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**OPINION COMMITTEE**

**RQ-0879-6A**

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April 16, 2010

The Honorable Greg Abbott  
Attorney General of Texas  
Attn: Opinion Committee  
PO Box 12548  
Austin, Texas 78711-2548

Re: Request for Attorney General Opinion Regarding Delegation of Final Order Authority by the Board of the Department of Motor Vehicles

Dear General Abbott:

The Board of the Texas Department of Motor Vehicles (TxDMV) unanimously and respectfully requests an Attorney General Opinion relating to the interpretation of the Occupations Code, Chapter 2301 and the Transportation Code, Chapters 1001-1005, concerning the final order authority and delegation power of the Board under these Codes, as well as certain Board members' ability to vote on matters involving both dealers and manufacturers. To assist you in responding to our request, we provide the following background and briefing.

## I. BACKGROUND

### A. Agency Structure

The Texas Legislature created the Board of the Texas Department of Motor Vehicles in HB 3097 of its latest legislative session. (Act of May 26, 2009, 81st Leg., R.S., ch. 933, 2009 Tex. Gen. Laws 2482) In this bill, the Legislature fashioned the new state agency by transferring to its jurisdiction three full divisions, and a portion of a fourth division of the Texas Department of Transportation: the Vehicle Titles and Registration Division, the Motor Vehicle Division, the Automobile Burglary and Theft Prevention Authority, and part of the Motor Carrier Division responsible for enforcement of Title 7, Subtitle F of the Transportation Code.

As such, the new agency has broad jurisdiction over numerous aspects of how the state of Texas regulates motor vehicles and the motor vehicle industry including motor vehicle titling and registration, motor carrier registration, motor vehicle theft, motor vehicle sales, and various activities involving the relationship between motor vehicle dealers, manufacturers, distributors, and the public-at-large.

This request for opinion strictly involves the authority of the TxDMV Board as it relates to the functions of the Motor Vehicle Division. The Motor Vehicle Division (MVD) of TxDMV is responsible for the implementation of regulatory functions under Chapter 2301 of the

Occupations Code, Chapter 503 of the Transportation Code, and the rules enacted pursuant to those statutes. Although TxDMV's regulatory authority extends over many other aspects of the motor vehicle industry, MVD's primary duty is to regulate motor vehicle distribution within the State of Texas. Currently, MVD licenses and regulates over 20,000 persons and entities in various capacities, including franchised and independent motor vehicle dealers, manufacturers, distributors, converters, lessors, and lease facilitators. MVD's licensee base and sphere of regulation has broadened over time as the legislature has expanded its authority over the industry.

Pursuant to these duties, the TxDMV through its Motor Vehicle Division acts as the forum for a number of different types of cases arising under Occupations Code Chapter 2301 (Chapter 2301) and Transportation Code Chapter 503 (Chapter 503). There are five types of cases presented to the agency pursuant to these statutes. These are:

- (a) Enforcement Actions – These cases are brought against licensees by MVD personnel for violations under these codes. The agency may order civil penalties against a licensee or other types of penalties that affect the licenses of licensed entities or others violating code provisions. These cases can arise under either Chapter 2301 or Chapter 503.
- (b) Dealer Disputes – These are cases where dealers have disputes with other dealers that arise pursuant to regulations under Chapter 2301.
- (c) Dealer/Manufacturer Disputes – These are cases that arise from the relationships between manufacturers (or distributors) and dealers. Chapter 2301 provides certain obligations and prohibitions that licensees must abide by, or the offended party may request a hearing to enforce the provisions of the Code.
- (d) Lemon Law cases – These cases are disputes between motor vehicle purchasers and motor vehicle manufacturers. Subchapter M of the Occupations Code provides a mechanism for consumers to request certain specified relief from a manufacturer if a vehicle is found to be defective.
- (e) Warranty performance complaints arising under Chapter 2301, subchapter E.

The Motor Vehicle Division also occasionally receives cases arising from civil disputes, one element of which lies within the agency's jurisdiction. The Texas Supreme Court found in 2002 that MVD's governing board possessed exclusive original jurisdiction to determine questions of the interpretation of Chapter 2301 of the Occupations Code. Therefore, the agency hears cases pertaining to interpretations of Chapter 2301 that arise from private disputes and that are referred by the courts. A court may refer a question to the TxDMV Board if the case contains a cause of action that turns upon the interpretation of an Occupations Code section, for instance in a breach of contract action. (See *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198 (Tex. 2002) and *Subaru of America v. David McDavid*

*Nissan, Inc.*, 84 S.W.3d 212 (Tex. 2002).) There is also a possibility that parties might come directly to the TxDMV Board for a determination of a Code violation without a direct case in controversy.

## B. Historical Context

1. **Since its start almost 40 years ago, the agency's authority has grown to include matters involving new car dealers and manufacturers, used car dealers, and dissatisfied consumers who have been sold a "Lemon."**

In 1971, the Legislature enacted the Texas Motor Vehicle Commission Code (TEX. REV. CIT. STAT. ANN. art. 4413(36) (Vernon 2001) now codified at TEX. OCC. CODE Ch. 2301 (Vernon 2009)) that established the Texas Motor Vehicle Commission (TMVC). The TMVC was tasked with the licensing and regulation "of persons engaged in the business as franchise new motor vehicle dealers and new motor vehicle manufacturer and distributors and their representatives..." (SB 140, 62<sup>nd</sup> Leg., R.S., ch. 51, 1971 Tex. Gen. Laws. 89) It also was empowered to hear and issue orders on consumer complaints seeking new vehicle warranty repairs from dealers. The TMVC was set up as an independent state agency, with a six-member board comprised of dealer, manufacturer, and public representatives.

A significant expansion of regulatory responsibility of the TMVC occurred in 1983 under SB 1141, (Act of June 19, 1983, 68<sup>th</sup> Leg., R.S., ch. 651, §§1-7 Tex. Gen. Laws 4135) with the advent of the Texas Lemon Law. This law enabled consumers who purchased substandard new motor vehicles to pursue repurchase or replacement of a vehicle directly from the manufacturer through a forum provided by the TMVC. The agency continued to regulate solely the franchised (new) motor vehicle dealers as well as the manufacturers and distributors of those vehicles.

The Lemon Law faced an immediate constitutional challenge. The agency accepted Lemon Law complaints, but did not act on them until the Fifth Circuit Court of Appeals rendered its decision that the law was constitutional. (*Chrysler Corp. v. Tex. Motor Veh. Comm'n, et al*, 755 F.2d 1192 (5th Cir. 1985)) The delay created a monumental case backlog, all of which went to the Commission for a final decision.

In 1989, the Legislature authorized the Texas Motor Vehicle Commission to delegate any of its powers to other members of the Commission, the Executive Director, or one or more employees of the Commission. (HB 2552, Act of May 18, 1989, 71st Leg., R.S. ch. 1130, §12 1989 Tex. Gen. Laws 4653, 4659) In 1991, the Lemon Law was amended to give final order authority to the Executive Director. (HB 524, Act of May 25, 1991, 72nd Leg., R.S. ch. 501, §23, 1991 Tex. Gen. Laws 1749, 1763) Both of these legislative actions allowed the agency to expeditiously process cases and better serve the citizens of Texas.

In 1992, the Legislature moved to consolidate transportation functions under one central agency, and created the Texas Department of Transportation (TxDOT). (HB 9, Act of Aug. 26, 1991, 72<sup>nd</sup> Leg., 1<sup>st</sup> C.S., ch. 7, §1A.01, 1991 Tex. Gen. Laws 237) The TMVC was folded into TxDOT, and became the Motor Vehicle Board of the Texas Department of Transportation. TxDOT is governed by the Texas Transportation Commission. Although the Motor Vehicle Board was a part of the agency's jurisdiction and mission, the Motor Vehicle Board operated as an independent board under the flag of TxDOT. The Motor Vehicle Board retained final order authority over cases brought alleging violations of its Motor Vehicle Commission Code involving its licensees. The Division Director of the Motor Vehicle Division (MVD) continued to act as final decision-maker for "lemon law" cases. Rules that were adopted pursuant to the Motor Vehicle Commission Code were adopted by the Motor Vehicle Board without input or consideration by the Transportation Commission. (See Section 7.01(b) of the Motor Vehicle Commission Code, art. 4413(36), TEX. REV. CIV. STAT. 1991.) Thus, MVD acted virtually independently of TxDOT for regulatory functions, but relied on TxDOT for support functions.

Prior to 1995, independent motor vehicle dealers were regulated by the Vehicle Titles and Registration Division of TxDOT. In 1995, the Legislature enacted SB 1139 (Act of June 8, 1995, 74<sup>th</sup> Leg., R.S., ch. 357, 1995 Tex. Gen. Laws), which moved the licensing and regulation functions over independent vehicle dealers to the Motor Vehicle Board. The independent dealer statute was found in Article 6686 (TEX. REV. CIV. STAT. 1994) that was codified into Transportation Code, Chapter 503. Therefore, after the enactment of SB 1139, the core regulatory functions for all motor vehicle dealers, both franchised and independent, as well as other activities related to motor vehicle industry regulation (such as manufacturers, distributors, and their representatives, the lemon law, and lessors and lease facilitators (added by SB 921, 74<sup>th</sup> Leg., ch. 345, 1995 Tex. Gen. Laws)) were consolidated under the jurisdiction of one body within one agency.

2. **From 1995 to 2005, the Motor Vehicle Board made the agency's final decisions in some types of cases and the Division Director made the final decisions in Lemon Law cases and enforcement cases brought under Chapter 503 of the Transportation Code.**

After these functions discussed in (A) above were centralized under the Motor Vehicle Board, it continued to regulate licensees under two enabling statutes, the Motor Vehicle Commission Code and Transportation Code Chapter 503. The Motor Vehicle Commission Code was codified in 2003 (HB 3507, 78<sup>th</sup> Leg., R.S., ch. 1276, 2003 Tex. Gen. Laws) into the Texas Occupations Code, Chapter 2301. The Legislature left Transportation Code Chapter 503 unchanged and separate from Chapter 2301.

The separation between the Occupations Code and the Transportation Code established similar, parallel regulatory structures that apply to the motor vehicle distribution industry. Chapter 2301 at sections 709, 710 and 711 established the basic procedure that a

hearings examiner would conduct needed hearings, prepare a proposal for decision, and present it to the Motor Vehicle Board for consideration and issuance of a final order. Yet, because of the structure and language of these separate enabling statutes, the Motor Vehicle Board did not exercise final order authority for all cases that were brought before the agency.

Here's why: Under the terms of Occupations Code Chapter 2301, Subchapter O, the Motor Vehicle Board retained final order authority over Enforcement actions alleging violations of Occupations Code Chapter 2301, as well as any dealer to dealer, or dealer to manufacturer disputes under Subchapter J. But, Subchapter M stated that "The director (Director of the Motor Vehicle Division) under board rules shall conduct hearings and issue final orders for the implementation and enforcement of this subchapter." (TEX. OCC. CODE §2301.606(a) (Vernon 2003))

Section 2301.602 stated that the *board* (Motor Vehicle Board) shall cause a manufacturer, converter, or distributor to abide by the terms of Subchapter M, and delegates rulemaking authority for the program to the Motor Vehicle Board. The Board, however, interpreted the language of §2301.606(a), to allow the director to issue final orders for Lemon Law cases.

Similarly, under Transportation Code §503.009(a), the Motor Vehicle Board was given jurisdiction over cases brought under Chapter 503, but under subsection (b), the procedures that applied to Lemon Law cases also applied to cases under Chapter 503. Thus, based on the interpretation of §2301.606(a), the MVD Division Director issued the final orders for any cases brought solely under Chapter 503.

To sum up, during this time period, the Motor Vehicle Board decided one type of Enforcement case (those brought under Occupations Code Chapter 2301 and its pre-codification predecessor statute) and the MVD Division Director decided the other type of Enforcement case (those brought under Transportation Code chapter 503). Also, the Motor Vehicle Board decided cases involving dealer disputes, dealer-manufacturer disputes, and warranty performance complaints, all of which were brought under Occupations Code Chapter 2301. The MVD Division Director decided Lemon Law cases.

- 3. In 2005, the legislature eliminated the Board and the MVD Division Director made all of the final decisions in all of the types of cases within the agency's jurisdiction.**

In 2005, the Legislature abolished the Motor Vehicle Board, transferring all of its final order authority to the Division Director of the Motor Vehicle Division (MVD). (Acts of June 14, 2005, HB 2702, 79<sup>th</sup> Leg., R.S., ch. 281, 2005 Tex. Gen. Laws. (See also TEX. OCC. CODE Chapter 2301, Subchapter B, (Vernon 2003), and TEX. OCC. CODE §2301.005(a) (Vernon 2005).) So, for the first time since MVD acquired regulatory authority over independent

dealers, final orders for all contested cases were issued by one final decision-maker—the MVD Division Director.

When it modified the statute in 2005, the legislature left intact the language of Chapter 2301 sections 709, 710, and 711, indicating that the Motor Vehicle Board reviews Proposals for Decision and issues final orders, *but* it modified § 2301.005 to clarify that references to Board meant references to the MVD Division Director.

**D. In 2009, the Legislature passed HB 3097, affecting the Motor Vehicle Division once again. These statutory changes raise questions that we seek your assistance in resolving.**

In 2009 the Department of Motor Vehicles (TxDMV) was created by HB 3097, which modified Occupations Code 2301 and added Chapter 1001 to the Transportation Code. With the passage of HB 3097, the legislature left intact, as it did in 2005, the language of Chapter 2301 sections 709, 710, and 711 indicating that the Board reviews Proposals for Decision and issues final orders. The legislature modified § 2301.005 to remove the language that references to Board mean references to the Division Director of the Motor Vehicle Division (MVD). It appears to us that this legislation reinstated final order authority for Chapter 2301 of the Occupations Code to the Board of the Department of Motor Vehicles (TxDMV Board). This statutory structure of the enabling statutes is similar to that of the earlier Motor Vehicle Board. As we read the statute, Chapter 2301, Subchapter M, and Chapter 503 of the Transportation Code continue to vest final order authority in the MVD Division Director, while the TxDMV Board has regained final order authority over the rest of the cases under Chapter 2301. We ask that you confirm that our understanding is correct; this request is couched as Question 1 below.

## II. SUBDELEGATION

### QUESTION 1:

Are we correct that the interplay of Occupations Code sections 2301.709, .710, and .711 along with the change to § 2301.005 operates to reinstate the pre-2005 system under which the TxDMV Board is authorized to make decisions in cases arising under Occupations Code Chapter 2301 except for those matters in which the MVD Division Director is authorized to make the final decision in Chapter 2301, Subchapter M cases and in those enforcement cases arising under Transportation Code Chapter 503?

We think that the wording of the statute following the 2009 amendments effectuated by HB 3097 has reinstated the prior distinctions between the TxDMV Board's and the Division Director's final order authority. Please see the history discussion above for the basis of this position.

**QUESTION 2:**

If your answer to Question 1 confirms our understanding of the statutory changes to mean that the TxDMV Board makes some decisions and the MVD Division Director others, may the Board delegate its decision-making authority to the MVD Division Director?

**A. Delegation Authority**

Currently, TxDMV interprets the language of HB 3097 such that its Board has jurisdiction to hear any cases alleging violations of Occupations Code Chapter 2301 that were filed after the effective date of the act, September 1, 2009. The MVD Division Director issues final orders for cases arising under Chapter 2301, Subchapter M, and Chapter 503 of the Transportation Code, as well as any cases that were filed before September 1, 2009, the effective date of the act. (Act of May 26, 2009, 81st Leg., R.S., ch. 933, § 6.01, 2009 Tex. Gen. Laws 2482, 2516)

The TxDMV Board's final order authority for decisions under Chapter 2301 of the Occupations Code is found in a number of different places in the Code. Specifically, the Occupations Code grants the Board the authority to consider the proposal for decision issued by an Administrative Law Judge, and to issue a final order. (TEX. OCC. CODE §§ 2301.709-2301.711) Additionally, Occupations Code §2301.153 makes a general grant of power to the Board, which states: "Notwithstanding any other provision of law, the board has all powers necessary, incidental, or convenient to perform a power or duty expressly granted under this chapter, including the power to...." In the list of enumerated powers included in the general grant are powers such as making findings of fact, issuing conclusions of law, suspending or revoking licenses, imposing civil penalties, and prohibiting and regulating acts and practices in connection with the distribution and sale of motor vehicles or warranty performance.

Also, under the same subchapter (Subchapter D), Board Powers and Duties, appears Section 2301.154, Delegation of Powers. (Subchapter C is entitled Director and other Division Personnel.) Before the 2009 amendments to Chapter 2301, each final decision-maker possessed the specific authority under this provision to delegate any of its powers to one or more of the employees of MVD, or possibly to members of the Board itself. For instance, in 2003, the provision read:

"Section 2301.154. The board may delegate any of its powers to:

- (1) one or more of its members;
- (2) the director; or
- (3) one or more of its employees." (TEX. OCC. CODE Ch. 2301, Vernon 2003)

The language of this provision, therefore, allowed the prior Motor Vehicle Board to specifically delegate its powers under the Code. Before codification of this provision into the Occupations Code, it existed in the Texas Motor Vehicle Commission Code under Section 3.04. (The prior version of Section 3.04 read, "The board may delegate any power which it holds or derives under this Act to (1) one or more of its members; (2) the Director; or (3) one or more of its employees." The provision read substantially the same since it was added in 1989. (Acts of May 18, 1989, 71<sup>st</sup> Leg. R.S., ch. 1130, 1989 Tex. Gen. Laws))

With the dissolution of the former Motor Vehicle Board in 2005, the language was amended by the Legislature, such that it read:

"Section 2301.154. The director may delegate any of the director's powers to one or more of the division's employees." (TEX. OCC. CODE Ch. 2301, Vernon 2005)

Thus, the MVD Division Director, in the capacity of the final decision-maker over the agency's cases, was able to delegate powers over those matters to other MVD employees, just as the Motor Vehicle Board was able to do when it served as a final decision-maker.

Then, in 2009, HB 3097 amended Chapter 2301, empowering the TxDMV Board to exercise broad general powers. Additionally, the bill stated in non-amendatory provisions, Section 6.01:

"All powers, duties, obligations, and rights of action of the Motor Vehicle Division and the Vehicle Titles and Registration Division of the Texas Department of Transportation are transferred to the Texas Department of Motor Vehicles and all powers, duties, obligations, and rights of action of the Texas Transportation Commission in connection or associated with those divisions of the Texas Department of Transportation are transferred to the board of the Texas Department of Motor Vehicles on November 1, 2009." (Act of May 26, 2009, 81<sup>st</sup> Leg., R.S., ch. 933, § 6.01, 2009 Tex. Gen. Laws 2482, 2516).

Section 2301.153 of the Occupations Code gives the TxDMV Board "all powers necessary, incidental, or convenient" to perform its regulatory duties under the chapter. Furthermore, the non-amendatory provisions of HB 3097 specifically transfer all powers of the Motor Vehicle Division to the Board—one of which clearly was the ability to delegate powers under the Code to personnel within the Motor Vehicle Division.

Additionally, HB 3097 amended §2301.005(a) of the Code. The 2007 version states that any reference in law or rule to the Texas Motor Vehicle Commission or to the board actually means the director, except for rulemaking purposes. This amendment served to



underscore that final decision-making authority was transferred to the MVD Division Director (as opposed to the Texas Transportation Commission). Furthermore, this acted as a protection measure to ensure that if any portion of the statute or underlying rules were not amended to reflect this statutory change, that there would be no misunderstanding of the legislative intent.

In 2009, however, that provision was modified to eliminate the "director" and replace it with the "board". The statute actually reads: "A reference in law, including a rule, to the Texas Motor Vehicle Commission or to the board means the board of the Texas Department of Motor Vehicles." We bring this to your attention because we believe it highlights the legislative intent to replace the MVD Division Director (as final decision-maker) with the new TxDMV Board, and possibly illustrates the oversight in drafting we believe occurred.

It should be noted that the legislature did expressly address delegation power of the TxDMV Board for certain summary or routine matters presented to it. This provision is found in Transportation Code §1003.002, which states that the TxDMV Board may create a summary procedure by rule for certain non-contested voluminous activities. This provision applies agency-wide, and would apply to matters before the Board from all divisions, not merely MVD.

The legislature, however, did not amend the Occupations Code Section 2301.154 to return the general delegation power of the final decision-maker to the TxDMV Board for its cases under that statute. Thus, the provision still reads that the *director* has the power to delegate any powers to division employees, despite the fact that § 2301.154 is contained within a subchapter entitled "*Board Powers and Duties*". The agency believes this is an oversight that occurred during the amendment process because the omission seems at odds with the historic structure of the Occupations Code and its predecessor, the Motor Vehicle Commission Code, as well as the express delegation authority granted to the Division Director as final decision-maker. This is the crux of the agency's dilemma.

## **B. Analysis of Case Law and Opinion Authority**

Attorney General Hill addressed the question of sub-delegation in an opinion that addressed the authority of the Railroad Commission to delegate to its executive director. In that opinion, Attorney General Hill held that the "power to delegate authority to the Director is the kind of power that the Legislature must expressly give...and that Texas courts would not find it to exist by implication. (Attorney General Op. H-884 (1976)) In reaching that conclusion, Attorney General Hill relied primarily on an Austin Court of Appeals decision, *Moody v. Texas Water Commission*, 373 S.W.2d 793 (Tex. Civ. App. – Austin 1964, writ ref'd n.r.e.). The opinion quotes *Moody*, which stated that "Public duties must be performed and governmental powers must be exercised by the officials or body designated by law and cannot be delegated to others. (citations omitted)"

Certainly, this precept is followed closely by the courts, such that it has become “a familiar rule of statutory construction”. (*Lipsey v. Tex. Dept. of Health*, 727 S.W.2d 61, 64 (Tex.App.—Austin, 1987) Justice Powers expanded on this rule in the *Lipsey* decision. He wrote:

“The rule holds where such a statute entrusts specified functions to a designated public officer or body, the Legislature presumably intends that only that officer or body shall exercise the assigned functions. In consequence of the statutory presumption, the officer or body designated by the Legislature may not ‘subdelegate’ the assigned functions *within* the agency, nor may they convey the assigned functions *outside* the agency to be performed by another public body, public official, or private individuals. When either kind of transfer is attempted by the public officer or body to whom a function has been entrusted, the consequences may be viewed in different ways: those making the transfer may be said to act in excess of their statutory authority; they fail to discharge the statutory duties entrusted to them by the Legislature; and the actions taken by those purportedly receiving authority to perform the functions are invalid because of *their want of authority*.” (Citations omitted) *Id.* at 64.

*But*, the *Lipsey* decision also recognized that the presumption of impermissible sub-delegation may be rebutted by any legislative intent that negates it. This legislative intention may be express, however, it also may be “implied and the presumption defeated owing to the nature of the assigned function, the makeup of the agency involved, the duties assigned to it, the statutory framework, and perhaps other matters.” *Id.* at 64-65.

The courts have not developed an extended line of cases that clearly flesh out what duties, framework, or other matters will serve as the basis for a permissible implied sub-delegation of legislative authority. One case of note is *Schade v. Tex. Workers’ Comp. Comm’n*, 150 S.W.3d 542, 548 (Tex.App. – Austin 2004), which examines the *Lipsey* case. The *Schade* case stems from a dispute over whether the Workers’ Compensation Commission could take a delegated power that was prescribed to one agency division, and then redelegate that statutory power to another agency division. In *Schade*, the Austin Court of Appeals found there is no sub-delegation issue because the statute expressly provided the commission, or its executive director, the flexibility to allocate functions within the agency. Such language acted as a provision of specific authority to the commission to organize its functions as it saw fit. *Id.* at 549.

The TxDMV Board has been provided express authority to “develop and implement policies that clearly define the respective responsibilities of the director and the staff” of the agency. (TEX. TRANSP. CODE § 1001.042) Perhaps, this acts as the grant of specific legislative authority that would allow the Board to delegate final order authority, at the very least

amongst those who have been granted final order authority under the statute, the TxDMV Board members and the MVD Division Director.

One could, however, read the Occupations Code by its plain meaning: Only the MVD Division Director may delegate final order authority under the statute(s) pursuant to § 2301.154. Also, in Transportation Code § 1003.002, the legislature did include express language addressing the TxDMV Board's power to delegate identified that power as extending to "routine matters" defined as activities that are "voluminous, repetitive, believed to be noncontroversial, and of limited interest to anyone other than persons immediately involved in or affected by the proposed department action." (TEX. TRANSP. CODE § 1003.002(b)) It is difficult to imagine that the final resolution of a contested case dispute would qualify as routine under this definition.

Yet, it seems contrary to both the history of the statutory scheme, as well as the structure of the agency, to find that the MVD Division Director has greater flexibility of delegation than the Board itself—from where the Division Director and the agency derive actual legislative regulatory authority.

So building on Justice Powers' theory, the history and the structure of the Codes do seem to provide the implication that the TxDMV Board *does* have delegation authority under the statute, if not the specific authorization to do so.

These are the circumstances upon which the agency believes it has the implied authority to sub-delegate final order authority:

- The TxDMV Board has one of the broadest grants of authority to regulate the motor vehicle industry as is seen within state government – exclusive original jurisdiction to regulate under Occupations Code Chapter 2301. (TEX. OCC. CODE §2301.151(a)) (See *Butnaru and McDavid supra.*) Included in that power is the ability to take *any* action specifically designated or implied that is either necessary or *convenient* to the regulation of the industry. (TEX. OCC. CODE § 2301.151(b))
- Since 1989, each final decision-maker designated by the Legislature to oversee the regulatory function of this activity has had the ability to delegate *any* of its powers, including final order authority, within the agency.
- The Legislature intended and did specifically replace "director" with "board" in at least one place within the statute showing that it did intend to stand the Board in the shoes of the MVD Division Director (in a sentence containing a redundant reference to the Board) in the role as final decision-maker for certain Chapter 2301 cases.

- The Division Director is specifically granted the power to delegate any powers to others within the agency, under a section entitled Subchapter D. Board Powers and Duties.

Therefore, as part of our Question 2, the TxDMV Board respectfully requests clarification from the Attorney General on the following:

Does the TxDMV Board have the express authority to delegate its final order duties based in the language of HB 3097, and the language of Chapter 2301 of the Texas Occupations Code? Is it not implied by the structure of the statute and the history of the agency that the Board has the authority to delegate its final order authority under Chapter 2301, at the very least, to the MVD Division Director who is already granted specific statutory authority to hear cases under Occupations Code, Chapter 2301, Subchapter M, and Chapter 503 of the Transportation Code? Or does the language of Transportation Code § 1003.002 indicate that the Board's authority to delegate is limited to routine matters?

This brings us to our third question.

### III. VOTING AUTHORIZATION

#### QUESTION 3:

If the TxDMV Board has final-decision making authority in some cases and cannot or chooses not to delegate that authority to the MVD Division Director or another employee, then under what circumstances may individual board members cast a vote in a matter before the Board?

Under the last iteration of the Occupations Code that was in effect when the former Motor Vehicle Board functioned as the final decision-maker for the agency, there existed the following provision:

“Section 2301.059. (a) A member of the board may not vote on an issue before the board for determination that directly affects the member or an entity in which the member has a financial interest.

(b) A member of the board appointed under Section 2301.051(b) may not vote on an issue involving a dispute in which a dealer and a manufacturer are parties.

(c) A member of the board appointed under Section 2301.051(b) is not counted in determining a quorum on an issue on which the member is prohibited from voting.”

At that time, §2301.051(b) of the Occupations Code established that the Motor Vehicle Board must have industry representation, to include two dealer representatives and one manufacturer representative. Section 2301.059 presumably addressed any concerns that might arise as the result of having dealers' or manufacturers' representatives voting on matters that might draw their sympathy based upon loyalty they felt to fellow licensees in the industry. Thus, that would prevent dealer and manufacturer representatives from voting on cases where a dealer was pitted against a manufacturer.

As previously, discussed, the Motor Vehicle Board was eliminated by the Texas Legislature in 2005. HB 3097 of the 2009 Texas Legislature created the new TxDMV, and also its governing Board (TxDMV Board). The makeup of the new TxDMV Board is different in character from the former Motor Vehicle Board. It is made up of nine members appointed by the governor of Texas with the advice and consent of the Texas Senate. (TEX. TRANSP. CODE §1001.021) The new TxDMV Board consists of two franchised dealers of different vehicle classes, one independent motor vehicle dealer, one representative of a manufacturer or distributor, one law enforcement representative, one tax assessor-collector, one motor carrier industry member, and two public members. (TEX. TRANSP. CODE §1001.021(b)) Thus, the concentration of board members that represent segments of the industry is significantly greater for the TxDMV Board than the former Motor Vehicle Board. The agency is concerned that this increase in industry representation might open the TxDMV Board to greater risk of criticism for favoring one or another segment of the various constituent groups represented there.

Transportation Code, Chapter 1001, contains the general provisions that created the TxDMV Board, and the new agency. Chapter 1001 contains provisions addressing conflict of interests for TxDMV Board members, and does prohibit any member from participating in deliberations and actions on matters where that member has an interest or a substantial financial interest. A substantial financial interest is defined very specifically to mean that the member is an employee, member, officer or director of an entity; or, owns or controls more than 5% of an entity. The provision directs members to recuse themselves from the Board's deliberations and actions on a matter where any such interest arises. (TEX. TRANSP. CODE §1001.028) HB 3097 did not include the addition of any provision that has language similar to that of the former Section 2301.059 (b) or (c), which would automatically prevent TxDMV Board members from voting. Also, Transportation Code § 1005.001 makes the TxDMV Board subject to the terms of Government Code Chapter 572 and any other law regulating the ethical conduct of state officers.

So, it appears that the "interest" that would trigger a TxDMV Board member's recusal is not clearly defined and could possibly or possibly not include the tendency to support an industry to which a member belongs. We ask the Attorney General to please provide clarification on whether the statute impliedly prevents industry members from voting on matters that would directly pit one type of industry member against another type of member, similar to the prohibition in the prior §2301.059.

We appreciate your attention to these questions and we ask that you expedite this request as quickly as your process will allow.

Sincerely,



Victor Vandergriff  
Chairman  
Board of the Texas Department of Motor Vehicles

cc: Department of Motor Vehicles Board Members  
Ed Serna, Executive Director, TxDMV  
Linda Secord, Interim General Counsel, TxDMV  
Brett Bray, Director, Motor Vehicle Division