

**State of California
Office of Administrative Law**

In re:
Department of Motor Vehicles

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Regulatory Action:

Title 13, California Code of Regulations

Government Code Section 11349.3

Adopt sections: 29.01

Amend sections:

Repeal sections:

OAL File No. 2011-0104-01S

This rulemaking action proposes to adopt one section itemizing the Vehicle Code sections the violation of which by a commercial driver the Department of Motor Vehicles (DMV) has determined meets the definition of a “serious traffic [violation]” under Title 49, Code of Federal Regulations, Section 383.51(c). In addition, this action proposes to adopt the disqualification penalties listed in that CFR subsection for a second or third serious traffic violation during a three-year period. Lastly, the action proposes to make similar violations submitted by another state or Canada serious traffic violations in California.

On February 16, 2011, OAL disapproved the proposed regulatory action. This Decision of Disapproval of Regulatory Action explains the reasons for OAL’s action.

DECISION

OAL disapproved the above-referenced regulatory action for the following reasons: failure to comply with the “Necessity”, “Clarity”, and “Consistency” standards of Government Code section 11349; failure to comply with the requirements for incorporation by reference.

DISCUSSION

The adoption of regulations by the DMV must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346). No statute exempts DMV’s rulemaking from APA coverage.

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for

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

A. NECESSITY

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

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

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

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

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons. (Gov. Code, sec. 11346.2(b)). The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a

regulation is needed and “how” this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1)). The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b)). In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

1. The initial statement of reasons submitted with this proposed regulatory action contained only a very general explanation of the need for the changes proposed by this rulemaking. In essence, DMV’s justification in the initial statement of reasons for the specification of 41 separate Vehicle Code sections and subsections as constituting “serious traffic violations” as described in Title 49, Code of Federal Regulations, section 383.51(c) was as follows:

“When identifying serious violations for purposes of disqualifying commercial drivers, the CFR provides tables to illustrate violations and the corresponding period of disqualification. Since the CFR provisions only identify the actual violation, these regulations are necessary to clarify the corresponding Vehicle Code violations.”
[Emphasis added].

This rationale fails to satisfy the “Necessity” standard because it fails to provide an explanation of “why” and “how” each of the 41 Vehicle Code sections corresponds to the Title 49 CFR section 383.51(c) listing of “serious traffic violations.” Title 49 CFR section 383.51(c), left hand column, lists eight categories of “serious traffic violations” ranging from speeding excessively (15 mph over the posted speed limit) to driving a commercial motor vehicle (CMV) without a proper class of commercial driver’s license (CDL) with required endorsements. The initial statement of reasons is silent on how each of the 41 Vehicle Code violations fits within each of the eight federal categories.

The lack of necessity is especially critical for those Vehicle Code sections which do not appear to match the types of violations listed in the CFR. Those Vehicle Code sections as summarized by DMV in the initial statement of reasons include:

“12500(b). Prohibits operating a motorcycle without appropriate endorsement.

12502(b). Requires nonresident commercial drivers to have in their possession a valid medical certificate issued within two years of the date of vehicle operation.

21753. Requires vehicles being passed to yield for the overtaking vehicle.

22406(b). Prohibits trucks, truck tractors, passenger vehicle or bus drawing another vehicle, schoolbus transporting students, farm labor vehicle transporting passengers, a vehicle transporting explosives and trailer busses, from traveling on a highway in excess of 55 miles per hour.

22406.1. Establishes penalties for commercial motor vehicle drivers traveling in excess of a posted speed limit.

36300. Provides that a person, while driving or operating an implement of husbandry incidentally operated or moved over a highway is not required to obtain a driver's license."

Without any necessity to justify the listing of these Vehicle Code sections as "serious traffic violations" as defined in the CFR, their listing may constitute a "Consistency" violation under the APA as well. OAL reserves the right to make this determination on resubmittal of this rulemaking action.

2. Proposed subsection 29.01(a)(2) states:

"(2) Violations submitted by another state **or Canada** shall be considered serious if the state/country submitting the violation designates that the violation is serious pursuant to Section 383.51(c) of Title 49, Code of Federal Regulations." [Emphasis added in bold].

The initial statement reasons provides no necessity for the citation of Canada as the only foreign country for which similar serious traffic violations will be considered as such in California.

Any changes made to the regulations to address the above "Necessity" concerns must be made available to the public pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

B. 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(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.”

1. Proposed section 29.01 violates the “Clarity” standard because it contains key terms or phrases that are undefined, ambiguous or inconsistent with the agency’s description of the intended effect of the regulation.

Proposed section 29.01 provides:

“§29.01 Disqualification of Commercial Drivers.

(a) A commercial driver who commits a second or third serious traffic violation, as described in Section 383.51(c) of Title 49, Code of Federal Regulations, during a three-year period, will be disqualified from driving a commercial vehicle. Violations of the following law are deemed to be serious violations for the purpose of this section:

(1) California Vehicle Code sections: 2800.1, 2800.2, 2800.3, 12500, 12500(a), 12500(b), 12500(c), 12500(d), 12502(a), 12502(b), 12517, 12519(a), 12523(a), 12523.5, 12524(a), 12804.6, 12951(a), 12951(b), 12952, 14603, 15210(p), 15250, 15250(a), 15275, 15275(a), 20006, 21658(a), 21659, 21703, 21704, 21704(a), 21705, 21753, 22406(b), 22406.1, 23103(a), 23103(b), 23104(a), 23104(b), 32002(b), and 36300.

(2) Violations submitted by another state or Canada shall be considered serious if the state/country submitting the violation designates that the violation is serious pursuant to Section 383.51(c) of Title 49, Code of Federal Regulations.”

The word “commits” in proposed section 29.01(a) is undefined and ambiguous because it potentially includes commercial drivers charged with a serious traffic violation as well as those

convicted. In addition, DMV's rulemaking file documents show that DMV intends that the word "commits" mean "convicted." DMV's forty-five day public notice for this rulemaking states:

"Cost Impact on Representative Private Persons or Businesses: This regulation will impact commercial driver license holders who are convicted of a serious driving offense. Once the department is notified of the conviction, the driver will be disqualified from operating a commercial vehicle for a period of time as specified in federal rules. Businesses may be impacted by the disqualification of an employee, however, these regulations only codify the penalties provided by federal regulations." [Emphasis added].

As a result of this ambiguity and inconsistency with DMV's description of the intended effect of the regulation, the language in proposed section 29.01(a) constitutes a presumed "Clarity" violation under Title 1 CCR section 16(a)(1) and (2).

2. Proposed section 29.01(a) also is unclear regarding penalties for a fourth or subsequent serious traffic violation. Section 29.01(a) refers only to "...a second or third serious traffic violation..." Persons directly affected have no way of determining penalties for a fourth or subsequent serious traffic violation from the language in proposed section 29.01(a). This ambiguity constitutes a presumed "Clarity" violation under Title 1 CCR section 16(a)(1).

This language is also inconsistent with the language of 49 CFR section 383.51(c). See "Consistency" discussion below.

3. The words "submitted" and "submitting" in proposed section 29.01(a)(2) are undefined and ambiguous. The regulation is silent on what constitutes "submitting" a similar serious traffic violation by another state or Canada to the DMV. This is a presumed "Clarity" violation under Title 1 CCR sections (a)(1) and (3).

4. The regulation is silent on when the "three-year period" for serious traffic violations is measured from creating uncertainty for those directly affected by the regulation. That uncertainty is compounded by the failure to use the word "conviction" instead of "commits" in the regulation.

Any changes made to the regulations to address the above "Clarity" concerns must be made available to the public pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

C. CONSISTENCY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the "Consistency" standard. (Gov. Code, sec. 11349.1(a)(4)). "Consistency" as defined by Government Code section 11349(d) means "...being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."

The table of penalties set forth in 49 CFR section 383.51(c) includes two columns for a “...third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a [Commercial Motor Vehicle (CMV) or non-CMV]....” [Emphasis added]. Proposed section 29.01(a), however, states, in pertinent part:

“§29.01 Disqualification of Commercial Drivers.

- (a) A commercial driver who commits a second **or third** serious traffic violation, as described in Section 383.51(c) of Title 49, Code of Federal Regulations, during a three-year period, will be disqualified from driving a commercial vehicle.” [Emphasis added in bold].

The language of proposed section 29.01(a) conflicts with the language in 49 CCR section 383.51(c) which explicitly covers a “third or subsequent conviction.” [Emphasis added]. This violates the “Consistency” standard in Government Code section 11349(d).

D. INCORPORATION BY REFERENCE

DMV’s final statement of reasons states that:

“There were no documents incorporated by reference.”

However, by adopting the table of penalties contained in 49 CFR section 383.51(c) for the second and third serious traffic violation committed by a commercial driver in California, the DMV “...makes provisions of another document part of that regulation by reference to the other document.” This meets the definition of incorporation by reference contained in Title 1 CCR section 20. In order to properly incorporate 49 CFR section 383.51(c) by reference, DMV must follow the requirements of Title 1 CCR section 20(c)(1)-(5). DMV failed to do so in this rulemaking.

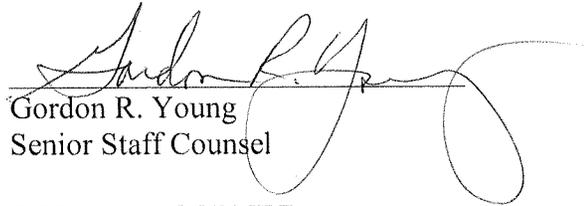
E. ADDITIONAL SUGGESTIONS

1. While not a reason for disapproval, OAL recommends deleting Vehicle Code section 15250 as an “Authority” citation for the proposed regulation. Vehicle Code section 15250 contains no express rulemaking authority for the rulemaking action taken here and is properly limited to a “Reference” citation.
2. While not a reason for disapproval, OAL recommends use of consistent terminology throughout the regulation to improve clarity; i.e., use “serious traffic violations” throughout the regulation instead of “violations” or “serious violations” or “serious.”

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action.

Date: February 23, 2011

A handwritten signature in black ink, appearing to read "Gordon R. Young", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

Gordon R. Young
Senior Staff Counsel

For:

DEBRA M. CORNEZ
Assistant Chief Counsel/Acting Director

Original: George Valverde
Cc: John Urakawa