

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:

CALIFORNIA HIGHWAY PATROL

REGULATORY ACTION:
Title 13, California Code of
Regulations

ADOPT SECTION 1235.7
AMEND SECTIONS 1200, 1235.1,
1235.2, 1235.4, AND 1256

DECISION OF DISAPPROVAL
OF REGULATORY ACTION
(Gov. Code, sec. 11349.3)

OAL File No. 2010-0319-04S

SUMMARY OF REGULATORY ACTION

The California Highway Patrol (CHP) proposed to amend sections 1200, 1235.1, 1235.2, 1235.4, and 1256 in title 13 of the California Code of Regulations concerning the assignment of carrier identification numbers pursuant to Vehicle Code section 34507.5. The CHP also proposed to adopt section 1235.7 in title 13 concerning the leasing of motor vehicles by intrastate motor carriers. On March 19, 2010, the CHP submitted the proposed regulatory action to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On May 3, 2010, OAL disapproved the proposed adoption. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

The Office of Administrative Law disapproved the above referenced regulatory action for the following reasons: failure to make changes available to the public, failure to comply with the necessity and clarity standards of Government Code section 11349; failure to make a document available to the public; the rulemaking file failed to include a statement of mailing for the notice required by Government Code section 11346.8(a); and the text of the regulations submitted did not match the text of the regulations as printed in the California Code of Regulations.

DISCUSSION

The adoption of regulations by the CHP must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.)

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

1. THE REGULATIONS SUBMITTED TO OAL FOR FILING WITH THE SECRETARY OF STATE CONTAIN CHANGES THAT WERE NOT MADE AVAILABLE TO THE PUBLIC

Subdivision (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment before the changes are adopted:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. **If a sufficiently related change is made, the full text of resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends or repeals the resulting regulation.** Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9. (Emphasis added.)

Section 44 of title 1 of the California Code of Regulations specifies how such sufficiently related changes are to be made available:

(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
- (2) all persons who submitted written comments at the public hearing; and
- (3) all persons whose comments were received by the agency during the public comment period; and

(4) all persons who requested notification from the agency of the availability of such changes.

(b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.

The text of the regulations submitted to OAL for filing with the Secretary of State in this rulemaking contained changes from the text that was made available to the public during the initial 45 day comment period. Specifically, in response to comments received during the public comment period, the CHP amended section 1235.7 by deleting part of (d)(5), all of (d)(8), (d)(9), (d)(10)(C), and (d)(11) and added a new subsection (i). The deletion of these provisions and the addition of this new subsection alter the rights and responsibilities of those affected by the regulation. These changes were not made available to the public as required by Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

2. NECESSITY

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of the title 1 of the California Code of Regulations provides:

In order to meet the ‘necessity’ standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

(1) a statement of the specific purpose of each adoption, amendment, or repeal;
and

(2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An ‘expert’ within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the

regulation in the initial statement of reasons. (Gov. Code, sec. 11346.2(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).) The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The “Initial Statement of Reasons” submitted with this proposed regulatory action did not contain an explanation of the need for the changes in: 1235.1(f) (specifically the changes in the first paragraph on page 1, Part 4, and Part 5, of the January 2007 revision of CHP 362); new subsections 1235.2(b)(22) and (c)(10); new subsections 1235.7(c) through (f); new subsections 1256(b), and (f) through (h). The document providing the missing necessity should be made available to the public for at least 15 days prior to resubmission pursuant to Government Code section 11347.1.

In this regard, subdivision (c)(1) of section 14501 of title 49 of the United States Code prohibits States from enacting regulations related to price, route, or service of any motor carrier, while subdivision (c)(2) of the same section reserves to States the authority to regulate for safety and minimum amounts of financial responsibility. Since OAL is also mandated to review each regulatory provision for authority and consistency, OAL will need to see the Department’s explanation of the necessity for some of the above listed regulatory provisions in order to complete its review. For this reason, OAL must reserve its review for authority and consistency until the explanation of the need for these provisions is provided upon resubmission.

3. CLARITY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The following provisions in proposed section 1235.7 fail to comply with the clarity standard:

- a. Subsection (f) as proposed by this rulemaking would have provided:

Regardless of the leasing regulations set forth in this section, **an authorized carrier may lease equipment to or from another authorized carrier** under the following conditions:

...

- (3) There must be a written lease agreement between the authorized carriers concerning the equipment as follows:

...
(B) It must provide that control and responsibility for the operation of the equipment shall be that of the lessee from the time possession is taken by the lessee and the receipt required under paragraph (c)(2) is given to the lessor until:
...

2. In the event that the agreement is between authorized carriers, possession of the equipment is returned to the lessor or given to another authorized carrier in an interchange of equipment.... (Emphasis added.)

A person directly affected by the regulation would not easily understand the significance of the bolded language in subsection (f)(3)(B)2 since subsection (f)(3) by its own terms only applies to written lease agreements between authorized carriers.

- b. There are two subsections (c)(3): one entitled "Identification of Equipment" and the other entitled "Records of Equipment."
- c. Subsection (d) skips from (d)(5) to (d)(7), from (d)(7) to (d)(10), and from (d)(10) to (d)(12). Subsection (d)(13) provides that an authorized carrier is obligated to ensure that certain owners receive all the rights and benefits due them, "especially those set forth in (d)(4)-(12) of this section." A person directly affected by the regulation might not easily understand if all the rights and benefits are present in their copy of the printed regulation.

4. A DOCUMENT ADDED TO THE RECORD WAS NOT MADE AVAILABLE TO THE PUBLIC FOR COMMENT

Subdivision (d) of Government Code section 11346.8 provides that:

No state agency shall add any material to the record of the rulemaking proceeding after the close of the public hearing or comment period, unless the agency complies with Section 11347.1. This subsection does not apply to material prepared pursuant to Section 11346.9.

Government Code section 11347.1 provides in part:

(a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available as required by this section.

(b) At least 15 calendar days before the proposed action is adopted by the agency, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:

- (1) Persons who testified at the public hearing.
 - (2) Persons who submitted written comments at the public hearing.
 - (3) Persons whose comments were received by the agency during the public comment period.
 - (4) Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation.
- (c) The document shall be available for public inspection at the location described in the notice for at least 15 calendar days before the proposed action is adopted by the agency.

...

In responding to a comment in the Final Statement of Reasons, the CHP relied upon a January 9, 1979 decision of the Interstate Commerce Commission (Ex-parte No. MC-43[Sub-No. 7]) and added this document to the rulemaking record. This document was not “prepared pursuant to [Government Code] Section 11346.9” so must be made available for comment pursuant to sections 11346.8(d) and 11347.1 of the Government Code.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. Please also note that: the Final Statement of Reasons must include a statement that publication of the incorporated form would be cumbersome, unduly expensive, or otherwise impractical to publish in the California Code of Regulations pursuant to title 1, section 20(c)(1), of the California Code of Regulations; the rulemaking file must include a statement as to the mailing of the “Notice of Public Hearing” for the public hearing held upon request pursuant to Government Code section 11346.8(a); there are some discrepancies from the existing California Code of Regulations and the reference citations shown in the text of the regulations submitted for sections 1235.1, 1235.2, and 1235.4 that must be resolved; and the text of the regulations submitted and the Form STD 400 should not include regulation sections not being amended by this rulemaking. If you have any questions, please contact me at (916) 323-6808.

Date: May 10, 2010

CRAIG TARPENNING

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