

**State of California
Office of Administrative Law**

In re:
Department of Motor Vehicles

Regulatory Action:

Title 13, California Code of Regulations

Adopt section: 29.01

Amend sections:

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2015-1016-01S

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

Through this regular rulemaking, the Department of Motor Vehicles (the “Department”) proposes to adopt section 29.01 in title 13 of the California Code of Regulations. In order to ensure safety guidelines are followed by commercial driver license holders, both federal regulations and the California Vehicle Code provide a period of commercial license disqualification when a license holder is convicted of a serious traffic violation. The Department proposes to adopt Section 29.01 to identify which types of California Vehicle Code violations and violations submitted by another state or Canada are considered serious traffic violations.

On October 16, 2015, the Department submitted the above-referenced rulemaking action to the Office of Administrative Law (“OAL”) for review. On December 2, 2015, OAL notified the Department of OAL’s decision to disapprove the proposed rulemaking. This Decision of Disapproval of Regulatory Action explains the reasons for OAL’s action.

DECISION

OAL disapproved the above-referenced rulemaking action for the following reasons: the proposed regulations failed to comply with the clarity, consistency, and necessity standards of Government Code section 11349.1, and the Department failed to follow required Administrative Procedure Act (“APA”) procedures.

All APA issues must be resolved prior to OAL’s approval of any resubmission.

DISCUSSION

The Department’s regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. (See Gov. Code, sec. 11340 et seq.) Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make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 regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations set forth in Government Code section 11349.1. (See Gov. Code, sec. 11340.1, subd. (a).) Generally, to satisfy the APA standards, a 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. (*Ibid.*) This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. Clarity

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, subd. (b).) Government Code section 11349.1, subdivision (a)(3) requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c) defines “clarity” to mean that regulations are “written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them.” The “clarity” standard is further defined in section 16 of title 1 of the CCR, OAL’s regulation on “clarity”, which provides the following:

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:

....

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

(3) the regulation uses terms which do not have meanings generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the government statute; or

....

Each instance of non-compliance with the clarity standard of the APA is set forth below:

1.1. Proposed Regulations Do Not Address Problems the Department Intends to Address Through this Rulemaking

In describing the problems they intend to address through this rulemaking, the Department states the following on the first page of the initial statement of reasons (the “ISR”):

In a recent audit conducted by the Federal Motor Carrier Safety Administration (FMCSA), California was found to be out of compliance due to its lack of regulations related to the disqualification of a commercial driver license. Specifically, there are no regulations to identify which Vehicle Code violations correspond to the federal violations that require a disqualification. When California is not in compliance with federal requirements, it risks losing the authority to issue and renew commercial driver licenses and the state is in jeopardy of losing significant federal highway funds.

Although the Department proposes “to identify which Vehicle Code violations correspond to the federal violations that require a disqualification” (ISR, p. 1), the proposed regulation instead identifies which types of California Vehicle Code violations and violations submitted by another state or Canada are considered serious traffic violations:

§29.01. Disqualification of Commercial Drivers.

(a) A commercial driver convicted of a second or third serious traffic violation during a three-year period will be disqualified from driving a commercial vehicle, as prescribed by the California Vehicle Code. For the purpose of this section, the following violations are deemed to be serious violations:

(1) California Vehicle Code sections: 2800.1, 2800.2, 2800.3, 12500(c), 12500(d), 12517(a), 12517(b), 12519(a), 12523(a), 12523.5(a), 12524(a), 12804.6(a), 12951(a), 12951(b), 15250, 15275, 21658(a), 21703, 21704(a), 21705, 22406.1, 23103(a), 23103(b), 23123.5(a), and 36300.

(2) Violations submitted by another state or by Canada shall be considered serious traffic violations if the state or country submitting the violation designates the violation as serious pursuant to 49 C. F. R., §383.51(c).

Since the proposed regulations identify serious traffic violations without identifying which of these violations “correspond to the federal violations that require a disqualification” (ISR, p. 1), “the language of the regulation[s] conflict[] with the agency’s description of the effect of the regulation[s.]” (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) It is also problematic that, in setting out to identify serious traffic violations, the proposed regulation fails to mention Vehicle Code section 15210, subdivision (p), which identifies what constitutes a “serious traffic violation”:

(p) “Serious traffic violation” includes any of the following:

- (1) Excessive speeding, as defined pursuant to the federal Commercial Motor Vehicle Safety Act (P.L. 99-570) involving any single offense for any speed of 15 miles an hour or more above the posted speed limit.
- (2) Reckless driving, as defined pursuant to the federal Commercial Motor Vehicle Safety Act (P.L. 99-570), and driving in the manner described under Section 2800.1, 2800.2, or 2800.3, including, but not limited to, the offense of driving a commercial motor vehicle in willful or wanton disregard for the safety of persons or property.
- (3) A violation of a state or local law involving the safe operation of a motor vehicle, arising in connection with a fatal traffic accident.
- (4) A similar violation of a state or local law involving the safe operation of a motor vehicle, as defined pursuant to the Commercial Motor Vehicle Safety Act (Title XII of P.L. 99-570).
- (5) Driving a commercial motor vehicle without a commercial driver's license.
- (6) Driving a commercial motor vehicle without the driver having in his or her possession a commercial driver's license, unless the driver provides proof at the subsequent court appearance that he or she held a valid commercial driver's license on the date of the violation.
- (7) Driving a commercial motor vehicle when the driver has not met the minimum testing standards for that vehicle as to the class or type of cargo the vehicle is carrying.
- (8) Driving a commercial motor vehicle while using an electronic wireless communication device to write, send, or read a text-based communication, as defined in Section 23123.5.

In the absence of a federal definition, existing definitions under this code shall apply.

1.2. Description in the Initial Statement of Reasons of the Effect of Including Vehicle Code section 23123.5, subdivision (a) as a Serious Traffic Violation

Proposed Section 29.01 identifies which types of California Vehicle Code violations and violations submitted by another state or Canada are considered serious traffic violations. A violation of Vehicle Code section 23123.5, subdivision (a) is listed as a serious traffic violation in proposed Section 29.01, subdivision (a)(1). Vehicle Code section 23123.5, subdivision (a) provides, "A person shall not drive a motor vehicle while using an electronic wireless communications device to write, send, or read a text-based communication, unless the electronic wireless communications device is specifically designed and configured to allow voice-operated and hands-free operation to dictate, send, or listen to a text-based communication, and it is used in that manner while driving." In the ISR, the Department describes the inclusion of Vehicle

Code section 23123.5, subdivision (a) as a serious traffic violation as follows: “If convicted of this violation **in a commercial motor vehicle** the conviction will be a serious violation.” (ISR, p. 7 [emphasis added].) However, a violation of Vehicle Code section 23123.5, subdivision (a) is not limited to operating a commercial motor vehicle when the violation is committed. As a result, “the language of the regulation conflicts with the agency’s description of the effect of the regulation[.]” (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).)

1.3. The Proposed Phrases “as prescribed by the California Vehicle Code” and “For the purpose of this section” in Subdivision (a)

Proposed Section 29.01, subdivision (a) provides, in pertinent part, “A commercial driver convicted of a second or third serious traffic violation during a three-year period will be disqualified from driving a commercial vehicle, **as prescribed by the California Vehicle Code.**” (Emphasis added.) A person directly affected would not easily understand from proposed subdivision (a) of Section 29.01 what Vehicle Code sections are being referred to and when the disqualification occurs after two rather than three convictions. (See Gov. Code, sec. 11349, subd. (c).) The problem is exacerbated because the very next phrase—“For the purpose of this section”—is being used without any reference to a specific section or sections of the Vehicle Code.

1.4. Use of “Submitted” and “Submitting” in the Proposed Section 29.01, Subdivision (a)(2)

Proposed Section 29.01, subdivision (a)(2) states, “Violations submitted by another state or by Canada shall be considered serious traffic violations if the state or country submitting the violation designates the violation as serious pursuant to 49 C. F. R., §383.51(c).” The words “submitted” and “submitting” are undefined and ambiguous. The proposed regulation is silent on what constitutes “submitting” a serious traffic violation when another state or Canada submits a serious traffic violation to the Department or how such a procedure or action occurs. As such, “the regulation uses terms which do not have meanings generally familiar to those ‘directly affected’ by the regulation, and those terms are defined neither in the regulation nor in the government statute[.]” (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(3).)

For the reasons discussed above, the Department failed to comply with the clarity standard of the APA. The Department must make all substantial regulatory text changes, which are sufficiently related to the original text, available to the public for comment for at least 15 days pursuant to Government Code section 11346.8, subdivision (c), and section 44 of title 1 of the CCR before the Department adopts the regulations and resubmits this regulatory action to OAL for review. Additionally, any comments made in relation to these proposed modifications must be summarized and responded to in the final statement of reasons (the “FSR”). (Gov. Code, sec. 11346.8, subd. (c); see also Gov. Code, sec. 11346.9, subd. (a)(3).)

2. Necessity

In addition to clarity, OAL also reviews proposed regulations for necessity. (Gov. Code, sec. 11349.1, subd. (a)(1).) “Necessity” is defined in Government Code section 11349, subdivision (a), as follows:

“Necessity” means 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 purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

This necessity must be provided in the ISR for substantive changes proposed in the original regulation text. Specifically, the ISR must include “[a] statement of the specific purpose of each adoption, amendment, or repeal, . . . and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed.” (Gov. Code, sec. 11346.2, subd. (b)(1); see also Cal. Code Regs., tit. 1, sec. 10.)

Each instance of non-compliance with the necessity standard of the APA is set forth below:

2.1. Inadequate Necessity for Proposed Subdivision (a)

The problem that proposed Section 29.01 is intended to address is stated in the ISR as “there are no regulations to identify which Vehicle Code violations correspond to the federal violations that require a disqualification.” (ISR, p. 1.) Proposed Section 29.01, subdivision (a) includes Vehicle Code violations that the Department identifies as a serious traffic violation. For each violation included in this subdivision, the Department explains why it is necessary to include the violation as a serious traffic violation. However, the ISR does not explain why each violation is necessary to accomplish the problem addressed in the ISR. Specifically, the Department does not state how each violation corresponds to federal violations that require a disqualification, which would justify the inclusion of the violation in the proposed regulations. Therefore, the ISR does not include “[a] statement of the specific purpose of each adoption . . . 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.” (Gov. Code, sec. 11346.2, subd. (b)(1); see also Cal. Code Regs., tit. 1, sec. 10.)

2.2. No Necessity for Inclusion of “Canada” in Subdivision (b)

No necessity is provided in the ISR for the inclusion of Canada as a country for which similar serious traffic violations will be considered as such in California.

The Department must resolve this issue and Issue #2.1 through an addendum to the ISR and make this document available to the public for comment for at least 15 calendar days pursuant to Government Code section 11347.1 before the Department adopts the regulations and resubmits this regulatory action to OAL for review. Any comments made in relation to this addendum must be summarized and responded to in the FSR. (Gov. Code, sec. 11346.8, subd. (c); see also Gov. Code, sec. 11346.9, subd. (a)(3).)

3. Consistency

OAL is required to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the consistency standard. (Gov. Code, sec. 11349.1, subd. (a)(4).) “ ‘Consistency’ means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov. Code, sec. 11349, subd. (d).)

The first sentence of proposed Section 29.01, subdivision (a), states, “A commercial driver convicted of a second **or third** serious traffic violation during a three-year period will be disqualified from driving a commercial vehicle, as prescribed by the California Vehicle Code.” (Emphasis added.) The use of the phrase “or third” conflicts with Vehicle Code section 15308, subdivision (a), which states, “A driver shall not operate a commercial motor vehicle for a period of 120 days if the person is convicted of a serious traffic violation involving a commercial or noncommercial motor vehicle and **the offense occurred within three years of two or more separate offenses** of serious traffic violations that resulted in convictions.” (Emphasis added.) Therefore, a commercial driver convicted of two or more—not just two or three—serious traffic violations during a three-year period will be disqualified from driving a commercial motor vehicle.

In resolving this consistency issue, the Department must make all substantial regulatory text changes, which are sufficiently related to the original text, available to the public for comment for at least 15 days pursuant to Government Code section 11346.8, subdivision (c), and section 44 of title 1 of the California Code of Regulations (the “CCR”) before the Department adopts the regulations and resubmits this regulatory action to OAL for review. Additionally, any comments made in relation to these proposed modifications must be summarized and responded to in the FSR. (Gov. Code, sec. 11346.8, subd. (c); see also Gov. Code, sec. 11346.9, subd. (a)(3).)

4. Failure to Follow Procedure

OAL also notes the following procedural issues that must be addressed prior to any resubmission of this rulemaking action:

4.1. STD. 399

Government Code section 11347.3, subdivision (b)(5) requires a rulemaking file to include the estimate, together with the supporting data and calculations, required by Government Code section 11346.5, subdivision (a)(6). Section 11346.5, subdivision (a)(6) requires, in part, the estimate of the cost or savings to any state agency. This subdivision further defines “cost or savings” as “additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.” Government Code section 11357 requires that the Department of Finance (“Finance”) adopt instructions for inclusion in the State Administrative Manual (“SAM”) prescribing the methods that any agency shall use in making the estimate required by section 11346.5, subdivision (a)(6).

For purposes of reporting this estimate, and other information, Finance has developed, and requires regulatory agencies to use, the STD. 399 “Economic and Fiscal Impact Statement”.

(SAM, Ch. 6600, commencing with sec. 6601.) Specifically, in SAM section 6615, Finance has established when financial estimates contained in an STD. 399 require Finance's concurrence. Section 6615 states, in pertinent part:

A state agency is not required in all instances to obtain the concurrence of [Finance] in its estimate of the fiscal impact of its proposed regulation on governmental agencies. Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

- | | |
|------------------------------------|---------------------|
| A.1 – Reimbursable Local Costs | B.1 – State Costs |
| A.2 – Non-Reimbursable Local Costs | B.2 – State Savings |
| A.3 – Local Savings | B.4 – Other |
| A.6 – Other | |

Currently, section B.4 of the Fiscal Impact Statement portion of the STD. 399 in the rulemaking file states, "Compliance with federal regulations will ensure California continues to receive federal highway funds." Since the Department checked the box next to section B.4, the STD. 399 requires Finance concurrence. The rulemaking file does not include an STD. 399 containing Finance concurrence, and, as a result, the Department failed to follow required APA procedures. A review and signature from Finance must be obtained and indicated on the STD. 399 before this rulemaking action can be resubmitted to OAL.

4.2. FSR

In regards to comments received by the Department, the FSR must contain the following:

A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action. The agency may aggregate and summarize repetitive or irrelevant comments as a group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group. For the purposes of this paragraph, a comment is "irrelevant" if it is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.

The Department did not adequately summarize and respond to comments (1) disagreeing with the Department's conclusion that there will not be a significant adverse economic impact; (2) arguing that the Department underestimates the impact of the proposed regulations on small businesses; (3) requesting that the Federal Motor Carrier Safety Administration's audit prompting this rulemaking be added to the record; and (4) discussing the clarity issue identified

in Issue #1.2, *supra*. Additionally, the “Statement of Reasons for the Modified Regulatory Text” document behind tab 10 of the rulemaking file contains information required to be included in—but is missing from—the FSR. This information includes an update to the information contained in the ISR and a summary and response to comments received by the Department. (See Gov. Code, sec. 11346.9, subd. (a)(1), (3).) The Department must revise the FSR accordingly prior to resubmitting this rulemaking action to OAL for review.

4.3. Authority and Reference

Government Code section 11346.2, subdivision (a)(2) requires that agencies “include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations.”

The Department cites three sources of authority for the proposed adoption of Section 29.01: Vehicle Code sections 1651, 15250, and 15308. Vehicle Code section 1651 gives the Department general rulemaking authority. Vehicle Code section 15250 requires a valid commercial driver’s license when operating a commercial motor vehicle and sets forth testing requirements. Vehicle Code section 15308 prohibits a driver from operating a commercial motor vehicle for a period of 120 days when the driver is convicted of a serious traffic violation under certain circumstances. Neither of these latter two statutes give the Department express or implied authority to adopt the proposed regulations. Therefore, Vehicle Code sections 15250 and 15308 are not suitable as sources of authority for the changes proposed through this rulemaking. Vehicle section 15308 is more suitable as a reference citation since it is a statute the agency is implementing, interpreting, or making specific through this rulemaking. (See Gov. Code, sec. 11346.2, subd. (a)(2).) For this reason, Vehicle Code section 15306—which similarly prohibits a driver from operating a commercial motor vehicle, but for a period of 60 days instead of 120—should also be added as a reference citation.

Prior to resubmitting this rulemaking action to OAL, the Department must revise the authority and reference citations accordingly.

4.4. Declaration of Closure

Government Code section 11347.3, subdivision (b)(12) requires that the rulemaking file include an index or table of contents. Regarding the affidavit or declaration that is required to be included with the index or table of contents, subdivision (b)(12) states the following:

The index or table of contents shall include an affidavit or a declaration under penalty of perjury in the form specified by Section 2015.5 of the Code of Civil Procedure by the agency official who has compiled the rulemaking file, specifying the date upon which the record was closed, and that the file or the copy, if submitted, is complete.

The affidavit or declaration must be signed the same day as the closure date identified therein, as the table of contents is part of the rulemaking record. Here, the declaration was

signed three days after the closure date. Upon resubmitting this rulemaking action to OAL, the Department must ensure that the closure date is the same as the date the declaration is signed.

4.5. Mailing Statement for 45-Day Notice

The rulemaking file must contain a statement confirming the agency's compliance "with the provisions of Government Code Section 11346.4(a)(1) through (4) regarding the mailing of notice of proposed action at least 45 days prior to public hearing and close of the public comment period, and stating the date upon which the notice was mailed." (Cal. Code Regs., tit. 1, sec. 86; see also Gov. Code, sec. 11346.4, subd. (a)(1)-(4).) The mailing statement currently in the rulemaking file states that the public comment period ended on December 7, 2014. However, the public comment period ended on December 8, 2014. The Department must include a revised mailing statement in any resubmission of this rulemaking action to OAL.

CONCLUSION

OAL disapproved the above-referenced rulemaking action for the foregoing reasons. Pursuant to Government Code section 11349.4, subdivision (a), the Department may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval. If you have any questions, please contact me at (916) 324-6948.

Date: December 9, 2015



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