

TITLE 16
BUREAU OF AUTOMOTIVE REPAIR

NOTICE OF PROPOSED REGULATORY ACTION CONCERNING
SMOG CHECK EQUIPMENT SECURITY AND FRAUD PREVENTION

NOTICE IS HEREBY GIVEN that the Department of Consumer Affairs, Bureau of Automotive Repair (hereinafter “Bureau” or “BAR”) is proposing to take the actions described in the Informative Digest below, after considering all comments, objections, and recommendations regarding the proposed action.

PUBLIC HEARING

The Bureau has not scheduled a public hearing on this proposed action. However, the Bureau will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days prior to the close of the written comment period. A hearing may be requested by making such request in writing addressed to the individuals listed under “Contact Person” in this Notice.

WRITTEN COMMENT PERIOD

Written comments relevant to the proposed regulatory action, including those sent by mail, facsimile, or e-mail to the addresses listed under Contact Person in this Notice, to be considered by the Bureau, must be received by the Bureau at its office no later than **Monday, November 8, 2021**, or must be received by the Bureau at any requested hearing, if one is held.

AUTHORITY AND REFERENCE

Pursuant to the authority vested by sections 9882, and 9884.9(b) of the Business and Professions Code (BPC) and sections 44002, 44016, and 44030 of the Health and Safety Code (HSC), to implement, interpret, or make specific HSC sections 44002, 44003, 44005, 44010, 44010.5, 44011, 44011.3, 44012, 44012.1, 44013, 44014, 44014.2, 44014.5, 44014.7, 44015, 44016, 44030, 44032, 44033, 44035, 44036, 44037, 44045.5, 44050, and 44052, the Bureau is considering amending sections 3340.15, 3340.41, and 3340.45 of article 5.5 and section 3394.26 of article 11.1 of chapter 1 of division 33 of title 16 of the California Code of Regulations (CCR).

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The primary purpose of this proposal is to add biometric security and remote access (e.g., web camera) solutions to a licensed Smog Check inspector’s use of the BAR-97 Emissions Inspection System (EIS) and On-Board Diagnostic Inspection System (OIS). The biometric portion will prevent the unauthorized use of the Smog Check inspection equipment and positively connect the inspector to the inspection. The remote access portion will allow the Bureau to perform a virtual hands-on inspection for purposes of observing the inspection process. The Bureau is proposing the following changes:

Amend section 3340.15, Article 5.5, Chapter 1, Division 33 of Title 16 of the CCR:

The proposed regulation would require that stations allow BAR personnel access to the station

whenever Smog Check inspections are being performed, even if the inspections occur outside of normal business hours and when the business is otherwise not open to the public.

Amend section 3340.41, Article 5.5, Chapter 1, Division 33 of Title 16 of the CCR:

The proposed regulation would require that Smog Check inspectors allow BAR personnel or BAR designated staff access to intervene during the inspection process remotely, via the internet, when prompted by BAR-OIS software (currently, not capable with the BAR-97 EIS). This will give BAR the ability to communicate directly with the inspector, see what the inspector sees, and ensure the inspection is performed properly.

The proposal also requires use of a biometric device when using either the BAR-97 EIS or BAR-OIS. The biometric device will prevent password sharing and unauthorized use of the BAR-97 EIS or BAR-OIS and verify the identity of the person performing the inspection. In addition, the proposal adds text to make it illegal to possess or use, at a Smog Check station, an electronic device or data source that can be used to falsify or manipulate inspection data. Electronic data sources are used to generate OBD inspection or other data in lieu of using an actual vehicle.

The proposal will also add two new forms incorporated by reference for use by BAR in conjunction with the broader biometric device implementation plan. These forms – the Notice on Collection of Personal Biometric Information and Its Use (New 1/2021), and the Biometric Data Collection Consent Statement (New 1/2021) will inform participants of the required information under the Information Practices Act and will provide participants with information on how their biometric data may be used.

Amend section 3340.45, Article 5.5, Chapter 1, Division 33 of Title 16 of the CCR:

The proposed regulation incorporates the revised Smog Check Manual to reflect the most current version.

Amend section 3394.26, Article 11.1, Chapter 1, Division 33 of Title 16 of the CCR:

The proposal adds administrative fines that BAR may apply when inspectors do not permit BAR remote access to inspection equipment and/or possess an electronic data source.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATION

This proposal seeks to better protect public health and safety and protect consumers by further preventing fraudulent Smog Check activity. As a result of these regulations, more vehicles with faulty emission controls will be repaired or retired from on-road use. Fewer polluting vehicles directly improves air quality. These proposed regulations will also protect against financial losses resulting from consumers purchasing used cars that have falsely passed a Smog Check inspection only to later find out that the vehicle needs thousands of dollars of repairs in order to pass inspection.

CONSISTENCY AND COMPATIBILITY WITH EXISTING STATE REGULATIONS

During the process of developing these regulations and amendments, BAR has conducted a search of any similar regulations on this topic and has concluded that these regulations are neither duplicative, nor inconsistent, nor incompatible with existing state regulations.

DOCUMENTS INCORPORATED BY REFERENCE

- 1) Smog Check Manual, dated January 2021;
- 2) Notice on Collection of Personal Biometric Information and Its Use (New 1/2021);

3) Biometric Data Collection Consent Statement (New 1/2021).

DISCLOSURES REGARDING THE PROPOSED ACTION

MANDATED BY FEDERAL LAW OR REGULATIONS:

No.

LOCAL MANDATE:

None.

FISCAL IMPACT ESTIMATES

COSTS TO ANY LOCAL AGENCY OR SCHOOL DISTRICT FOR WHICH GOVERNMENT CODE SECTIONS 17500-17630 REQUIRES REIMBURSEMENT:

None.

FISCAL IMPACT ON PUBLIC AGENCIES INCLUDING COSTS OR SAVINGS TO STATE AGENCIES AND COSTS/SAVINGS IN FEDERAL FUNDING TO THE STATE:

The Bureau anticipates that the proposed regulatory action will be cost-neutral and that implementation, administration, and enforcement of the proposed changes will be fully absorbed by existing BAR personnel working within existing resources. It is difficult, however, to estimate the impact on the Bureau's enforcement-related activities. As such, the Bureau's future enforcement-related costs are unknown at this time.

This proposal will result in no costs or savings in federal funding to the state.

NONDISCRETIONARY COSTS/SAVINGS TO LOCAL AGENCIES:

None.

EFFECT ON HOUSING COSTS:

None.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE:

None.

RESULTS OF ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The Bureau has determined that this regulatory proposal will have a minimal impact, if any, on the creation of jobs or new businesses or the elimination of jobs or existing businesses in the State of California.

In addition, the proposed action is not expected to expand or reduce existing business.

For more on benefits of the regulatory proposal, see above in this notice.

COST IMPACT ON REPRESENTATIVE PRIVATE PERSON OR BUSINESS:

A representative private person or business may incur costs in reasonable compliance with the proposed action as more fully discussed under the 'Effect on Small Business' section below in this Notice.

BUSINESS REPORTING REQUIREMENTS

None.

EFFECT ON SMALL BUSINESS

BAR has determined that the proposed regulatory action will not have a significant effect on small businesses. This determination is based on BAR research that indicates an average cost of approximately \$550 for each EIS- and OIS-compatible device (\$400 per palm vein scanner and \$150 per external web camera). This one-time equipment cost should be absorbable by California businesses, or passed on to consumers via a negligible increase to the station's Smog Check inspection fee.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Bureau must determine that no reasonable alternative that it considered or that has otherwise been identified and brought to the attention of the Bureau would be more effective in carrying out the purpose for which it was proposed or would be as effective and less burdensome to affected private persons than the adopted regulation or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Any interested person may present statements orally or in writing relevant to the above determinations at any requested hearing.

CONTACT PERSON

Inquiries or comments concerning the proposed administrative action may be addressed to:

Holly O'Connor
Bureau of Automotive Repair
10949 North Mather Blvd.
Rancho Cordova, CA 95670
Telephone: (916) 403-8627
E-mail: Holly.OConnor@dca.ca.gov

The backup contact person is:

Lusine Sarkisyan
Bureau of Automotive Repair
10949 North Mather Blvd.
Rancho Cordova, CA 95670
Telephone: (916) 403-8560
E-mail: Lusine.Sarkisyan@dca.ca.gov

INITIAL STATEMENT OF REASONS AND INFORMATION

BAR has prepared an Initial Statement of Reasons of the proposed action and has available all the information upon which the proposal is based.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations, any document incorporated by reference, the Initial Statement of Reasons, and all of the information upon which the proposal is based, may be obtained upon request from the Bureau of Automotive Repair at 10949 North Mather Boulevard, Rancho Cordova, California 95670.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding any requested hearing and considering all timely and relevant comments received, the Bureau may adopt the proposed regulations substantially as described in this notice. If the Bureau makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Bureau adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Holly O'Connor at the address indicated above. The Bureau will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY AND LOCATION OF THE RULEMAKING FILE AND THE FINAL STATEMENT OF REASONS

All the information upon which the proposed regulations are based is contained in the rulemaking file, which is available for public inspection by contacting the person named above.

You may obtain a copy of the Final Statement of Reasons, once it has been prepared, by making a written request to the contact person named above, or by accessing the website listed below.

WEBSITE ACCESS

Materials regarding this proposal can also be found on BAR's Web site at [https://www.bar.ca.gov/About BAR/Regulatory Actions.aspx](https://www.bar.ca.gov/About%20BAR/Regulatory%20Actions.aspx).