as stolen to law enforcement. The owner will be directed to contact the department for another personalized plate choice.

(B) The owner may select a different personalized number to be issued at no charge with the same expiration as the stolen specialty plate. On recovery of the stolen vehicle or license plates, the department will issue, at the owner's or applicant's request, replacement license plates, bearing the same personalized number as those that were stolen.

(g) License plates created after January 1, 1999. In accordance with Transportation Code, §504.702, the department will begin to issue specialty license plates authorized by a law enacted after January 1, 1999, only if the sponsoring entity for

that license plate submits the following items before the fifth anniversary of the effective date of the law.

(1) The sponsoring entity must submit a written application. The application must be on a form approved by the director and include, at a minimum:

(A) the name of the license plate;

(B) the name and address of the sponsoring entity;

(C) the name and telephone number of a person authorized to act for the sponsoring entity; and

(D) the deposit.

(2) A sponsoring entity is not an agent of the department and does not act for the department in any matter, and the department does not assume any responsibility for fees or applications collected by a sponsoring entity.

(h) Assignment procedures for state, federal, and county officials.

(1) State Officials. State Official license plates contain the distinguishing prefix "SO." Members of the state legislature may be issued up to three sets of State Official specialty license plates with the distinguishing prefix "SO," or up to three sets of State Official specialty license plates that depict the state capitol, and do not display the distinguishing

prefix "SO." An application by a member of the state legislature, for a State Official specialty license plate, must specify the same specialty license plate design for each applicable vehicle. State Official license plates are assigned in the following order:

(A) Governor;

(B) Lieutenant Governor;

(C) Speaker of the House;

(D) Attorney General;

(E) Comptroller;

(F) Land Commissioner;

(G) Agriculture Commissioner;

(H) Secretary of State;

(I) Railroad Commission Presiding Officer followed by the remaining members based on their seniority;

(J) Supreme Court Chief Justice followed by the remaining justices based on their seniority;

(K) Criminal Court of Appeals Presiding Judge followed by the remaining judges based on their seniority;

(L) Members of the State Legislature, with Senators assigned in order of district number followed by Representatives assigned in order of district number, except that in the event of redistricting, license plates will be

reassigned; and

(M) Board of Education Presiding Officer followed by the remaining members assigned in district number order, except that in the event of redistricting, license plates will be reassigned.

(2) Members of the U.S. Congress.

(A) U.S. Senate license plates contain the prefix "Senate" and are assigned by seniority; and

(B) U.S. House license plates contain the prefix "House" and are assigned in order of district number, except that in the event of redistricting, license plates will be reassigned.

(3) Federal Judge.

(A) Federal Judge license plates contain the prefix "USA" and are assigned on a seniority basis within each court in the following order:

(i) Judges of the Fifth Circuit Court of Appeals;

(ii) Judges of the United States District Courts;

(iii) United States Bankruptcy Judges; and

(iv) United States Magistrates.

(B) Federal Administrative Law Judge plates

contain the prefix "US" and are assigned in the order in which applications are received.

(C) A federal judge who retired on or before August 31, 2003, and who held license plates expiring in March 2004 may continue to receive federal judge plates. A federal judge who retired after August 31, 2003, is not eligible for U.S. Judge license plates.

(4) State Judge.

(A) State Judge license plates contain the prefix "TX" and are assigned sequentially in the following order:

(i) Appellate District Courts;

(ii) Presiding Judges of Administrative Regions;

(iii) Judicial District Courts;

(iv) Criminal District Courts; and

(v) Family District Courts and County Statutory Courts.

(B) A particular alpha-numeric combination will always be assigned to a judge of the same court to which it was originally assigned.

(C) A state judge who retired on or before August 31, 2003, and who held license plates expiring in March 2004 may continue to receive state judge plates. A state judge who

retired after August 31, 2003, is not eligible for State Judge license plates.

(5) County Judge license plates contain the prefix "CJ" and are assigned by county number.

(6) In the event of redistricting or other plate reallocation, the department may allow a state official to retain that official's plate number if the official has had the number for five or more consecutive years.

(i) Development of new specialty license plates.

(1) Procedure. The following procedure governs the process of authorizing new specialty license plates under Transportation Code, §504.801, whether the new license plate originated as a result of an application or as a department initiative.

(2) Applications for the creation of new specialty license plates. An applicant for the creation of a new specialty license plate, other than a vendor specialty plate under §217.52 of this title (relating to Marketing of Specialty License Plates through a Private Vendor), must submit a written application on a form approved by the executive director. The application must include:

(A) the applicant's name, address, telephone number, and other identifying information as directed on the

form;

(B) certification on Internal Revenue Service letterhead stating that the applicant is a not-for-profit entity;

(C) a draft design of the specialty license plate;

(D) projected sales of the plate, including an explanation of how the projected figure was established;

(E) a marketing plan for the plate, including a description of the target market;

(F) a licensing agreement from the appropriate third party for any intellectual property design or design element;

(G) a letter from the executive director of the sponsoring state agency stating that the agency agrees to receive and distribute revenue from the sale of the specialty license plate and that the use of the funds will not violate a statute or constitutional provision; and

(H) other information necessary for the board [~~Board~~] to reach a decision regarding approval of the requested specialty plate.

(3) Review process. The board: [~~Board:~~]

(A) will not consider incomplete applications;

(B) may request additional information from an applicant if necessary for a decision; and

(C) will consider specialty license plate applications that are restricted by law to certain individuals or groups of individuals (qualifying plates) using the same procedures as applications submitted for plates that are available to everyone (non-qualifying plates).

(4) Request for additional information. If the board [~~Board~~] determines that additional information is needed, the applicant must return the requested information not later than the requested due date. If the additional information is not received by that date, the board [~~Board~~] will return the application as incomplete unless the board: [~~Board:~~]

(A) determines that the additional requested information is not critical for consideration and approval of the application; and

(B) approves the application, pending receipt of the additional information by a specified due date.

(5) Board decision. The board’s [~~Board's~~] decision will be based on:

(A) compliance with Transportation Code, §504.801;

(B) the proposed license plate design, including:

(i) whether the design appears to meet the legibility and reflectivity standards established by the department;

(ii) whether the design meets the standards established by the department for uniqueness;

(iii) other information provided during the application process;

(iv) the criteria designated in §217.27 as applied to the design; and

(v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales; and

(C) the applicant's ability to comply with Transportation Code, §504.702 relating to the required deposit or application that must be provided before the manufacture of a new specialty license plate.

(6) Public comment on proposed design. All proposed plate designs will be considered by the board [~~Board~~] as an agenda item at a regularly or specially called open meeting. Notice of consideration of proposed plate designs will be posted in accordance with Office of the Secretary of State meeting notice requirements. Notice of each license plate design will be posted on the department's Internet website to receive public

comment at least 25 days in advance of the meeting at which it will be considered. The department will notify all other specialty plate organizations and the sponsoring agencies who administer specialty license plates issued in accordance with Transportation Code, Chapter 504, Subchapter G, of the posting. A comment on the proposed design can be submitted in writing through the mechanism provided on the department's Internet website for submission of comments. Written comments are welcome and must be received by the department at least 10 days in advance of the meeting. Public comment will be received at the board's [~~Board's~~] meeting.

(7) Final approval.

(A) Approval. The board [~~Board~~] will approve or disapprove the specialty license plate application based on all of the information provided pursuant to this subchapter at an open meeting.

(B) Application not approved. If the application is not approved under subparagraph (A) of this paragraph, the applicant may submit a new application and supporting documentation for the design to be considered again by the board [~~Board~~] if:

(i) the applicant has additional, required documentation; or

(ii) the design has been altered to an acceptable degree.

(8) Issuance of specialty plates.

(A) If the specialty license plate is approved, the applicant must comply with Transportation Code, §504.702 before any further processing of the license plate.

(B) Approval of the plate does not guarantee that the submitted draft plate design will be used. The board [~~Board~~] has final approval authority of all specialty license plate designs and may adjust or reconfigure the submitted draft design to comply with the format or license plate specifications.

(C) If the board, [~~Board,~~] in consultation with the applicant, adjusts or reconfigures the design, the adjusted or reconfigured design will not be posted on the department's website for additional comments.

(9) Redesign of specialty license plate.

(A) Upon receipt of a written request from the applicant, the department will allow redesign of a specialty license plate.

(B) A request for a redesign must meet all application requirements and proceed through the approval process of a new specialty plate as required by this subsection.

(C) An approved license plate redesign does not

require the deposit required by Transportation Code, §504.702, but the applicant must pay a redesign cost to cover administrative expenses.

(j) Golf carts.

(1) A county tax assessor-collector may issue golf cart license plates as long as the requirements under Transportation Code, §551.403 or §551.404 are met.

(2) A county tax assessor-collector may only issue golf cart license plates to residents or property owners of the issuing county.

(3) A golf cart license plate may not be used as a registration insignia, and a golf cart may not be registered for operation on a public highway.

(4) The license plate fee for a golf cart license plate is $10.

§217.47. Vehicle Emissions Enforcement System.

(a) Purpose. Transportation Code, §502.047 requires the department to implement a system requiring verification that a vehicle complies with vehicle emissions inspection and maintenance programs as required by the Health and Safety Code, §382.202 and §382.203, and Transportation Code, Chapter 548, Subchapter F. Transportation Code, §501.0276 and §502.047

requires a vehicle subject to Transportation Code, §548.3011 to pass an emissions test on resale in an affected or early action compact county before it is titled or registered. This section prescribes the department's policies and procedures if a vehicle does not comply with the emissions standards set by federal and state laws and the provisions of the Texas air quality State Implementation Plan.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affected County--A county with a motor vehicle emissions inspection and maintenance program established under Transportation Code, §548.301.

(2) Department--The Texas Department of Motor Vehicles.

(3) DPS--The Texas Department of Public Safety.

(4) Early action compact county--A participating county under Health and Safety Code, Chapter 382, Subchapter H.

(5) TCEQ--The Texas Commission on Environmental Quality.

(6) Vehicle--A self-propelled vehicle required to be registered in the state, except those vehicles exempted by TCEQ.

(7) Vehicle inspection report--A vehicle inspection

form prescribed by DPS that is printed by the vehicle exhaust gas analyzer immediately following an emissions test.

(8) Vehicle emissions I/M program--A vehicle emissions inspection and maintenance program meeting all the requirements of the Environmental Protection Agency.

(9) Waiver--A form and certificate that allows a vehicle to be considered in compliance with the vehicle emissions I/M program for a specified period of time after a vehicle fails an emissions test.

(c) Notice from DPS or TCEQ.

(1) DPS, after notice to the vehicle owner, will notify the department if a motor vehicle owner fails to comply with the requirements of Transportation Code, Chapter 548, Subchapter F.

(2) TCEQ, after notice to the vehicle owner, will notify the department if a motor vehicle fails to comply with the requirements of Health and Safety Code, §382.202 and §382.203, [~~§382.037 and §382.0372,~~] and Transportation Code, Chapter 548, Subchapter F.

(3) The notice will include the vehicle identification number and the license plate number of the affected vehicle.

(4) If the department receives a notice of emissions noncompliance from DPS or TCEQ, the department will place a

notation on the motor vehicle record that the motor vehicle has failed to comply with the vehicle emissions I/M program.

(5) If the department receives a notice of emissions compliance from DPS or TCEQ, the department will remove the non-compliance notation from the motor vehicle record.

(6) If a vehicle record contains a notation of failure to comply with the vehicle emissions I/M program, the tax assessor-collector will deny registration unless provided with:

(A) proof of compliance with the vehicle emissions I/M program with a "passing" vehicle inspection report; or

(B) proof of a waiver issued by DPS that includes the vehicle identification number and the license plate number.

(7) DPS and TCEQ will provide the department with the notifications in a format approved by the department.

(8) DPS and TCEQ will enter into an agreement with the department regarding the remittance to the department for costs associated with implementation of the emissions program.

(d) Vehicles moved into affected or early action compact counties. If a vehicle was last titled in an unaffected county and is to be titled or registered in an affected or early action compact county, it is not eligible for a title receipt, a title, or registration after a retail sale unless proof is presented to

the county tax assessor-collector that the vehicle has passed the emissions test. This subsection does not apply to a vehicle that will be used in the affected or early action compact county for fewer than 60 days during the registration period for which registration is sought or to a vehicle that is a 1996 or newer model and has less than 50,000 miles.

§217.52. Marketing of Specialty License Plates through a Private Vendor.

(a) Purpose and scope. The department will enter into a contract with a private vendor to market department-approved specialty license plates in accordance with Transportation Code, Chapter 504, Subchapter J. This section sets out the procedure for approval of the design, purchase, and replacement of vendor specialty license plates. In this section, the license plates marketed by the vendor are referred to as vendor specialty license plates.

(b) Application for approval of vendor specialty license plate designs.

(1) Approval required. The vendor shall obtain the approval of the board [~~Board~~] for each license plate design the vendor proposes to market in accordance with this section and the contract entered into between the vendor and the department.

(2) Application. The vendor must submit a written application on a form approved by the executive director to the department for approval of each license plate design the vendor proposes to market. The application must include:

(A) a draft design of the specialty license plate;

(B) projected sales of the plate, including an explanation of how the projected figure was determined;

(C) a marketing plan for the plate including a description of the target market;

(D) a licensing agreement from the appropriate third party for any design or design element that is intellectual property; and

(E) other information necessary for the board [~~Board~~] to reach a decision regarding approval of the requested vendor specialty plate.

(c) Review and approval process. The board [~~Board~~] will review vendor specialty license plate applications. The board: [~~Board:~~]

(1) will not consider incomplete applications; and

(2) may request additional information from the vendor to reach a decision.

(d) Board decision.

(1) Decision. The decision of the board [~~Board~~] will be based on:

(A) compliance with Transportation Code, Chapter 504, Subchapter J;

(B) the proposed license plate design, including:

(i) whether the design meets the legibility and reflectivity standards established by the department;

(ii) whether the design meets the standards established by the department for uniqueness to ensure that the proposed plate complies with Transportation Code, §504.852(c);

(iii) whether the license plate design can accommodate the International Symbol of Access (ISA) as required by Transportation Code, §504.201(f);

(iv) the criteria designated in §217.27 of this title (relating to Vehicle Registration Insignia) as applied to the design;

(v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales; and

(vi) other information provided during the application process.

(2) Public comment on proposed design. All proposed plate designs will be considered by the board [~~Board~~] as an

agenda item at a regularly or specially called open meeting. Notice of consideration of proposed plate designs will be posted in accordance with Office of the Secretary of State meeting notice requirements. Notice of each license plate design will be posted on the department's Internet web site to receive public comment at least 25 days in advance of the meeting at which it will be considered. The department will notify all specialty plate organizations and the sponsoring agencies who administer specialty license plates issued in accordance with Transportation Code, Chapter 504, Subchapter G, of the posting. A comment on the proposed design can be submitted in writing through the mechanism provided on the department's Internet web site for submission of comments. Written comments are welcome and must be received by the department at least 10 days in advance of the meeting. Public comment will be received at the board's [~~Board's~~] meeting.

(e) Final approval and specialty license plate issuance.

(1) Approval. The board [~~Board~~] will approve or disapprove the specialty license plate application based on all of the information provided pursuant to this subchapter in an open meeting.

(2) Application not approved. If the application is not approved, the applicant may submit a new application and

supporting documentation for the design to be considered again by the board [~~Board~~] if:

(A) the applicant has additional, required documentation; or

(B) the design has been altered to an acceptable degree.

(3) Issuance of approved specialty plates.

(A) If the vendor's specialty license plate is approved, the vendor must submit the non-refundable start-up fee before any further design and processing of the license plate.

(B) Approval of the plate does not guarantee that the submitted draft plate design will be used. The board [~~Board~~] has final approval of all specialty license plate designs and will provide guidance on the submitted draft design to ensure compliance with the format and license plate specifications.

(f) Redesign of vendor specialty license plates.

(1) On receipt of a written request from the vendor, the department will allow a redesign of a vendor specialty license plate.

(2) The vendor must pay the redesign administrative costs as provided in the contract between the vendor and the department.

(g) Multi-year vendor specialty license plates. Purchasers

will have the option of purchasing vendor specialty license plates for a one-year, a three-year, or a five-year period.

(h) License plate categories and associated fees. The categories and the associated fees for vendor specialty plates are set out in this subsection.

(1) Custom license plates. Custom license plates include license plates with a variety of pre-approved background and character color combinations that may be personalized with either three alpha and two or three numeric characters or two or three numeric and three alpha characters. Generic license plates on standard white sheeting with the word "Texas" that may be personalized with up to six alphanumeric characters are considered custom license plates before December 2, 2010. The fees for issuance of Custom and Generic license plates are $150 for one year, $400 for three years, and $450 for five years.

(2) T-Plates (Premium) license plates. T-Plates (Premium) license plates may be personalized with up to seven alphanumeric characters, including the "T," on colored backgrounds or designs approved by the department. The fees for issuance of T-Plates (Premium) license plates are $150 for one year, $400 for three years, and $450 for five years.

(3) Luxury license plates. Luxury license plates may be personalized with up to six alphanumeric characters on

colored backgrounds or designs approved by the department. The fees for issuance of luxury license plates are $150 for one year, $400 for three years, and $450 for five years.

(4) Freedom license plates. Freedom license plates include license plates with a variety of pre-approved background and character color combinations that may be personalized with up to seven alphanumeric characters. The fees for issuance of freedom license plates are $195 for one year, $445 for three years, and $495 for five years.

(5) Background only license plates. Background only license plates include non-personalized license plates with a variety of pre-approved background and character color combinations. The fees for issuance of background only license plates are $50 for one year, $130 for three years, and $175 for five years.

(6) Vendor souvenir license plates. Vendor souvenir license plates are replicas of vendor specialty license plate designs that may be personalized with up to 24 [~~twenty-four~~] alphanumeric characters. Vendor souvenir license plates are not street legal or legitimate insignias of vehicle registration. The fee for issuance of souvenir license plates is $40.

(7) Auction of alphanumeric patterns. The vendor may auction alphanumeric patterns for one, three, or five year terms

with options to renew indefinitely at the current price established for a one, three, or five year luxury category license plate. The purchaser of the auction pattern may select from the vendor background designs at no additional charge at the time of initial issuance. The auction pattern may be moved from one vendor design plate to another vendor design plate as provided in subsection (n)(1) of this section. The auction pattern may be transferred from owner to owner as provided in subsection (l)(2) of this section.

(8) Personalization and specialty plate fees.

(A) The fee for the personalization of license plates applied for prior to November 19, 2009 is $40 if the plates are renewed annually.

(B) The personalization fee for plates applied for after November 19, 2009 is $40 if the plates are issued pursuant to Transportation Code, Chapter 504, Subchapters G and I.

(C) If the plates are renewed annually, the personalization and specialty plate fees remain the same fee as at the time of issuance if a sponsor of a specialty license plate authorized under Transportation Code, Chapter 504, Subchapters G and I signs a contract with the vendor in accordance with Transportation Code, Chapter 504, Subchapter J.

(i) Payment of fees.

(1) Payment of specialty license plate fees. The fees for issuance of vendor specialty license plates will be paid directly to the state through vendor and state systems for the license plate category and period selected by the purchaser. A person who purchases a multi-year vendor specialty license plate must pay upon purchase the full fee which includes the renewal fees.

(2) Payment of statutory registration fees. To be valid for use on a motor vehicle, the license plate owner is required to pay, in addition to the vendor specialty license plate fees, any statutorily required registration fees in the amount as provided by Transportation Code, Chapter 502, and this subchapter.

(j) Refunds. Fees for vendor specialty license plate fees will not be refunded after an application is submitted to the vendor and the department has approved issuance of the license plate.

(k) Replacement.

(1) Application. An owner must apply directly to the county tax assessor-collector for the issuance of replacement vendor specialty license plates and must pay the fee described in paragraphs (2) or (3) of this subsection, whichever applies.

(2) Lost or mutilated vendor specialty license plates. To replace vendor specialty license plates that are lost or mutilated, the owner must pay the statutory replacement fee provided in Transportation Code, §504.007.

(3) Optional replacements. An owner of a vendor specialty license plate may replace vendor specialty license plates by submitting a request to the county tax assessor-collector accompanied by the payment of a $6 fee.

(4) Interim replacement tags. If the vendor specialty license plates are lost or mutilated to such an extent that they are unusable, replacement license plates will need to be remanufactured. The county tax assessor-collector will issue interim replacement tags for use until the replacements are available. The owner's vendor specialty license plate number will be shown on the interim replacement tags.

(5) Stolen vendor specialty license plates. The county tax assessor-collector will not approve the issuance of replacement vendor specialty license plates with the same license plate number if the department's records indicate that the vehicle displaying that license plate number was reported stolen or the license plates themselves were reported stolen.

(l) Transfer of vendor specialty license plates.

(1) Transfer between vehicles. The owner of a vehicle

with vendor specialty license plates may transfer the license plates between vehicles by filing an application through the county tax assessor-collector if the vehicle to which the plates are transferred:

(A) is titled or leased in the owner's name; and

(B) meets the vehicle classification requirements for that particular specialty license plate.

(2) Transfer between owners. Vendor specialty license plates may not be transferred between persons unless the license plate pattern was initially purchased through auction as provided in subsection (h)(7) of this section. An auctioned alphanumeric pattern may be transferred as a specialty license plate or as a virtual pattern to be manufactured on a new background as provided under the restyle option in subsection (n)(1) of this section. In addition to the fee paid at auction, the new owner of an auctioned alphanumeric pattern or plate will pay the department a fee of $25 to cover the cost of the transfer, and complete the department's prescribed application at the time of transfer.

(m) Gift plates.

(1) A person may purchase plates as a gift for another person if the purchaser submits a statement that provides:

(A) the purchaser's name and address;

(B) the name and address of the person who will receive the plates; and

(C) the vehicle identification number of the vehicle on which the plates will be displayed or a statement that the plates will not be displayed on a vehicle.

(2) To be valid for use on a motor vehicle, the recipient of the plates must file an application with the county tax assessor-collector and pay the statutorily required registration fees in the amount as provided by Transportation Code, Chapter 502, and this subchapter.

(n) Restyled vendor specialty license plates. A person who has purchased a multi-year vendor specialty license plate may request a restyled license plate at any time during the term of the plate.

(1) For the purposes of this subsection, "restyled license plate" is a vendor specialty license plate that has a different style from the originally purchased vendor specialty license plate but:

(A) is within the same price category, except if the pattern is an auction pattern; and

(B) has the same alpha-numeric characters and expiration date as the previously issued multi-year license plates.

(2) The fee for each restyled license plate is $50.

§217.54. Registration of Fleet Vehicles.

(a) Scope. A registrant may consolidate the registration of multiple motor vehicles, including trailers and semitrailers, [~~semi-trailers,~~] in a fleet instead of registering each vehicle separately. This section prescribes the policies and procedures for fleet registration.

(b) Eligibility. A fleet must meet the following requirements to be eligible for fleet registration.

(1) No fewer than 25 [~~twenty-five~~] vehicles will be registered as a fleet;

(2) Vehicles may be registered in annual increments for up to eight years;

(3) All vehicles in a fleet must be owned by or leased to the same business entity;

(4) All vehicles must be vehicles that are not registered under the International Registration Plan; and

(5) Each vehicle must currently be titled in Texas or be issued a registration receipt, or the registrant must submit an application for a title or registration for each vehicle.

(c) Application.

(1) Application for fleet registration must be in a

form prescribed by the department. At a minimum the form will require:

(A) the full name and complete address of the registrant;

(B) a description of each vehicle in the fleet, which may include the vehicle's model year, make, model, vehicle identification number, document number, body style, gross weight, empty weight, and for a commercial vehicle, manufacturer's rated carrying capacity in tons;

(C) the existing license plate number, if any, assigned to each vehicle; and

(D) any other information that the department may require.

(2) The application must be accompanied by the following items:

(A) in the case of a leased vehicle, a certification that the vehicle is currently leased to the person to whom the fleet registration will be issued;

(B) registration fees prescribed by law for the entire registration period selected by the registrant;

(C) local fees or other fees prescribed by law and collected in conjunction with registering a vehicle for the entire registration period selected by the registrant;

(D) evidence of financial responsibility for each vehicle as required by Transportation Code, §502.046, unless otherwise exempted by law;

(E) annual proof of payment of Heavy Vehicle Use Tax;

(F) the state's portion of the vehicle inspection fee for the vehicle inspections conducted in Texas; and

(G) any other documents or fees required by law.

(d) Registration period.

(1) The fleet owner will designate a single registration period for a fleet so the registration period for each vehicle will expire on the same date.

(2) The fleet registration period will begin on the first day of a calendar month and end on the last day of a calendar month.

(e) Insignia.

(1) As evidence of registration, the department will issue distinguishing insignia for each vehicle in a fleet.

(2) The insignia shall be included on the license plate and affixed to the vehicle.

(3) The insignia shall be attached to the rear license plate if the vehicle has no windshield.

(4) The registration receipt for each vehicle shall at

all times be carried in that vehicle and be available to law enforcement personnel.

(5) Insignia may not be transferred between vehicles, owners, or registrants.

(f) Fleet composition.

(1) A registrant may add a vehicle to a fleet at any time during the registration period. An added vehicle will be given the same registration period as the fleet and will be issued fleet registration insignia.

(2) A registrant may remove a vehicle from a fleet at any time during the registration period. The fleet registrant shall return the fleet registration insignia for that vehicle to the department at the time the vehicle is removed from the fleet. Credit for any vehicle removed from the fleet for the remaining full year increments can be applied to any vehicle added to the fleet or at the time of renewal. No refunds will be given if credit is not used or the account is closed.

(3) If the number of vehicles in an account falls below 25 [~~twenty-five~~] during the registration period, fleet registration will remain in effect. If the number of vehicles in an account is below 25 [~~twenty-five~~] at the end of the registration period, fleet registration will be canceled. In the event of cancellation, each vehicle shall be registered

separately. The registrant shall immediately return all fleet registration insignia to the department.

(g) Fees.

(1) When a fleet is first established, the department will charge a registration fee for each vehicle for the entire registration period selected. A currently registered vehicle, however, will be given credit for any remaining time on its separate registration.

(2) When a vehicle is added to an existing fleet, the department will charge a registration fee that is prorated based on the number of months of fleet registration remaining. If the vehicle is currently registered, this fee will be adjusted to provide credit for the number of months of separate registration remaining.

(3) When a vehicle is removed from fleet registration, it will be considered to be registered separately. The vehicle's separate registration will expire on the date that the fleet registration would have expired. The registrant must pay the statutory replacement fee to obtain regular registration insignia before the vehicle may be operated on a public highway.

(h) Payment. Payment will be made in the manner prescribed by the department.

(i) Cancellation.

(1) The department will cancel registration for non-payment and lack of proof of annual payment of the Heavy Vehicle Use Tax.

(2) The department may cancel registration on any fleet vehicle that is not in compliance with the inspection requirements under Transportation Code, Chapter 548 and the Texas Department of Public Safety rules regarding inspection requirements on the anniversary date(s) of the registration.

(3) A vehicle with a cancelled registration may not be operated on a public highway.

(4) If the department cancels the registration of a vehicle under this subsection, the registrant can request the department to reinstate the registration by doing the following:

(A) complying with the requirements for which the department cancelled the registration;

(B) providing the department with notice of compliance on a form prescribed by the department; and

(C) for a registration cancelled under paragraph (2) of this subsection, paying an administrative fee in the amount of $10.

(5) A registrant is only eligible for reinstatement of the registration within 90 calendar days of the department's notice of cancellation.

(6) If a registrant fails to timely reinstate the registration of a cancelled vehicle registration under this section, the registrant:

(A) is not entitled to a credit or refund of any registration fees for the vehicle; and

(B) must immediately return the registration insignia to the department.

(j) Inspection fee. The registrant must pay the department by the deadline listed in the invoice for the state's portion of the vehicle inspection fee for a vehicle inspection conducted in Texas.

§217.56. Registration Reciprocity Agreements.

(a) Purpose. To promote and encourage the fullest possible use of the highway system and contribute to the economic development and growth of the State of Texas and its residents, the department is authorized by Transportation Code, §502.091 to enter into agreements with duly authorized officials of other jurisdictions, including any state of the United States, the District of Columbia, a foreign country, a state or province of a foreign country, or a territory or possession of either the United States or of a foreign country, and to provide for the registration of vehicles by Texas residents and nonresidents on

an allocation or distance apportionment basis, and to grant exemptions from the payment of registration fees by nonresidents if the grants are reciprocal to Texas residents.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Cab card--The apportioned vehicle registration receipt that contains, but is not limited to, the vehicle description and the registered weight at which the vehicle may operate in each jurisdiction.

(2) Department--The Texas Department of Motor Vehicles.

(3) Director--The director of the Motor Carrier Division, Texas Department of Motor Vehicles.

(4) Executive director--The chief executive officer of the department.

(5) Regional Service Center--A department office which provides specific services to the public, including replacement titles, bonded title rejection letters, and apportioned registration under the International Registration Plan (IRP).

(6) Temporary cab card--A temporary registration permit authorized by the department that allows the operation of a vehicle for 30 days subject to all rights and privileges

afforded to a vehicle displaying apportioned registration.

(c) Multilateral agreements.

(1) Authority. The executive director may on behalf of the department enter into a multilateral agreement with the duly authorized officials of two or more other jurisdictions to carry out the purpose of this section.

(2) International Registration Plan.

(A) Applicability. The IRP is a registration reciprocity agreement among states of the United States and other jurisdictions providing for payment of registration fees on the basis of fleet distance operated in various jurisdictions. Its purpose is to promote and encourage the fullest possible use of the highway system by authorizing apportioned registration for commercial motor vehicles and payment of appropriate vehicle registration fees and thus contributing to the economic development and growth of the member jurisdictions.

(B) Adoption. The department adopts by reference the January 1, 2015, edition of the IRP. Effective January 1, 2016, the department adopts by reference the amendments to the IRP with an effective date of January 1, 2016. Effective July 1, 2016, the department adopts by reference the amendment to the IRP with an effective date of July 1, 2016. The department

further adopts by reference the July 1, 2013, edition of the IRP Audit Procedures Manual. In the event of a conflict between this section and the IRP or the IRP Audit Procedures Manual, the IRP and the IRP Audit Procedures Manual control. Copies of the documents are available for review in the Motor Carrier Division, Texas Department of Motor Vehicles. Copies are also available on request. The following words and terms, when used in the IRP or in paragraph (2) of this subsection, shall have the following meanings, unless the context clearly indicates otherwise.

(i) Apportionable vehicle--Any vehicle - except recreational vehicles, vehicles displaying restricted plates, city pickup and delivery vehicles, and government-owned vehicles - used or intended for use in two or more member jurisdictions that allocate or proportionally register vehicles and used either for the transportation of persons for hire or designed, used, or maintained primarily for the transportation of property and:

(I) is a power unit having two axles and a gross vehicle weight or registered gross vehicle weight in excess of 26,000 pounds (11,793.401 kilograms);

(II) is a power unit having three or more axles, regardless of weight;

(III) is used in combination, when the weight of such combination exceeds 26,000 pounds (11,793.401 kilograms) gross vehicle weight; or

(IV) at the option of the registrant, a power unit, or the power unit in a combination of vehicles having a gross vehicle weight of 26,000 pounds (11,793.401 kilograms) or less.

(ii) Commercial vehicle--A vehicle or combination of vehicles designed and used for the transportation of persons or property in furtherance of any commercial enterprise, for hire or not for hire.

(iii) Erroneous issuance--Apportioned registration issued based on erroneous information provided to the department.

(iv) Established place of business--A physical structure owned or leased within the state of Texas by the applicant or fleet registrant and maintained in accordance with the provisions of the IRP.

(v) Fleet distance--All distance operated by an apportionable vehicle or vehicles used to calculate registration fees for the various jurisdictions.

(C) Application.

(i) An applicant must submit an application

to the department on a form prescribed by the director, along with additional documentation as required by the director.

(ii) Upon approval of the application, the department will compute the appropriate registration fees and notify the registrant.

(D) Fees. Upon receipt of the applicable fees in the form as provided by §209.23 of this title (relating to Methods of Payment), the department will issue one or two license plates and a cab card for each vehicle registered.

(E) Display.

(i) The department will issue one license plate for a tractor, truck tractor, trailer, and semitrailer. [~~semi-trailer.~~] The license plate issued to a tractor or a truck tractor shall be installed on the front of the tractor or truck tractor, and the license plate issued for a trailer or semitrailer [~~semi-trailer~~] shall be installed on the rear of the trailer or semitrailer. [~~semi-trailer.~~]

(ii) The department will issue two license plates for all other vehicles that are eligible to receive license plates under the IRP. Once the department issues two license plates for a vehicle listed in this clause, one plate shall be installed on the front of the vehicle, and one plate shall be installed on the rear of the vehicle.

(iii) The cab card shall be carried at all times in the vehicle in accordance with the IRP.

(F) Audit. An audit of the registrant's vehicle operational records may be conducted by the department according to the IRP provisions and the IRP Audit Procedures Manual. Upon request, the registrant shall provide the operational records of each vehicle for audit in unit number order, in sequence by date, and including, but not limited to, a summary of distance traveled by each individual vehicle on a monthly, quarterly, and annual basis with distance totaled separately for each jurisdiction in which the vehicle traveled.

(G) Assessment. The department may assess additional registration fees of up to 100% of the apportionable fees paid by the registrant for the registration of its fleet in the registration year to which the records pertain, as authorized by the IRP, if an audit conducted under subparagraph (F) of this paragraph reveals that:

(i) the operational records indicate that the vehicle did not generate interstate distance in two or more member jurisdictions for the distance reporting period supporting the application being audited, plus the six-month period immediately following that distance reporting period;

(ii) the registrant failed to provide

complete operational records; or

(iii) the distance must be adjusted, and the adjustment results in a shortage of registration fees due Texas or any other IRP jurisdiction.

(H) Refunds. If an audit conducted under subparagraph (F) of this paragraph reveals an overpayment of fees to Texas or any other IRP jurisdiction, the department will refund the overpayment of registration fees in accordance with Transportation Code, §502.195 and the IRP. Any registration fees refunded to a carrier for another jurisdiction will be deducted from registration fees collected and transmitted to that jurisdiction.

(I) Cancellation. The director or the director's designee may cancel a registrant's apportioned registration and all privileges provided by the IRP if the registrant:

(i) submits payment in the form of a check that is dishonored;

(ii) files or provides erroneous information to the department; or

(iii) fails to:

(I) remit appropriate fees due each jurisdiction in which the registrant is authorized to operate;

(II) meet the requirements of the IRP

concerning established place of business;

(III) provide operational records in accordance with subparagraph (F) of this paragraph;

(IV) provide an acceptable source document as specified in the IRP; or

(V) pay an assessment pursuant to subparagraph (G) of this paragraph.

(J) Enforcement of cancelled registration.

(i) Notice. If a registrant is assessed additional registration fees, as provided in subparagraph (G) of this paragraph, and the additional fees are not paid by the due date provided in the notice or it is determined that a registrant's apportioned license plates and privileges should be canceled, as provided in subparagraph (I) of this paragraph, the director or the director's designee will mail a notice by certified mail to the last known address of the registrant. The notice will state the facts underlying the assessment or cancellation, the effective date of the assessment or cancellation, and the right of the registrant to request a conference as provided in clause (ii) of this subparagraph.

(ii) Conference. A registrant may request a conference upon receipt of a notice issued as provided by clause (i) of this subparagraph. The request must be made in writing to

the director or the director's designee within 30 days of the date of the notice. If timely requested, the conference will be scheduled and conducted by the director or the director's designee at division headquarters in Austin and will serve to abate the assessment or cancellation unless and until that assessment or cancellation is affirmed or disaffirmed by the director or the director's designee. In the event matters are resolved in the registrant's favor, the director or the director's designee will mail the registrant a notice of withdrawal, notifying the registrant that the assessment or cancellation is withdrawn, and stating the basis for that action. In the event matters are not resolved in the registrant's favor, the director or the director's designee will issue a ruling reaffirming the department's assessment of additional registration fees or cancellation of apportioned license plates and privileges. The registrant has the right to appeal in accordance with clause (iii) of this subparagraph.

(iii) Appeal. If a conference held in accordance with clause (ii) of this subparagraph fails to resolve matters in the registrant's favor, the registrant may request an administrative hearing. The request must be in writing and must be received by the director no later than the 20th day following the date of the ruling issued under clause

(ii) of this subparagraph. If requested within the designated period, the hearing will be initiated by the department and will be conducted in accordance with Chapter 206, Subchapter D of this title (relating to Procedures in Contested Cases). Assessment or cancellation is abated unless and until affirmed or disaffirmed by order of the Board of the Texas Department of Motor Vehicles.

(K) Reinstatement.

(i) The director or the director's designee will reinstate apportioned registration to a previously canceled registrant if all applicable fees and assessments due on the previously canceled apportioned account have been paid and the applicant provides proof of an acceptable recordkeeping system for a period of no less than 60 days.

(ii) The application for the following registration year will be processed in accordance with the provisions of the IRP.

(L) Denial of apportioned registration for safety reasons. The department will comply with the requirements of the Performance and Registration Information Systems Management program (PRISM) administered by the Federal Motor Carrier Safety Administration (FMCSA).

(i) Denial or suspension of apportioned

registration. Upon notification from the FMCSA that a carrier has been placed out of service for safety violations, the department will:

(I) deny initial issuance of apportioned registration;

(II) deny authorization for a temporary cab card, as provided for in subparagraph (M) of this paragraph;

(III) deny renewal of apportioned registration; or

(IV) suspend current apportioned registration.

(ii) Issuance after denial of registration or reinstatement of suspended registration. The director or the director's designee will reinstate or accept an initial or renewal application for apportioned registration from a registrant who was suspended or denied registration under clause (i) of this subparagraph upon presentation of a Certificate of Compliance from FMCSA, in addition to all other required documentation and payment of fees.

(M) Temporary cab card.

(i) Application. The department may authorize issuance of a temporary cab card to a motor carrier with an established Texas apportioned account for a vehicle upon

proper submission of all required documentation, a completed application, and all fees for either:

(I) Texas title as prescribed by Transportation Code, Chapter 501 and Subchapter A of this chapter (relating to Motor Vehicle Titles); or

(II) registration receipt to evidence title for registration purposes only (Registration Purposes Only) as provided for in Transportation Code, §501.029 and §217.24 of this title (relating to Vehicle Last Registered in Another Jurisdiction).

(ii) Title application. A registrant who is applying for a Texas title as provided for in clause (i)(I) of this subparagraph and is requesting authorization for a temporary cab card, must submit to a Regional Service Center by email, fax, overnight mail, or in person a photocopy of the title application receipt issued by the county tax assessor-collector's office.

(iii) Registration Purposes Only. A registrant who is applying for Registration Purposes Only under clause (i)(II) of this subparagraph and is requesting authorization for a temporary cab card, must submit an application and all additional original documents or copies of original documents required by the director to a Regional

Service Center by email, fax, or overnight mail or in person.

(iv) Department approval. On department approval of the submitted documents, the department will send notice to the registrant to finalize the transaction and make payment of applicable registration fees.

(v) Finalization and payment of fees. To finalize the transaction and print the temporary cab card, the registrant may compute the registration fees through the department's apportioned registration software application, TxIRP system, and:

(I) make payment of the applicable registration fees to the department as provided by §209.23 of this title (related to Methods of Payment); and

(II) afterwards, mail or deliver payment of the title application fee in the form of a check, certified cashier's check, or money order payable to the county tax assessor-collector in the registrant's county of residency and originals of all copied documents previously submitted.

(vi) Deadline. The original documents and payment must be received by the Regional Service Center within 72-hours after the time that the office notified the registrant of the approval to print a temporary cab card as provided in clause (iv) of this subparagraph.

(vii) Failure to meet deadline. If the registrant fails to submit the original documents and required payment within the time prescribed by clause (vi) of this subparagraph, the registrant's privilege to use this expedited process to obtain a temporary cab card will be denied by the department for a period of six months from the date of approval to print the temporary cab card.

SUBCHAPTER D. NON-REPAIRABLE AND SALVAGE MOTOR VEHICLES

§217.82. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Casual sale--The sale by a salvage vehicle dealer, insurance company, or salvage pool operator of not more than five non-repairable or salvage motor vehicles to the same person during a calendar year. The term does not include a sale to a salvage vehicle dealer or the sale of an export-only motor vehicle to a person who is not a resident of the United States.

(2) Certificate of title--A written instrument that may be issued solely by and under the authority of the department and that reflects the transferor, transferee, vehicle description, license plate and lien information, and rights of survivorship agreement as specified in Subchapter A of this chapter or as required by the department.

(3) Application for Title--A form prescribed by the director of the department's Vehicle Titles and Registration Division that reflects the information required by the department to create a motor vehicle title record.

(4) Damage--Sudden damage to a motor vehicle caused by the motor vehicle being wrecked, burned, flooded, or stripped of

major component parts. The term does not include gradual damage from any cause, sudden damage caused by hail, or any damage caused only to the exterior paint of the motor vehicle.

(5) Date of sale--The date of the transfer of possession of a specific vehicle from a seller to a purchaser.

(6) Department--The Texas Department of Motor Vehicles.

(7) Export-only sale--The sale of a non-repairable or salvage motor vehicle, by a salvage vehicle dealer, including a salvage pool operator acting as agent for an insurance company, or a governmental entity, to a person who resides outside the United States.

(8) Flood damage--A title remark that is initially indicated on a non-repairable or salvage vehicle title to denote that the damage to the vehicle was caused exclusively by flood and that is carried forward on subsequent title issuance.

(9) Insurance company--A person authorized to write automobile insurance in this state or an out-of-state insurance company that pays a loss claim for a motor vehicle in this state.

(10) Manufacturer's certificate of origin--A form prescribed by the department showing the original transfer of a new motor vehicle from the manufacturer to the original

purchaser, whether importer, distributor, dealer, or owner, and when presented with an application for title, showing, on appropriate forms prescribed by the department, each subsequent transfer between distributor and dealer, dealer and dealer, and dealer and owner.

(11) Metal recycler--A person who:

(A) is predominately engaged in the business of obtaining ferrous or nonferrous metal that has served its original economic purpose to convert the metal, or sell the metal for conversion, into raw material products consisting of prepared grades and having an existing or potential economic value;

(B) has a facility to convert ferrous or nonferrous metal into raw material products consisting of prepared grades and having an existing or potential economic value, by a method other than the exclusive use of hand tools, including the processing, sorting, cutting, classifying, cleaning, baling, wrapping, shredding, shearing, or changing the physical form or chemical content of the metal; and

(C) sells or purchases the ferrous or nonferrous metal solely for use as raw material in the production of new products.

(12) Motor vehicle--A vehicle described by

Transportation Code, §501.002(17).[~~§501.002(14).~~]

(13) Non-repairable motor vehicle--A motor vehicle, regardless of the year model, that is wrecked, damaged, or burned to the extent that the only residual value of the motor vehicle is as a source of parts or scrap metal, or that comes into this state under a title or other ownership document that indicates that the motor vehicle is non-repairable, junked, or for parts or dismantling only.

(14) Non-repairable vehicle title--A document that evidences ownership of a non-repairable motor vehicle.

(15) Out-of-state buyer--A person licensed in an automotive business by another state or jurisdiction if the department has listed the holders of such a license as permitted purchasers of salvage motor vehicles or non-repairable motor vehicles based on substantially similar licensing requirements and on whether salvage vehicle dealers licensed in Texas are permitted to purchase salvage motor vehicles or non-repairable motor vehicles in the other state or jurisdiction.

(16) Out-of-state ownership document--A negotiable document issued by another jurisdiction that the department considers sufficient to prove ownership of a non-repairable or salvage motor vehicle and to support issuance of a comparable Texas certificate of title for the motor vehicle. The term does

not include a title issued by the department, including a:

(A) regular certificate of title;

(B) non-repairable vehicle title;

(C) salvage vehicle title;

(D) salvage certificate;

(E) Certificate of Authority to Demolish a Motor Vehicle; or

(F) any other ownership document issued by the department.

(17) Person--An individual, partnership, corporation, trust, association, or other private legal entity.

(18) Rebuilt salvage certificate of title--A regular certificate of title evidencing ownership of a non-repairable motor vehicle that was issued a non-repairable vehicle title prior to September 1, 2003, or salvage motor vehicle that has been rebuilt.

(19) Salvage motor vehicle--A motor vehicle, regardless of the year model:

(A) that is:

(i) damaged or is missing a major component part to the extent that the cost of repairs exceeds the actual cash value of the motor vehicle immediately before the damage; or

(ii) damaged and comes into this state under an out-of-state ownership document that states on its face "accident damage," "flood damage," "inoperable," "rebuildable," "salvageable," or similar notation, and is not an out-of-state ownership document with a "rebuilt," "prior salvage," or similar notation, or a non-repairable motor vehicle; and

(B) does not include:

(i) a motor vehicle for which an insurance company has paid a claim for repairing hail damage, or theft, unless the motor vehicle was damaged during the theft and before recovery to the extent that the cost of repair exceeds the actual cash value of the motor vehicle immediately before the damage;

(ii) the cost of materials or labor for repainting the motor vehicle; or

(iii) sales tax on the total cost of repairs.

(20) Salvage vehicle dealer--A person engaged in this state in the business of acquiring, selling, dismantling, repairing, rebuilding, reconstructing, or otherwise dealing in non-repairable motor vehicles or salvage motor vehicles or used parts, including a person who is in the business of a salvage vehicle dealer, regardless of whether the person holds a license

issued by the department to engage in the business. The term does not include a person who casually repairs, rebuilds, or reconstructs fewer than three salvage motor vehicles in the same calendar year.

(21) Salvage vehicle title--A document issued by the department that evidences ownership of a salvage motor vehicle.

§217.84. Application for Non-repairable or Salvage Vehicle Title.

(a) Place of application. The owner of a non-repairable or salvage motor vehicle who is required to obtain or voluntarily chooses to obtain a non-repairable or salvage vehicle title, as provided by §217.83 of this title (relating to Requirement for Non-repairable or Salvage Vehicle Title), shall apply for a non-repairable or salvage vehicle title by submitting an application, the required accompanying documentation, and the statutory fee to the department.

(b) Information on application. An applicant for a non-repairable or salvage vehicle title shall submit an application on a form prescribed by the department. A completed form, in addition to any other information required by the department, must include:

(1) the name and current address of the owner;

(2) a description of the motor vehicle, including the motor vehicle's model year, make, model, identification number, body style, manufacturer's rated carrying capacity in tons for commercial vehicles, and empty weight;

(3) a statement describing whether the motor vehicle is a non-repairable or salvage motor vehicle; and

(A) was the subject of a total loss claim paid by an insurance company under Transportation Code, §501.1001 or §501.1002;[~~§501.092 or §501.093;~~]

(B) is a self-insured motor vehicle under Transportation Code, §501.091; [~~§501.094;~~]

(C) is an export-only motor vehicle under Transportation Code, §501.099;

(D) was sold, transferred, or released to the owner or former owner of the motor vehicle; or

(E) was sold, transferred, or released to a buyer at casual sale by a salvage vehicle dealer, insurance company, or salvage pool operator;

(4) whether the damage was caused exclusively by flood;

(5) a description of the damage to the motor vehicle;

(6) the odometer reading and brand, or the word "exempt" if the motor vehicle is exempt from federal and state

odometer disclosure requirements, if the motor vehicle is a salvage motor vehicle;

(7) the name, address, and city and state of residence of the previous owner;

(8) the name and mailing address of any lienholder and the date of lien, as provided by subsection (e) of this section; and

(9) the signature of the applicant or the applicant's authorized agent and the date the certificate of title application was signed.

(c) Accompanying documentation. A non-repairable or salvage vehicle title application must be supported, at a minimum, by:

(1) evidence of ownership, as described by subsection (d)(1) or (3) of this section, if the applicant is an insurance company that is unable to locate one or more of the owners;

(2) an odometer disclosure statement properly executed by the seller of the motor vehicle and acknowledged by the purchaser, if the motor vehicle is less than 10 model years old and the motor vehicle is a salvage motor vehicle; and

(3) a release of any liens.

(d) Evidence of non-repairable or salvage motor vehicle ownership.

(1) Evidence of non-repairable or salvage motor

vehicle ownership properly assigned to the applicant must accompany the application for a non-repairable or salvage vehicle title, except as provided by paragraph (2) of this subsection. Evidence must include documentation sufficient to show ownership to the non-repairable or salvage motor vehicle, such as:

(A) a Texas Certificate of Title;

(B) a certified copy of a Texas Certificate of Title;

(C) a manufacturer's certificate of origin;

(D) a Texas Salvage Certificate;

(E) a non-repairable vehicle title;

(F) a salvage vehicle title;

(G) a comparable ownership document issued by another jurisdiction, except that if the applicant is an insurance company, evidence must be provided indicating that the insurance company is:

(i) licensed to do business in Texas; or

(ii) not licensed to do business in Texas, but has paid a loss claim for the motor vehicle in this state; or

(H) a photocopy of the inventory receipt or a title and registration verification evidencing surrender to the

department of the negotiable evidence of ownership for a motor vehicle as provided by §217.86 of this title (relating to Dismantling, Scrapping, or Destruction of Motor Vehicles), and if the evidence of ownership surrendered was from another jurisdiction, a photocopy of the front and back of the surrendered evidence of ownership.

(2) An insurance company that acquires ownership or possession of a non-repairable or salvage motor vehicle through payment of a claim may apply for a non-repairable or salvage vehicle title to be issued in the insurance company's name without obtaining an ownership document or if it received an ownership document without the proper assignment of the owner if the company is unable to obtain a title from the owner, in accordance with paragraph (1) of this subsection, and the application is not made earlier than the 30th day after the date of payment of the claim. The application must also include:

(A) a statement that the insurance company has provided at least two written notices to the owner and any lienholder attempting to obtain the title or proper assignment of title for the motor vehicle;

(B) a copy of a document:

(i) indicating that payment has been made, including an electronic check, canceled check, or screen print

from the insurance company's database that identifies the type of payment method; and

(ii) reflecting the vehicle identification number, vehicle owner names, name of the person to whom payment was made if different from vehicle owners, payment amount, and date payment was issued; and

(C) any unassigned or improperly assigned title in the insurance company's possession.

(3) An insurance company that acquires, through payment of a claim, ownership or possession of a salvage motor vehicle or non-repairable motor vehicle covered by an out-of-state ownership document may obtain a salvage vehicle title or non-repairable vehicle title in accordance with paragraph (1) or (2) of this subsection if:

(A) the motor vehicle was damaged, stolen, or recovered in this state; or

(B) the motor vehicle owner from whom the company acquired ownership resides in this state.

(4) A salvage pool operator may apply for title in the name of the salvage pool operator by providing to the department:

(A) documentation from the insurance company that:

(i) the salvage pool operator, on request of an insurance company, was asked to take possession of the motor vehicle subject to an insurance claim and the insurance company subsequently denied coverage or did not take ownership of the vehicle; and

(ii) the name and address of the owner of the motor vehicle and the lienholder, if any; and

(B) proof that the salvage pool operator, before the 31st day after receiving the information from the insurance company, sent a notice to the owner and any lienholder informing them that:

(i) the motor vehicle must be removed from the location specified in the notice not later than the 30th day after the date the notice is mailed; and

(ii) if the motor vehicle is not removed within the time specified in the notice, the salvage pool operator will sell the motor vehicle and retain from the proceeds any costs actually incurred by the operator in obtaining, handling, and disposing of the motor vehicle, except for charges:

(I) that have been or are subject to being reimbursed by a third party; and

(II) for storage or impoundment of the

motor vehicle.

(5) Proof of notice under this subsection consists of:

(A) the validated receipts for registered or certified mail and return receipt or an electronic certified mail receipt, including signature receipt; and

(B) any unopened certified letters returned by the post office as unclaimed, undeliverable, or with no forwarding address.

(e) Recordation of lien on non-repairable and salvage vehicle titles. If the motor vehicle is a salvage motor vehicle, a new lien or a currently recorded lien may be recorded on the salvage vehicle title. If the motor vehicle is a non-repairable motor vehicle, only a currently recorded lien may be recorded on the non-repairable vehicle title.

(f) Issuance. Upon receipt of a completed non-repairable or salvage vehicle title application, accompanied by the statutory application fee and the required documentation, the department will, before the sixth business day after the date of receipt, issue a non-repairable or salvage vehicle title, as appropriate.

(1) If the condition of salvage is caused exclusively by flood, a "Flood Damage" notation will be reflected on the face of the document and will be carried forward upon subsequent title issuance.

(2) If a lien is recorded on a non-repairable or salvage vehicle title, the vehicle title will be mailed to the lienholder. For proof of ownership purposes, the owner will be mailed a receipt or printout of the newly established motor vehicle record, indicating a lien has been recorded.

(3) A non-repairable vehicle title will state on its face that the motor vehicle may:

(A) not be repaired, rebuilt, or reconstructed;

(B) not be issued a regular certificate of title or registered in this state;

(C) not be operated on a public highway; and

(D) may only be used as a source for used parts or scrap metal.

§217.86. Dismantling, Scrapping, or Destruction of Motor Vehicles.

(a) A person who acquires ownership of a non-repairable or salvage motor vehicle for the purpose of dismantling, scrapping, or destruction shall, not later than the 30th day after the motor vehicle was acquired:

(1) submit to the department a report, on a form prescribed by the department:

(A) stating that the motor vehicle will be

dismantled, scrapped, or destroyed; and

(B) certifying that all unexpired license plates and registration validation stickers have been removed from the motor vehicle, in accordance with Occupations Code, §2302.252; and

(2) surrender to the department the properly assigned ownership document.

(b) The person shall:

(1) maintain records of each motor vehicle that will be dismantled, scrapped, or destroyed, as provided by Chapter 221, Subchapter D [~~§217.191(d)~~] of this title (relating to Records) [~~Record of Purchases, Sales, and Inventory)~~]; and

(2) store all unexpired license plates and registration validation stickers removed from those vehicles in a secure location.

(c) The department will issue the person a receipt with surrender of the report and ownership documents.

(d) License plates and registration validation stickers removed from vehicles reported under subsection (a)(1) of this section may be destroyed upon receipt of the acknowledged report from the department.

(e) The department will place an appropriate notation on motor vehicle records for which ownership documents have been

surrendered to the department.

(f) Not later than 60 days after the motor vehicle is dismantled, scrapped, or destroyed, the person shall report to the department and provide evidence that the motor vehicle has been dismantled, scrapped, or destroyed.

SUBCHAPTER E. TITLE LIENS AND CLAIMS

§217.103. Restitution Liens.

(a) Purpose. Pursuant to the Code of Criminal Procedure, Article 42.22, the victim or an attorney for the state may file a lien on any interest in a motor vehicle of a person convicted of a criminal offense to secure payment of restitution or fines or costs. This section establishes the procedures to perfect the filing and the removal of the lien on any interest of the defendant in a motor vehicle whether then owned or after-acquired.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Department--The Texas Department of Motor Vehicles.

(2) Restitution lien--A lien placed against a defendant's motor vehicle in order to recoup a judgment or fines or costs.

(3) State--The State of Texas and all its political subdivisions.

(4) Victim--A close relative of a deceased victim, guardian of a victim, or victim, as those terms are defined by the Code of Criminal Procedure, Article 56.01.

(c) Persons who may file a restitution lien. The following persons may file a restitution lien:

(1) a victim of a criminal offense to secure the amount of restitution to which the victim is entitled under the order of a court in a criminal case; and

(2) an attorney of the state to secure the amount of fines or costs entered against a defendant in a judgment in a felony criminal case.

(d) Perfection of a restitution lien. A restitution lien against any interest in a motor vehicle must be perfected in accordance with Transportation Code, Chapter 501, and in the name of the court which established the restitution lien, in care of the court clerk. The victim or the attorney representing the state must file an application for certificate of title with a county tax-assessor collector to perfect the restitution lien. The application must be on a form prescribed by the department as described in §217.4 of this title (relating to Initial Application for Title), and shall be supported by, at a minimum, the following documents:

(1) evidence of motor vehicle ownership, as described in §217.5 of this title (relating to Evidence of Motor Vehicle Ownership), which is properly assigned to or issued in the name of the defendant;

(2) an original or certified copy of the court order or judgment establishing the restitution lien and requiring the defendant to pay restitution, fines, or costs; and

(3) an affidavit to perfect a restitution lien which must include, at a minimum:

(A) the name and birth date of the defendant whose interest in the motor vehicle is subject to the lien;

(B) the residence or principal place of business of the person named in the lien, if known;

(C) the criminal proceeding giving rise to the lien, including the name of the court, the name of the case, and the court's file number for the case;

(D) the name and address of the attorney representing the state and the name and address of the person entitled to restitution;

(E) a statement that the notice is being filed pursuant to Code of Criminal Procedure, Article 42.22;

(F) the amount of restitution, fines, and costs the defendant has been ordered to pay by the court;

(G) a statement that the amount of restitution owed at any one time may be less than the original balance and that the outstanding balance is reflected in the records of the clerk of the court hearing the criminal proceeding giving rise

to the lien;

(H) the vehicle description (year, make, and vehicle identification number) of the motor vehicle for which the restitution lien is to be perfected; and

(I) the signature of the attorney representing the state or a magistrate.

(e) Fees. The applicant will be required to pay a $5 [~~$5.00~~] restitution lien filing fee, in addition to a title application fee in accordance with Transportation Code, §501.138, and any other applicable fees required by Transportation Code, Chapters 501, 502, and 520.

(f) Recording a restitution lien. Upon receiving a completed application for certificate of title, the required supporting documents and any applicable fees, the department or its designated agent will process and issue a certificate of title recording the restitution lien. The original certificate of title shall be mailed to the first lienholder, in accordance with Transportation Code, §501.027.

(g) Release of perfected restitution liens. The clerk of the court recorded as the lienholder will receive payments from the defendant and maintain a record of the outstanding balance of restitution, fines, or costs owed by the defendant. Upon satisfaction of the lien, the clerk of the court shall execute

the release of lien as described in §217.106 of this title (relating to Discharge of Lien). [~~Liens).~~] The release of lien must be provided to the owner or owner's designee. A photocopy of the release of lien shall be forwarded to the department for filing.

SUBCHAPTER H. DEPUTIES

§217.163. Full Service Deputies.

(a) A county tax assessor-collector, with the approval of the commissioners court of the county, may deputize a person to act as a full service deputy in the same manner and with the same authority as though done in the office of the county tax assessor-collector, subject to the criteria and limitations of this section, including signing the addendum as [~~entering into the agreement~~] specified in subsection (k) [~~(j)~~] of this section.

(b) A full service deputy must offer and provide titling and registration services to the general public, and must accept any application for registration, registration renewal, or title transfer that the county tax assessor-collector would accept and process, unless otherwise limited by the county.

(c) The county tax assessor-collector may impose reasonable obligations or requirements upon a full service deputy in addition to those set forth in this section. [~~The additional obligations or requirements must be reflected in the agreement specified in subsection (j) of this section.~~]

(d) To be eligible to serve as a full service deputy, a person must be trained, as approved by the county tax assessor-collector, to perform motor vehicle titling, registration, and

registration renewal services, or otherwise be deemed competent by the county tax assessor-collector to perform such services.

(e) To be eligible to serve as a full service deputy, a person must post a bond payable to the county tax assessor-collector consistent with §217.167 of this title (relating to Bonding Requirements) with the bond conditioned on the person's proper accounting and remittance of the fees the person collects.

(f) A person applying to be a full service deputy must complete the application process as specified by the county tax assessor-collector. The application process may include satisfaction of any bonding requirements and completion of any additional required documentation or training of the deputy before the processing of any title, registration, or registration renewal applications may occur.

(g) A full service deputy must provide the physical address at which services will be offered, the mailing address, the phone number, and the hours of service. This information may be published on the department's website and may be published by the county if the county publishes a list of deputy locations.

(h) A full service deputy shall keep a separate accounting of the fees collected and remitted to the county and a record of daily receipts.

(i) A full service deputy may charge or retain fees consistent with the provisions of §217.168 of this title (relating to Deputy Fee Amounts).

(j) A full service deputy must maintain records in compliance with the State of Texas Records Retention Schedule as promulgated by the Texas State Library and Archives Commission.

(k) Beginning January 1, 2017, a full service deputy must sign an addendum provided by the department outlining the terms and conditions of the full service deputy's access to and use of the department's registration and titling system. Any contract or agreement, or renewal of the contract or agreement, between the county and the full service deputy that authorizes the full service deputy to provide registration and titling services in the county must specifically incorporate the addendum by reference, and the contract or agreement may not supersede or contradict any term within the addendum. An addendum described by this subsection is required for each location at which the full service deputy operates. The addendum must be incorporated into any agreement or contract between the full service deputy and the county beginning January 1, 2017. The county must provide the department a current copy of each contract or agreement, including any amendments, with a full service deputy within 60 days of execution.

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

DATE: November 3, 2016
Action Requested: APPROVAL

To: Texas Department of Motor Vehicles Board (TxDMV)
From: Jeremiah Kuntz, Director, Vehicles Titles and Registration Division
Agenda Item: 11.3 Adoption of Rule under Title 43, Texas Administrative Code, Chapter 217, Vehicle Titles and Registration, New §217.57, Alternatively Fueled Vehicles

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RECOMMENDATION

Approval to publish the adoption of the new rule in the *Texas Register*.

PURPOSE AND EXECUTIVE SUMMARY

New §217.57 is adopted to implement House Bill 735, 84th Legislature, Regular Session, 2015.

FINANCIAL IMPACT

There will be no major fiscal implications related to the adopted new rule.

BACKGROUND AND DISCUSSION

House Bill 735 added Transportation Code, §502.004, Information on Alternatively Fueled Vehicles, which requires the department to:

- establish by rule a program to collect information about the number of alternatively fueled vehicles in this state, and
- submit an annual report to the legislature that includes the information collected.

The proposal was published in the *Texas Register* on September 23, 2016. The comment period closed on October 24, 2016. The department received a comment from Plug-In Texas, suggesting that hydrogen fuel cell drive vehicles (HFCVs) be added to the engine type collected and report by the department. In response, the department noted that the rule language is intentionally broad to encompass different vehicle fuel type information as that information is available to the department. The department intends to use vehicle identification number (VIN) decoding software to collect the data and compile for the report. So long as a VIN continues to contain characters indicating utilization of hydrogen as a fuel type, the department will include this information in its report. As such, the department does not believe the rule requires amendment in order to collect and report on vehicles that use HFCVs.

If the Board adopts the new rule during its November 3, 2016 open meeting, staff anticipates:

- publication of the adoption in the November 25, 2016 issue of the *Texas Register*; and
- an effective date of December 4, 2016.

From: Russ Keene
To: Zz - Resource - GCO_Rules
Subject: Comment for Pending Rule HB 735, 84th Legislature
Date: Monday, October 24, 2016 12:24:35 PM
Attachments: ~~PITx Letter to DM[redacted]5 2016.pdf~~

Please see letter addressed to David D. Duncan attached. Thank you.

Russell T. Keene
Russ@CrossnoreGroup.com

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October 20, 2016

David D. Duncan, Esq.
General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731
Via email: rules@txdmv.gov

Re: Rule Promulgation of HB 735, 84th Legislature, Relating to the collection of information regarding alternatively fueled vehicles in the state, 43 TAC [new] Section 217.57

Dear Mr. Duncan:

Plug-in Texas appreciates the diligence of the Department of Motor Vehicles' Commissioners and staff in promulgating rules for the implementation of HB 735 authored by Representative Celia Israel in 2015.

As our organization's mission is to broaden the introduction of alternative fuels into Texas, Plug-in Texas supported HB 735 during the 84th Legislature and believes the resulting annual collection data set will provide clear understanding of the number of alternative fueled vehicles on Texas roadways.

The organization does, respectfully, suggest that hydrogen fuel cell drive vehicles (HFCVs) be added to the engine type collected and reported by DMV.

Fuel cells are already used to generate electricity for other applications, including in spacecraft and in stationary uses, such as emergency power generators. HFCVs are considered one of several possible long-term pathways for low-carbon passenger transportation. The benefits of hydrogen-powered vehicles are many, including high energy efficiency of fuel cell drivetrains, which use 40 to 60 percent of the energy available from hydrogen, and very limited GHG emissions and few other air pollutants during vehicle operation.

Original equipment automakers are investing billions of dollars in cleaner, high tech vehicles including hydrogen fuel cell technology. Several passenger HFCVs are presently commercially available. While it may be several years before such vehicles are in wide use upon Texas roads, the automotive industry believes HFCVs to be a promising future technology that will be in use in passenger vehicles in the near future, and an understanding of the proliferation of HFCVs will be important to Texas policy makers and stakeholders.

Thank you for considering our organization's views in this matter.

Respectfully,

Russell T. Keene for *Plug-In Texas*

CC: The Honorable Celia Israel
The Honorable Rodney Ellis

BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES

RESOLUTION APPROVING ADOPTION OF NEW
43 TAC SECTION 217.57, ALTERNATIVELY FUELED VEHICLES

The Board of the Texas Department of Motor Vehicles (board) finds it necessary to adopt new Chapter 217, Vehicle Titles and Registration, §217.57, Alternatively Fueled Vehicles.

The preamble and the new section are attached to this resolution as Exhibits A-B, and are incorporated by reference as though set forth verbatim in this resolution, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the board that the attached new rule is adopted.

The department is directed to take the necessary steps to implement the actions authorized in this order pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

_____
Raymond Palacios, Jr., Chairman
Board of the Texas Department of Motor Vehicles

Recommended by:

_____
Jeremiah Kuntz, Director
Vehicle Titles and Registration Division

Order Number: _____ Date Passed: November 3, 2016

Texas Department of Motor Vehicles
Chapter 217, Vehicle Titles and Registration

Adoption Preamble

The Texas Department of Motor Vehicles (department) adopts new §217.57, Alternatively Fueled Vehicles, without changes to the proposed text as published in the September 23, 2016, issue of the *Texas Register* (41 TexReg 7469). The rule will not be republished.

EXPLANATION OF ADOPTED NEW SECTION

New §217.57 is adopted to implement House Bill 735, 84th Legislature, Regular Session, 2015, regarding the collection of information on the number of alternatively fueled vehicles registered in this state. House Bill 735 added Transportation Code, §502.004, Information on Alternatively Fueled Vehicles, which requires the department, by rule, to establish a program to collect information about the number of alternatively fueled vehicles in this state. Section 502.004 also requires the department to submit an annual report to the legislature that includes the information collected, including, at a minimum, the number of vehicles that use electric plug-in drives, hybrid electric drives, compressed natural gas drives, and liquefied natural gas drives.

COMMENTS

The department received a comment on the proposed rules from Plug-In Texas. Plug-In Texas suggested that hydrogen fuel cell drive vehicles (HFCVs) be added to the engine type collected and reported by the department. The rule language is intentionally broad to encompass different vehicle fuel type information as that information is available to the department. Transportation Code, §502.004, defines “alternatively fueled vehicle” as “a motor vehicle that is capable of using a fuel other than gasoline or diesel fuel.” The statute requires, at a minimum, a report on registered vehicles that use electric plug-in drives, hybrid electric drives, compressed natural gas drives, and liquefied natural gas drives. The department intends to use vehicle identification number (VIN) decoding software to collect the data and compile for the report. So long as a VIN continues to contain characters indicating utilization of hydrogen as a fuel type, the department will include this information in its report. As such, the department does not believe the rule requires amendment in order to collect and report on vehicles that use HFCVs.

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of

Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically, Transportation Code, §502.004, which requires the department to establish a program, by rule, about the number of alternatively fueled vehicles registered in this state.

CROSS REFERENCE TO STATUTE

Transportation Code, §§501.021, 502.040, and 502.043.

Texas Department of Motor Vehicles
Chapter 217, Vehicle Titles and Registration

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

§217.57. Alternatively Fueled Vehicles.

The department shall collect vehicle fuel type information for motor vehicles registered in this state, including alternatively fueled vehicles, as defined by Transportation Code, §502.004, and submit an annual report to the legislature that includes the information collected under this section.

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

DATE: November 3, 2016
Action Requested: APPROVAL

To: Texas Department of Motor Vehicles Board (TxDMV)
From: William P. Harbeson, Enforcement Division Director; and Jimmy Archer, Motor Carrier Division Director
Agenda Item: 13 (Household Goods) Amendments
Proposal of Rules under Title 43, Texas Administrative Code, Chapter 218, Motor Carriers (Household Goods) Amendments §§218.2, 218.13, 218.31, 218.32, 218.52, 218.53, 218.56, 218.59, 218.60, and 218.61

RECOMMENDATION

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

PURPOSE AND EXECUTIVE SUMMARY

Transportation Code, §643.155 requires the department to appoint a rules advisory committee consisting of representatives of household goods motor carriers, the public, and the department. The advisory committee is required to examine the rules regarding the protection of consumers using the services of a household goods motor carrier, and to make recommendations to the department on modernizing and streamlining the rules. The department appointed the advisory committee, which met four times.

FINANCIAL IMPACT

There are no major fiscal implications related to the proposed amendments. A proposed amendment requires household goods carriers to include their name on their Internet website and to list the required information on the page that is specific to Texas intrastate household goods operations. To the extent a household goods carrier does not currently list its name on its website or does not list the required information on the webpage that is specific to Texas intrastate household goods operations, the carrier may incur minimal costs to modify its website.

A second proposed amendment will require household goods carriers that lease vehicles under a short-term lease to display their name and certificate of registration number on the leased power units. These motor carriers can comply with this proposed requirement with minimal cost by placing printed magnets on the sides of these leased vehicles or by creating their own markings with stickers or with a marker and cardboard.

A third proposed amendment will require household goods carriers to add "TxDMV No." prior to the certificate of registration number on both sides of their power units. To the extent a household goods carrier needs to add "TxDMV No." on both sides of their power units, they can comply with this proposed requirement with minimal cost by placing printed magnets on both sides of their power units or by using stickers or a marker to add "TxDMV No." directly to the surface of the vehicle.

BACKGROUND AND DISCUSSION

Proposed amendments:

- Create separate definitions for an advertisement and a print advertisement, since print advertisements are governed by specific rules.
- Amend existing rules to provide for greater consumer protection.
- Modernize the rules to authorize certain documentation to be created and submitted in an electronic format.

If the proposed amendments are approved by the board, staff anticipates publication of the proposed amendments in the *Texas Register* on or about November 25, 2016. Comments on the proposed amendments will be accepted until 5:00 p.m. on December 26, 2016.

BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES

RESOLUTION APPROVING PUBLICATION OF PROPOSED AMENDMENTS
43 TAC SECTIONS 218.2, 218.13, 218.31, 218.32, 218.52, 218.53, 218.56,
219.59, 219.60, AND 218.61,
RELATING TO MOTOR CARRIERS

The Board of the Texas Department of Motor Vehicles (board) finds it necessary to amend Chapter 218, Motor Carriers, Subchapter A: §218.2, Definitions; Subchapter B: §218.13, Application for Motor Carrier Registration; Subchapter C: §218.31, Investigations and Inspections of Motor Carrier Records; §218.32, and Motor Carrier Records; Subchapter E: §218.52, Advertising; §218.53, Household Goods Carrier Cargo Liability; §218.56, Proposals and Estimates for Moving Services; §218.59, Inventories; 218.60, Determination of Weights; and §218.61, Claims.

The preamble and the proposed amendments are attached to this resolution as Exhibits A-B, and are incorporated by reference as though set forth verbatim in this resolution, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the board that the attached rules are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

The department is directed to take the necessary steps to implement the actions authorized in this order pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

_____
Raymond Palacios, Jr., Chairman
Board of the Texas Department of Motor Vehicles

Recommended by:

_____
William P. Harbeson, Director
Enforcement Division

Order Number: _____ Date Passed: November 3, 2016

Texas Department of Motor Vehicles
Chapter 218, Motor Carriers

Proposed Preamble

The Texas Department of Motor Vehicles (department) proposes amendments to Chapter 218, Motor Carriers, Subchapter A: §218.2, Definitions; Subchapter B: §218.13, Application for Motor Carrier Registration; Subchapter C: §218.31, Investigations and Inspections of Motor Carrier Records; §218.32, Motor Carrier Records; Subchapter E: §218.52, Advertising; §218.53, Household Goods Carrier Cargo Liability; §218.56, Proposals and Estimates for Moving Services; §218.59, Inventories; 218.60, Determination of Weights; and §218.61, Claims.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, §643.155, requires the department to appoint a rules advisory committee (advisory committee) consisting of representatives of the public, the department, and motor carriers transporting household goods. The rules advisory committee is required to examine rules adopted by the department under §§643.153(a) and (b) and make recommendations to the department on modernizing and streamlining the rules. The advisory committee made recommendations to the department after meeting four times to discuss and examine the rules. The majority of the proposed amendments resulted from the advisory committee’s recommendations to the department.

Amendments are proposed to §218.2 to add definitions for the terms "advertisement" and "print advertisement," which are regulated to protect the shippers (consumers). Amendments renumber the remaining terms. Also, an amendment to the existing term "household goods carrier" clarifies that the term includes all vehicles, regardless of the size of the vehicle. Further, the definition for the term “manager” was deleted because the proposed amendments delete this term from Chapter 218.

An amendment is proposed to §218.13 to require an application for registration by a household goods carrier to include a tariff. This proposed amendment helps to protect the consumers by ensuring a tariff is on file before the household goods carrier begins to transport household goods for compensation. The tariff lists the maximum rates the household goods carrier can charge the consumer. According to the Better Business Bureau (BBB) representative on the advisory committee, the second most frequent complaint they receive from consumers regarding household goods carriers is that the price at the end of the move is different than the verbal quote. The BBB representative also stated they will not accredit a household goods carrier until the carrier is registered with the department. If the BBB

has not accredited a household goods carrier, a consumer may be less likely to do business with that carrier.

An amendment to §218.13 clarifies that the director's conditional acceptance of an application does not authorize the applicant to operate as a motor carrier. This proposed amendment helps protect consumers from motor carriers that may incorrectly think they can operate as a motor carrier if the director has conditionally accepted an application.

Amendments to §218.31 clarify that employees of the department are certified as department investigators and may conduct investigations and inspect records under Transportation Code, Chapters 643 and 645. Amendments further specify the time, location, and notification requirements for the investigations and inspections. Conforming amendments are proposed throughout Chapter 218 to use the term "department investigator."

Amendments to §218.32 delete unnecessary language regarding household goods carrier's records and clarify that all records must be prepared and maintained in a complete and accurate manner. Also, an amendment clarifies that out-of-state motor carriers may maintain the required records at a business

location in Texas, rather than at its principal place of business in Texas.

Amendments to §218.52 modify the requirements for household goods carrier advertisements, including the specific requirements for print advertisements and websites. Amendments also delete outdated language and modify the requirements regarding the identifying markings on household goods carrier’s vehicles. The amendments require a household goods carrier that is operating vehicles under a short-term lease to display the name of the carrier and the carrier’s certificate of registration number on both sides of the vehicle. The markings help to protect consumers by enabling law enforcement officers and the department’s investigators to quickly identify vehicles involved in the transportation of household goods. In addition, the markings help the consumer in identifying the household goods carrier.

Amendments to §218.53 clarify the amounts of and the method of calculating a carrier's liability for loss or damage of cargo. According to the BBB representative on the advisory committee, the third most frequent complaint they receive from consumers

regarding household goods carriers is that the consumer does not understand how the liability works.

An amendment to §218.56 removes the language that prohibits a motor carrier from including the following in a proposal: the name, logo, or motor carrier registration number of any other motor carrier. An amendment also clarifies that proposals based on hourly rates are required to state the maximum amount the consumer could be required to pay for the listed transportation and related services. According to one of the household goods carrier representatives on the advisory committee, some household goods carriers believe the current rules does not require a proposal based on hourly rates to state the maximum amount the consumer could be required to pay. According to the BBB representative on the advisory committee, the second most frequent complaint they receive from consumers regarding household goods carriers is the price at the end of the move is different than the verbal quote. This clarification helps to protect consumers by making it clear that any proposal must state the maximum amount the consumer could be required to pay.

Amendments to §218.59 modify the requirements regarding inventories prepared by agreement between the motor carrier and

the consumer to give the parties the flexibility they need for each move. Amendments clarify that a consumer's agent may sign an inventory for the consumer at origin and designation.

Amendments to §§218.59, 218.60, and 218.61 respectively allow the inventory to be prepared in an electronic format, allow weight tickets to be in an electronic format, and allow a claim and an acknowledgment of a claim to be filed in an electronic format. These amendments expressly allow the consumer and the household goods carrier to benefit from the convenience of modern technology.

Amendments to §218.61 also add clarifying language.

Proposed amendments are made throughout Chapter 218 to revise terminology for consistency with other department rules and with current department practice. Nonsubstantive amendments are proposed to correct grammar throughout the proposed amended sections.

FISCAL NOTE

Linda M. Flores, Chief Financial Officer, has determined that for each of the first five years the proposed amendments are in

effect, there will be no significant fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments.

William P. Harbeson, Director of the Enforcement Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed amendments.

PUBLIC BENEFIT AND COST

Mr. Harbeson has also determined that for each year of the first five years the amendments are in effect, the public benefits anticipated as a result of enforcing or administering the amendments will be to: 1) provide more protection for the consumers; 2) modernize the rules; and 3) streamline the rules. There are no anticipated economic costs for persons required to comply with the amendments as proposed, other than the proposed amendments to §218.52.

SMALL AND MICRO-BUSINESS IMPACT ASSESSMENT

Pursuant to Government Code, Chapter 2006, the department anticipates a potential adverse economic effect on small businesses and micro-businesses if the proposed amendments to

§218.52 are adopted.

There may be anticipated economic costs for persons required to comply with the proposed amendments to §218.52 regarding required language on the household goods carriers' Internet website to the extent the website does not currently list the carrier's name or does not list the required information on the page that is specific to Texas intrastate household goods operations.

There may be anticipated economic costs for persons required to comply with the proposed amendments to §218.52 regarding the identifying markings on household goods carriers' vehicles that are not already governed by Transportation Code, Chapter 642, which requires identifying markings on certain vehicles. Section 218.52 does not currently require the identifying markings on power units operated under a short-term lease. The proposed amendments require the household goods carrier or its agent to include the identifying markings on power units operated under a short-term lease; however, the proposed amendments also delete the requirement to display the identifying markings on trailers. The household goods carriers may utilize different approaches to comply with the proposed

requirements, such as using stickers that are available at most hardware stores or a marker and cardboard to create their own identifying markings for the power units operated under a short-term lease. The department's Economic Impact Statement provides the data for household goods carriers that choose the more expensive solution of using a printed magnet that can be removed and reused. However, the household goods carriers can choose a less expensive alternative to comply with these amendments.

The current §218.52 requires the household goods carriers to include their certificate of registration number on both sides of their vehicles. A proposed amendment to §218.52 requires the household goods carriers to include "TxDMV No." prior to their certificate of registration number on both sides of their vehicles. To the extent a household goods carrier does not display its certificate of registration number this way on both sides of their power units, the carrier may incur a cost to comply with the proposed amendment. The household goods carriers may utilize different approaches to comply with the proposed requirement, such as using a marker to write in "TxDMV No." prior to their certificate of registration number or using stickers that are available at most hardware stores. The department's Economic Impact Statement provides the data for

household goods carriers that choose the more expensive solution of using a printed magnet that can be added to the current certificate of registration number. However, the household goods carriers can choose a less expensive alternative to comply with these amendments.

Out of the 590 active household goods carriers that are registered with the Texas Workforce Commission, the department determined that 98% (579 of 590) are small businesses. Out of this 98%, 84% (486 of 579) fall within the definition of a micro-business because the carrier has 20 or fewer employees. A review of the North American Industry Classification System on the U.S. Census Bureau website revealed that there are five different types of movers that are included in this classification. The five different types of movers are Furniture Moving, Used; Motor Freight Carrier, Used Household Goods; Trucking Used Household, Office, or Institutional Furniture and Equipment; Used Household and Office Goods Moving; and Van Lines, Moving and Storage Services.

The department performed research to determine the estimated cost for small businesses to comply with the proposed amendments to §218.52 regarding websites. The department concluded that an

entity would have to make minor adjustments to its website and absorb the costs of doing so.

If a household goods carrier manages its website in-house, the cost would be minimal for the time spent in updating its website. If a household goods carrier hired an external company to create and maintain the carrier's website, the carrier would not incur a cost if the update is covered by the monthly maintenance fee under its contract. However, if a household goods carrier has to hire someone to update the carrier's website, the carrier might have to pay an hourly rate of $40 for an update that is estimated to take approximately 15 minutes.

The proposed amendments to §218.52 require the household goods carrier or its agent to display certain information on two sides (left and right) of each power unit, including vehicles operated under a short-term lease. The marking must include the carrier’s name (or assumed name) and certificate of registration number (styled “TxDMV No. _____”), and meet minimum sizing and readability requirements.

Because a carrier might operate a fleet of vehicles under short-term leases, or otherwise have a high vehicle turnover, the

department assumes that the carrier would likely meet the proposed requirements by attaching magnetic signs to its power units. The department finds that signs sufficient to meet the requirements can be purchased for about $155 for ten signs ($15.50 per sign), which is enough for five power units. Per-sign prices fall as the carrier purchases more signs.

For a carrier that already includes the TxDMV certificate of registration number on its vehicles, but without “TxDMV No.” written prior to the number, the carrier may elect to purchase smaller magnetic signs that say “TxDMV No.” to place in front of the number already displayed on its vehicles. Ten 3-by-10-inch signs would cost the carrier about $23 ($2.30 per sign), with per-sign prices falling as the carrier purchases more signs.

The department did not find evidence that the proposed amendments to Section 218.52 would have an adverse economic effect on micro-businesses that is distinct from any potential adverse economic effect on small businesses.

TAKINGS IMPACT ASSESSMENT

The department has determined that this proposal affects no private real property interests and that this proposal does not

restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under the Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to David D. Duncan, General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Building 1, Austin, Texas, 78731, or by email to *rules@txdmv.gov.* The deadline for receipt of comments is 5:00 p.m. on December 26, 2016.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and duties of the department under the Transportation Code; Transportation Code, §643.003, which authorizes the department to adopt rules to administer Transportation Code, Chapter 643; and more specifically, Transportation Code, §643.153(a), which requires the department to adopt rules to protect a consumer using the service of a motor carrier who is transporting household goods

for compensation; and Transportation Code, §643.153(b), which requires the department to adopt rules necessary to ensure that a customer of a motor carrier transporting household goods is protected from deceptive or unfair practices and unreasonably hazardous activities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 643 and 645.

SUBCHAPTER A GENERAL PROVISIONS

§218.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Advertisement--An oral, written, graphic, or pictorial statement or representation made in the course of soliciting intrastate household goods transportation services, including, without limitation, a statement or representation made in a newspaper, magazine, or other publication, or contained in a notice, sign, poster, display, circular, pamphlet, or letter, or on radio, the Internet, or via an on-line service, or on television. The term does not include direct communication between a household goods carrier or carrier’s representative and a prospective shipper, and does not include the following:

(A) promotional items of nominal value such as ball caps, tee shirts, and pens;

(B) business cards;

(C) listings not paid for by the household goods carrier or its household goods carrier's agent; and

(D) listings of a household goods carrier's business name or assumed name as it appears on the motor carrier certificate of registration, and the household goods

carrier's address, and contact information in a directory or similar publication.

(2)[~~(1)~~] Approved association--A group of household goods carriers, its agents, or both, that has an approved collective ratemaking agreement on file with the department under §218.64 of this title (relating to Rates).

(3)[~~(2)~~] Binding proposal--A formal written offer stating the exact price for the transportation of specified household goods and any related services.

(4)[~~(3)~~] Board--Board of the Texas Department of Motor Vehicles.

(5)[~~(4)~~] Certificate of insurance--A certificate prescribed by and filed with the department in which an insurance carrier or surety company warrants that a motor carrier for whom the certificate is filed has the minimum coverage as required by §218.16 of this title (relating to Insurance Requirements).

(6)[~~(5)~~] Certificate of registration--A certificate issued by the department to a motor carrier and containing a unique number.

(7)[~~(6)~~] Certified scale--Any scale designed for weighing motor vehicles, including trailers or semitrailers not attached to a tractor, and certified by an authorized scale inspection and licensing authority. A certified scale

may also be a platform-type or warehouse-type scale properly inspected and certified.

(8)[~~(7)~~] Commercial motor vehicle--

(A) Includes:

(i) any motor vehicle or combination of vehicles with a gross weight, registered weight, or gross weight rating in excess of 26,000 pounds, that is designed or used for the transportation of cargo in furtherance of any commercial enterprise;

(ii) any vehicle, including buses, designed or used to transport more than 15 passengers, including the driver; and

(iii) any vehicle used in the transportation of hazardous materials in a quantity requiring placarding under the regulations issued under the federal Hazardous Materials Transportation Act (49 U.S.C. §§5101-5128).

(B) Does not include:

(i) a farm vehicle with a gross weight, registered weight, and gross weight rating of less than 48,000 pounds;

(ii) cotton vehicles registered under Transportation Code, §504.505;

(iii) a vehicle registered with the

Railroad Commission under Natural Resources Code, §113.131 and §116.072;

(iv) a vehicle operated by a governmental entity;

(v) a motor vehicle exempt from registration by the Unified Carrier Registration Act of 2005; and

(vi) a tow truck, as defined by Occupations Code, §2308.002 and permitted under Occupations Code, Chapter 2308, Subchapter C.

(9)[~~(8)~~] Commercial school bus--A motor vehicle owned by a motor carrier that is:

(A) registered under Transportation Code, Chapter 643, Subchapter B;

(B) operated exclusively within the boundaries of a municipality and used to transport preprimary, primary, or secondary school students on a route between the students' residences and a public, private, or parochial school or daycare facility;

(C) operated by a person who holds a driver's license or commercial driver's license of the appropriate class for the operation of a school bus;

(D) complies with Transportation Code, Chapter 548; and

(E) complies with Transportation Code, §521.022.

(10)[~~(9)~~] Conspicuous--Written in a size, color, and contrast so as to be readily noticed and understood.

(11)[~~(10)~~] Conversion--A change in an entity's organization that is implemented with a Certificate of Conversion issued by the Texas Secretary of State under Business and Organizations Code, §10.154.

(12)[~~(11)~~] Department--Texas Department of Motor Vehicles (TxDMV).

(13)[~~(12)~~] Director--The director of the Motor Carrier Division, Texas Department of Motor Vehicles.

(14)[~~(13)~~] Division--The Motor Carrier Division.

(15)[~~(14)~~] Estimate--An informal oral calculation of the approximate price of transporting household goods.

(16)[~~(15)~~] Farmer--A person who operates a farm or is directly involved in cultivating land or in raising crops or livestock that are owned by or are under the direct control of that person.

(17)[~~(16)~~] Farm vehicle--Any vehicle or combination of vehicles controlled or operated by a farmer or rancher being used to transport agriculture products, farm machinery, and farm supplies to or from a farm or ranch.

(18)[~~(17)~~] FMCSA--Federal Motor Carrier Safety

Administration.

(19)[~~(18)~~] Foreign commercial motor vehicle--A commercial motor vehicle that is owned by a person or entity that is domiciled in or a citizen of a country other than the United States.

(20)[~~(19)~~] Gross weight rating--The maximum loaded weight of any combination of truck, tractor, and trailer equipment as specified by the manufacturer of the equipment. If the manufacturer's rating is unknown, the gross weight rating is the greater of:

(A) the actual weight of the equipment and its lading; or

(B) the maximum lawful weight of the equipment and its lading.

(21)[~~(20)~~] Household goods--Personal property intended ultimately to be used in a dwelling when the transportation of that property is arranged and paid for by the householder or the householder's representative. The term does not include personal property to be used in a dwelling when the property is transported from a manufacturing, retail, or similar company to a dwelling if the transportation is arranged by a manufacturing, retail, or similar company.

(22)[~~(21)~~] Household goods agent--A motor carrier who transports household goods on behalf of another motor

carrier.

(23)[~~(22)~~] Household goods carrier--A motor carrier who transports household goods for compensation or hire in furtherance of a commercial enterprise, regardless of the size of the vehicle.

(24)[~~(23)~~] Insurer--A person, including a surety, authorized in this state to write lines of insurance coverage required by Subchapter B of this chapter.

(25)[~~(24)~~] Inventory--A list of the items in a household goods shipment and the condition of the items.

(26)[~~(25)~~] Leasing business--A person that leases vehicles requiring registration under Subchapter B of this chapter to a motor carrier that must be registered.

[~~(26) Manager--The manager of the department's Motor Carrier Division, Credentialing Section.~~]

(27) Mediation--A non-adversarial form of alternative dispute resolution in which an impartial person, the mediator, facilitates communication between two parties to promote reconciliation, settlement, or understanding.

(28) Motor Carrier or carrier--A person who controls, operates, or directs the operation of one or more vehicles that transport persons or cargo over a public highway in this state.

(29) Motor transportation broker--A person who

sells, offers for sale, or negotiates for the transportation of cargo by a motor carrier operated by another person or a person who aids and abets another person in selling, offering for sale, or negotiating for the transportation of cargo by a motor carrier operated by another person.

(30) Moving services contract--A contract between a household goods carrier and shipper, such as a bill of lading, receipt, order for service, or work order, that sets out the terms of the services to be provided.

(31) Multiple user--An individual or business who has a contract with a household goods carrier and who used the carrier's services more than 50 times within the preceding 12 months.

(32) Not-to-exceed proposal--A formal written offer stating the maximum price a shipper can be required to pay for the transportation of specified household goods and any related services. The offer may also state the non-binding approximate price. Any offer based on hourly rates must state the maximum number of hours required for the transportation and related services unless there is an acknowledgment from the shipper that the number of hours is not necessary.

(33) Principal place of business--A single location that serves as a motor carrier's headquarters and where it maintains its operational records or can make them available.

(34) Print advertisement--A written, graphic, or pictorial statement or representation made in the course of soliciting intrastate household goods transportation services, including, without limitation, a statement or representation made in or contained in a newspaper, magazine, circular, or other publication. The term does not include direct communication between a household goods carrier or carrier's representative and a prospective shipper, and does not include the following:

(A) promotional items of nominal value such as ball caps, tee shirts, and pens;

(B) business cards;

(C) Internet websites;

(D) listings not paid for by the household goods carrier or its household goods carrier's agent; and

(E) listings of a household goods carrier's business name or assumed name as it appears on the motor carrier certificate of registration, and the household goods carrier's address, and contact information in a directory or similar publication.

(35)[~~(34)~~] Public highway--Any publicly owned and maintained street, road, or highway in this state.

(36)[~~(35)~~] Reasonable dispatch--The performance of transportation, other than transportation provided under

guaranteed service dates, during the period of time agreed on by the carrier and the shipper and shown on the shipment documentation. This definition does not affect the availability to the carrier of the defense of force majeure.

(37)[~~(36)~~] Replacement vehicle--A vehicle that takes the place of another vehicle that has been removed from service.

(38)[~~(37)~~] Revocation--The withdrawal of registration and privileges by the department or a registration state.

(39)[~~(38)~~] Shipper--The owner of household goods or the owner's representative.

(40)[~~(39)~~] Short-term lease--A lease of 30 days or less.

(41)[~~(40)~~] SOAH--The State Office of Administrative Hearings.

(43)[~~(41)~~] Substitute vehicle--A vehicle that is leased from a leasing business and that is used as a temporary replacement for a vehicle that has been taken out of service for maintenance, repair, or any other reason causing the temporary unavailability of the permanent vehicle.

(44)[~~(42)~~] Suspension--Temporary removal of privileges granted to a registrant by the department or a registration state.

(45)[~~(43)~~] Unified Carrier Registration System or UCR--A motor vehicle registration system established under 49 U.S.C. §14504a or a successor federal registration program.

(46)[~~(44)~~] USDOT--United States Department of Transportation.

(47)[~~(45)~~] USDOT number--An identification number issued by or under the authority of the FMCSA or its successor.

SUBCHAPTER B MOTOR CARRIER REGISTRATION

§218.13. Application for Motor Carrier Registration.

(a) Form of application. An application for motor carrier registration must be filed with the department's Motor Carrier Division and must be in the form prescribed by the director and must contain, at a minimum, the following information.

(1) USDOT number. A valid USDOT number.

(2) Business or trade name. The applicant must designate the business or trade name of the motor carrier.

(3) Owner name. If the motor carrier is a sole proprietorship, the owner must indicate the name and social security number of the owner. A partnership must indicate the partners' names, and a corporation must indicate principal officers and titles.

(4) Principal place of business. A motor carrier must disclose the motor carrier's principal business address.

If the mailing address is different from the principal business address, the mailing address must also be disclosed.

(5) Legal agent.

(A) A Texas-domiciled motor carrier must provide the name and address of a legal agent for service of process if the agent is different from the motor carrier.

(B) A motor carrier domiciled outside Texas must provide the name and Texas address of the legal agent for service of process.

(C) A legal agent for service of process shall be a Texas resident, a domestic corporation, or a foreign corporation authorized to transact business in Texas with a Texas address for service of process.

(6) Description of vehicles. An application must include a motor carrier equipment report identifying each commercial motor vehicle that requires registration and that the carrier proposes to operate. Each commercial motor vehicle must be identified by its motor vehicle identification number, make, model year, and type of cargo and by the unit number assigned to the commercial motor vehicle by the motor carrier. Any subsequent registration of vehicles must be made under subsection (e) of this section.

(7) Type of motor carrier operations. An applicant must state if the applicant:

(A) proposes to transport passengers, household goods, or hazardous materials; or

(B) is domiciled in a foreign country.

(8) Insurance coverage. An applicant must indicate insurance coverage as required by §218.16 of this title (relating to Insurance Requirements).

(9) Safety affidavit. Each motor carrier must complete, as part of the application, an affidavit stating that the motor carrier knows and will conduct operations in accordance with all federal and state safety regulations.

(10) Drug-testing certification. Each motor carrier must certify, as part of the application, that the motor carrier is in compliance with the drug-testing requirements of 49 C.F.R. Part 382. If the motor carrier belongs to a consortium, as defined by 49 C.F.R. Part 382, the applicant must provide the names of the persons operating the consortium.

(11) Duration of registration.

(A) An applicant must indicate the duration of the desired registration. Registration may be for seven calendar days or for 90 days, one year, or two years. The duration of registration chosen by the applicant will be applied to all vehicles. Household goods carriers may not obtain seven day or 90 day certificates of registration.

(B) Interstate motor carriers that operate in intrastate commerce and meet the requirements under §218.14(c) of this title (relating to Expiration and Renewal of Commercial Motor Vehicles Registration) are not required to renew a certificate of registration issued under this section.

(12) Additional requirements. The following fees and information must be submitted with all applications.

(A) An application must be accompanied by an application fee of:

(i) $100 for annual and biennial registrations;

(ii) $25 for 90 day registrations; or

(iii) $5 for seven day registrations.

(B) An application must be accompanied by a vehicle registration fee of:

(i) $10 for each vehicle that the motor carrier proposes to operate under a seven day, 90 day, or annual registration; or

(ii) $20 for each vehicle that the motor carrier proposes to operate under a biennial registration.

(C) An application must be accompanied by proof of insurance or financial responsibility and insurance filing fee as required by §218.16.

(D) An application for registration by a

household goods carrier must include a tariff that sets out the maximum charges for transportation of household goods between two or more municipalities, or a copy of the tariff governing interstate transportation services on a highway between two or more municipalities.

(E)[~~(D)~~] An application must be accompanied by any other information required by law.

(b) Conditional acceptance of application. If an application has been conditionally accepted by the director pursuant to Transportation Code, §643.055, the applicant may not operate the following until the department has issued a certificate under Transportation Code, §643.054:

(1) a commercial motor vehicle or any other motor vehicle to transport household goods for compensation, or

(2) a commercial motor vehicle to transport persons or cargo. [~~The director may conditionally accept an application if it is accompanied by all fees and by proof of insurance or financial responsibility, but is not accompanied by all required information. Conditional acceptance in no way constitutes approval of the application. The director will notify the applicant of any information necessary to complete the application. If the applicant does not supply all necessary information within 45 days from notification by the director, the application will be considered withdrawn and all~~

~~fees will be retained.~~]

(c) Approved application. An applicant meeting the requirements of this section and whose registration is approved will be issued the following documents:

(1) Certificate of registration. The department will issue a certificate of registration. The certificate of registration will contain the name and address of the motor carrier and a single registration number, regardless of the number of vehicles requiring registration that the carrier operates.

(2) Insurance cab card. The department will issue an insurance cab card listing all vehicles to be operated under the carrier's certificate of registration. The insurance cab card shall be continuously maintained at the registrant's principal place of business. The insurance cab card will be valid for the same period as the motor carrier's certificate of registration and will contain information regarding each vehicle registered by the motor carrier.

(A) A current copy of the page of the insurance cab card on which the vehicle is shown shall be maintained in each vehicle listed, unless the motor carrier chooses to maintain a legible and accurate image of the insurance cab card on a wireless communication device in the vehicle or chooses to display such information on a wireless

communication device by accessing the department's online system from the vehicle. The appropriate information concerning that vehicle shall be highlighted if the motor carrier chooses to maintain a hard copy of the insurance cab card or chooses to display an image of the insurance cab card on a wireless communication device in the vehicle. The insurance cab card or the display of such information on a wireless communications device will serve as proof of insurance as long as the motor carrier has continuous insurance or financial responsibility on file with the department.

(B) On demand by a department investigator[~~department-certified inspector~~] or any other authorized government personnel, the driver shall present the highlighted page of the insurance cab card that is maintained in the vehicle or that is displayed on a wireless communication device in the vehicle. If the motor carrier chooses to display the information on a wireless communication device by accessing the department's online system, the driver must locate the vehicle in the department's online system upon request by the department-certified inspector or other authorized government personnel.

(C) The motor carrier shall notify the department in writing if it discontinues use of a registered

commercial motor vehicle before the expiration of its insurance cab card.

(D) Any erasure or alteration of an insurance cab card that the department printed out for the motor carrier renders it void.

(E) If an insurance cab card is lost, stolen, destroyed, or mutilated; if it becomes illegible; or if it otherwise needs to be replaced, the department will print out a new insurance cab card at the request of the motor carrier. Motor carriers are authorized to print out a copy of a new insurance cab card using the department's online system.

(F) The department is not responsible for a motor carrier's inability to access the insurance information using the department's online system.

(G) The display of an image of the insurance cab card or the display of insurance information from the department's online system via a wireless communication device by the motor carrier does not constitute effective consent for a law enforcement officer, the department investigator [~~department-certified inspector~~], or any other person to access any other content of the wireless communication device.

(d) Additional and replacement vehicles. A motor carrier required to obtain a certificate of registration under this section shall not operate additional vehicles unless the

carrier identifies the vehicles on a form prescribed by the director and pays applicable fees as described in this subsection.

(1) Additional vehicles. To add a vehicle, a motor carrier must pay a fee of $10 for each additional vehicle that the motor carrier proposes to operate under a seven day, 90 day, or annual registration. To add a vehicle during the first year of a biennial registration, a motor carrier must pay a fee of $20 for each vehicle. To add a vehicle during the second year of a biennial registration, a motor carrier must pay a fee of $10 for each vehicle.

(2) Replacement vehicles. No fee is required for a vehicle that is replacing a vehicle for which the fee was previously paid. Before the replacement vehicle is put into operation, the motor carrier shall notify the department, identify the vehicle being taken out of service, and identify the replacement vehicle on a form prescribed by the department. A motor carrier registered under seven day registration may not replace vehicles.

(e) Supplement to original application. A motor carrier required to register under this section shall submit a supplemental application under the following circumstances.

(1) Change of cargo. A registered motor carrier may not begin transporting household goods or hazardous materials

unless the carrier submits a supplemental application to the department and shows the department evidence of insurance or financial responsibility in the amounts specified by §218.16.

(2) Change of name. A motor carrier that changes its name shall file a supplemental application for registration no later than the effective date of the change. The motor carrier shall include evidence of insurance or financial responsibility in the new name and in the amounts specified by §218.16. A motor carrier that is a corporation must have its name change approved by the Texas Secretary of State before filing a supplemental application. A motor carrier incorporated outside the state of Texas must complete the name change under the law of its state of incorporation before filing a supplemental application.

(3) Change of address or legal agent for service of process. A motor carrier shall file a supplemental application for any change of address or any change of its legal agent for service of process no later than the effective date of the change. The address most recently filed will be presumed conclusively to be the current address.

(4) Change in principal officers and titles. A motor carrier that is a corporation shall file a supplemental application for any change in the principal officers and titles no later than the effective date of the change.

(5) Conversion of corporate structure. A motor carrier that has successfully completed a corporate conversion involving a change in the name of the corporation shall file a supplemental application for registration and evidence of insurance or financial responsibility reflecting the new company name. The conversion must be approved by the Office of the Secretary of State before the supplemental application is filed.

(6) Change in drug-testing consortium status. A motor carrier that changes consortium status shall file a supplemental application that includes the names of the persons operating the consortium.

(7) Retaining a revoked or suspended certificate of registration number. A motor carrier may retain a prior certificate of registration number by:

(A) filing a supplemental application to re-register instead of filing an original application; and

(B) providing adequate evidence that the carrier has satisfactorily resolved the facts that gave rise to the suspension or revocation.

(f) Change of ownership. A motor carrier must file an original application for registration when there is a corporate merger or a change in the ownership of a sole proprietorship or of a partnership.

(g) Alternative vehicle registration for household goods agents. To avoid multiple registrations of a commercial motor vehicle, a household goods agent's vehicles may be registered under the motor carrier's certificate of registration under this subsection.

(1) The carrier must notify the department on a form approved by the director of its intent to register its agent's vehicles under this subsection.

(2) When a carrier registers vehicles under this subsection, the carrier's certificate will include all vehicles registered under its agent's certificates of registration. The carrier must register under its certificate of registration all vehicles operated on its behalf that do not appear on its agent's certificate of registration.

(3) The department may send the carrier a copy of any notification sent to the agent concerning circumstances that could lead to denial, suspension, or revocation of the agent's certificate.

(h) Substitute vehicles leased from leasing businesses. A registered motor carrier is not required to comply with the provisions of subsection (e) of this section for a substitute vehicle leased from a business registered under §218.18 of this title (relating to Short-term Lease and Substitute Vehicles). A motor carrier is not required to carry proof of

registration as described in subsection (d) of this section if a copy of the lease agreement for the originally leased vehicle is carried in the cab of the temporary replacement vehicle.

SUBCHAPTER C RECORDS AND INSPECTIONS

§218.31. Investigations and Inspections of Motor Carrier Records.

(a) Certification of department investigators [~~inspectors~~]. In accordance with Transportation Code, Chapter 643, the executive director or designee will designate department employees as certified [~~inspectors~~] for the purpose of entering the premises of a motor carrier to copy or verify documents the motor carrier is required to maintain according to this chapter [~~by this section to be maintained by the motor carrier~~]. The executive director or designee shall provide credentials to department investigators [~~certified inspectors~~] identifying them as department employees and as certified [~~inspectors~~] to conduct investigations and inspect records on behalf of the department.

(b) Investigations and Inspections.

(1) A motor carrier shall grant a department investigator certified under this section [~~inspector~~] access to the carrier's premises to conduct inspections or investigations of alleged violations of this chapter and of

Transportation Code, Chapters 643 and 645. The motor carrier shall provide adequate work space with reasonable working conditions and allow the department investigators [~~certified inspector~~] to copy and verify records and documents the motor carrier is required to maintain according to this chapter [~~be maintained by the carrier under §218.32 of this title (relating to Motor Carrier Records)~~].

(2) The department investigator [~~certified inspector~~] may conduct inspections and investigations during normal business hours unless mutual arrangements have been made otherwise.

(3) The department investigator [~~certified inspector~~] will present his or her credentials [~~and a written statement from the department~~] to the motor carrier prior to conducting an investigation or inspection [~~indicating the inspector's authority to inspect and investigate the motor carrier~~].

(c) Access. A motor carrier shall provide access to requested records and documents at:

(1) the motor carrier's principal place of business; or

(2) a location agreed to by the department and the motor carrier.

(d) Designation of meeting time. If the motor carrier's

normal business hours do not provide the access necessary for the investigator to conduct the investigation and the parties cannot reach an agreement as to a time to meet to access the records, the department shall designate the time of the meeting and provide written notice via the business address, facsimile number, or e-mail address on file with the department [~~by certified mail or facsimile~~].

§218.32. Motor Carrier Records.

(a) General records to be maintained. Every motor carrier shall prepare and maintain in a complete and accurate manner:

(1) operational logs, insurance certificates, documents to verify the carrier's operations, and proof of registration fee payments;

(2) [~~complete and accurate~~] records of services performed;

(3) all certificate of title documents, weight tickets, permits for oversize or overweight vehicles and loads, dispatch records, or any other document that would verify the operations of the vehicle to determine the actual weight, insurance coverage, size, and/or capacity of the vehicle; and

(4) the original certificate of registration and registration listing, if applicable.

[~~(b) Additional records for household goods carriers. In order to verify compliance with Subchapters B and E of this chapter (relating to Motor Carrier Registration and Consumer Protection), every household goods carrier shall retain complete and accurate records maintained in accordance with reasonable accounting procedures of all services performed in intrastate commerce. Household goods carriers shall retain all of the following information and documents:~~]

[~~(1) moving services contracts, such as bills of lading or receipts;~~]

[~~(2) proposals for moving services;~~]

[~~(3) inventories, if applicable;~~]

[~~(4) freight bills;~~]

[~~(5) time cards, trip sheets, or driver's logs;~~]

[~~(6) claim records;~~]

[~~(7) ledgers and journals;~~]

[~~(8) canceled checks;~~]

[~~(9) bank statements and deposit slips;~~]

[~~(10) invoices, vouchers, or statements supporting disbursements; and~~]

[~~(11) dispatch records.~~]

(b)[~~(c)~~] Proof of motor carrier registration.

(1) Except as provided in paragraph (2) of this subsection and in §218.13(c)(2) of this title (relating to

Application for Motor Carrier Registration), every motor carrier shall maintain a copy of its current registration listing in the cab of each registered vehicle at all times. A motor carrier shall make available to a department investigator [~~certified inspector~~] or any law enforcement officer a copy of the current registration listing upon request.

(2) A registered motor carrier is not required to carry proof of registration in a vehicle leased from a leasing business that is registered under §218.18 of this title (relating to Short-term Lease and Substitute Vehicles), when leased as a temporary replacement due to maintenance, repair, or other unavailability of the originally leased vehicle. A copy of the lease agreement, or the lease for the originally leased vehicle, in the case of a substitute vehicle, must be carried in the cab of the vehicle.

(3) A motor carrier is not required to carry proof of compliance with UCR or the UCR plan or agreement in its vehicle.

[c][~~(d)~~] Location of files. Except as provided in this subsection, every motor carrier shall maintain at a principal place of business in Texas all records and information required by the department.

(1) Texas motor carriers[~~firms~~]. If a motor carrier

wishes to maintain records at a specific location other than its principal place of business in Texas, the motor carrier shall make a written request to the director[~~manager~~]. A motor carrier may not begin maintaining records at an alternate location until the request is approved by the director[~~manager~~].

(2) Out-of-state motor carriers[~~firms~~]. A motor carrier whose principal business address is located outside the state of Texas shall maintain records required under this section at its [~~principal place of~~] business location in Texas. Alternatively, a motor carrier may maintain such records at a specific out-of-state facility if the carrier reimburses the department for necessary travel expenses and per diem for any inspections or investigations conducted in accordance with §218.31 of this title (relating to Investigations and Inspections of Motor Carrier Records).

(3) Regional office or driver work-reporting location. All records and documents required by this subchapter which are maintained at a regional office or driver work-reporting location, whether or not maintained in compliance with paragraphs (1) and (2) of this subsection, shall be made available for inspection upon request at the motor carrier's principal place of business or other location specified by the Department within 48 hours after a request is

made. Saturdays, Sundays, and federal and state holidays are excluded from the computation of the 48-hour period of time in accordance with 49 C.F.R. §390.29.

(e) Preservation and destruction of records. All books and records generated by a motor carrier, except driver's time cards and logs, must be maintained for not less than two years at the motor carrier's principal business address. A motor carrier must maintain driver's time cards and logs for not less than six months at the carrier's principal business address.

SUBCHAPTER E CONSUMER PROTECTION

§218.52. Advertising.

(a) False, misleading, or deceptive advertisements. A household goods carrier and its household goods agents may not use any false, misleading, or deceptive advertisements.[~~(a) Print advertising through August 4, 2015. A household goods carrier shall include the following information on print advertisements primarily addressing a local market within this state:~~]

[~~(1) the name of the household goods carrier as shown on the certificate of registration;~~]

[~~(2) the street address of the household goods carrier's or its agent's place of business in this state; and~~]

[~~(3) the household goods carrier's certificate of~~

~~registration number in the following form, "DMV No. _____".~~]

(b) Print advertisements.[~~Print advertising on or after August 5, 2015.~~] A household goods carrier shall include the following information on all print advertisements primarily addressing a local market within this state:

(1) the full business name or assumed name of the household goods carrier as shown on the certificate of registration;

(2) the street address of the household goods carrier's or its agent's place of business in this state; and

(3) the household goods carrier's certificate of registration number in the following form, "TxDMV No. _____".

(c) Use of household goods agent's name. A household goods carrier may include the name of its household goods agent as filed with the department in its print advertisements.

(d) Websites. A household goods carrier shall provide the following information on the home page or, in the case of a national household goods carrier, the page specific to Texas intrastate household goods operations, on any website operated by or for the household goods carrier:

(1) the household goods carrier’s name;

(2) department’s toll-free consumer help line as

listed on the department's website; and

(3) the household goods carrier's certificate of registration number in the following form, "TxDMV No. _____".

[~~(d) Items not considered to be print advertisements through August 4, 2015. For the purposes of this section, print advertisement shall not include:~~]

[~~(1) promotional items of nominal value such as ball caps, tee shirts, and pens;~~]

[~~(2) business cards;~~]

[~~(3) internet websites;~~]

[~~(4) listings not paid for by the household goods carrier or its household goods carrier's agent;~~]

[~~(5) nationally placed billboards; and~~]

[~~(6) single-line listings of a carrier name, address, and telephone number in a directory or similar publication.~~]

[~~(e) Items not considered to be print advertisements on or after August 5, 2015. For the purposes of this section, print advertisement shall not include:~~]

[~~(1) promotional items of nominal value such as ball caps, tee shirts, and pens;~~]

[~~(2) business cards;~~]

[~~(3) Internet websites;~~]

[~~(4) listings not paid for by the household goods carrier or its household goods carrier's agent; and~~]

[~~(5) single-line listings of a household goods carrier's name, address, and telephone number in a directory or similar publication.~~]

[~~(f) Internet websites through August 4, 2015. A household goods carrier shall provide the department's toll-free telephone number (1-888-368-4689) and the household goods carrier's certificate of registration number on any website operated by or for the household goods carrier.~~]

[~~(g) Internet websites on or after August 5, 2015. A household goods carrier shall provide the following information on any website operated by or for the household goods carrier:~~

[~~(1) department's toll-free consumer helpline as listed on the department's website; and~~]

[~~(2) the household goods carrier's certificate of registration number in the following form, "TxDMV No. _____".~~]

(e)[~~(h)~~] Identifying markings on household goods carrier's vehicles.

(1) A household goods carrier or its agent shall display the following information on both sides of [~~either~~] the power unit, including power units operated under a short-

term lease[~~or trailer~~]:

(A) the business name or assumed name of the household goods carrier as it appears on the motor carrier certificate of registration; and

(B) the household goods carrier's registration number as it appears on the motor carrier certificate of registration in the following form, "TxDMV No. _____".

(2) The markings required by [~~paragraph (1) of~~] this subsection shall have clearly legible letters and numbers at least two inches in height.

(3) This subsection does not apply to vehicles[~~:~~]

[~~(A)~~] required to comply with Transportation Code, Chapter 642.[~~; or~~]

[~~(B) operated under a short-term lease.~~]

[~~(i) Prohibited advertisements. For the purposes of this subsection, an advertisement is any communication to the public in connection with an offer or sale of an intrastate transportation service. A household goods carrier and its household goods agents may not use any false, misleading, or deceptive advertisements.~~]

§218.53. Household Goods Carrier Cargo Liability.

(a) Unless the carrier and shipper agree in writing to a higher limit of carrier liability, a household goods carrier's

liability for loss or damage of property shall be $.60 per pound per article. Claims for loss or damage of property may be settled based on the weight of the article multiplied by $.60.

(b) If the carrier and shipper have agreed in writing to a higher limit of liability, the carrier may charge the shipper for this higher limit of liability. If the agreement between the carrier and shipper to a higher limit of liability provides for a deductible, the carrier's liability to pay for loss or damage of property will be reduced by the amount of the deductible.

[~~A household goods carrier shall be liable for $.60 per pound per article, unless the carrier and shipper agree, in writing, to a higher limit of carrier liability. The household goods carrier shall not be liable for damages in an amount in excess of the agreed to higher limit of liability for the loss, destruction, or damage of the household goods.~~]

§218.56. Proposals and Estimates for Moving Services.

(a) Written proposals. Prior to loading, a household goods carrier shall provide a written proposal, such as a bid or quote, to the shipper. A proposal shall state the maximum amount the shipper could be required to pay for the listed transportation and listed related services. This section does

not apply if a pre-existing transportation contract sets out the maximum amount the shipper could be required to pay for the transportation services. Pre-existing transportation contracts include, but are not limited to, corporate contracts for the relocation of multiple employees.

(1) A proposal must contain the name and registration number of the household goods carrier as they appear on the motor carrier certificate of registration. If a proposal is prepared by the household goods carrier's agent, it shall include the name of the agent as listed on the carrier's agent filing with the department. A proposal shall also include the street address of the household goods carrier or its agent. [~~A proposal may not include the name, logo, or motor carrier registration number of any other motor carrier.~~]

(2) A proposal must clearly and conspicuously state whether it is a binding or not-to-exceed proposal.

(3) A proposal must completely describe the shipment and all services to be provided. A proposal must state, "This proposal is for listed items and services only. Additional items and services may result in additional costs."

(4) A proposal must specifically state when the shipper will be required to pay the transportation charges, such as if payment must be made before unloading at the final destination. A proposal must also state what form of payment

is acceptable, such as a cashier's check.

(5) A proposal must conspicuously state that a household goods carrier's liability for loss or damage to cargo is limited to $.60 per pound per article unless the household goods carrier and shipper agree, in writing, to a higher limit of carrier liability.

(b) Hourly rates. If a proposal is based on an hourly rate, then it is not required to provide the number of hours necessary to perform the transportation and related services. However, if the number of hours is not included in a proposal, then the carrier must secure a written acknowledgment from the shipper indicating the proposal is complete without the number of hours. Also, the proposal shall state the maximum amount the shipper could be required to pay for the listed transportation and listed related services.

(c) Proposal as addendum. If a proposal is accepted by the shipper and the carrier transports the shipment, then the proposal is considered an addendum to the moving services contract.

(d) Additional items and services. If the household goods carrier determines additional items are to be transported and/or additional services are required to load, transport, or deliver the shipment, then before the carrier transports the additional items or performs the additional services the

carrier and shipper must agree, in writing, to:

(1) allow the original proposal to remain in effect;

(2) amend the original proposal or moving services contract; or

(3) substitute a new proposal for the original.

(e) Amendments and storage.

(1) An amendment to an original proposal or moving services contract, as allowed in subsection (d) of this section, must:

(A) be signed and dated by the household goods carrier and shipper; and

(B) clearly and specifically state the amended maximum price for the transportation of the household goods.

(2) If the household goods carrier fails to amend or substitute an original proposal as required by this subsection and subsection (d) of this section, only the charges stated on the original proposal for moving services may be assessed on the moving services contract. The carrier shall not attempt to amend or substitute the proposal to add items or services after the items or services have been provided or performed.

(3) If through no fault of the carrier, the shipment cannot be delivered during the agreed delivery period, then the household goods carrier may place the shipment in storage and assess fees relating to storage according to the terms in

§218.58 of this title (relating to Moving Services Contract - Options for Carrier Limitation of Liability), without a written agreement with the shipper to amend or substitute the original proposal.

(f) Combination document. A proposal required by subsection (a) of this section may be combined with other shipping documents, such as the moving services contract, into a single document. If a proposal is combined with other shipping documents, the purpose of each signature line on the combination document must be clearly indicated. Each signature is independent and shall not be construed as an agreement to all portions and terms of the combination document.

(g) Telephone estimates. A household goods carrier may provide an estimate for the transportation services by telephone. If the household goods carrier provides the estimate by telephone, then the carrier must also furnish a written proposal for the transportation services to the shipper prior to loading the shipment.

§218.59. Inventories.

(a) Applicability. A household goods carrier has the option of preparing an inventory of the shipment.

(b) Inventories prepared by the carrier. A household goods carrier may prepare a complete or partial inventory for

its own use without an agreement between the carrier and shipper. The household goods carrier may not charge a fee for preparing an inventory for its own use.

(c) Inventories prepared by agreement between the carrier and shipper. If the household goods carrier and shipper agree to the preparation of an inventory by the carrier, the carrier may assess a fee for this service.

(1) Information contained in the inventory.

(A) The inventory must contain the shipper's name [~~and the household goods carrier's name as it appears on its motor carrier certificate of registration. The inventory may not include the name, logo, or motor carrier registration number of any other motor carrier~~]. The inventory may include the name of the household goods carrier's agent as it is listed on the carrier's agent filing with the department.

(B) The inventory must describe each item in the shipment, unless the parties agree to a partial inventory. The shipper and the carrier may agree regarding the amount of detail that must be included in the inventory.

(C) If any charges are based on the size of the containers, the inventory must list the quantity and size of each container. [~~Additionally, if the household goods carrier assesses handling charges for specific items, such as, pianos, the inventory must show these items separately, if not already~~

~~shown on the moving services contract.~~]

(D) [~~(C)~~] The inventory must describe and use the symbol "CP" for all containers packed or crated by the carrier. Additionally, the inventory must describe and use the symbol "PBO" for all containers packed or crated by the shipper.

(E)[~~(D)~~] The inventory must include a key for any abbreviation used to describe the condition of the items.

(2) Inventory at origin. The inventory shall be signed by the household goods carrier and the shipper or shipper's agent at origin. The inventory must include a conspicuous statement that the shipper's signature is affirming the contents and condition of the items in the shipment.

(3) Inventory at destination. The carrier and the shipper or shipper's agent shall sign the inventory at destination. A legible copy of the inventory shall be given to the shipper. Signing the inventory does not waive a claimant's right to file a claim.[~~The inventory must include the following statement adjacent to the shipper's signature line, "Signing the inventory means:~~]

[~~(A) all items loaded have been received, except as noted;~~]

[~~(B) obvious loss or damage has been noted;~~

~~and~~]

[~~(C) signing the inventory does not waive a claimant's right to file a claim."~~]

(4) Combination document. The inventory may be combined with other shipping documents, such as the moving services contract, into a single document. If the inventory is combined with other shipping documents, the purpose of each signature line on the combination document must be clearly indicated. Each signature is independent and shall not be construed as an agreement to all portions and terms of the combination document.

(d) Electronic format. An inventory may be prepared in an electronic format.

§218.60. Determination of Weights.

(a) Shipment weights. A carrier transporting household goods on a not-to-exceed proposal using shipment weight as a factor in determining transportation charges shall determine the weight of each shipment transported prior to the assessment of any charges. Except as provided in this section, the weight shall be obtained on a certified scale.

(b) Weighing procedures.

(1) The weight of each shipment shall be obtained by determining the difference between the:

(A) tare weight of the vehicle on which the shipment is to be loaded prior to the loading and the gross weight of the same vehicle after the shipment is loaded; or

(B) gross weight of the vehicle with the shipment loaded and the tare weight of the same vehicle after the shipment is unloaded.

(2) At the time of both weighings, all pads, dollies, handtrucks, ramps, and other equipment required in the transportation of a shipment shall be on the vehicle. Neither the driver nor any other person shall be on the vehicle at the time of the weighings.

(3) The fuel tanks on the vehicle shall be full at the time of each weighing or, in the alternative, no fuel may be added between the two weighings when the tare weighing is the first weighing performed.

(4) The trailer of a tractor-trailer vehicle combination may be detached from the tractor and weighed separately at each weighing providing the length of the scale platform is adequate to only accommodate and support the entire trailer at one time.

(5) Shipments weighing 1,000 pounds or less may be weighed on a certified platform or warehouse scale prior to loading for transportation or subsequent to unloading.

(6) The net weight of shipments transported in

containers shall be the difference between the tare weight of the container, including all pads, blocking and bracing used or to be used in the transportation of the shipment, and the gross weight of the container with the shipment loaded.

(7) The shipper or any other person responsible for the payment of the freight charges shall have the right to observe all weighings of the shipment. The household goods carrier must advise the shipper or any other person entitled to observe the weighings of the time and specific location where each weighing will be performed and must give that person a reasonable opportunity to be present to observe the weighings. Waiver by a shipper of the right to observe any weighing or reweighing is permitted and does not affect any rights of the shipper under this subchapter.

(c) Weight tickets.

(1) The carrier shall obtain a separate weight ticket for each weighing required under this subsection and the ticket shall be carried on the vehicle. However, if both weighings are performed on the same scale, one weight ticket may be used to record both weighings. Every weight ticket shall be signed by the person performing the weighing. Weight tickets or copies of weight tickets in an electronic format shall be maintained with [~~attached to~~] the carrier's copy of moving services contract covering the shipment. Weight tickets

shall contain:

(A) the complete name and location of the scale;

(B) the date of each weighing;

(C) identification of the weight entries as being tare, gross, or net weights;

(D) the company or carrier identification of the vehicle; and

(E) the last name of the shipper as it appears on the moving services contract.

(2) This ticket must be retained by the carrier as part of the records for [~~file on~~] the shipment. A bill presented to collect any shipment charges dependent on the weight transported must be accompanied by true copies of all weight tickets in either a printed or electronic format obtained in the determination of the shipment weight.

(d) Reweighing of shipments. Before unloading a shipment weighed at origin and after the shipper is informed of the billing weight and total charges, the shipper may request a reweigh. The charges shall be based on the reweigh weight.

(e) Stored shipments. If a shipment is weighed and placed in storage in transit or delivered out of storage to destination by another vehicle, then no additional weighing shall be required unless the shipment has been decreased or

increased in weight subsequent to the original weighing of the shipment.

(f) Constructive weight. Where no certified scale is available at origin, at a point en route, or at destination, a constructive weight, based on seven pounds per cubic foot of properly loaded space may be used to determine the weight of the household goods shipment.

§218.61. Claims.

(a) Filing of claims. A household goods carrier must act on all claims filed by a shipper on shipments of household goods according to this section.

(1) A claim must be filed in writing or by electronic format [~~document transfer~~] with the household goods carrier or the household goods carrier's agent whose name appears on the moving services contract. A claim is considered filed on the date the claim is received by the household goods carrier. A shipper must file a [~~written~~] claim either in writing or by electronic format within 90 days:

(A) of delivery of the shipment to the final destination; or

(B) after a reasonable time for delivery has elapsed in the case of failure to make delivery.

(2) The claim must include enough facts to identify

the shipment. The claim must also describe the type of claim and request a specific type of remedy.

(3) Shipping documents may be used as evidence to support a claim, but cannot be substituted for a written claim.

(4) A claim submitted by someone other than the owner of the household goods must be accompanied by a written explanation of the claimant's interest in the claim.

(b) Acknowledgment and disposition of filed claims.

(1) A household goods carrier shall send an [~~a written~~] acknowledgment of the claim either in writing or by electronic format to the claimant within 20 days (excluding Sundays and nationally recognized holidays) after receipt of the claim by the carrier or his agent.

(A) The claim acknowledgment shall include the statement, "Household goods carriers have 90 days from receipt of a claim to pay, decline to pay, or make a firm settlement offer, in writing, to a claimant. Questions or complaints concerning the household goods carrier's claims handling should be directed to the Texas Department of Motor Vehicles (TxDMV), [~~department's~~] Enforcement Division, via the toll-free consumer helpline as listed on the department's website. Additionally, a claimant has the right to request mediation from TxDMV within 30 days (excluding Sundays and nationally

recognized holidays) after any portion of the claim is denied by the carrier, the carrier makes a firm settlement offer that is not acceptable to the claimant, or 90 days has elapsed since the carrier received the claim and the claim has not been resolved."

(B) The household goods carrier is not required to issue the acknowledgment letter prescribed in this subsection if the claim has been resolved or the household goods carrier has initiated communication regarding the claim with the claimant within 20 days (excluding Sundays and nationally recognized holidays) after receipt of the claim. However, the burden of proof of the claim resolution or communication with the claimant is the responsibility of the household goods carrier.

(2) After a thorough investigation of the facts, the household goods carrier shall pay, decline to pay, or make a firm settlement offer in writing to the claimant within 90 days after receipt of the claim by the household goods carrier or its household goods agent. The settlement offer or denial shall state, "A claimant has the right to seek mediation through the Texas Department of Motor Vehicles (TxDMV)[~~TxDMV~~] within 30 days (excluding Sundays and nationally recognized holidays) after any portion of the claim is denied by the carrier, the carrier makes a firm settlement offer that is not

acceptable to the claimant, or 90 days has elapsed since the carrier received the claim and the claim has not been resolved."

(3) A household goods carrier must provide a copy of the shipping documents to the shipper's insurance company upon request. The carrier may assess a reasonable fee for this service.

(c) Documenting loss or damage to household goods.

(1) Inspection. If a loss or damage claim is filed and the household goods carrier wishes to inspect the items, the carrier must complete any inspection as soon as possible, but no later than 30 calendar days, after receipt of the claim.

(2) Payment of shipping charges. Payment of shipping charges and payment of claims shall be handled separately, and one shall not be used to offset the other unless otherwise agreed upon by both the household goods carrier and claimant.

(d) Claim records. A household goods carrier shall maintain a record of every claim filed. Claim records shall be retained for two years as required by §218.32 of this title (relating to Motor Carrier Records). At a minimum, the following information on each claim shall be maintained in a systematic, orderly and easily retrievable manner:

(1) claim number (if assigned), date received, and

amount of money or the requested remedy;

(2) number (if assigned) and date of the moving services contract;

(3) name of the claimant;

(4) date the carrier issued its claim acknowledgment letter;

(5) date and total amount paid on the claim or date and reasons for disallowing the claim; and

(6) dates, time, and results of any mediation coordinated by the department.

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

Board Policy Documents

Governance Process (10/13/11)

Strategic Planning (10/13/11)

Board Vision (4/7/16)

Agency Boundaries (9/13/12)

KPIs (9/12/14)

Texas Department of Motor Vehicles
TxDMV Board Governance Policy

1. PURPOSE

The directives presented in this policy address board governance of the Texas Department of Motor Vehicles (TxDMV).

2. SCOPE

The directives presented in this policy apply to the TxDMV Board and TxDMV agency personnel who interact with the Board. The TxDMV Board Governance Policy shall be one that is comprehensive and pioneering in its scope.

3. POLICY

3.1. TxDMV Board Governing Style

The Board shall govern according to the following general principles: (a) a vision for the agency, (b) diversity in points of view, (c) strategic leadership, providing day-to-day detail as necessary to achieve the agency vision, (d) clear distinction of Board and Executive Director roles, (e) collective decision making, (f) react proactively rather than reactively and with a strategic approach. Accordingly:

3.1.1. The Board shall provide strategic leadership to TxDMV. In order to do this, the Board shall:

3.1.1.1. Be proactive and visionary in its thinking.

3.1.1.2. Encourage thoughtful deliberation, incorporating a diversity of viewpoints.

3.1.1.3. Work together as colleagues, encouraging mutual support and good humor.

3.1.1.4. Have the courage to lead and make difficult decisions.

3.1.1.5. Listen to the customers and stakeholders needs and objectives.

3.1.1.6. Anticipate the future, keeping informed of issues and trends that may affect the mission and organizational health of the TxDMV.

3.1.1.7. Make decisions based on an understanding that is developed by appropriate and complete stakeholder participation in the process of identifying the needs of the motoring public, motor vehicle industries,

and best practices in accordance with the mission and vision of the agency.

3.1.1.8. Commit to excellence in governance, including periodic monitoring, assessing and improving its own performance.

3.1.2. The Board shall create the linkage between the Board and the operations of the agency, via the Executive Director when policy or a directive is in order.

3.1.3. The Board shall cultivate a sense of group responsibility, accepting responsibility for excellence in governance. The Board shall be the initiator of policy, not merely respond to staff initiatives. The Board shall not use the expertise of individual members to substitute for the judgment of the board, although the expertise of individual members may be used to enhance the understanding of the Board as a body.

3.1.4. The Board shall govern the agency through the careful establishment of policies reflecting the board's values and perspectives, always focusing on the goals to be achieved and not the day-to-day administrative functions.

3.1.5. Continual Board development shall include orientation of new Board members in the board's governance process and periodic board discussion of how to improve its governance process.

3.1.6. The Board members shall fulfill group obligations, encouraging member involvement.

3.1.7. The Board shall evaluate its processes and performances periodically and make improvements as necessary to achieve premier governance standards.

3.1.8. Members shall respect confidentiality as is appropriate to issues of a sensitive nature.

3.2. TxDMV Board Primary Functions/Characteristics

TxDMV Board Governance can be seen as evolving over time. The system must be flexible and evolutionary. The functions and characteristics of the TxDMV governance system are:

3.2.1. Outreach

3.2.1.1. Monitoring emerging trends, needs, expectations, and problems from the motoring public and the motor vehicle industries.

3.2.1.2. Soliciting input from a broad base of stakeholders.

3.2.2. Stewardship

3.2.2.1. Challenging the framework and vision of the agency.

3.2.2.2. Maintaining a forward looking perspective.

3.2.2.3. Ensuring the evolution, capacity and robustness of the agency so it remains flexible and nimble.

3.2.3. Oversight of Operational Structure and Operations

3.2.3.1. Accountability functions.

3.2.3.2. Fiduciary responsibility.

3.2.3.3. Checks and balances on operations from a policy perspective.

3.2.3.4. Protecting the integrity of the agency.

3.2.4. Ambassadorial and Legitimating

3.2.4.1. Promotion of the organization to the external stakeholders, including the Texas Legislature, based on the vision of the agency.

3.2.4.2. Ensuring the interests of a broad network of stakeholders are represented.

3.2.4.3. Board members lend their positional, professional and personal credibility to the organization through their position on the board.

3.2.5. Self-reflection and Assessment

3.2.5.1. Regular reviews of the functions and effectiveness of the Board itself.

3.2.5.2. Assessing the level of trust within the Board and the effectiveness of the group processes.

3.3. Board Governance Investment

Because poor governance costs more than learning to govern well, the Board shall invest in its governance capacity. Accordingly:

3.3.1. Board skills, methods, and supports shall be sufficient to ensure governing with excellence.

3.3.1.1. Training and retraining shall be used liberally to orient new members, as well as maintain and increase existing member skills and understanding.

3.3.1.2. Outside monitoring assistance shall be arranged so that the board can exercise confident control over agency performance. This includes, but is not limited to, financial audits.

3.3.1.3. Outreach mechanisms shall be used as needed to ensure the Board's ability to listen to stakeholder viewpoints and values.

3.3.1.4. Other activities as needed to ensure the Board's ability to fulfill its ethical and legal obligations and to represent and link to the motoring public and the various motor vehicle industries.

3.3.2. The Board shall establish its cost of governance and it will be integrated into strategic planning and the agency's annual budgeting process.

3.4. Practice Discipline and Assess Performance

The Board shall ensure the integrity of the board's process by practicing discipline in Board behavior and continuously working to improve its performance. Accordingly:

3.4.1. The assigned result is that the Board operates consistently with its own rules and those legitimately imposed on it from outside the organization.

3.4.1.1. Meeting discussion content shall consist solely of issues that clearly belong to the Board to decide or to monitor according to policy, rule and law. Meeting discussion shall be focused on performance targets, performance boundaries, action on items of Board authority such as conduct of administrative hearings, proposal, discussion and approval of administrative rule-making and discussion and approval of all strategic planning and fiscal matters of the agency.

3.4.1.2. Board discussion during meetings shall be limited to topics posted on the agenda.

3.4.1.3. Adequate time shall be given for deliberation which shall be respectful, brief, and to the point.

3.4.2. The Board shall strengthen its governing capacity by periodically assessing its own performance with respect to its governance model. Possible areas of assessment include, but are not limited to, the following:

3.4.2.1. Are we clear and in agreement about mission and purpose?

3.4.2.2. Are values shared?

3.4.2.3. Do we have a strong orientation for our new members?

3.4.2.4. What goals have we set and how well are we accomplishing them?

3.4.2.5. What can we do as a board to improve our performance in these areas?

3.4.2.6. Are we providing clear and relevant direction to the Executive Director, stakeholders and partners of the TxDMV?

3.4.3. The Board Chair shall periodically promote regular evaluation and feedback to the whole Board on the level of its effectiveness.

Texas Department of Motor Vehicles
Strategic Planning Policy

1. PURPOSE

The directives presented in this policy address the annual Strategic Planning process at the Texas Department of Motor Vehicles (TxDMV).

2. SCOPE

The directives presented in this policy apply to the TxDMV Board and TxDMV agency personnel who interact with the Board. TxDMV Strategic Planning Policy attempts to develop, document and expand its policy that is comprehensive in its scope in regards to the strategic planning process of the Board and the Department beyond that of the state strategic planning process.

3. POLICY

3.1. TxDMV Board Strategic Planning

This policy describes the context for strategic planning at TxDMV and the way in which the strategic plan shall be developed and communicated.

3.1.1. The Board is responsible for the strategic direction of the organization, which includes the vision, mission, values, strategic goals, and strategic objectives.

3.1.2. TxDMV shall use a 5-year strategic planning cycle, which shall be reviewed and updated annually, or as needed.

3.1.3. The 5-year strategic plan shall be informed by but not confined by requirements and directions of state and other funding bodies.

3.1.4. In developing strategic directions, the Board shall seek input from stakeholders, the industries served, and the public.

3.1.5. The Board shall:

3.1.5.1. Ensure that it reviews the identification of and communication with its stakeholders at least annually.

3.1.5.2. Discuss with agency staff, representatives of the industries served, and the public before determining or substantially changing strategic directions.

3.1.5.3. Ensure it receives continuous input about strategic directions and agency performance through periodic reporting processes.

3.1.6. The Board is responsible for a 5-year strategic plan that shall identify the key priorities and objectives of the organization, including but not limited to:

3.1.6.1. The creation of meaningful vision, mission, and values statements.

3.1.6.2. The establishment of a Customer Value Proposition that clearly articulates essential customer expectations.

3.1.6.3. A Strengths, Weaknesses, Opportunities and Threats (SWOT) Analysis, to be updated annually.

3.1.6.4. An assessment of external factors or trends (i.e., customer needs, political factors, economic factors, industry trends, technology factors, uncertainties, etc.)

3.1.6.5. Development of the specific goals and objectives the Department must achieve and a timeline for action.

3.1.6.6. Identification of the key performance indicators to measure success and the initiatives that shall drive results.

3.1.6.7. Engage staff at all levels of the organization, through the executive director, in the development of the strategic plan through surveys, interviews, focus groups, and regular communication.

3.1.6.8. Ensure the strategic planning process produces the data necessary for LBB/GOBPP state required compliance while expanding and enhancing the strategic plan to support the needs of the TxDMV. The overall strategic plan shall be used as a tool for strategic management.

3.1.7. The Board delegates to the Executive Director the responsibility for **implementing** the agency's strategic direction through the development of agency wide and divisional operational plans.

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

Category: TxDMV Vision
Date Approved: April 7, 2016
Owner: TxDMV Board

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.

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

Key Performance Indicator Measures
Adopted by TxDMV Board 9/12/14

GOAL	STRATEGY	#	MEASURE	Baseline	Target	Actual	OWNER
Performance Driven	Effective and efficient services	1	Average processing time for new franchise license applications	45 days	35 days		MVD
		2	Average processing time for franchise renewals	11 days	5 days		MVD
		3	Average processing time of franchise license amendments	20 days	8 days		MVD
		4	Average processing time for new Dealer's General Distinguishing Number (GDN) license applications	35 days	17 days		MVD
		5	Average processing time for GDN renewals	14 days	7 days		MVD
		6	Average processing time for GDN license amendments	19 days	7 days		MVD
		7	Average turnaround time for single-trip routed permits	33.88 mins	32 mins		MCD
		8	Average turnaround time for intrastate authority application processing	1.47 days	1.4 days		MCD
		9	Average turnaround time for apportioned registration renewal applications processing	2 days	2 days		MCD
		10	Average turnaround time to issue salvage or non-repairable vehicle titles	5 days	4 days		VTR
		11	Average time to complete motor vehicle complaints with no contested case proceeding	131 days	120 days		ENF
		12	Average time to complete motor vehicle complaints with contested case proceeding	434 days	400 days		ENF
		13	Average time to complete salvage complaints with no contested case proceeding	131 days	120 days		ENF
		14	Average time to complete salvage complaints with contested case proceeding	434 days	400 days		ENF
		15	Average time to complete motor carrier complaints with no contested case proceeding	297 days	145 days		ENF
		16	Average time to complete motor carrier complaints with contested case proceeding	133 days	120 days		ENF
		17	Average time to complete household goods complaints with no contested case proceeding	432 days	145 days		ENF
		18	Average time to complete household goods complaints with contested case proceeding	371 days	180 days		ENF
		19	Average time to complete Oversize/Overweight (OS/OW) complaints with no contested case proceeding	40 days	35 days		ENF
		20	Average time to complete OS/OW complaints with contested case proceeding	265 days	250 days		ENF
		21	Percent of lemon law cases resolved prior to referral for hearing	76%	60%		ENF
		22	Average time to complete lemon law cases where no hearing is held	147 days	65 days		ENF
		23	Average time to complete lemon law cases where hearing is held	222 days	150 days		ENF
		24	Percent of total renewals and net cost of registration renewal: A. Online B. Mail C. In Person	A. 15% B. 5% C. 80%	A. 16% B. 5% C. 79%		VTR
		25	Total dealer title applications: A. Through Webdealer B. Tax Office	Baseline in development	A. 5% B. 95%		VTR

GOAL	STRATEGY	#	MEASURE	Baseline	Target	Actual	OWNER
		26	Percent of total lien titles issued: A. Electronic Lien Title B. Standard Lien Title	A. 16% B. 84%	A. 20% B. 80%		VTR
		27	Percent of total OS/OW permits: A. Online (self-issued) B. Online (MCD-issued) C. Phone D. Mail E. Fax	A. 57.47% B. 23.03% C. 11.33% D. 1.76% E. 6.4%	A. 58% or greater B. 25% or greater C. 10% or less D. 1.7% or less E. 5.3% or less		MCD
		28	Average time to complete lemon law and warranty performance cases after referral	Baseline in development	25 days		OAH
		29	Average time to issue a decision after closing the record of hearing	Baseline in development	30 days		OAH
	Implement appropriate best practices	30	Percent of audit recommendations implemented	Baseline in development	90% annual goal for these recommendations which Internal Audit included in a follow-up audit		IAD
Optimized Services and Innovation	Continuous business process improvement and realignment	31	Percent of projects approved by the agency's governance team that finish within originally estimated time (annual)	57%	100%		EPMO
		32	Percent of projects approved by the agency's governance team that finish within originally estimated budget (annual)	71%	100%		EPMO/ FAS
		33	Percent of monitoring reports submitted to Texas Quality Assurance Team (TXQAT) by or before the due date	79%	100%		EPMO
		34	Percent of project manager compliance with EPMO project management standards based upon internal quality assurance reviews	Baseline in development	100%		EPMO
	Executive ownership and accountability for results	35	Percent of employees due a performance evaluation during the month that were completed on time by division.	Baseline in development	100%		HR
		36	Percent of goals accomplished as stated in the directors performance evaluation	Baseline in development	Measure annually at the end of the fiscal year		EXEC
	Organizational culture of continuous improvement and creativity	37	Employees who rate job satisfaction as above average as scored by the Survey of Employee Engagement (SEE)	3.47 (SEE 2012)	3.65	3.60 (SEE 2013)	HR
		38	Increase in the overall SEE score	337 (SEE 2012)	360	351 (SEE 2013)	HR
	Focus on the internal customer	39	Percent of favorable responses from customer satisfaction surveys	Baseline in development	90%		EPMO
		40	Annual agency voluntary turnover rate	6.5% (FY 2013)	5.0%		HR
	Increase transparency with external customers	41	Number of education programs conducted and number of stakeholders/customers attending education programs	4.48/80.61	4/80		MCD
		42	Number of education programs conducted and number of stakeholders/customers attending education programs	36/335	42/390		VTR
		43	Number of eLearning training modules available online through the Learning Management System and number of modules completed by stakeholders/customers	eLearning Modules Available - 28 Completed - 735	Available - 31 Completed - 814		VTR

GOAL	STRATEGY	#	MEASURE	Baseline	Target	Actual	OWNER
Customer Centi		44	Number of Shows and Exhibits attended to educate stakeholders/customers about TxDMV services and programs	6	7		MVD
		45	Number of education programs conducted and number of stakeholders/customers attending education programs	3/250	3/250		ENF
		46	Number of education programs conducted and number of stakeholders/customers attending education programs	3/150	4/300		ABTPA
		47	Percent of customers and stakeholders who express above average satisfaction with communications to and from TxDMV	Baseline in development	80%		All Divisions
	Excellent Service Delivery	48	Average hold time	9 min	9 min		CRD
		49	Abandoned call rate	22%	20%		CRD
		50	Average hold time	Baseline in development	1 min		ITS
		51	Abandoned call rate	Baseline in development	5%		ITS
		52	Average hold time	Credentialing -1.6 minutes Permits - 2.08 minutes CFS - 54.38 seconds	Credentialing - 1.5 minutes Permits - 2 minutes CFS - 50 seconds		MCD
		53	Abandoned call rate	Credentialing - 7% Permits - 6.42% CFS - 5.63%	Credentialing - 6% Permits - 5% CFS - 5%		MCD
Key:		Critical	Off Target		On target		Not yet started

Vision: The Texas Department of Motor Vehicles sets the standard as the premier provider of customer service in the nation.

Mission: To serve, protect, and advance the citizens and industries in the state with quality motor vehicle related services.

Philosophy: The Texas Department of Motor Vehicles is customer-focused and performance driven. We are dedicated to providing services in an efficient, effective and progressive manner as good stewards of state resources. With feedback from our customers, stakeholders and employees, we work to continuously improve our operations, increase customer satisfaction and provide a consumer friendly atmosphere.

Values: We at the Texas Department of Motor Vehicles are committed to: **TEXAS-T**ransparency, **E**fficiency, E**X**cellence**, A**ccountability, and **S**takeholders.