

**State of California
Office of Administrative Law**

In re:

Department of Motor Vehicles

**Regulatory Action: Title 13
California Code of Regulations**

**Adopt sections: 346.00, 346.02, 346.04,
346.06, 346.08, 346.10,
346.12, 346.14, 346.16**

Amend sections:

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2008-0414-01 S

SUMMARY OF REGULATORY ACTION

In this regulatory action, the Department of Motor Vehicles (Department) proposes the adoption of regulations providing for the “Mature Driver Improvement Course Approval Program” to implement Vehicle Code sections 1675, 1676, and 1677. Under this program, the Department establishes standards and develops criteria for the approval of initial and renewal driver improvement courses specifically designed for the safe driving needs of drivers who are 55 years of age or older, known as “mature driver improvement courses.” The regulations include (among other provisions) the requirements for applications to the Department for course approval, curriculum and other requirements for courses, provisions relating to the advertising of courses by course providers, provisions pertaining to course providers notifying the Department of changes, requirements relating to the completion certificates that are issued to participants who have completed courses, program fee requirements, and provisions pertaining to course provider records.

DECISION

On May 27, 2008, the Office of Administrative Law (OAL) notified the Department of the disapproval of this regulatory action. The reasons for the disapproval were the following: failure of the regulations to comply with the “Clarity,” “Necessity,” “Consistency,” “Authority,” and “Reference” standards of Government Code section 11349.1.

DISCUSSION

Regulations adopted by the Department must generally be adopted pursuant to the rulemaking provisions of the California Administrative Procedure Act (APA), Government Code sections 11340 through 11364. Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA (Gov. Code, sec. 11346). No exemption or exclusion applies to the regulatory action here under review. Moreover, Vehicle Code section 1651, which sets forth the Department's general authority to adopt and enforce rules and regulations to carry out the provisions of the Vehicle Code relating to the Department, specifically states: "Rules and regulations shall be adopted, amended, or repealed in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code." Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed by OAL for compliance with the procedural requirements and substantive standards of the APA, in accordance with Government Code section 11349.1.

A. CLARITY

OAL must review regulations for compliance with the "Clarity" standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines "Clarity" as meaning "written or displayed so that the meaning of 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 California Code of Regulations (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 exists:
- (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
 - (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 governing statute; or
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) the regulation presents information in a format that is not readily understandable by persons "directly affected;" or
 - (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

- (b) Persons shall be presumed to be “directly affected” if they:
- (1) are legally required to comply with the regulation; or
 - (2) are legally required to enforce the regulation; or
 - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
 - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

The following provisions of the Department’s proposed Mature Driver Improvement Course Approval Program regulations do not comply with the “Clarity” standard:

1. Proposed regulation section 346.02(a) – Regulation section 346.02(a) commences with the following introductory language: “Any individual, partnership, corporation, association, or public school may apply for approval of an initial and renewal mature driver improvement course by submitting the following to the department at the address listed on the application form.” (Emphasis added.) This introductory language is followed by subsections (a)(1) through (a)(5), which a user of the regulation would logically presume to be the list of the specific items which must be submitted by an applicant for course approval. However, the presentation of subsection (a) is less than clear because only subsections (a)(1), (a)(3), and (a)(4) actually list specific items which must be submitted to the Department in the application process. Subsection (a)(2), instead of listing an item that must be submitted in an application, is the statement: “Providers with approved initial courses are not required to submit a new application.” Subsection (a)(5), instead of listing an item that must be submitted in an application, is the statement: “An application for course approval includes approval of an initial and renewal course pursuant to 1675(a).” Given the introductory language, this mixing of application content requirements with other statements relating to providers who are not required to apply and relating to the effect of an approved application is confusing.

A second and related “Clarity” concern with proposed regulation section 346.02 pertains to the placement of the “perjury statement and certification” requirement currently proposed as subsection (a)(2)(A). In subsection 346.02(a)(2), the statement “[p]roviders with approved initial courses are not required to submit a new application” is immediately followed by subsection (a)(2)(A) which states: “The applicant shall sign a perjury statement pursuant to Code of Civil Procedure section 2015.5, and certify that the curriculum provided in the course complies with the requirements of Vehicle Code section 1675, and Sections 346.04 and 346.06 of this article” The placement of this perjury statement and certification requirement under subsection (a)(2) is confusing, since subsection (a)(2) relates to providers with approved courses who are not required to submit new applications. The rulemaking record indicates that the perjury statement and certification requirement actually relates to persons who are applying and signing the application form under the prior subsection (a)(1). In fact, the course approval application form, OL 1002, required by and incorporated by reference under subsection (a)(1), contains the “applicant certification” under penalty of perjury. If the perjury statement and certification requirement is intended to apply to those persons who are submitting application forms under subsection (a)(1), then the clear and correct placement of the perjury statement and certification requirement language would be as subsection (a)(1)(A).

A third clarity concern with proposed regulation section 346.02(a) relates to the wording of subsection 346.02(a)(5), which reads: “An application for course approval includes approval of an initial and renewal course pursuant to 1675(a).” This subsection contains an incomplete citation to “1675(a)” which, for clarity, should be a reference to “Vehicle Code section 1675(a).” Furthermore, it is likely that the intended meaning of this provision could be more clearly worded: “Approval of an application for course approval constitutes approval of both the initial course and the renewal course pursuant to Vehicle Code section 1675(a).”

2. Proposed form OL 1002 and regulation section 346.02(a)(4) -- Form OL 1002, the “Application for Approval of Mature Driver Improvement Course,” is incorporated by reference in section 346.02(a)(1) of the proposed regulations. This form instructs the applicant to submit the completed application “with a non-refundable application fee of \$100.00.” However, regulation section 346.02(a)(4), in its final form and as submitted to OAL for review, provides that one of the application requirements is “[a] five hundred dollar (\$500) non-refundable application fee.” This internal conflict between the application form (with the \$100 application fee) and section 346.02(a)(4) of the regulation text (with the \$500 application fee) results in an ambiguity regarding the correct amount of the application fee for those who must comply with the application fee requirement and for those who must enforce the application fee requirement, thereby not complying with the “Clarity” standard.

3. Proposed regulation section 346.04(a) and the OL 1008 Guidelines – Regulation section 346.04(a) provides, in part, the following: “The curriculum for classroom and non-classroom mature driver improvement courses shall comply with the department’s Mature Driver Improvement Course Guidelines, OL 1008 (Rev. 1/2007), which is hereby incorporated by reference” The Addendum to the Final Statement of Reasons and the referenced Mature Driver Improvement Course Guidelines (Guidelines), as contained in the rulemaking record, indicate that the revision date of the Guidelines intended to be incorporated by reference is “10/2006” not “1/2007.” Persons attempting to comply with the regulation could be confused by a regulation which refers to a “Rev. 1/2007” version of the Guidelines when, in fact, a “Rev. 10/2006” version applies. This conflict between the language of the regulation text and the supporting rulemaking record as to the date of the Guidelines constitutes a “Clarity” problem. In addition to the “Clarity” concern, we further note that OAL’s regulation on “incorporation by reference” specifically requires the correct identification in the regulation text of the date of publication or issuance of a document incorporated by reference. See California Code of Regulations, title 1, section 20(c)(4).

4. Proposed regulation section 346.04(a)(2) – A person applying for approval of a mature driver improvement course must submit the proposed mature driver improvement course curriculum to the Department and the curriculum must comply with a number of specified statutory and regulatory requirements. One regulatory provision pertaining to the submission and evaluation of proposed course curriculum is section 346.04(a)(2), which reads as follows:

The curriculum shall cover all topics in Section 346.06 of these regulations and Vehicle Code section 1675 in sufficient detail to enable the department to evaluate that the following is consistent with the department lesson plan and instruction time frame:

- (A) The method(s) of presentation of the material.
- (B) The specific information that will be presented under each topic heading.
- (C) Whether the information presented is current and accurate.

The wording of this provision is awkward and confusing and consequently the meaning of the provision is less than clear. The use of the phrase “the following is consistent” in this context is particularly hard to understand. Some additional clarifying language or a revision of the wording could certainly add to the clarity of this provision so that the meaning will be “easily understood” by both those persons required to comply with and those persons required to enforce the regulation.

5. Proposed regulation section 346.10(a) and form OL 1002 – The regulations require that persons with previously-approved mature driver improvement courses report certain changes in information to the Department. Specifically, proposed section 346.10(a) provides, in part:

A mature driver improvement course provider shall notify the department within 10 days of any change to the information that is required to be listed on the Application for Approval of Mature Driver Improvement Course form, OL 1002 (Rev. 11/2007), including:

. . . .

(2) Individual, partner, corporation, or association, including change of corporate officers, if a corporation

The reference to reporting a “change of corporate officers, if a corporation” is confusing in this context. An examination of the form OL 1002 shows that while individual, partner, corporation and association information is required to be listed on the form, there is no required listing of corporate officers on this application form. The only reference to a corporate officer is that a “principal corporate officer” signs the bottom of the form under penalty of perjury if the applicant is a corporation. Since the form does not require a listing or reporting of corporate officers during the application process, it could be difficult for a person attempting to comply with section 346.10(a) to understand the intended meaning of the “change of corporate officers” reporting requirement and the specific corporate officer changes which must be reported. If the intent here is to require a course provider to report when the principal corporate officer who originally signed the form is no longer associated with the course provider and to report the name of the replacement for that particular officer, then that meaning needs to be made clear.

B. NECESSITY AND CONSISTENCY

OAL must review regulations for compliance with the “Necessity” and “Consistency” standards of the APA, as required by Government Code section 11349.1. As discussed

in detail below, proposed regulation section 346.14(c) relating to the Department's fee for course completion certificates raises both "Necessity" and "Consistency" concerns.

Government Code section 11349, subdivision (a), defines "Necessity" as meaning: "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." The "Necessity" standard is further defined in OAL's regulation on "Necessity" in section 10 of title 1 of the CCR.

Government Code section 11349, subdivision (d), defines "Consistency" as meaning: "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."

Proposed regulation section 346.14(c) -- In this rulemaking, proposed regulation sections 346.12 and 346.14 provide for the "Mature Driver Improvement Course Certificates" (i.e., "completion certificates") which the Department issues to course providers and which course providers then issue to course participants who have successfully completed a mature driver improvement course. In connection with the Department's issuance of completion certificates to course providers, proposed regulation section 346.14(c) states: "The department shall charge a fee of one dollar per completion certificate issued to the course provider." For the reasons discussed below, OAL finds that the rulemaking record does not adequately support the amount of the \$1.00 per completion certificate fee and does not adequately demonstrate that the \$1.00 per completion certificate fee is consistent with Vehicle Code section 1676, subdivision (c), the statute governing the amount of this fee.

Vehicle Code section 1676, subdivision (c), sets specific statutory standards for the Department's completion certificate fee. This Vehicle Code provision states, in part, the following:

The department shall charge a fee not to exceed three dollars (\$3) for each completion certificate issued to a mature driver improvement course provider, pursuant to subdivision (d) of Section 1675. The amount of the fee shall be determined by the department and shall be sufficient to defray the actual costs incurred by the department for administering the mature driver improvement program, for evaluating the program, and for any other activities deemed necessary by the department to assure high quality education for participants of the program. (Emphasis added.)

In support of the \$1.00 per completion certificate fee, the rulemaking record includes the following statement in the Initial Statement of Reasons: "The dollar fee has been determined by the department to suffice to cover the department's cost for certificate forms." The rulemaking record also includes a supporting document entitled "Mature Driver Improvement Course Completion Certificate Costing." This supporting document commences with the statement:

“The following costing is for a Mature Driver Completion Certificate (Form OL 1001). The costing data includes the actual cost of the form, associated staff costs, and mailing cost for issuance of the form.” This statement is followed by data purporting to calculate the “total cost to process one certificate.” The total cost to process one certificate shows a “grand total” of “\$11.19.” It is difficult to determine from the rulemaking record how the stated total cost to process one certificate of \$11.19 became the basis for the \$1.00 per completion certificate fee in regulation section 346.14(c). Substantial evidence has not been presented supporting the \$1.00 fee amount contained in the regulation, and consequently the “Necessity” standard has not been satisfied.

Furthermore, as discussed above, in the case of this completion certificate fee, there are specific statutory standards which must be met in setting the amount of the fee: the fee shall not exceed \$3.00 for each completion certificate and the fee “shall be sufficient to defray the actual costs incurred by department for administering the mature driver improvement program, for evaluating the program, and for any other activities deemed necessary by the department to assure high quality education for participants of the program.” The rulemaking record does not include the necessary mature driver improvement program budgetary data and other supporting explanatory information to demonstrate that these statutory standards have been met in setting the amount of the completion certificate fee, particularly the standard regarding the sufficiency of the fee to cover specified actual program costs. Consequently, the rulemaking record does not adequately demonstrate that proposed regulation section 346.14(c) imposing the \$1.00 per completion certificate fee is consistent with the statutory fee standard in Vehicle Code section 1676, subdivision (c). The “Consistency” standard has not been satisfied.

In order to remedy these deficiencies, the Department will need to re-examine the proposed completion certificate fee and include in the rulemaking record budgetary data for the mature driver improvement program and an explanation which adequately supports the amount of the fee and demonstrates that the statutory standard in Vehicle Code section 1676, subdivision (c), has been considered and satisfied. The data and explanation of the amount of the fee, when added to the rulemaking record, will need to be made available to the public in accordance with Government Code section 11347.1. (With regard to adding data and other supporting material to the rulemaking record and making that information available to the public, see also Government Code section 11346.8, subdivision (d), and Government Code section 11346.9, subdivision (a)(1).)

C. AUTHORITY AND REFERENCE

OAL must review regulations for compliance with the “Authority” and “Reference” standards of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (b), defines “Authority” as meaning: “the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.” Government Code section 11349, subdivision (e), defines “Reference” as meaning: “the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.” The “Authority” and “Reference” standards are further defined in OAL’s regulation in section 14 of title 1 of the CCR.

Each proposed regulation section must include “Authority” and “Reference” citations at the end of the section. See Government Code section 11344, subdivision (d); Government Code section 11346.2, subdivision (a)(2); and CCR, title 1, section 14(d). OAL reviews the “Authority” and “Reference” citations at the end of each proposed regulation section to verify that the rulemaking agency has been granted the regulatory power to adopt the regulation and to verify that the proper sources of “Authority” and “Reference” for the regulation are cited.

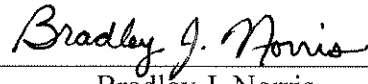
OAL has identified the following “Authority” and “Reference” citation problems with the proposed regulations:

1. “Reference” citation to section 20155.2 of the Code of Civil Procedure – Proposed regulation section 346.02 includes a “Reference” citation to “Section 20155.2, Code of Civil Procedure.” This is an incorrect citation (there is no section 20155.2 within the Code of Civil Procedure). Based upon the content of this regulation, the correct citation would appear to be “Section 2015.5, Code of Civil Procedure.”
2. “Authority” citations to section 1652 of the Vehicle Code – Proposed regulation sections 346.00, 346.04, 346.10, 346.12, and 346.14 each contain an “Authority” citation to section 1652 of the Vehicle Code. Vehicle Code section 1652 provides for the Department’s prescription of forms and that the Department may require that any application or document filed with the Department be signed and submitted under penalty of perjury. Section 1652 is inappropriate as an “Authority” citation for purposes of these regulations since it does not constitute a provision of law that permits or obligates the Department to adopt these regulations (other Vehicle Code sections are cited as “Authority,” including Vehicle Code sections 1651, 1675, 1676, and 1677 which are proper sources of “Authority”). However, Vehicle Code section 1652 would be an appropriate “Reference” citation for each of the regulations which prescribe forms or which require the submission of documents signed and submitted under penalty of perjury.
3. “Authority” citations to section 470 of the Vehicle Code -- Proposed regulation sections 346.02, 346.12, and 346.14 each contain an “Authority” citation to Section 470 of the Vehicle Code. Vehicle Code section 470 is a statutory definition of the term “Person.” Section 470 is inappropriate as an “Authority” citation for purposes of these regulations since it does not constitute a provision of law that permits or obligates the Department to adopt these regulations.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-4237.

Date: May 29, 2008



Bradley J. Norris
Senior Staff Counsel

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