

**State of California
Office of Administrative Law**

In re:

Department of Motor Vehicles

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

**Adopt sections: 225.38
Amend sections: 225.00, 225.03, 225.06,
225.09, 225.21, 225.35,
225.45, 225.48, 225.54,
225.72**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2008-0821-03 S

SUMMARY OF REGULATORY ACTION

In this regulatory action, the Department of Motor Vehicles (Department) proposed to amend a number of its existing regulations and adopt one new regulation in title 13 of the California Code of Regulations pertaining to its "Business Partner Automation Program" (BPA Program). Vehicle Code section 1685 authorizes the Department to establish contracts for electronic programs that allow qualified private industry partners (business partners) to join the Department in providing services, including processing and payment programs for vehicle registration and titling transactions, and further authorizes the Department to adopt regulations implementing the BPA Program. In 2002, the Department first adopted regulations implementing Vehicle Code section 1685, establishing the BPA Program, and the program has been expanding in scope and has been modified in a series of regulatory amendments and additions since that time. A major focus of this current regulatory action is the addition of a number of new types of transactions to the scope of the authorized transactions that can be performed by the business partners.

DECISION

On October 3, 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: (1) failure of the regulations to comply with the "Clarity" standard of Government Code section 11349.1, (2) failure of the regulations to comply with the "Necessity" standard of Government Code section 11349.1, (3) failure of the regulations to comply with the "Authority" standard of Government Code section 11349.1, (4) failure of the regulations to comply with the "Reference" standard of Government Code section 11349.1, (5) failure to comply with all required

Administrative Procedure Act procedures, (6) failure to meet all of the requirements for incorporation by reference as set forth in section 20 of title 1 of the California Code of Regulations, and (7) a number of the required documents were defective.

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.

The existing BPA Program regulations include the incorporation by reference of numerous program forms and other documents, including the incorporation by reference of an extensive program handbook entitled "BPA Transaction Procedures and Inventory Requirements Handbook" (the BPA Handbook). The current proposed regulatory action includes not only the adoption and amendment of regulations printed in the California Code of Regulations (CCR), but also the amendment of a number of existing BPA Program forms, the addition of one new form, and substantial amendments and additions to the BPA Handbook. Pursuant to OAL's regulation on "Incorporation by Reference," material proposed for incorporation by reference is reviewed for compliance with APA substantive standards and APA procedures. See CCR, title 1, section 20. Consequently, the Department forms and the BPA Handbook which are incorporated by reference in this rulemaking are subject to OAL's review along with the CCR text.

Due to the scope of the "Clarity" and "Necessity" issues discussed below, OAL reserves the right to conduct a complete APA review for compliance with the substantive and procedural requirements of the APA upon the resubmission of this rulemaking. All APA issues must be resolved prior to OAL approval of any submission.

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 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 proposed BPA Program regulations do not comply with the “Clarity” standard in the areas discussed below. In addition to the “Clarity” problems specifically identified in this decision, the regulations raise other miscellaneous and minor “Clarity” concerns which will be discussed with Department staff.

1. Lack of Definition of “Miscellaneous Original” – In this rulemaking, a number of amendments are being made to the regulations and documents incorporated by reference to implement the addition of a new BPA Program transaction (or category of transactions) referred to as “miscellaneous original” or “miscellaneous originals.” Regulation section 225.09(b)(3), pertaining to BPA Program surety bond requirements, is being amended to include within its scope the bond requirement for “miscellaneous original” transactions. Regulation section 225.45(b)(2), which sets forth the maximum customer fees which may be charged by licensed registration services for specified transactions, is being amended to include the fee for “miscellaneous original” transactions. Several of the BPA Program application forms (which are incorporated by reference) are being amended to include “miscellaneous originals” in the listing of transaction categories for which estimated volumes are to be reported. Finally, in the BPA

Handbook, a new Section E. “Miscellaneous Originals” is being added which provides information as to how business partners are to process several types of “miscellaneous original” transactions.

Although “miscellaneous original” transactions are being added to the BPA Program regulatory scheme in the regulations and documents discussed above, the regulations as proposed do not contain a clear definition of the term “miscellaneous original,” and OAL is not aware of a definition of this term in the Department’s governing statutes and regulations. Furthermore, “miscellaneous original” is not a term which has a clear, definite meaning on its face. If the Department wishes to authorize a new transaction category labeled “miscellaneous original” for the business partners under the BPA Program, the meaning and scope of this category must be clearly established in the BPA Program regulations. A clear definition of “miscellaneous original” will provide greater certainty for those persons “directly affected” by the BPA Program regulations with regard to exactly what business partner transactions are and are not permitted in this category. As currently proposed, the regulations are not clear on this point.

2. Definition of “Accountable Inventory” – Regulation section 225.00(c), as proposed, defines the term “accountable inventory” to include “department issued license plates, year stickers, and salvage and non-repairable vehicle certificates.” In the BPA Handbook, page 2 sets forth similar language in defining “accountable inventory.” However, page 56 of the BPA Handbook identifies the items of “accountable inventory” as including only “DMV-issued license plates and year stickers” (without including salvage and non-repairable vehicle certificates). This internal inconsistency results in a lack of clarity regarding the exact meaning and scope of the term “accountable inventory” as that term is used within the BPA Program regulations.

3. Definition of “Controlled Inventory” – Regulation section 225.00(e) defines the term “controlled inventory” to include “DMV95A paper and month stickers.” In the BPA Handbook, pages 2 and 56 contain definitions of “controlled inventory” which are consistent with regulation section 225.00(e). However, page 58 of the BPA Handbook provides: “CVRA [Commercial Vehicle Registration Act] decals and year stickers are controlled inventory” This internal inconsistency regarding the inventory included within “controlled inventory” results in a lack of clarity regarding the definition and scope of the term “controlled inventory” as that term is used within the BPA Program regulations.

4. “Application Requirements” Regulation and Forms – Regulation section 225.03, “Application Requirements,” in subsections 225.03(a)(1), (a)(2) and (a)(3), incorporates by reference three BPA Program application forms for use by the three types of business partner applicants. These forms are: (1) the “Business Partner Automation Application, First-Line Business Partner” form (form REG 4024), (2) the “Business Partner Automation Application, First-Line Service Provider” form (form REG 4023), and (3) the “Business Partner Automation Application, Second-Line Business Partner” form (form REG 4025). Revised versions of these three forms have been proposed as part of this rulemaking.

Each of these application forms requires the applicant to specify the “estimated volume of transactions you will process annually,” and then lists various categories of transactions for the estimates. Two of the revised categories are entitled “New Vehicles/New Vessels/PFR” and

“Registration Renewals/PFR.” The use of the acronym “PFR” raises a “Clarity” concern. It is not clear from the BPA Program statute or regulations or from the Department’s generally-applicable statutory or regulatory definitions what the term “PFR” means. Undefined terms, including acronyms, constitute a “Clarity” standard problem (unless it can be demonstrated that the meaning of the term would be generally familiar to persons directly affected by the regulation).

A second concern relates exclusively to the form entitled “Business Partner Automation Application, First-Line Service Provider” (form REG 4023). On this form, there is a problem in section IX which requests the “Estimated Number of Second-Line Business Partners Who Will Use Your Services” and in section X which requests the “Physical Location Where Your BPA Interface Services and Hardware Will Be Located.” The specific problem is that “City,” “State,” and “Zip Code” entries which were presumably intended for the physical location (address) information in section X have instead been printed in section IX, which could be confusing for a person attempting to comply with the application form requirements.

Finally, we note that, on the bottom of each of the three application forms, the stated mailing address for returning a completed application is somewhat different from the mailing address specified for submitting applications in regulation section 225.03(b). In order to prevent confusion for users of these forms attempting to comply with the Department’s regulation and form requirements, the addresses should be consistent.

5. Financial Security (Surety Bond) Requirements – Regulation section 225.09(b)(3) is being amended to revise the financial security (surety bond) requirements for second-line business partners, principally due to new types of business partner transactions being authorized in this rulemaking. The provision relating to when a bond in the amount of \$10,000 is required is being amended to read: “A second-line business partner processing registration renewal, a substitute vehicle license sticker, and a substitute vehicle license plate and sticker transactions only shall maintain a bond in the amount of ten thousand dollars (\$10,000).” In all other cases, section 225.09(b)(3) requires a bond in the amount of \$50,000 from a second-line business partner. Regulation section 225.09(a) incorporates by reference a form entitled “Business Partner Automation Surety Bond” (form REG 866). On the proposed revision of that form which is included in this rulemaking, page 1 of the form includes (among others) the following “WHEREAS” provision: “Section 225.09(b)(3), Chapter 1, Division 1, in Title 13 of the California Code of Regulations requires the Principal, as a second-line business partner processing any vehicle transactions, not limited to registration renewals to file or have on file with the Department of Motor Vehicles a bond in the sum of \$50,000.” (Emphasis added.) For internal consistency with regulation section 225.09(b)(3), the phrase “not limited to registration renewals” should be “not limited to registration renewals, substitute vehicle license sticker, and substitute vehicle license plate and sticker transactions,” or equivalent language. Furthermore, the reference to “vehicle transactions” should probably now be “vehicle or vessel transactions,” given that the BPA Program is being expanded in this rulemaking to cover vessels under the Department’s jurisdiction.

In addition, where the “Business Partner Automation Surety Bond” form is incorporated by reference in regulation section 225.09(a), the regulation as proposed for amendment reflects an

incorrect revision date for the form. While section 225.09(a) sets forth a form revision date of “7/2007,” the final version of the surety bond as approved by the Department of Justice and shown in Tabs 13 and 14 of the rulemaking file is dated “8/2007.” Correct identification of the version of the form is required both for compliance with the “Clarity” standard (i.e., so that the regulation is clear as to the version of the form to be used) and to meet incorporation by reference requirements under CCR, title 1, section 20(c)(4).

6. Deposit Agreement and Assignment Form – Regulation section 225.09(d) incorporates by reference a new deposit form (for deposits given in lieu of a surety bond) entitled “Business Partner Deposit Agreement and Assignment” (form REG 4029). While most of the provisions of this form are well drafted and make sense under Code of Civil Procedure section 995.710 and other applicable law, one of the form provisions is difficult to understand. On page 3 of the form, the certification and signature section of the form includes the following language: “The undersigned executes this bond on behalf of the surety under an unrevoked power of attorney.” (Emphasis added.) This provision does not make sense (and is potentially confusing for BPA Program participants attempting to comply with the deposit form requirements) because in these “deposit given in lieu of a surety bond” situations there would presumably be no bond and no surety involved.

There is also a minor clarity problem on page 2 of the form where a provision reads: “NOW THEREFORE, the conditions of the foregoing obligations are that if the business partner shall not cause any loss to the State of California arising out of the operation of the private industry partnership, then this obligation is to void; otherwise it is to remain in full force and effect.” The wording seems to be in error in the phrase “then this obligation is to void.”

7. Adoption of the “Business Partner Obligations” Regulation – This rulemaking includes the adoption of a new regulation section 225.38 entitled “Business Partner Obligations.” While this section is new, almost all of the regulatory content is pre-existing and is being moved from regulation section 225.09, “Financial Security Requirements.” Prior to this regulatory proposal, regulation section 225.09 has included within its scope both financial security requirements (including surety bond requirements) and business partner obligations requirements. The Department indicates in the Initial Statement of Reasons that the intent in adopting a separate section 225.38 is to clarify for business partners their obligations as participants in the BPA Program that are separate and distinct from financial security requirements. In moving the business partner obligations provisions from section 225.09 to new section 225.38, references in the new section to “bond requirements” which were previously clear in the context of a regulation section that combined financial security with business partner obligations provisions have now lost clarity, since the new section 225.38 does not include the referenced bond requirements. Consequently, in proposed regulation section 225.38(a), the reference to “secured by the bond” would be more easily understood if it read “secured by the bond required by Section 225.09.” Similarly, in proposed regulation section 225.38(c), the reference to “secured under the bond” would be clearer if it read “secured under the bond required by Section 225.09.”

8. Requirements for Vessel Agents – Within the BPA Handbook, the Department proposes a new Section G. “Vessels.” This section specifically authorizes certain vessel-related transactions (such as the registration of vessels and the issuance of vessel numbers) to be included for the first

time within the scope of the BPA Program. In addition, this “Vessels” section introduces into the BPA Program regulatory scheme a type of private industry partner previously not part of the BPA Program regulations – the “vessel agent.” The provisions pertaining to vessel agents in Section G. “Vessels” raise a “Clarity” concern as to exactly what is required of vessel agents who participate in the BPA Program, as discussed below.

A review of pertinent law (outside of the BPA Program statutes and regulations) shows that vessel registration and other vessel-related matters under the Department’s jurisdiction are generally governed by Vehicle Code sections 9840 through 9928 and the Department regulations set forth in CCR, title 13, sections 190.00 through 192.00. Within these bodies of law, the authorization (appointment) by the Department of “vessel agents” (sometimes referred to as “undocumented vessel registration agents”) is contained in Vehicle Code section 9858 and implemented in Department regulations set forth in CCR, title 13, sections 190.30 through 190.38. Under these Department regulations, vessel agents are subject to an “application for appointment” process and are obligated to fulfill specified responsibilities and duties.

In the proposed BPA Handbook’s “Vessels” section, the provisions on pages 36 through 39 generally indicate that vessels may be registered or transferred through an authorized vessel agent, that vessel agents are appointed by the Department, and that vessel agents who have been appointed may accept undocumented vessel registration and transfer applications and issue permanent vessel numbers and temporary certificates of number. The “Clarity” concern is that, in introducing vessel agents into the BPA Program regulatory scheme, there is a lack of sufficient detail about how authorized vessel agents become part of and operate within the BPA Program. Do authorized vessel agents seeking to be part of the BPA Program, in addition to meeting vessel agent appointment requirements, also need to apply to be business partners under the BPA Program and meet all BPA Program application requirements? Do authorized vessel agents who process transactions under the BPA Program need to fully comply with both the vessel agent duties and responsibilities as set forth in CCR, title 13, sections 190.30 through 190.38 (see particularly sections 190.34 and 190.36) and with the BPA Program duties and responsibilities as set forth in CCR, title 13, sections 225.00 through 225.72? (For example, vessel agents have their own distinctive transaction reporting and quarterly inventory reporting requirements as set forth in regulation section 190.36. Do vessel agents in the BPA Program need to comply with both these vessel agent requirements and with the BPA Handbook requirements?) These requirements, duties and responsibilities for authorized vessel agents processing transactions within the context of the BPA Program need to be clarified. Currently the vessel-related provisions on pages 36 through 39 of the BPA Handbook do not provide sufficient detail to give certainty regarding these matters for both those required to comply with the regulations and for those who enforce the regulations.

9. Customer Fees for Vessel Transactions: A second vessel-related “Clarity” concern pertains to an ambiguity in the BPA Program regulatory scheme regarding the customer fees which may be charged by business partners for vessel-related transactions, due to two differing legal provisions. The following provision is set forth on page 36 of the BPA Handbook: “Document Preparation Fee – Vessel agents have the option of charging a document preparation fee not to exceed \$20. This fee is not required or collected by the department.” Based upon a review of pertinent law, this \$20 maximum fee amount appears to be based upon Vehicle Code section

9858.1 which states: “Any documentary preparation charge by an authorized [vessel] agent of the department shall not exceed twenty dollars (\$20).” In contrast, regulation section 225.45, the primary regulation pertaining to BPA Program customer fees, does not reflect this \$20 maximum fee. Section 225.45(b), which purports to set forth the maximum amounts that may be charged by business partners for each type of transaction processed through to completion by a business partner, provides only for customer transaction fees (charges) “up to \$25” for certain specified types of transactions and “up to \$75” for certain other specified types of transactions. Furthermore, in regulation section 225.45(b), the only specific reference to vessel-related charges is a provision which would allow “licensed registration services” to charge fees of “up to \$25” for “new vessel” transactions. Due to these differing legal provisions pertinent to vessel-related customer transaction fees (on page 36 of the BPA Handbook and in regulation section 225.45(b)), it is not wholly clear as to the customer fees which may be charged for vessel-related transactions.

In addition, we note that the proposed language in regulation section 225.45(b)(2), authorizing “licensed registration services” to charge “up to \$25” for new vessel transactions, implies that licensed registration services (as contrasted with authorized vessel agents) may be engaged in “new vessel” transactions and charging the associated fees. The BPA Handbook “Vessel” section refers only to vessel agents, not licensed registration services, performing vessel-related registrations and issuances of vessel numbers. “Registration service” is a defined term which appears to have a meaning, and be the subject of requirements, separate and apart from those of a “vessel agent.” See the definition of “registration service” in Vehicle Code section 505.2 and the laws and regulations relating to registration services, Vehicle Code sections 11400 through 11413 and CCR, title 13, sections 330.00 through 330.60. Given that the BPA Handbook authorizes vessel agents to perform the vessel-related services, should the fees in regulation section 225.45(b) pertaining to vessels be established for vessel agents rather than registration services?

10. The BPA Handbook – The BPA Handbook includes significant added material pertaining to the new transactions being authorized for the BPA Program. This material is principally contained in the following sections of the BPA Handbook: (1) Section C. “Legal Owner/Lienholder Transfers,” (2) Section D. “Substitutes and Duplicates,” (3) Section E. “Miscellaneous Originals,” (4) Section F. “Nonresident Vehicles,” (5) Section G. “Vessels,” and (6) Section H. “Salvage, Nonrepairable, Junks, and Nonrevivable Junk Transactions and Vehicle License Fee (VLF) Refunds” (within Section H., the “Salvage Certificate (Title Only) for Nonresident” portion is new material).

While some of the new transaction material in the BPA Handbook is reasonably clear, portions of this material are not “easily understood.” For example, within some sections of the BPA Handbook (such as “Miscellaneous Originals” and “Vessels”), the organization and presentation of the material results in the information being difficult to follow, and it is sometimes not easy to ascertain what material pertains to a particular transactional matter within a BPA Handbook section. The Department should generally re-examine the new transaction provisions of the BPA Handbook from the perspective of members of the “directly affected” public attempting to comply with the requirements, keeping in mind that not all members of the “directly affected” public would necessarily already have significant knowledge of the transactional areas involved.

An effort should be made to improve the organization and presentation of the new transaction material for added clarity.

In addition to the “Clarity” concern with the new transaction provisions of the BPA Handbook discussed above, there are many specific concerns with the BPA Handbook relating to matters such as cross-references, wording and spelling problems, legal citation problems, incorrect form references, and similar matters. Most of these specific “Clarity” concerns are relatively minor, but corrections will be required before the revised BPA Handbook can be approved as part of the regulatory action. To give some examples: Citations to form names and/or form numbers are incorrect on pages 37, 38, 39, 40, 67, and 68 of the BPA Handbook. Legal citations use unclear citation styles on pages 38 and 39 of the BPA Handbook. Wording appears to be incorrect or misleading or words are spelled incorrectly on pages 16, 30, 31, 34, 41, and 43 of the BPA Handbook. OAL will discuss the full list of specific BPA Handbook “Clarity” concerns with Department staff.

B. NECESSITY

OAL must review regulations for compliance with the “Necessity” standard of the APA, as required by Government Code section 11349.1. 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.” (Emphasis added.)

The “Necessity” standard is further defined in OAL’s regulation on “Necessity” in section 10 of title 1 of the CCR, which provides the following in subsection (b):

- (b) 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. 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 this BPA Program rulemaking, the rulemaking record generally includes substantial evidence which is adequate to support the proposed CCR provisions and the revisions to

the program forms. Most of this supporting evidence is contained in the explanations set forth in the Initial Statement of Reasons. However, the rulemaking record does not present substantial evidence sufficient to meet the “Necessity” standard in two areas, as discussed below:

1. New Transaction Provisions in the BPA Handbook – As indicated above, the BPA Handbook includes significant added material pertaining to the new transactions being authorized for the BPA Program. This material is principally contained in the following sections of the BPA Handbook: (1) Section C. “Legal Owner/Lienholder Transfers,” (2) Section D. “Substitutes and Duplicates,” (3) Section E. “Miscellaneous Originals,” (4) Section F. “Nonresident Vehicles,” (5) Section G. “Vessels,” and (6) Section H. “Salvage, Nonrepairable, Junks, and Nonrevivable Junk Transactions and Vehicle License Fee (VLF) Refunds” (within Section H., the “Salvage Certificate (Title Only) for Nonresident” portion is new material).

The rulemaking record includes little to explain the rationale for the specific BPA Handbook provisions pertaining to these new transactions, and some of these provisions are quite lengthy, complicated and far-reaching. Generally, the rulemaking record (in the Initial Statement of Reasons) merely indicates for each type of new transaction that a new transaction is being added with a very brief description of the addition, but providing little or no specific explanation for the detailed provisions relating to the new transaction as contained in the BPA Handbook. With respect to much of this new material, the rationale and basis for the added provisions is not self-evident or easily determinable in the absence of further explanation, even upon a review of the Vehicle Code and Department’s existing duly-adopted regulations. For example, Section F. “Nonresident Vehicles” includes significant material relating to when nonresident owners of vehicles must register their vehicles in California, when California registration fees become due for nonresident vehicles, and similar matters that needs to be explained in the rulemaking record (including, where appropriate, providing the statutory basis for the provisions). Similarly, Section E. “Miscellaneous Originals” contains relatively complicated provisions in several diverse areas (including legal matters such as smog certification exemptions and weight certificate exemptions) which need to be explained and justified in the rulemaking record.

In summary, the rulemaking record submitted in this rulemaking does not contain substantial evidence setting forth the rationale for the specific BPA Handbook provisions relating to the new transactions, and the “Necessity” standard has not been satisfied in this area.

2. Fee Provisions – Regulation section 225.45(b)(2) is being amended in this rulemaking to establish the maximum amount of customer fees that may be charged by licensed registration services for the various types of newly-authorized transactions. Essentially, some of the new transactions are being authorized with fees “up to \$25” and some of the new transactions are being authorized with fees “up to \$75.” The rulemaking record (in the Initial Statement of Reasons) explains generally that section 225.45(b)(2) is being amended to identify the authorized vehicle registration

transactions that are available to business partners and the maximum amounts a business partner may charge a customer for each type of transaction, and that this is necessary to fulfill the requirements of Vehicle Code section 1685(c). (Vehicle Code section 1685(c) provides that the Director of the Department may establish, through the adoption of regulations, the maximum amount that a qualified private industry partner may charge its customers in providing services under the program.)

Despite the general statement in the rulemaking record supporting the amendment of regulation section 225.45(b)(2), the rulemaking record is missing justification as to why particular added transactions are being authorized with fees “up to \$25” and other particular added transactions are being authorized with fees “up to \$75.” The rulemaking record needs to include a more specific explanation as to how these maximum fees were determined for each of the added transactions. Consequently, in order to satisfy the “Necessity” standard, the rulemaking record in this matter should be augmented to include additional evidence in support of the particular fee amounts chosen for the particular types of added transactions.

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 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.

Regulation section 225.38 – The proposed adoption of new regulation section 225.38 failed to include any “Authority” and “Reference” citations at the end of the section. Appropriate citations will need to be added.

D. INCORRECT PROCEDURES (INCLUDING DEFECTIVE DOCUMENTS)

In addition to the APA substantive issues discussed above, there were also a number of problems relating to APA procedural requirements, including defective documents. Each of these problem areas is discussed below.

1. Underline/Strikeout of Changes in the Originally-Proposed Regulation Text – Government Code section 11346.2, subdivision (a)(3), provides that, when a State agency prepares regulation text for notice and public comment in connection with a 45-day notice, “[t]he agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.” This underline/strikeout format isolates for the public the specific regulation text additions and deletions being made which are subject to public comment. While in this rulemaking the Department generally followed underline/strikeout requirements in connection with its originally-proposed regulation text, there were several instances where the changes to the existing CCR text were not properly shown. The primary instances were the following:

a. In regulation section 225.09(a), the following sentence was added and should have been underlined: “The conditions of the bond shall be incorporated in the REG 866 form.”

b. In regulation section 225.09(b)(3), the following words and phrases were added and should have been underlined: “a substitute vehicle license plate and sticker,” “a substitute vehicle license sticker,” “vehicle registration renewal,” and “NOTE:”. In addition, the second reference to “vehicle” in this subsection is existing text and should not have been underlined.

c. In the reference citations for regulation section 225.09, the following citations were added and should have been underlined: “Sections 995.710 and 995.360, Code of Civil Procedure.”

In addition to these three examples, there were some minor other changes which were not properly shown in underline/strikeout format which OAL will discuss with the Department.

When the Department makes the modified regulation text available to the public pursuant to Government Code Section 11346.8, subdivision (c), and CCR, title 1, section 44, the changes to existing text discussed above should be correctly shown in addition to other modifications being made.

2. Underline/Strikeout of Changes in the Final Regulation Text – CCR, title 1, section 8, pertaining to underline/strikeout of final regulation text submitted to OAL for review and filing with the Secretary of State, provides in part in subsection (b) that “[t]he final text of the regulation shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations.” While the Department generally met underline/strikeout requirements in the final regulation text submitted to OAL, the final regulation text had the same underline/strikeout problems identified above for the originally proposed regulation text. OAL will discuss these underline/strikeout concerns with the Department. These underline/strikeout problems will need to be corrected when the Department resubmits the final regulation text to OAL for review.

3. Rulemaking File Index Closure Date -- Government Code section 11347.3, subdivision (b)(12), requires that a rulemaking file include an index or table of contents, with an affidavit or declaration under penalty of perjury that specifies (among other matters) “the date upon which the record was closed.” In the case of the declaration under penalty of perjury for this BPA Program rulemaking, the record closing date statement reads: “The rulemaking record for the

subject regulations was closed on November 14, 2007.” This closing date appears to be incorrect because the rulemaking record includes an amended Economic and Fiscal Impact Statement (STD. 399) with an Agency Secretary signature date of March 12, 2008 and with a Department of Finance signature date of April 5, 2008. These subsequent dates on a document in the rulemaking record would indicate that the record was actually closed subsequent to November 14, 2007.

4. Final Statement of Reasons – The Final Statement of Reasons as submitted raises several areas of concern and needs a number of revisions in order to fully comply with the requirements of Government Code section 11346.9, subdivision (a). Principally, the “Update to the Initial Statement of Reasons” section needs to be further updated to correct the record for a number of factual and other errors which were contained in the Initial Statement of Reasons. For example, the Initial Statement of Reasons contained miscellaneous errors in citing page numbers within the BPA Handbook, in the identification of the “new transactions” and other changes being made in the BPA Handbook, and in citation of certain CCR subsections. OAL will discuss the specific Initial Statement of Reasons problems with Department staff for their use in correcting the record in the Final Statement of Reasons. Upon the resubmission of this rulemaking to OAL, the Final Statement of Reasons “Update” section will need to be revised to reflect the correction of the Initial Statement of Reasons errors, to explain the new revisions which have been made to the regulation text, and to remedy the “Necessity” concerns discussed above.

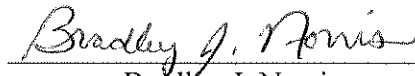
In addition, the “Imposition of Mandate on Local Agencies or School Districts” and “Incorporation by Reference” sections of the Final Statement of Reasons contain wording errors or omissions which need to be corrected. OAL will discuss the specific problems with Department staff.

5. Updated Informative Digest – The Updated Informative Digest as submitted contains several relatively minor factual errors and omissions (such as incomplete descriptions of the regulation amendments being made in regulation sections 225.00, 225.03, and 225.45). Therefore, this document requires revisions in order to fully comply with Government Code section 11346.9, subdivision (b). OAL will discuss these minor problems with Department staff for their use in correcting the Updated Informative Digest upon the resubmission of this rulemaking to OAL.

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: October 10, 2008



Bradley J. Norris
Senior Staff Counsel

FOR: SUSAN LAPSLEY
Director

Original: George Valverde
Copy: Christie Patrick