

Report From Agency

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION OFFICE OF THE SECRETARY

The State of Wisconsin Department of Transportation Proposes an Order to Create ss. Trans 138.02 (13m), (13r), and 138.0225, relating to motor vehicle auction dealers and affecting small businesses.

AGENCY REPORT TO LEGISLATURE CLEARINGHOUSE RULE 23-014

I. THE PROPOSED RULE:

The proposed rule revisions and the analysis are attached.

II. REFERENCE TO APPLICABLE FORMS:

No forms are newly required by these rule revisions.

III. FISCAL ESTIMATE AND EIA:

The Fiscal Estimate and EIA are attached.

IV. DETAILED STATEMENT EXPLAINING THE BASIS AND PURPOSE OF THE PROPOSED RULE, INCLUDING HOW THE PROPOSED RULE ADVANCES RELEVANT STATUTORY GOALS OR PURPOSES:

The objective of this proposed rule is to clarify the department's interpretation of s. 218.34, Stats., following the Jefferson County Circuit Court's decision in *Jefferson Mid-State Auto Auction, LLC et. al. v. Wis. Dept. of Transp.*, Case No. 21CV172 relating to provisional licensing policies. That statute provides, in relevant part:

218.34 Purchases from a motor vehicle auction.

- (1) No person may purchase or submit a bid for the purchase of a motor vehicle from a motor vehicle auction unless the following conditions are satisfied:
 - (a) The person holds a valid motor vehicle dealer, motor vehicle wholesaler, or motor vehicle buyer license.
 - ...
 - (2) No motor vehicle auction may accept a bid for the purchase of a motor vehicle or complete the sale transaction unless the person who submits the bid or offers to purchase a motor vehicle from the motor vehicle auction satisfies the requirements of sub. (1) and the motor vehicle auction verifies that the motor vehicle dealer license, motor vehicle wholesaler license, or motor vehicle buyer license number displayed on the person's license and included on each sheet of that person's bid or other document evidencing the purchase of a motor vehicle are identical.

This proposed rule sets forth the department's interpretation of that statute. Specifically, that the department may only issue a license after the statutory procedure for assessing a license application is completed, and that the license is 'valid' only after the licensing process is completed, the application is approved, and a license is issued.

V. SUMMARY OF PUBLIC COMMENTS AND THE DEPARTMENT'S RESPONSES, AND EXPLANATION OF ANY RESULTING MODIFICATIONS TO THE PROPOSED RULES:

The State of Wisconsin Department of Transportation held a combined public hearing on the emergency and permanent rules ch. Trans 138 on Thursday, June 1, 2023, at 1:30pm at the Wisconsin Department of Transportation, 4822 Madison Yards Way, Room N134; Madison, WI 53705.

Below is a summary of the comments received:

- Kristie Letizia of Greater Milwaukee Auto Auction ("GMAA") said that auctions move quickly and solicit bidders nationwide just days before an auction, so there needs to be a system in which licenses get approved in real time (comparable to a fishing license). The waiting time hurts auction business by excluding potential bidders who do not hold licenses. DOT has approved all bidder license applications submitted by GMAA. Everything else in the world is 'real time'.
- Craig Giesler of Fox Valley Auto Auction said there have been many changes to buyer regulations since 2004. New technology has increased interstate wholesale auction competition. Feels like auctions haven't been a part of the regulatory conversation for many years.
- Karen Rye for National Auto Auction Association, reiterated by the written comments of Paul Lips, said the rules will not result in level playing field with respect to interstate commerce. Dealers who are waiting for their license will simply go to neighboring states. When those relationships are established with other states, then it's difficult to get those dealers to return to Wisconsin. Issuance of license can take up to 60 days, according to DOT website. Believes this rule should be based on data. The rule states that, over time, the department observed increases in unlicensed motor vehicle sales and odometer fraud, and that those two data points were causally connected. However, the summary of factual data and analytical methodology states that no data was collected in developing the rule. How was it determined that the observed increase was related to motor vehicle buyers being permitted to purchase vehicles at auction during such period that the license was pending? Helpful data point would be how many applicants were able to purchase at auction under the 2004 policy only to have their application denied upon final review by the department. This number would be the true indicator of the 2004 policy's effect on black market vehicle sales because it would show how many of the offending retail sellers would not have had access to purchase at auction if not for the 2004 policy. DOT should modernize licensing by allowing electronic verification of licenses, and should standardize license expiry dates and renewal dates to prevent lapses via online application process. Rule text seems to further limit and discourage auction participation. Rule states that applicant must be employed by a licensed motor vehicle dealer, however s. 218.0101

(22m), Stats., provides that a motor vehicle buyer may either be employed by or contracted with one or more motor vehicle dealers. The definition of a valid license provides that an applicant must meet the conditions set under s. Trans 138.0225, which is very specific to motor vehicle buyers but fails to indicate such: “As paragraph 3 of s. Trans 138.0225 provides that no person may submit bids or purchase motor vehicles at a motor vehicle auction unless they have a valid license in their possession. This appears to remove the ability for motor vehicle dealer owners and wholesalers from participating in auctions, as permitted by statute. Wants DOT to temporarily revert to 2004 policy for all auctions while the DOT and auctions develop a solution.

- Paul Norman, for Fox Valley Auto Auctions, Jefferson Mid State Auto Auction, Central Wisconsin Auto Auction and Greater Milwaukee Auto Auctions (“Auto Auctions”), reiterated by written testimony, said the Auto Auctions oppose the rule and are adversely affected by it. Existing consumer safeguards include require licensed dealer to vouch for the buyer license applicant and be responsible for its actions, and DOT maintained and made available to the auctions buyer license ineligibility list but has discontinued that practice. When buyers need to be turned away from their auctions and not allowed to bid, it injures the Auto Auctions’ business because those buyers then go to the unregulated out-of-state and online auctions to buy vehicles, and sellers ultimately follow them, because the price that sellers receive for vehicles at an auction is directly affected by the number of participating buyers. The Proposed Rule will have a substantial negative impact on the Auto Auctions by significantly reducing that number. The real problems are caused by certain licensed wholesalers, whom the Auto Auctions must allow to bid at auction, who sell directly to consumers and roll back odometers after the auction sale is concluded and the vehicle is no longer controlled by the auctions. The department has not shown that this rule is necessary to prevent illegal actions nor that those problems are caused by buyers between the period their license applications are submitted and acted upon.
- Chris Snyder for Wisconsin Auto and Truck Dealers Association (“WATDA”) wrote in support of the rule. WATDA said Wisconsin currently has an issue with too many wholesalers and buyers and not enough regulatory tools to effectively oversee auction activity. The number of incidents of title jumping and odometer tampering stemming from vehicles running through Wisconsin auto auctions calls for real change in the licensing process. Vehicles sold at the auctions are supposed to be restricted to dealers, wholesalers, and licensed buyers. The vehicles are sold at wholesale and are not to be retailed to consumers unless they are sold by licensed dealers. Many of the buyers have licenses but have not been properly vetted by the licensing authority. They purchase vehicles at the auctions and then sell them via the Internet directly to the public. This activity has put consumers at risk due to vehicles not being properly titled and/or inspected prior to sale.

Department response: The department made no modifications to the rule as result of the public comments received. While the department recognizes the potentially negative impact on Wisconsin auto auctions by reducing or delaying the number of eligible buyers, the department believes the impact will be minimal and short-lived. Department data for CY2022 show the average processing time for a completed individual buyer’s license application was 3 to 5 days. Department data also show no reduction in the number of individual buyer’s licenses issued after 2018. To the contrary, data show a repeated annual increase in the number of individual buyer’s

licenses since 2018, when the department prohibited bidding under a buyer's license application and instead required a valid license. In 2017, the last full year before prohibiting bidding under applications, there were 4,090 individual buyer's licenses. In 2021 there was an increase of 1,200 valid license holders, for a total of 5,747 individual buyer's licenses. The department anticipates that both in-state and out-of-state persons desiring to repeatedly buy vehicles at Wisconsin auctions will obtain a buyer's license, notwithstanding a potential delay of 60 days or less.

The comments also do not address the statute that requires a "valid license". The statutes do not authorize a temporary license or provisional license and the department lacks authority to consider license applicants to hold a valid license. The availability of other means to provide consumer protection from buyer license applicants does not authorize the department to allow bidding by anyone who does not hold a 'valid license'. The department does not have data showing illegal acts are committed by buyer license applicants at any greater frequency than valid license holders, however the department has observed increases in unlicensed motor vehicle dealer sales and odometer fraud directly connected to the sale of motor vehicles allowed under the 2004 policy, which allowed purchase by license applicants.

VI. RESPONSE TO LEGISLATIVE COUNCIL STAFF COMMENTS:

1a. SECTION 2 of the proposed rule specifies in s. Trans 138.0225 (intro.) that only persons specified in s. 218.34 (1) (a), Stats., "who hold a valid license may bid on or purchase motor vehicles at motor vehicle auction dealers". Similarly, proposed sub. (3) forbids any person from submitting a bid on or purchasing a motor vehicle at a motor vehicle auction without a "valid license". The rule defines "valid license" as "a written authorization issued by the department that authorizes the holder to bid on or to purchase at a motor vehicle auction, to an applicant who meets the requirements under s. Trans 138.0225". Among other requirements under proposed s. Trans 138.0225, an applicant must "be an employee of a licensed motor vehicle dealer". A person who is licensed as a motor vehicle dealer or as a motor vehicle wholesaler would seem not to satisfy that requirement, and thus under the rule would seem to be prohibited from bidding on or purchasing a motor vehicle at a motor vehicle auction. The department should address whether the rule is consistent with s. 218.34 (1) (a), Stats., which allows licensed motor vehicle dealers, wholesalers, and buyers to bid on and purchase motor vehicles at motor vehicle auctions.

Department response: The department amended Section 2 at the suggestion of the Rules Clearinghouse. The previous language may have been interpreted as requiring all bidders at auction, including the owners of motor vehicle and wholesale dealers, to obtain buyer's licenses to bid at auction. This would appear to conflict with s. 218.34 (1) (a), Stats. To avoid potential confusion as to whether dealers need to keep their license certificate on their person at auction, the department updated the rule language to state that motor vehicle buyers must only keep their license on them.

1b. The statutes define “motor vehicle buyer” as “an individual who is employed by or who has contracted with one or more motor vehicle dealers to bid on or purchase a motor vehicle being held and offered for sale by a motor vehicle dealer or motor vehicle auction”. [s. 218.0101 (22m), Stats.] Under SECTION 2 of the proposed rule, an applicant for a “valid license” must “be an employee of a licensed motor vehicle dealer”. This does not appear to expressly include individuals who have contracted with a motor vehicle dealer. Is the rule’s limitation of “valid licenses” to an “employee of a licensed motor vehicle dealer” consistent with s. 218.0101 (22m), Stats.?

Department response: The term “motor vehicle buyer” describes two different types of buyers: 1) motor vehicle buyer licensees, who are employed by a licensed dealer; 2) a licensed wholesale dealer who has contracted with another vehicles to purchase at auction their behalf. In this second case, the wholesaler already has a license approved under s. 218.34, Stat., and does not require a separate motor vehicle buyer licensee to bid at auction. This rule would not limit the ability of a contracted wholesale dealer to purchase vehicles at auction.

1c. The department should explain why the rule prescribes different expiration dates for out-of-state buyers than it does for in-state buyers and the statutory authority for doing so.

Department response: This is now address in the rule analysis.

1d. The rule summary’s listing of statutes interpreted and statutory authority could be reorganized and revised. The statutes interpreted should include the following: ss. 218.0111 (1), 218.0114 (1) and (4), and 218.34. The statutory authority should include the following: ss. 85.16 (1), 218.0152 (3), and 227.11 (2) (a), Stats. Note that the citation to s. 227.10 (1), Stats., is not included in this statutory authority list, as that section does not confer rulemaking authority, and this list instead includes s. 227.11 (2) (a), Stats., to the extent the department may feel it is necessary to cite that authority. Also note that a citation to s. 85.16 (1), Stats., is added as it does confer rulemaking authority. [s. 1.01 (2) (c) 1. and 2., Manual.]

Department response: This has been addressed in the rule language.

2a. Proposed s. Trans 138.0225 (intro.) should be revised to include a statement about the interaction and applicability of the subunits, such as “All of the following conditions apply to a valid license:”. [s. 1.11 (2), Manual.]

Department response: The department updated the rule at the suggestion of the Rules Clearinghouse.

2b. The department should consider reorganizing the rule to group the eligibility requirements together and the application requirements together. Proposed s. Trans 138.0225

(1)(a) and (c) are eligibility requirements for a “valid license”. Proposed sub. (1) (d) is an application requirement, as is the requirement in proposed sub. (2) that an applicant submit to the department an application for a license on a form approved by the department. Proposed sub. (1) (b) does not fit neatly into either of these categories. Additionally, sub. (1) (intro.) should include a statement about the interaction and applicability of the subunits, such as “meet all of the following requirements:”. [s. 1.11 (2), Manual.]

Department response: This has been addressed in the rule language.

2c. The department should review and revise the organization of proposed s. Trans 138.0225 (2) (intro.) and (a). When an introduction and subunits are created, the introduction should include a statement about the interaction and applicability of the subunits (such as “all of the following”), and more than one subunit should be created. [s. 1.11 (2) and (4), Manual.]

Department response: This has been addressed in the rule language.

4a. The rule summary explains that the rule’s purpose is to address issues related to persons who may be licensed as motor vehicle buyers. The term “motor vehicle buyer” is defined in s. 218.0101 (22m), Stats., but the rule does not reference that definition or provide a separate definition of “motor vehicle buyer”. [s. 1.07 (4), Manual.]

Department response: The department updated the rule analysis at the suggestion of the Rules Clearinghouse.

4b. The proposed rule in s. Trans 138.0225 (2) (intro.) refers to an application form that must be submitted. The proposed rule should add a note indicating how an applicant may obtain the form. [s. 1.12 (3), Manual.]

Department response: The department updated the rule at the suggestion of the Rules Clearinghouse.

5a. The department’s plain language analysis provides historical information about how it has implemented s. 218.34, Stats., over time, but does not directly connect the present rulemaking to the statutory language. It may be helpful for the department to more clearly explain why it believes this rulemaking correctly interprets s. 218.34, Stats., given that a purpose of the rulemaking appears to be to clarify an interpretation of the statute that differs from how it was previously implemented.

Department response: This has been addressed in the rule analysis.

5b. *The department should consider whether what the rule defines as a “valid license” would more accurately be described as a “motor vehicle buyer’s license”. The requirement that an applicant for a valid license be an employee of a motor vehicle dealer suggests it is, though the rule also uses the term “buyer license” intermittently without defining the term. If what the department means by “valid license” is actually a “motor vehicle buyer’s license”, the department should revise throughout the rule to ensure defined terms are used consistently and accurately.*

Department response: The department updated the rule at the suggestion of the Rules Clearinghouse.

5c. *In proposed s. Trans 138.0225 (intro.), the rule specifies that “[a]ll persons must keep the valid license on their person prior to bidding or purchasing vehicles at a motor vehicle auction”. And proposed sub. (3) similarly specifies that “no person may submit bids or purchase motor vehicles at a motor vehicle auction unless they have a valid license in their possession”. It appears these provisions might be intended to implement the statutory requirement that every motor vehicle buyer “carry his or her license when engaged in business and, and display the license upon request”. [s. 218.0114 (18), Stats.] If that is the case, the department should revise the rule to eliminate redundancy and adhere more closely to the statutory language.*

Department response: The department updated the rule at the suggestion of the Rules Clearinghouse.

5d. *In proposed s. Trans 138.0225 (2) (intro.), the phrase “is considered holding a valid license” is indirect, passive voice, and grammatically incomplete. It should be rewritten to more directly specify that a license is not valid until the department issues the license. [s. 1.05 (1) (d), Manual.]*

Department response: The department updated the rule at the suggestion of the Rules Clearinghouse.

5e. *Proposed s. Trans 138.0225 (2) (a) provides that a motor vehicle buyer’s license expires “on the date printed on the license or the expiration date [of the] sponsoring employer’s motor vehicle license, whichever is sooner”. How will the department establish what date is printed on the license? What standard will be used to make that calculation? Additionally, the proposed rule specifies when a license expires for “persons who live outside this state”. Would these expiration dates apply to a buyer who resides in a state other than Wisconsin but works for or contracts with a Wisconsin motor vehicle dealer?*

Department response: The department updated the rule at the suggestion of the Rules Clearinghouse. A Wisconsin buyer's license expiration date is automatically set to the same expiration date of the parent dealer license. It is tied to the license, and therefore anything affecting the dealer license would also impact the buyer's license.

There is no statutory requirement for licensing periods, but they may be set by rule per s. 218.0114 (13) (e), Stats. Buyer's licenses have not previously had their licensing period set by rulemaking. This update clarifies that the applicant must submit a copy of the sponsoring dealer's certification with the application.

5f. Proposed s. Trans 138.0225 (4) appears to mandate that a person renew his or her license. If the purpose, instead, is to specify the procedure for a person to renew if he or she wishes to renew, the rule should specify that procedure. In particular, the standard for renewal should be identified by rule; a statement that renewal must be "in a manner specified by the department" is inadequate to alert a reader as to the renewal requirements that must be met.

Department response: The department updated the rule at the suggestion of the Rules Clearinghouse. The renewal process is the same as applying for a new license, as specified in s. Trans 138.0225 (1).

5g. Throughout the rule, the department should use the singular forms of words unless specifically referring to multiples of the word used. Singular use is the favored style and includes the plural. Also, when regulating classes of people, the obligation to comply with the regulation is on each individual member of the group, not the group as a whole. [s. 1.05 (1) (c), Manual.]

Department response: The department updated the rule at the suggestion of the Rules Clearinghouse.

VII. REPORT FROM THE SBRRB AND FINAL REGULATORY FLEXIBILITY ANALYSIS:

The Department did not receive any statement, suggested changes, or other material from the Small Business Regulatory Review Board.

(END)