

**State of California  
Office of Administrative Law**

**In re:**

**Office of the California State Fire  
Marshal**

**Regulatory Action:**

**Title 19, California Code of  
Regulations**

**Amend section: 557.19  
Adopt section: 560.4  
Renumber sections: 560.4, 560.5 and  
560.6, as sections 560.5, 560.6, and  
560.7, respectively.**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2011-0921-01S**

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**DECISION SUMMARY**

On September 21, 2011, the Office of the California State Fire Marshal (OSFM) submitted to the Office of Administrative Law (OAL) the proposed amendment of section 557.19 and the proposed adoption of section 560.4 and renumbering of existing sections 560.4, 560.5, and 560.6, as sections 560.5, 560.6, and 560.7, respectively, for inclusion into Articles 2 and 3 of Chapter 3 of Division 1 of Title 19 of the California Code of Regulations (CCR) regarding vehicle signage and registration for use in portable fire extinguisher inspection, maintenance, and testing services.

On November 2, 2011, OAL notified the OSFM that OAL disapproved the proposed amended and adopted regulations for failure to comply with specified standards and procedures of the California Administrative Procedure Act (APA). The reasons for the disapproval are summarized below:

A. the proposed regulations fail to comply with the clarity standard of Government Code section 11349.1(a)(3) and Title 1 CCR section 16(a);

B. the proposed regulations fail to comply with the necessity standard of Government Code section 11349.1(a)(1) and Title 1 CCR section 10(b); and

C. the agency failed to comply with procedural requirements of the Administrative Procedure Act and its implementing regulations regarding:

(1) the failure to include in the Final Statement of Reasons summaries of and responses to all public comments pursuant to Government Code section 11346.9(a)(3); and

(2) the failure to include in the Notice of Proposed Action, an adequate statement regarding the effect on small business of the proposed amended and adopted regulations pursuant to Title 1 CCR section 4(b).

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

## **BACKGROUND**

The OSFM took this rulemaking action because it has learned of fraudulent business practices by portable fire extinguisher servicing companies wherein company representatives misrepresent to potential customers that their company is affiliated with a local fire department or otherwise misrepresent themselves or the company they represent. As a solution to this practice, the OSFM proposed the amendment and adoption of regulations in Title 19 of the CCR, as specified above, to require that both sides of vehicles used in portable fire extinguisher servicing identify the business name, license number, and telephone number of the company, and that all such vehicles be registered and licensed with the Department of Motor Vehicles as “commercial vehicles” pursuant to California Vehicle Code section 260(a).

## **DISCUSSION**

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

## A. 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. Government Code section 11340(b). Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Section 11349(c) of the Government Code defines "clarity" to mean "...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them." Title 1 CCR section 16 states in pertinent part that:

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

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

(1) ....

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

Proposed new section 560.4 states: "Every concern licensed under this chapter shall display the business name, concern license number and business phone number on each side of each service vehicle...." The "chapter" referred to by this proposed regulation is Chapter 3 "Fire Extinguishers." Chapter 3 includes section 595.5 "Fire Extinguisher License Types." Subdivision (a) of that section lists the types of licenses and includes subparagraph (7), which provides as follows: "Type L. (Limited). A class of license, limited to public or private entities that are not engaged in the business of servicing fire extinguishers and which only maintain their own portable fire extinguishers...."

Type L licensees (Los Angeles Unified School District, the University of Southern California, and Stanford University) commented on the proposed regulations and asked to be specifically excused from compliance with the new requirements because they are not engaged in the business of servicing fire extinguishers and only maintain their own portable fire extinguishers. The OFSM responded to these comments in the Final Statement of Reasons and stated that these regulations were intended for private service company vehicles, not vehicles with exempt license plates. Notwithstanding this statement in the OFSM's Final Statement of Reasons, no changes were made to the actual text of the proposed regulation which continued to state, at the time of submission to OAL, that: "Every concern licensed under this chapter shall display the business name, concern license number and business phone number on each side of each service vehicle."

## B. NECESSITY.

OAL must review regulations for compliance with the necessity standard of the APA, in accordance with Government Code section 11349.1(a)(1). Section 11349(a) provides that “necessity” means that the record of the rulemaking proceeding demonstrates by substantial evidence the need for the 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. Necessity is explained primarily in the agency’s Initial Statement of Reasons (“ISR”). Section 11346.2(b)(1) requires that the ISR 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 for which it is proposed. Title 1 CCR section 10(b) requires that the rulemaking record include a statement of the specific purpose of each adoption, amendment, or repeal and information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.

Proposed amended section 557.19(d) defines the term “service vehicle” and includes a requirement that a service vehicle must be properly registered and licensed by the California Department of Motor Vehicles in accordance with California Vehicle Code section 260(a) as a “commercial vehicle.” None of the documents in the record (the Notice of Proposed Rulemaking/Informative Digest, the Initial Statement of Reasons, and the Final Statement of Reasons/Summary and Response to Public Comments) contains a statement of the specific purpose of this provision or the rationale for the determination by the OSFM that the provision is reasonably necessary to carry out the purpose for which it is proposed.

Additionally, due to the absence of an explanation of the purpose and necessity of this provision, OAL was unable to determine whether the OFSM has the authority to require licensing and registration of vehicles under California Vehicle Code section 260(a). That section provides that: “A ‘commercial vehicle’ is a motor vehicle of a type required to be registered under this code....” The case of *California Career Schools v. Department of Motor Vehicles* (2004) 120 Cal.App.4<sup>th</sup> 10, indicates that a “commercial vehicle,” for purposes of California Vehicle Code section 260(a), does not mean that the vehicle is merely used in business but rather is a term that refers to the design of the vehicle. It is not clear that the vehicles which the OSFM is requiring to be registered under Vehicle Code section 260(a) are also vehicles that are of a type required to be registered under the Vehicle Code. Moreover, the rulemaking record contains comments from commenters which indicate that vehicles used in fire extinguisher servicing sometimes include the private vehicles of company employees. These vehicles may not be of a type required to be registered under the Vehicle Code. Upon resubmission, the OSFM must address this issue of authority in the rulemaking record for OAL’s review if the OFSM elects to continue to require registration and licensing of service vehicles in accordance with California Vehicle Code section 260(a).

## C. PROCEDURAL REQUIREMENTS OF THE APA.

**(1) The OSFM failed to include in its Final Statement of Reasons summaries and responses to the following public comments and to explain how the proposed regulation was changed to accommodate each objection or recommendation, or its reasons for making no change, pursuant to Government Code section 11346.9(a)(3).**

(a) Commenter #2, Cal-State Fire & Safety Equipment Co., stated that requiring service vehicles to be registered as “commercial” is not practical or necessary and asked that the requirement be removed. The comment was not summarized or responded to by the OSFM. OSFM must do so in an amended or substitute Final Statement of Reasons.

(b) Commenter #2, Cal-State Fire & Safety Equipment Co., and Commenter #4, Unknown, requested that instead of requiring the marking of vehicles, the OSFM should instead require that service technicians wear identifying clothing or a service uniform which display the same information. The comment was responded to by OSFM as follows: “The alternative of requiring service technicians to wear a standard uniform statewide would be unmanageable because of the diversity of the state.” The commenters did not recommend a standard, state-wide uniform, but rather identifying clothing or a service uniform which displayed the same information as was otherwise to be marked on service vehicles. Such clothing or uniforms would or could, presumably, look different, because they would display different company information. It is unclear what is meant by the concept of “the diversity of the state” in the context of these comments. In an amended or substitute Final Statement of Reasons, the OSFM must summarize these comments and include the reason(s) for rejecting the proposed alternatives.

(c) Commenter #8, Lariat, suggested, as an alternative to requiring vehicle marking, that service technicians be required to wear a clearly marked identification badge. The OSFM did not summarize or respond to this comment but must do so in an amended or substitute Final Statement of Reasons.

(d) Commenters #s 9 and 12, of the Los Angeles Unified School District, commented and requested that the proposed requirements not apply to “Limited” license or L Type licensees. The OSFM’s summaries of these comments do not specifically acknowledge the “Limited” license or L Type license bases of these commenters’ comments. The OSFM’s responses to these comments do not explain how the regulation was changed to accommodate the comment or provide the agency’s reasons for making no change, but, rather, address a different issue (exemption of vehicles with exempt license plates). The OSFM must summarize and respond to

the “Limited” license or L Type license comments of these commenters in an amended or substitute Final Statement of Reasons.

(e) Commenter #11, University of Southern California, inquired as to whether the proposed regulations would apply to Type L licensees. The OSFM’s response to the inquiry was that: “These regulations do not apply to vehicle[s] with exempt license plates. These regulations are intended for private service company vehicles not vehicle[s] with exempt license plates.” As with the commenters discussed in (d) above, OSFM’s response addresses a different issue (exemption of vehicles with exempt license plates) and does not address the concern of a private entity, such as the University of Southern California, whose vehicles may not carry exempt license plates. Pursuant to Title 19 CCR section 595.5(a)(7), Type L licensees may include both public and private entities.

**(2) The OSFM failed to include in its notice of proposed rulemaking an adequate statement of the reason(s) for its determination that the proposed adoption and amendment of regulations will not affect small business pursuant to Title 1 CCR section 4(b).**

Title 1 CCR section 4(a) requires that an agency’s notice of proposed adoption or amendment of regulations include a determination as to whether the adoption or amendment affects small business. Title 1 CCR section 4(b) requires that an agency’s notice of proposed adoption or amendment of regulations include a brief explanation of the reasons for an agency’s determination that its regulation does not affect small business.

In the OSFM’s notice in this action, the OSFM states: “There is no effect on small business because small businesses are not involved in the enforcement of vehicle markings for these fire extinguisher companies.” The OSFM’s notice statement is wholly inadequate because it does not comply with Title 1 CCR section 4(b). Section 4(b) concerns whether *compliance* with the regulation by regulated entities affects small business and not whether *enforcement* of the regulation by regulated entities affects small businesses. Small businesses do not enforce a state agency’s regulations. An agency’s costs of enforcement of its regulation are a fiscal cost issue which must be disclosed in a different section of the agency’s notice of proposed rulemaking pursuant to Government Code section 11346.5(a)(6).

Any re-noticing by the OSFM of these regulations pursuant to Government Code section 11346.8(c) must include a statement that complies with Title 1 CCR section 4.

**Miscellaneous.**

Proposed section 560.4 is titled “Vehicle Marking” and deals exclusively with the marking of vehicles used in servicing portable fire extinguishers. California Health and Safety Code section 13170 provides as follows:

Any advertisement of the servicing, charging, or testing of portable fire extinguishers constitutes prima facie evidence that the premises, business, building, room, shop, store or establishment in or upon which it appears, or to which it refers, is a separate place of business location.

The cited Health and Safety Code section addresses only advertising used on fixed, real-property business locations and is not an applicable Reference Citation for proposed section 560.4 of Title 19 of the CCR, because the latter provision does not implement, interpret, or make more specific the cited Health and Safety Code section pursuant to Government Code section 11349(e) and Title 1 CCR section 14(b).

### CONCLUSION

For the foregoing reasons, OAL disapproves the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the OFSM may resubmit revised regulations within 120 days of the OFSM's receipt of this Decision of Disapproval. If the OSFM makes other than non-substantial or solely grammatical changes in revising the regulations, the Department shall make all changes which are sufficiently related to the original text available for at least 15 days for public comment pursuant to Government Code section 11346.8(c).

Date: November 9, 2011

  
Dale Mentink, Senior Staff Counsel

Original: Tonya L. Hoover  
Copy: Diane K. Arend