

**State of California
Office of Administrative Law**

In re:

Department of Motor Vehicles

Regulatory Action:

**Title 13, California Code of
Regulations**

**Adopt sections: 153.00, 153.02,
153.04, 153.06,
153.08, 153.10,
153.12, 153.14,
153.16, 153.18,
153.20, 153.22**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2012-0926-02S

DECISION SUMMARY

On September 26, 2012, the Department of Motor Vehicles (DMV) submitted to the Office of Administrative Law (OAL) the proposed adoption of sections 153.00, 153.02, 153.04, 153.06, 153.08, 153.10, 153.12, 153.14, 153.16, 153.18, 153.20, and 153.22 of Title 13 of the California Code of Regulations (CCR). These regulations implement Assembly Bill 1515 (Chapter 540, Statutes of 2009) which created the Electronic Lien and Title (ELT) program, which requires that all vehicle lienholders' title information be held in an electronic format.

On November 7, 2012, OAL notified the DMV that OAL had disapproved the regulatory action because it failed to comply with the clarity and necessity standards and procedural requirements of the Administrative Procedure Act (APA).

BACKGROUND

Assembly Bill 1515 was sponsored by the motor vehicle lien and titling industry and was designed to benefit both businesses (lienholders) and the state. The benefits to lienholders would include reduction in work effort and lower costs, no paper title storage requirements, and improved customer service by avoiding lost titles. Electronic records replace the need for large banks and catalogs of paper titles and increase work and space efficiency which together reduce the average cost of tracking, handling, and storing titles from as much as \$12 per title to \$2 per title. The state is anticipated to experience annual savings of approximately \$1.7 million due to reduced printing,

postage, and paper costs, in the elimination of processing of duplicate title applications for lost paper titles, and due to enhancement of the DMV's automation system which will allow technicians to enter an ELT identification number rather than a lienholder's name and address.

DISCUSSION

Any regulation amended or adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute 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 review. (Gov. Code, secs. 11340.5 and 11346.) OAL reviews regulatory actions for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that required procedures are followed in order to provide meaningful public opportunity to comment on rules and regulations before they become effective.

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340(b).) Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Section 11349(c) of the Government Code defines "clarity" to mean "...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them." Title 1 CCR section 16 states in pertinent part that:

In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exist:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or

(2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or

...

(4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or

...

(6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

In adopting the APA, the Legislature found that substantial time and public funds have been spent in adopting regulations, the necessity for which has not been established. (Gov. Code, sec. 11340(c).) No adopted regulation is valid unless it is reasonably necessary to effectuate the purpose of the statute which it is implementing, interpreting or making specific. (Gov. Code, sec. 11342.2.) Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the necessity standard. Section 11349(a) of the Government Code 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.” Title 1 CCR section 10(b) states in pertinent part that:

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 regulation 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....

In addition to reviewing proposed regulations for compliance with the clarity and necessity standards, among others, OAL reviews the record of the rulemaking proceeding and may approve regulations if they comply with Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code. (Gov. Code, sec. 11349.1(a).) OAL must, therefore, review the record of the rulemaking proceeding for compliance by the adopting agency with the procedural requirements of the APA. Those procedures include, among other things, the preparation by the adopting agency of the estimate required by Government Code section 11346.5(a)(6). (Gov. Code, sec. 11349.1(d)(1).) Government Code section 11346.5(a)(6) requires that the notice of a proposed rulemaking action include an estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency. Instructions adopted by the Department of Finance are contained in the State Administrative Manual (SAM) and include the requirement that a state agency obtain the concurrence of the Department of Finance in the state agency’s estimate that the adoption of a regulation will result in state agency savings. SAM section 6615; see also Government Code section 11357(c).

All passages of proposed text quoted in this Decision are underlined as shown in the original text.

A. Several of DMV's proposed regulatory provisions fail to meet the Clarity standard of the APA.

(1) Section 153.02(a).

This subdivision provides:

Participation in the ELT Program is mandatory for licensed or federal or state chartered financial institutions holding California title(s) and may be voluntary for other California licensed or federal or state chartered lenders operating in California.

DMV's use of the word "may" makes the subdivision unclear as to whether the program may be voluntary for these other lenders, but is not always voluntary, and under what circumstances the program is not voluntary for these other lenders. Prior to resubmission of this regulation to OAL for review, DMV must clarify this provision to specify whether the program is voluntary for these other lenders in all circumstances, and under what circumstances, if any, the program is not voluntary for these lenders.

(2) Section 153.02(c).

This subdivision incorporates two forms, both of which contain clarity problems.

Form REG 670 (New 11/2011)

Page 2 of the form states: The [DMV] reserves the right to modify the following terms and conditions. The most current version of the Terms and Conditions can be found at www.dmv.ca.gov, and shall be reviewed annually.

Later the same form says: DMV's contact information is: DMV ELT Administrator, as shown at www.dmv.ca.gov.

The OAL reviewing attorney spent time on the DMV's website and could not find either of these pieces of information.

Form REG 671 (New 11/2011) contains the same references and, therefore, the same clarity problem.

Both forms, therefore, fail to comply with title 1 CCR section 16(a)(6). Prior to resubmission of this regulation to OAL for review, DMV must clarify these provisions by

providing the specific URL scheme or character string which brings a reader directly to the documents or information referenced.

(3) Section 153.08(c)(7)(A) and form REG 670 (New 11/2011) and form REG 671 (New 11/2011).

Section 153.08(c)(7)(A) states:

Financial institution/lenders understand that the department reserves the right to amend or enhance its requirements and the continuance of the financial institution/lenders enrollment in the ELT Program is contingent upon the financial institution/lenders compliance with the updated criteria. Information security requirements will be provided to applicants approved by the department and shall be reviewed annually.

The two forms contain this language:

REG 670: ELT Service Provider understands the DMV reserves the right to amend or enhance its requirements. Continuance of the ELT Service Provider's enrollment in the DMV ELT program is contingent upon the ELT Service Provider's compliance with the updated criteria.

REG 671: Financial Institution/Lender understands the DMV reserves the right to amend or enhance its requirements and the continuance of the Financial Institution/Lenders enrollment in the DMV ELT program is contingent upon the Financial Institution/Lender's compliance with the updated criteria. Information Security requirements will be provided to approved applicants and shall be reviewed annually.

In addition, both form REG 670 and form REG 671 contain this statement:

The [DMV] reserves the right to modify the following terms and conditions. The most current version of the Terms and Conditions can be found at www.dmv.ca.gov, and shall be reviewed annually.

The DMV's reference, immediately above, to its website for the Terms and Conditions creates the same clarity issue discussed under (2) above, because the provision of only the DMV's website address does not identify or bring a reader to the Terms and Conditions information referenced in the regulation.

Additionally, all four provisions quoted above are unclear because it is not clear what the terms are of the amendments, enhancements, or modifications to terms and conditions, which DMV is reserving to itself the right to implement.

The provisions quoted above also raise APA consistency-standard issues, because Government Code section 11340.5 requires that no state agency shall issue, utilize, or

enforce any rule which is a regulation unless it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA. It is unclear from the provisions quoted above whether the amendments or enhancements to requirements or the modifications of the terms and conditions to which regulated entities are subject will be adopted and filed with the Secretary of State pursuant to the APA or whether they will be implemented by some other means. DMV may reserve the right to amend its regulations, however, any substantive amendments, enhancements, or modifications must be made under the procedures specified in the APA in order for them to be legally valid.

The last sentence of section 153.08(c)(7)(A) is also unclear in its reference to: "Information security requirements [which] will be provided to applicants approved by the department." It is unclear whether this provision refers to existing security requirements contained in the regulations and forms adopted pursuant to this rulemaking action, or to supplemental requirements or future changes to requirements which are in addition to, or which will change, the security requirements adopted in this action.

Prior to resubmission of this regulation to OAL for review, DMV must clarify these provisions by providing a specific URL scheme or character string which brings a reader directly to the information referenced and by removing reference to any regulatory provisions which are not or cannot be incorporated by reference into this rulemaking action at this time.

(4) Section 153.06(c).

This subdivision states:

No fees will be incurred by the participant in the ELT Program unless the participant fails to convert its electronic titles to paper titles upon withdrawal, surrender, revocation by the department, or unless the participant voluntarily chooses to convert their existing paper titles to electronic titles."

About this subdivision, the Initial Statement of Reasons states:

Subsection (c) is adopted to inform participants that there is no fee to participate in the ELT Program unless the participant fails to convert electronic titles to paper titles upon ceasing business or unless a participant chooses to convert existing paper titles to electronic titles. This provision is necessary to ensure the participant is aware that, unlike many departmental programs, no fee is necessary.

It is unclear what the second "unless" clause means in this subdivision. If the second "unless" clause applies to participants who are exiting the program, and who proceed to convert their existing paper titles into electronic titles, presumably, then, the DMV will have to convert those electronic titles to paper, and this is the reason for DMV's

assessment of a fee. However, that situation is the same situation as when a participant fails to convert all its electronic titles to paper titles upon exiting the program. Therefore, the situation described by the second “unless” clause is the same situation already covered by the first “unless” clause in subdivision (c) and makes the regulation unclear as to what other situation the second “unless” clause might apply to. Prior to resubmission of this rulemaking action to OAL for review, DMV must clarify this provision or remove any redundant provision.

(5) Section 153.08(c)(4)(D).

This subdivision states:

(c) Participants shall ensure the following security requirements are met:

(4) [organizational policies] These policies should address:

...

(D) Development and implementation of an ELT Program User Identification (ID) and password policy. The policy should mandate that each user be assigned a User ID and that each user select a unique and confidential password. The department recommends the use of strong passwords and implementation of best practice standards.

These paragraphs are unclear whether the provisions they contain are required or not. By alternating between words such as “shall” and “should” and “should mandate,” which could be interpreted as either a suggestion or a mandate, and “recommends,” the DMV has not clearly stated whether the contents of the regulated entity’s policies, contained in subparagraphs (A) through (D), are required or not. Prior to resubmission of this rulemaking action to OAL for review, DMV must clarify these provisions.

(6) Section 153.08(d)(2)(B).

This subdivision states:

(d) Participants shall agree to the following terms and conditions:

(2) Participants agree to reimburse the State of California...for any loss or damage that the State...may suffer by reason of any act of the participant...arising out of or related to the participant’s duties...including:

(B) Information obtained from the department or customers which is used for any purpose other than specified in regulations or ELT agreement.

Regarding the use of the term “ELT agreement,” it is unclear what this “ELT agreement” document is and what purposes it might contain that are not already specified in the

regulations and forms which are being adopted in this action. Prior to resubmission of this action to OAL for review, DMV must clarify this term and the specifics of any additional purposes which this document contains and to which a regulated entity would be limited in its use of information.

(7) Section 153.10(d)(6)(D).

This series of paragraphs contain the same clarity issues as section 153.08(c)(4)(D). See (5) above.

(8) Section 153.10(f)(1).

This provision contains the same clarity and potential consistency issues as section 153.08(c)(7)(A), except this section concerns service providers as opposed to financial institutions. See (3) above.

(9) Section 153.10(g)(2)(B).

This provision contains the same clarity issue regarding the term "ELT agreement" as section 153.08(d)(2)(B). See (6) above.

(10) Section 153.14(b).

This subdivision states:

Service providers shall conduct electronic transactions under this program following the processes prescribed by the department.

It is unclear what the "processes prescribed by the department" are. Prior to resubmission of this action to OAL for review, DMV must clarify what processes shall be conducted pursuant to this provision, and, if the processes are regulatory, they must be adopted pursuant to the APA and made available pursuant to Government Code section 11346.8 and title 1 CCR section 44.

(11) Section 153.22(a)(2).

This subdivision states:

Voluntary ELT participants can be terminated by the department upon giving a 30 day written notice with reason(s) to the participant.

The subdivision contains a misplaced modifier which could be corrected, and the grammar of the subdivision could be improved. OAL suggests either using the word "receiving" instead of "giving" or: "upon *the department* giving... In addition, the word "may" would be preferred over the word "can" in this sentence.

(12) Section 153.22(b).

This subdivision states:

Mandatory participants may terminate participation in the program only if they cease doing business in this state.

This subdivision is unclear because it appears to be overly broad. Mandatory participants are: "licensed or federal or state chartered financial institution[s]." Such an institution might be quite large and have multiple businesses in the state. It is unclear whether such an institution would have to cease doing business (any and all business) in this state in order to terminate participation in this program. If DMV did not intend that a financial institution have to "cease doing [all] business in this state" in order to withdraw from this program, OAL suggests the insertion of "ELT Program" in front of "business" in this sentence. If that was DMV's intent, OAL suggests the same insertion for subdivision (b)(1).

(13) Section 153.12(a) – (i).

These subdivisions are awkwardly constructed with the use of a complete sentence only in subdivision (a) and the others as fragments. This problem could be easily addressed by adding the following introductory phrase prior to subdivisions (a) through (i): "The following shall be good cause for the department to refuse to enter into an agreement with an applicant: (a) Failure of a company to demonstrate its honesty, integrity, good character, or reputation to the satisfaction of the department. (b) Failure... etc.

Prior to resubmission of this rulemaking action to OAL for review, DMV must revise the text to address the clarity issues discussed above. Any substantive changes made by DMV to the text must be made available for a period of 15 days pursuant to Government Code section 11346.8(c) and title 1 CCR section 44.

B. DMV's rulemaking file for this action fails to contain substantial evidence of the necessity for mandating participation in the ELT program for licensed or federal or state chartered financial institutions and for making participation by licensed or federal or state chartered lenders, that are not financial institutions, voluntary.

Section 1500(c) and (d) and section 153.02(a) provide, respectively, as follows:

(c) "Mandatory ELT Program participant" is any licensed or federal or state chartered financial institution (i.e., bank, credit union, savings association, thrift institution, loan, or finance company) that holds a security interest in a California titled vehicle(s), excluding a business licensed to engage in automobile and/or vessel sales.

(d) "Voluntary ELT Program participant" is any California licensed or federal or state chartered lender operating in California that holds a security interest in a California titled vehicle(s) that does not qualify in (c) of these definitions.

(a) Participation in the ELT Program is mandatory for licensed or federal or state chartered financial institutions holding California title(s) and may be voluntary for other California licensed or federal or state chartered lenders operating in California.

Under the APA, the rulemaking file document which must contain a state agency's statement of the necessity of each adoption is the Initial Statement of Reasons (ISR). Government Code section 11346.2(b)(1) requires that the ISR include: "A statement of the specific purpose of each adoption... the problem the agency intends to address, and the rationale for the determination by the agency that each adoption... is reasonably necessary to carry out the purpose and address the problem for which it is proposed." In this file, the ISR statements for the above quoted provisions of the regulations are, respectively, these:

Section 153.00. Definition.

This section is adopted for clarity by providing specific definitions of terms used in the Electronic Lien and Titling (ELT) Program, as well as the following proposed regulations.

Section 153.02. Participation.

This section is adopted to specify who may voluntarily participate and who is mandatorily required to participate in this program. This program requires certain lenders such as financial institutions to participate and allows others to voluntarily participate in the program.

Subsection (a) is adopted to specify that the ELT Program is mandatory for certain financial institutions and voluntary for others. This provision is necessary to ensure affected entities are aware whether their participation is mandatory or voluntary.

In addition to the ISR, OAL reviewed the remainder of the rulemaking file in search of a statement of the reasons why certain lenders must participate in this program and why, for all other lenders, participation is voluntary. OAL was unable to find a statement of the necessity for the distinction drawn by DMV. Prior to resubmission of this action to OAL for review, DMV must create an addendum to the ISR which explains the need for this distinction and must make the addendum available to the public for comment for a period of 15 days along with its revised regulatory text.

C. DMV has failed to comply with several procedural requirements of the APA in this rulemaking action.

(1) The Form 399 contained in the file lacks the necessary concurring signature from the Department of Finance.

Because DMV has identified annual savings to the state in Section B of the Fiscal Impact Statement of the Form 399, it is required, pursuant to SAM section 6615, to obtain the concurrence of the Department of Finance regarding this determination. Prior to resubmitting this action to OAL for review, DMV must obtain the written concurrence of the Department of Finance on the Form 399.

(2) The DMV has failed to explain in the ISR its reasons for rejecting two alternatives it considered to this regulation.

Government Code section 11346.2(b)(5)(A) provides that the ISR shall include: "A description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives." In this file, DMV discusses, in both the ISR and in the Notice, that it considered a total of four alternatives. One alternative failed to implement the governing statute and was described as rejected for that reason. The second alternative was selected, and the reasons for its selection were provided, but neither the ISR nor the Notice explains why the other two alternatives were rejected. Prior to resubmitting this action to OAL for review, DMV must include in its addendum to the ISR an explanation of its reasons for rejecting the two alternatives it considered to the adopted regulation and make it available to the public for a period of 15 days.

(3) The Informative Digest of the Notice in this rulemaking action failed to include an evaluation of whether the regulation is inconsistent/incompatible with existing state regulations pursuant to Government Code section 11346.5(a)(3)(D).

Prior to resubmission of this action to OAL for review, DMV must amend its Undated Informative Digest to include this evaluation.

(4) The ISR fails to contain any facts, evidence, documents, or testimony to support the initial determination by the agency that the regulation will not have a significant adverse economic impact on business pursuant to Government Code section 11346.2(b)(6).

Prior to resubmitting this action to OAL for review, DMV must include in its addendum to the ISR the information required by section 11346.2(b)(6) and make it available to the public for a period of 15 days.

(5) The Final Statement of Reasons does not include the DMV's determination, if any, that no reasonable alternative to the regulation would be more cost effective to affected private persons and equally as effective as required by Government Code section 11346.9(a)(4).

Prior to resubmitting this action to OAL for review, DMV must amend its Final Statement of Reasons to include the statement described above.

(6) Although the following do not constitute independent reasons for this Decision of Disapproval, OAL also notes that the regulatory text and incorporated forms contain a number of errors and anomalies as follows:

(a) Forms REG 670 and REG 671 – use of plural personal pronouns for singular business entity on page 2, item 5.

(b) Forms REG 670 and REG 671 – missing words in item 4, page 2: “...location of [or] venue for” judicial review.

(c) Form REG 671, page 2, Section B, item 1 – possessive case missing apostrophe: Financial Institution/Lender's enrollment.

(d) Section 153.08(c)(7)(A) – same issue as in (c) above: lender's enrollment and lender's compliance.

(e) Section 153.10(a) – erroneous Article reference. Reference should be to Article 3 not 3.0.

(f) Section 153.10(g)(2)(A) – inconsistency of plurals [obligations].

(g) Section 153.12(h) and (i) – extra use of “who”.

(h) Sections 153.20(c)(1)(B), 153.20(d), 153.20(e), 153.22(c), and 153.22(d) – use of “will” instead of “shall,” which is used elsewhere throughout text.

(i) Section 153.22(a) – use of term “application” instead of “approval.” The latter term would appear to be more appropriate as well as consistent with sections 153.02(c), 153.04(a), and 153.06(a)(1)(A).

(j) Section 153.22(a)(1) – missing word; the word “from” appears to be missing prior to “participation.”

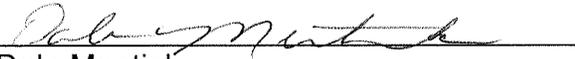
CONCLUSION

For the foregoing reasons, OAL disapproves OAL file number 2012-0926-02S. Pursuant to Government Code section 11349.4(a), the DMV may resubmit revised text and corrected rulemaking file documents within 120 days of its receipt of this Decision

Decision of Disapproval
OAL File No. 2012-0926-02S

of Disapproval. Prior to any resubmission of this action to OAL for review, DMV shall send its revised text to all those persons listed in title 1 CCR section 44 and allow for at least 15 days for comment pursuant to Government Code section 11346.8(c). The DMV shall also make any addendum to the ISR and any technical, theoretical, or empirical study, report, or similar document which it relies upon in the proposed action available to the public for comment for a period of at least 15 days pursuant to Government Code section 11347.1.

Date: November 14, 2012


Dale Mentink
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