

**TITLE 16. PROFESSIONAL AND VOCATIONAL REGULATIONS
DIVISION 33. BUREAU OF AUTOMOTIVE REPAIR**

FINAL STATEMENT OF REASONS

Hearing Date: November 12, 2021.

Subject Matter of Proposed Regulations: Smog Check Equipment Security and Fraud Prevention

Sections Affected: §3340.15, §3340.41, and §3340.45 of Article 5.5, and §3394.26 of Article 11.1 of Chapter 1, Division 33, Title 16, California Code of Regulations.

UPDATED INFORMATION

The Informative Digest and Initial Statement of Reasons are included in the rulemaking file and incorporated as though set forth herein.

The Bureau noticed the regulation proposal on September 24, 2021, and gave the public forty-five (45) days to provide public comment, ending on November 8, 2021. The rulemaking was originally submitted to the Office of Administrative Law (OAL) on December 31, 2021 (OAL file number 2021-1231-01S).

After discussion with OAL, further text clarification was requested. The Bureau withdrew the file on February 11, 2022, to edit the final text. On April 15, 2022, the Bureau issued a 15-day notice of availability of modified text containing the changes discussed below, and the comment period closed on May 2, 2022. The Bureau received two comments during this period. Comments from the original and modified text comment periods are discussed below.

For the reasons discussed below, the Bureau modified the proposed regulatory text as follows:

1. Section 3340.41(f)
 - a. Participation in BAR's biometric data system is an eligibility requirement for Smog Check Inspectors. Smog Check Inspectors shall have their biometric data collected and identity verified at a BAR field office or other BAR-designated facility during a BAR station visit prior to biometric use during inspections.

This edit was made to provide the Bureau the flexibility regarding locations where the collection and verification of identity may occur. The Bureau currently has two field offices without a building so such flexibility is necessary. With that change made, a specific callout to allow enrollment during a Bureau station visit is no longer necessary.

- b. Upon proven incompatibility with the biometric system, if, at the time of enrollment, the biometric system is unable to collect sufficient data necessary to create a uniquely identifiable profile from both hands, BAR may shall allow access to the BAR-97 EIS or BAR-OIS using a inspector's license number and BAR-assigned access code.

This edit was made to clarify circumstances under which inspectors would be granted the ability to access the OIS or EIS without using the biometric system for reasons of incompatibility with the biometric system. (Post modified text, the “BAR” shown in italicized strikeout, above, was removed from the EIS or OIS, in response to comments, which are discussed below.)

The Bureau removed “inspector’s license number” because it is always entered whether or not biometric is used and is not germane to this discussion.

- c. If the Bureau determines that the reason for which the uniquely identifiable profile could not be collected is temporary, the Bureau shall establish a 30-day window during which the inspector may access the BAR-EIS or BAR-OIS using a BAR-assigned access code, after the conclusion of which the inspector would need to return to the BAR field office or other BAR-designated facility to enroll, which shall include the establishment of another 30-day window, if the biometric system is unable to collect sufficient data necessary to create a uniquely identifiable profile from both hands. If, after enrollment, an inspector encounters circumstances where the biometric scanner is unable to collect the data required to permit them to perform an inspection, the inspector shall return to the BAR field office or other BAR-designated facility for enrollment based on the changed circumstances.

The text was added to provide the Bureau the flexibility to issue temporary biometric security exemptions, where appropriate, and clarifies the reasons for which inspectors may be granted temporary exemptions. This text was also added to explain the process by which temporary exemptions are granted, extended to another 30-day window if necessary, and ultimately resolved. The text also clarifies where these actions occur and what is the process for resolving circumstances when an inspector that previously had a working scan is no longer be able to access the inspection equipment using the biometric system. (Post modified text, the “BAR” shown in italicized strikeout, above, was removed from the EIS or OIS, in response to comments, which are discussed below.)

2. Section 3340.41(i)(1)

- a. Enrollment at a BAR field office or other a BAR-designated licensed facility for current licensees shall occur on or after begin on the effective date of the regulation. BAR will inform Smog Check inspectors of the mandatory enrollment requirement and date at least 30 days prior to the mandatory enrollment date of the enrollment start date at least 30 days prior to that date. The mandatory enrollment date shall be at least 30 calendar days after the effective date of the regulation.

This text explains enrollment shall begin on the effective date of the regulation. This gives inspectors an exact beginning date for enrollment, rather than stating enrollment may start on or after the effective date. This still states that the Bureau must let inspectors know of the enrollment start date at least 30-days prior; however, the regulatory change makes the language more clear.

- b. Smog Check inspectors licensed after the effective date of the regulation shall enroll as outlined in subdivision (f) prior to being allowed to performing any Smog Check inspections before or with the issuance of an access code pursuant to Section 1.4.0 of the Smog Check Manual described in section 3340.45. Biometric use in lieu of a BAR-assigned access code shall be mandatory no earlier than October 1, 2022, except as provided in subdivision (f). BAR will inform Smog Check inspectors of the mandatory use date at least 30 days prior to the start date.

For clarity, the provision “as outlined in subdivision (f)” was added to specify the enrollment process to be followed. This further explains that inspectors who become licensed after the effective date of the regulation may not perform inspections prior to biometric enrollment.

“Biometric use in lieu of a BAR-assigned access code shall be mandatory no earlier than October 1, 2022, except as provided in subdivision (f)” was added to specify that mandatory enrollment and biometric equipment usage shall not be required prior to October 1, 2022, and to clarify, as provided in subdivision (f), that if an inspector’s uniquely identifiable profile could not be collected, they may use the access code for 30-days.

Similar to language stating that BAR must let inspectors know of the enrollment start date at least 30-days prior, this lets inspectors know of the mandatory biometric device use date at least 30 days prior to that start date.

Local Mandate

A mandate is not imposed on local agencies or school districts.

Small Business Impact

The Bureau is unaware of the number of potential small businesses that would be impacted by this regulatory proposal.

Economic Impact Assessment

The Bureau has made an initial determination that the proposed regulatory revision will not have a significant adverse impact on businesses, including small businesses, and will not impact the ability of California businesses to compete with businesses in other states.

Fiscal Impact

The regulations result in a fiscal impact to the state as follows:

BAR IT Hardware: BAR will need to purchase additional laptop computers, cameras, and development kits with one-time costs of approximately \$125,000. Any future IT hardware purchases will be included in periodic updates and costs are unknown at this time.

BAR IT Software: BAR’s existing IT maintenance contract provider will update the current software systems to include biometric compatibility through routine quarterly updates. BAR estimates the biometric compatibility enhancement time-work hours will take approximately 1,200 hours with estimated one-time costs of \$400,000, which will be absorbed within the existing maintenance contract.

Biometric Enrollment and Consent Workload: BAR indicates a Program Representative I will take approximately 15 minutes to collect an individual's biometric data and consent of enrollment with costs of approximately \$20 per licensee.

BAR anticipates approximately 5,887 Inspectors will be enrolled in each of the first two years of implementation and 495 per year annually thereafter, which would result in costs as follows:

Bureau of Automotive Repair Biometric Workload												
Biometric Registration		Years Ongoing										Total
		1	2	3	4	5	6	7	8	9	10	
Enrollment and Consent Per Year	Various	5,887	5,887	495	495	495	495	495	495	495	495	15,734
Enrollment and Consent Workload (PR I - 15 min)	\$20	\$116,268	\$116,268	\$9,776	\$9,776	\$9,776	\$9,776	\$9,776	\$9,776	\$9,776	\$9,776	\$310,747
Total Costs:		\$116,268	\$116,268	\$9,776	\$9,776	\$9,776	\$9,776	\$9,776	\$9,776	\$9,776	\$9,776	\$310,747

*Program Representative I - approximately \$80 per hour

Enforcement-Related: While the regulations are intended to deter unlawful and fraudulent activity, it is difficult to estimate the impact to BAR's enforcement-related activities. BAR's future enforcement-related costs are unknown at this time.

To the extent the regulations reduce the total number of future fraudulent inspections cases adjudicated in the state annually, BAR's investigation, Attorney General (AG), and Office of Administrative Hearing (OAH) costs could be reduced.

Alternatively, the regulations could result in an increase in BAR identifying violations, which would increase enforcement-related costs.

As a result, BAR cannot provide an estimate of enforcement-related costs at this time.

Citation and Fines: Failure to comply with the regulations could result in a citation and fines from \$1,000 to \$5,000 per violation, which would help to offset any enforcement-related costs.

Anticipated Benefits of this Proposal

This regulatory proposal will improve consumer protection afforded by the enhanced security measures preventing fraudulent inspection of used cars for sale with costly to repair faults. This proposal will also improve air quality when faulty vehicles are identified by proper inspection so that the vehicle will get repaired to reduce emissions.

Consideration of Alternatives

No reasonable alternative to the regulatory proposal was found to be either more effective in carrying out the purpose for which the action is proposed, or as effective and less burdensome in achieving the purposes of the regulation.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

Alternative 1: The Bureau considered fingerprint readers. This alternative was rejected because fingerprint readers were found to be easily fooled with a printed fingerprint image used in place of a real finger. In addition, the fingerprint readers tested by BAR were affected by sunlight which blocks proper usage. As discussed under “Specific Technologies or Equipment” below, fingerprint readers were not “equally effective” in achieving the security sought by this regulation.

Alternative 2: The Bureau considered facial recognition cameras. This alternative was rejected because accurate facial recognition required use of an Intel Realsense camera which did not perform well in poor lighting conditions and would add unnecessary expense caused by required replacement of the BAR-OIS and BAR-97 EIS computers with a model containing an imbedded camera. A computer with built-in facial recognition camera starts at \$549. As discussed under “Specific Technologies or Equipment” below, facial recognition cameras were not “equally effective” in achieving the security sought by this regulation nor were they less burdensome due to the costs and downtime required.

Alternative 3: The Bureau considered multifactor authentication; however, this lacked positive user identification during initial enrollment. For example, electronically signing up for an account then entering a token would not allow BAR to identify the user by viewing a government-issued ID. This alternative was not “equally effective” in achieving the security sought by this regulation. Multifactor authentication software licenses would cost approximately \$328,032 per year.

Alternative 4: Pursuant to Gov. Code, § 11346.2 (b)(4)(A), the Bureau considered a performance based alternative where inspectors would be allowed to use any off-the-shelf biometric technology. This alternative was found to be not feasible because BAR would have to prove every available technology performed with a high degree of accuracy. This was also found to be not feasible due to the cost of integrating an unknown number of technologies with the existing BAR-OIS software. Ultimately, this solution would continue to fail to meet BAR’s policy goals of enhanced authentication and security.

Alternative 5: The Bureau considered taking no action. This alternative was rejected because it would expose consumers to illegal and unethical practices and prevent BAR from achieving the emissions-reductions goals of the Smog Check Program.

Objections or Recommendations/Responses

During the 45-day comment period, the Bureau received comments regarding the proposed action from Thomas Bogue on September 25, 2021; M. Najafi on September 28, 2021; and William Hooper on November 8, 2021.

During the 15-day modified text comment period, the Bureau received comments from Mario Salas on April 15th, 2022 and Thomas Bogue on April 16th, 2022.

Summary of Comments Received During the 45-day Notice Period

The proposed text was made available to the public for comment from September 24, 2021 to November 8, 2021. The Bureau received three requests for a hearing, and the hearing was held on November 12, 2021. No comments were received during the hearing.

The Bureau elected not to change the proposed regulation based on the comments received during the 45-day comment period. The Bureau's summary of and responses to the comments are presented below. Note: comments are in italics.

Comment 1: Thomas Bogue, September 25, 2021

Who is going to pay for and maintain this equipment? What happens when equipment quits functioning, does emission testing become inoperable?

Reply:

The Smog Check stations will pay for and maintain the equipment. If the equipment becomes inoperable, the Smog Check station may choose to have it repaired or replaced.

Is the Department of Consumer Affairs and Bureau of Automotive Repair's goal to make private emission testing so difficult, expensive, time consuming and complicated Independent Shops no longer will perform inspections, as you see more are dropping out of the program all together, and therefore the State will become the only testing facilities?

Reply:

The department's goal is not to discourage independent shops from participating, rather it is to ensure the integrity of the Smog Check Program and also to level the playing field for shops and inspectors adhering to the goals of the Smog Check Program.

Unlicensed activity and fraudulent inspections are both significant problems in the Smog Check Program. When station and inspectors engage in such behavior, they not only reduce the effectiveness of the program, but also divert business from stations trying to do legitimate inspections because consumers with malfunctioning vehicles tend to seek out stations that produce lenient test results. The biometric security prevents unlicensed activities and makes it easier to hold stations and inspectors accountable when they choose fraudulent behavior. By addressing these issues, BAR helps ensure that inspections get funneled to stations and inspectors playing by the rules.

In response to the claim that the biometric device makes it more difficult to perform an inspection, this is not true. Currently, inspectors must enter passwords at the beginning and end of inspections. As data security measures forced increased complexity of passwords, it takes more time for inspectors to enter their passwords, including re-entry when passwords are entered incorrectly. The biometric scan, by comparison, is quick and easy and takes less time. Further, the Bureau is committed to making the enrollment process convenient and minimally burdensome for participants, as outlined in the Initial Statement of Reasons for this rulemaking. The increased complexity of the biometric system outlined in this rulemaking is needed for public protection. Biometric use will help prevent fraudulent and unlicensed activity.

Will the State have the same requirements as imposed on the Independents?

Reply:

Yes, the Referee stations will be subject to the same requirements as independent stations.

Considering how few 1995 and older vehicles are still on the road, why not instead exempt 1995 and older vehicles as 1996 and newer vehicles from my understanding are nearly impossible for the deviant shops to cheat?

Reply:

Per the 2020 Smog Check Performance Report (see Underlying Data), it is necessary to continue inspecting older model year vehicles since “Older vehicles, while a smaller percentage of the fleet, continue to contribute disproportionately to overall smog-forming emissions of ROG + NOx”. Inspections for this population of vehicles is essential for meeting the state’s clean air goals as described in the Initial Statement of Reasons for this rulemaking.

Regarding the inability of shops and inspectors to cheat during inspections of newer vehicles, the commenter’s understanding is incorrect. The Bureau is currently confronting significant issues with Smog Check fraud during inspections of newer vehicles due to the development and prevalence of electronic devices developed specifically to communicate erroneous OBD data to the BAR-OIS or BAR-97 EIS during inspection. The biometric security device is being implemented to specifically address this problem.

Comment 2: M. Najafi, September 28, 2021

Hi, I’ve been a smog tech for 20 years, a master auto tech for 30 years and I strongly oppose this proposal.

Bar proposal for excessive security measures appears to be redundant, unnecessary and a cover for some other agenda such as making the job of Bar inspectors easier as they mention this in the proposal.. Technicians and shop staff should not feel that they are entering a top-secret government facility when going to work. This is like supermarkets hand searching everybody at the exit door to catch a very few shoplifters.

*Bar claims currently only the username and password can identify the technicians which is not enough. That’s not true. Technician also **sign** the inspection report which makes them the ultimate responsible party for the test. So Bar’s argument that technicians can claim their password was lost or stolen is completely baseless because the technician has also **signed and dated** the inspection report.*

Reply:

The commenter raises concerns about the level of oversight proposed by this rulemaking. The Bureau has developed this rulemaking to limit the amount of oversight required to prevent known fraud. For example, remote access under this proposed rulemaking is not continuous, but will only be used upon the inspector allowing BAR access during the testing process.

The commenter claims that introduction of the biometric security is redundant for existing passwords and signatures currently required of an inspector during a Smog Check inspection. This is not true. The biometric security would replace these requirements.

In the Bureau's experience, the biometric security measures proposed in this rulemaking are necessary because unlicensed activity is unaffected by the existing security measures, as some licensed inspectors will share their security passwords with unlicensed inspectors, thus allowing them to perform fraudulent inspections while the licensed inspector whose password they used can claim to be unaware of the fraud occurring, that they were a victim of someone having stolen their password. This is regularly claimed in administrative hearings against stations and inspectors who performed fraud. Further, the signature blocks on vehicle inspection reports for fraudulent inspections are usually blank or false. The biometric security addresses these concerns by identifying the inspector performing the inspection, thus preventing unlicensed activity and tying individuals to fraudulent inspections.

Verifying licensed inspectors are performing the inspections is needed for public protection. Biometric use will help prevent fraudulent unlicensed activity. Signing an inspection report does not prevent an unlicensed person from performing the inspection because the signature can be forged, and because the signature is only required after the inspection is completed. The biometric scan will be required at the beginning and end of inspection to ensure the licensed inspector started and completed the inspection.

Bar claims some tests are done outside of the shop business hours behind closed doors preventing the Bar staff from doing their investigation. Well simply program the machines not to perform any tests outside of the business hours, OR, invalidate any certificate issued outside of business hours set by the Bar.

Reply:

Many stations have a legitimate business need to inspect after typical business hours. For example, some fleet stations inspect vehicles at night to prepare vehicles for sale during business hours. This is also true for other high-volume used car operations. For this reason, it would also be difficult to choose and unclear whether the Bureau has the authority to mandate a single set of business hours. It would also be problematic to outright prohibit the use of testing equipment outside of those set hours.

Bar already has a program embedded into the OIS that detects the use of "clean plugging" devices, flags those vehicles and requires them to be tested by the referee.

Installation of video and audio devices inside a private property is in violation of Federally-protected privacy and civil rights. Asking the shop owner and the technicians to give up their privacy rights to qualify for a State contract violates those laws as State is required to grant those contract without discrimination. So when the shop owner and the technicians qualify for the State Contract, that contract is their right not a privilege.

Reply:

The Bureau has the ability to recognize and block certificates for Referee direction upon detection of certain electronic earmarks of fraudulent activity. However, the Bureau is confronting rapidly evolving fraud on a semi-industrial scale. The Bureau is involved in continuous efforts to recognize and combat the latest permutation of fraud, thus leaving a

window for fraudulent inspectors to flourish in the intervening time while the Bureau develops pattern recognition for the latest behaviors. Additionally, the complexity of the methods used by fraudulent actors necessitate more effective prosecution when behaviors are identified. The biometric security addresses these concerns.

Regarding the privacy claims, licensed inspectors perform inspections on behalf of the state and existing laws provide for Bureau access to stations performing these inspections to ensure quality control. The proposed remote access is an extension of this authority, providing both a lower cost means for the Bureau to ensure inspection quality and a more timely intervention should there be an issue with the inspection process. During the remote access, inspectors will control the camera and thus also control what BAR sees. Further, video and audio devices will only be enabled upon the inspector granting access. Inspectors will be aware when the camera is operating, as they would be made aware if Bureau personnel were present in the smog check station.

Bar OIS is already in violation of Federal and State privacy laws when it asks the technician to waive their privacy laws and allow the State to monitor their computers when they're performing inspections.

These security measures would've been relevant some 25 to 30 years ago when majority of cars were tested for tailpipe emissions. Currently very small percentage of cars are tested for tailpipe emissions and those numbers are dropping every month, hence "clean piping" is a very marginal issue, next to nothing, and hardly worth such an equipment revolution. Bar did the same non- sense, inefficient, very late and useless program modification when they required Evap testers be connected directly to the Bar-97 machines last year when it should've been done when Evap testing started in 2013. Both Evap testing and their connection to the Bar-97 are extremely late and useless as we do those tests once or twice a month. It's actually crossing the inefficiency line into the pure stupidity side.

Reply:

Licenses of the Bureau are currently subject to review by the licensing entity. This rulemaking proposes a method of review consistent with existing law.

The audio and video observation proposed by this rulemaking is limited in physical scope to the testing area, and in time scope to the duration of an actual emissions test. Further, Health and Safety Code section 44035 allows the Bureau "access to licensed stations for the purpose of examining property, station equipment, repair orders, emissions equipment, repair orders, emissions equipment maintenance records, and any emission inspection items, as defined by" the Bureau. Separately, emissions tests must be done per statutorily specified standards, including but not limited to those stated at Health and Safety Code section 44012 *et seq.* and any regulations adopted by the Bureau. Per existing CCR section 3340.15(g), licensed smog check stations are also required to allow the bureau or its representative "reasonable access during normal business hours to the station for the bureau's quality assurance efforts to evaluate the effectiveness of tests and/or repairs made to vehicles subject to the Smog Check Program." Smog check stations must also, per CCR section 3340.15(a), allow the inspection and approval of the work area by the Bureau.

Under the proposed rulemaking, licensees will be aware of the possibility of the observation occurring, and when video and audio observation is requested by the Bureau, a prompt will be shown to the licensee, giving the licensee an opportunity to ensure only personnel and equipment relevant to the testing are in the area.

On the issue of exempting older vehicles, the size of the 1995 and older fleet still is a critical component of the California emissions inventory. Fraud, including unlicensed activity, is an issue affecting program integrity for the inspection of these older vehicles.

Once California's annual Wildfire season that adds millions of tons of carbon monoxide to the atmosphere ends, then Bar will have a better justification for implementing extreme measure but as of now when wildfires are still raging, these measures look insane and out of touch with the reality.

Reply:

The Bureau does not track pollution related to Wildfire season or oversee regulations related to fire management. However, given that external sources of carbon monoxide are entering the atmosphere in California, it is imperative that vehicles do not add to that mix.

Comment 3: William Hooper, November 8, 2021

I. Simulation and Manipulation Devices and Software

Proposed section 3340.41, subdivision (h), should be revised to clarify the nature of the devices and software that are prohibited, and to avoid holding Smog Check licensees responsible for devices and software that they cannot practicably detect.

A. Clarification of Prohibited Devices and Software

The regulation should be revised to make clear that it does not prohibit legitimate devices or software that cause changes, before a Smog Check inspection, in the vehicle identification number (VIN), calibration information, and so on, that are collected during the inspection.

As described in the enclosed examples of automakers' manuals and service bulletins, programming or reprogramming the VIN is often required when a faulty engine control module (ECM) is replaced with a new part or with a used part salvaged from another vehicle. Installing a new ECM calibration (software) is also an authorized, effective repair for some emissions-related malfunctions, but it changes the calibration identification and calibration verification number reported by the vehicle. Smog Check stations need to be allowed to have and use the computers, vehicle interface hardware, and software required for these everyday repair operations.

The problem of latent capabilities in programmable devices should also be considered. Vehicle interface hardware, needed for the repair operations discussed above, often includes controller area network (CAN) transceivers, which could, if combined with appropriate software, be deemed "capable of simulating the OBD data stream from a vehicle." Narrowing the prohibition to apply only to devices that have been designed or programmed for a prohibited function, rather than those

merely capable of such functions, would address this ambiguity and provide better guidance to licensees, while still avoiding the need for the Bureau to prove that illicit devices or software found in stations were actually used in fraudulent Smog Check inspections.

Accordingly, I suggest revising proposed subdivision (h) as follows:

(h) No licensed station shall have in the approved testing area at any time any electronic device or software ~~capable of simulating~~ designed or programmed to simulate the OBD data stream from a vehicle or ~~manipulating to manipulate~~, during a Smog Check inspection, the OBD VIN, calibration identification, calibration verification number, MIL-status, readiness, or diagnostic trouble codes collected from a vehicle during a Smog Check Inspection.

Reply:

The commenter rightly notes there are many devices commonly found within the automotive service industry that are capable of being used to simulate the OBD data stream for the vehicle and that could be used to commit fraud. While such devices do have legitimate use in the service industry, their legitimate uses are not required during a Smog Check inspection. Because the programming necessary to convert a device with legitimate uses into a device that can be used to commit fraud is virtually undetectable without intimate knowledge of the nature of the programming, it is critical that BAR have the authority to make possession of these devices within the inspection area a citable offense. Note that this does not prevent stations from owning or possessing such device; rather, they can't be within the inspection area, which means that they cannot be easily accessible for use during an inspection. Simulator devices used for Smog Check fraud are currently a serious problem for the integrity of the Smog Check inspection.

The Bureau considered the comment and has decided to not make the change. As written, the section does not provide BAR authority to cite stations for possession of devices only used for legitimate repair purposes in the approved testing area.

I. Simulation and Manipulation Devices and Software

B. Exclusion of Devices and Software in Vehicles

With some exceptions, the regulation should not apply to devices and software in vehicles, since it is often impracticable for Smog Check licensees to detect such devices or software.

Modern vehicles, with their extensive interior trim, complex wiring harnesses, and numerous electronic modules, offer many possible hiding places.

Concealed electronic devices are unlikely to be found or recognized without disassembly and examination far beyond the scope of the Smog Check program authorized by the Legislature and accepted by the public. The visual inspection procedures in the Smog Check Manual strike an appropriate balance between detecting emissions tampering and limiting the costs of inspection, in terms of both

labor and possible damage to vehicles, and thus the burden on the public. Inspectors should not be expected to do more than the Manual requires.

Likewise, if software has been installed on a vehicle's built-in computers to cause improper responses during a Smog Check inspection, this may be impossible for a licensee to detect using the available equipment, procedures, and information. Indeed, the objective of such sophisticated emissions tampering is to escape detection by Bureau-authorized Smog Check equipment.

Accordingly, I suggest adding the following to proposed subdivision (h):

. . . provided, however, that this subdivision shall not apply to any device or software in a customer's vehicle, unless a Bureau licensee (1) places or installs the device or software in the vehicle, (2) starts or continues a Smog Check inspection with actual knowledge that the device or software is prohibited and is present in the vehicle, or (3) does not, because of the licensee's failure to comply with the Smog Check Manual, find and report the device or software during a Smog Check inspection that, if properly conducted, should have discovered the device or software.

To avoid creating unnecessary loopholes, the suggested proviso applies only to customers' vehicles, and it has exceptions for three situations in which it would be reasonable to hold licensees responsible. Exception (2) uses an actual knowledge standard to avoid encouraging licensees to refuse customers or vehicles based on mere suspicions or assumptions about the likelihood of emissions tampering. For the Smog Check program to remain viable, inspections need to be available to all Californians and for all covered vehicles.

Reply:

The Bureau considered the comment and has decided to not make the change. The commenter's proposed language creates an explicit carve out through which inspectors committing fraud can claim lack of knowledge or intent to get out of discipline for failing to identify illegal modifications. This would actually make it more difficult to enforce against fraudulent licenses.

II.Remote Monitoring

Proposed section 3340.41, subdivision (b), should be revised to explain licensees' responsibilities; to address situations in which remote access is interrupted by network failures or other situations outside licensees' control; to provide adequate notice to persons whose conversations may be heard or recorded; and to limit access, disclosure, and retention of recordings.

Reply:

The Bureau considered the comment and has decided to not make the change. If there is a carve out in the regulations allowing licensees to claim network failures or other interruptions "beyond their control," fraudulent operators would easily be able to create such interruptions in pursuit of the fraudulent activities, including not ensuring adequate internet services necessary to participate in the program.

A. Licensee's Responsibilities to Cooperate

The proposed regulation states that licensees would be required to permit the Bureau or its designees "remote access to view and record," but the proposed Smog Check Manual uses the phrase "virtual hands-on inspection" (emphasis added), and the Initial Statement of Reasons mentions that the camera must be "able to reach underhood or interior vehicle items as requested by BAR" (page 17). This implies that licensees would be expected not only to allow "access" but also to comply, at least, with requests to reposition the camera.

If such cooperation is a requirement, this should be stated in the regulation or Manual, which should also identify any other remotely-directed activities—such as relocating or removing parts, tools, or equipment to provide a better view for the camera—that licensees would be required to do. Similarly, if licensees would be expected to respond, orally or by text message, to questions about in- progress or past inspections, this obligation and its limits should be stated.

Reply:

The Bureau considered the comment and has decided to not make the change. It is understood that virtual hands-on inspection requires communication and interaction, just as is the case with a normal hands-on inspection. Requiring a prescriptive list of allowable interactions would only provide a legalistic screen behind which fraudulent or incompetent inspectors would attempt to hide because any minor deviation from that list, no matter how common sense the requested interaction might be, would be cause for the inspector not to comply.

The regulation should also state that licensees are free to refuse any request, without fear of discipline, if compliance would risk personal injury or property damage. Automotive servicing can be dangerous, and some hazards may not be apparent to a remote observer.

Reply:

The Bureau considered the comment and has decided to not make the change because allowing request refusal without penalty would undermine the effectiveness of remote access.

The Bureau's regulatory impact analysis should be revised to add estimates of the costs of cooperation for licensees, who would have to take time to respond to requests from the Bureau or its designees, and for the public, who would have to wait longer for inspections to be completed.

Reply:

The Bureau considered the comment and has decided to not make the change because the cost is lower- remote access inspections take less time than in person. Further, the Bureau has neither the reason nor the resources to regularly interfere with inspections when there is no indication that improper inspections occurring.

Just as is the case with regular BAR station visits, stations performing proper inspections may never experience a virtual hands-on inspection, let alone be substantially impacted to an extent where anticipated costs would be a factor.

II. Remote Monitoring

B. Interruptions in Remote Access

The regulation should acknowledge that remote viewing and recording by the Bureau or its designees will sometimes be interrupted or impaired by causes beyond licensees' control, for which licensees would often be unable to obtain exculpatory evidence.

Many people have experienced online meetings in which a participant's video or audio was missing or impaired, but these problems are not limited to consumer or small-business equipment or Internet connections. In my experience designing and implementing systems used by major broadcasters and media companies to transmit video and audio over the Internet and private networks, I have found that such transmissions can be interrupted or impaired by network congestion, packet loss, bit errors, and other transient conditions. These conditions may be the responsibility of the sender or recipient, of the sender's or recipient's Internet service provider (ISP) or telecommunications carrier, or of some other ISP or carrier along the network path between them. Even with specialized expertise and cooperation, unlikely to be available to small businesses such as Smog Check stations, it can be impossible to identify the cause of a specific event, since ISPs typically do not make or retain records indicating why particular traffic was delayed or not delivered.

Accordingly, the regulation should be revised to give licensees the benefit of a rebuttable presumption that interruptions or impairments in remote viewing or recording were not the licensee's responsibility. This presumption might be overcome, of course, by evidence that the camera was unplugged from the EIS or BAR-OIS, for example, or that the licensee verbally refused to cooperate with a reasonable request (see II.A, above).

Reply:

The Bureau considered the comment and has decided to not make the change. In cases where licensees have internet connection failures, licensees will have due process through which they can plead their circumstances. Existing citation appeal processes would allow for consideration of mitigating factors such as legitimate connectivity issues preventing complete remote interaction. Further, existing processes require licensees to interact via the internet with Bureau-maintained systems to conduct tests.

In addition, since it does not appear that the Bureau has specified minimum data rates or other required characteristics of Smog Check stations' Internet connections, it should be assumed that some stations, especially in rural areas, may have connections that cannot deliver live video and audio, even when using H.264 or other compression techniques, at sufficient quality to be useful, or for which such transmissions would result in substantial usage charges.

These charges, the costs of upgraded Internet connections, and the possibility of Smog Check station closures in regions where adequate Internet connections are unavailable or too costly, should all be considered in the Bureau's regulatory impact analysis.

Reply:

The Bureau considered the comment and has decided to not make the change. Implementation of the proposed rulemaking will be done in a manner minimizing the required bandwidth for compliance. In the Bureau's experience, the majority of stations currently use a form of remote access when receiving support from their equipment vendor. The Bureau has a vested interest in ensuring adequate Smog Check Program coverage throughout the state, including in rural areas that may not have access to the same quality internet services provided in less rural areas. That said, licensees will be responsible to ensure adequate internet services when available. If this was not a requirement, licensees interested in committing fraud would simply subscribe to substandard internet providers so as to prevent monitoring to discourage their behavior. In cases where licensees wish to challenge action against their license due to failures related to their internet service provider, licensees will have due process through which they can plead their circumstances.

II. Remote Monitoring

C. Notice of Monitoring and Recording

California law (Penal Code § 632) generally prohibits electronic eavesdropping and recording of conversations in which there is a reasonable expectation of privacy, unless all parties to the conversation give their consent. The Bureau should require its licensees to post signs to inform persons in or near testing areas of the potential for remote viewing, listening, and recording.

Reply:

The Bureau considered the comment and has decided to not make the change because stations don't need to post signs as stations, per industry standards, don't allow the public in work area for safety reasons. During a test, access to the testing area is generally limited to licensees and workers at the station. Further, licensees will have the opportunity to notify others should they be in the inspection area that remote access is being granted. This proposed regulation is not made lightly, rather it is proposed to address a real problem of serious fraud occurring during Smog Check inspections, as noted in the Initial Statement of Reasons for this rulemaking.

The recordings of "video, audio, pictures, and text" contemplated by the proposed regulation are likely to contain personal information, as that term is defined in the Information Practices Act of 1977 (Cal. Civil Code §§ 1798 et seq.). Accordingly, the Bureau should also provide, in the regulation or elsewhere, the information collection notice required by that statute, which should be separate from the notice covering the proposed biometric data system.

Reply:

The Bureau considered the comment and has decided to not make the change. Monitoring will not be continuous and only started once a licensee has granted access. This will be the same as on-site inspections currently allowed under statute. The licensee will control the direction of the camera to allow BAR to monitor behaviors and circumstances directly related to the licensee's activities related to their license. Further, there is no form through which any information is being solicited by the Bureau, which is the circumstance under which Civil Code 1798.17 regarding notices would apply.

II. Remote Monitoring

D. Limits on Recording Access, Disclosure, and Retention

The Bureau should adopt enforceable restrictions on access to and disclosure of the recordings. Licensees and their customers have substantial privacy interests, especially in activities or conversations that may be unrelated to Smog Check testing but occur within range of an activated camera or microphone. The Bureau should also establish a relatively short maximum retention period for recordings that do not contain evidence of misconduct.

Reply:

The Bureau considered the comment and has decided to not make the change. Monitoring will not be continuous and only started once a licensee has granted access. This will be the same as on-site inspections currently allowed under statute. The licensee will control the direction of the camera to allow BAR to monitor behaviors and circumstances directly related to the licensee's activities related to their license. As such, licensees will have the ability to control what is disclosed through the video and audio signal within the work area. Should recordings be used for disciplinary purposes against the licensee, such recordings would become part of the public record absent specific reasons for which the videos should not be made public. Any retention periods would be established internally and need not be listed in a regulation.

III. General Comments

A. Potential for Underground Regulations

I urge the Bureau to ensure that the Smog Check program and its requirements for stations, inspectors, and the public are defined in adopted regulations and in documents, such as the Smog Check Manual, that are reasonably available to licensees and the public. Revisions to the EIS or BAR-OIS software, such as those described on pages 10 and 11 of the Initial Statement of Reasons, should not take the place of rulemaking proceedings as a means of making substantive changes to the Smog Check program, inspection standards, or licensee responsibilities.

Reply:

The Bureau considered the comment and has decided no changes are necessary in response. The Bureau supports full disclosure through the regulatory process.

III. General Comments

B. Arrangement of Subdivisions

The proposed section 3340.41 would be easier to read if subdivision (f), introducing the biometric data system, were adjacent to subdivision (i), describing enrollment in that system, rather than separated from it by subdivisions (g) and (h), covering other topics. If this suggestion is adopted, the schedule of fines in proposed section 3394.26 should be updated accordingly.

Reply:

The Bureau considered the comment and has decided to keep the arrangement of subdivisions in place. The placement of the subdivisions through this proposed rulemaking is intended to fit with the preexisting regulatory structure.

III. General Comments

C. January 2021 Dates

The proposed new edition of the Smog Check Manual, biometric notice, and consent statement should be dated January 2022, not January 2021, and the references to these documents in the proposed regulations and Initial Statement of Reasons should be updated accordingly.

Reply:

The Bureau bases the dates on when the draft was written, not when the package is finalized.

Summary of Comments Received During the 15-day Notice Period

The Bureau has elected not to change the proposed regulation based on the comments received. The Bureau's summary of and responses to the comments received during the 15-day modified text comment period are presented below. Note: comments are in italics.

Comment 1: Mario Salas, April 15, 2022: On April 15, 2022, the Bureau received the attached comment from Mr. Salas via email.

1. Mr. Salas proposed the following general change regarding the word "Bureau" and changes to section 3340.41(f):
The California Business and Professions Code §9880.1 defines "Bureau" to mean Bureau of Automotive Repair. The majority of the provisions within the California Code of Regulations follow suit referring to the Bureau of Automotive Repair as "Bureau" but also allows for "BAR." Proposed legislation under CCR §3340.41 the Bureau is referred to as "BAR." For consistency with the B&P and existing CCR, I respectfully submit the instances of BAR be changed to "Bureau" with the exceptions of the abbreviation of recognized equipment names such as BAR-97 EIS and BAR-OIS. There are also inconsistencies in the use of Smog Check Inspector(s) and Smog Check inspector(s).

Reply: The Bureau notes that although these changes are outside of modified text, the Bureau did make conforming changes to the inconsistencies in the use of Smog Check Inspector(s) and Smog Check inspector(s) for consistency.

2. The modified text of this proposed rulemaking contains the following language:
“(f) During initial biometric data collection and annually, licensed Smog Check Inspectors shall review the Notice on Collection of Personal Biometric Information and Its Use (New 1/2021) and the Biometric Data Collection Consent Statement (New 1/2021), hereby incorporated by reference, and agree to their terms.”

Mr. Salas recommends the following language: *(f) During initial biometric data collection, and annually thereafter, licensed Smog Check Inspectors or qualified applicants, shall review and consent to the terms contained within the Notice on Collection of Personal Biometric Information and Its Use (Dated 1/2021) and the Biometric Data Collection Consent Statement (Dated 1/2021), hereby incorporated by reference.*

Reply: The Bureau considered the comment provided by Mr. Salas and notes that this portion of the proposed text is not part of the modified text subject to the 15-day comment period during which Mr. Salas submitted this comment.

Additionally, the Bureau:

- a. Rejected adding the word “thereafter” because it is already clear that inspectors shall review and consent to the terms annually.
 - b. Rejected the term “qualified applicants” because biometric consent is not a condition of licensing.
3. The modified text of this proposed rulemaking contains the following language:
“(f) When prompted by the EIS or OIS software, the licensee shall authenticate their identity for purposes of authorizing their access to the EIS or OIS using a biometric device model specified in section 1.8.0 of the Smog Check Manual described in section 3340.45.”

Mr. Salas recommends the following language: *(f) When accessing the Smog Check Inspection mode, or when prompted by the BAR-97 EIS (EIS) or BAR-OIS (OIS), the licensee shall authenticate their identity using a biometric device model specified in section 1.8.0 of the Smog Check Manual described in section 3340.45.*

Reply: The Bureau considered the comment provided by Mr. Salas and rejects making the change because it does not add any value to the proposed regulation. This text is also not part of the modified text open for comment during the 15-day period. Nonetheless, the language is already clear that the licensee shall authenticate their identity using a biometric device. The Bureau does not believe any additional clarity is gained by specifying that the prompt occur when accessing Smog Check Inspection mode because it will also occur when issuing a certificate and will also occur while allowing optional biometric use for other non-Smog Check inspection software functions as a matter of extended convenience. Listing all of the software screens when biometric prompts will occur is not necessary when the global statement “when prompted by the EIS or OIS software” covers this.

The Bureau does not believe any additional clarity is gained by removing the “for purposes of authorizing their access to the EIS or OIS”, as identification is a condition of accessing the EIS or OIS.

4. Mr. Salas recommends the following language: *(f) ... If, at the time of enrollment, the biometric system is unable to collect sufficient data necessary to create a uniquely identifiable profile from either or both hands, BAR shall allow access to the ~~BAR-97 EIS or BAR-OIS~~ using a BAR-assigned access code.*

Reply: The Bureau considered the comment provided by Mr. Salas and rejects adding “either or” because it is already clear that the Bureau will issue an exemption allowing continued use of access code in lieu of biometric scan with incompatibility. For consistency, as a non-substantive change, the Bureau accepted Mr. Salas’ comment to remove “BAR” when referencing the EIS and OIS and made the change throughout.

5. The modified text of this proposed rulemaking contains the following language: “(f). ... If the Bureau determines that the reason for which the uniquely identifiable profile could not be collected is temporary, the Bureau shall establish a 30-day window during which the inspector may access the BAR-EIS or BAR-OIS using a BAR-assigned access code, after the conclusion of which the inspector would need to return to the BAR field office or other BAR-designated facility to enroll, which shall include the establishment of another 30-day window, if the biometric system is unable to collect sufficient data necessary to create a uniquely identifiable profile from both hands. If, after enrollment, an inspector encounters circumstances where the biometric scanner is unable to collect the data required to permit them to perform an inspection, the inspector shall return to the BAR field office or other BAR designated facility for enrollment based on the changed circumstances.”

Mr. Salas recommends the following language: *(f)(1) If the biometric **device** is unable to collect **the licensee’s uniquely identifiable profile from either or both hands, and the Bureau determines the reason is temporary**: the Bureau shall establish a 30-day period during which the inspector may access the EIS or OIS using a **Bureau assigned** access code. At the conclusion **of the 30-day period**, the Smog Check inspector **must** return to a Bureau field office or other designated facility to enroll. **If the condition persists, and the biometric system is unable to collect the licensee’s profile**, the Bureau shall establish another 30-day period.*

*(f)(2) After enrollment, if an inspector encounters circumstances **preventing the use of the biometric device**, or the device is unable to collect the licensee’s unique profile from either or both hands, the inspector shall return to a Bureau field office or other designated facility and **re-enroll or request temporary access based on a change in circumstance**.*

*Changes from the text as modified are highlighted above by BAR for this Final Statement of Reasons in **bold text**.

Reply: The Bureau considered the comment provided by Mr. Salas and rejects adding the subdivisions because the Bureau believes that the current proposal is adequately clear and describes the requirements. Changing the language doesn’t change the circumstances under which the provision would be effective. Many of the above changes

appear to be related to word usage – changing ‘system’ to ‘device’, or changing ‘BAR’ to ‘Bureau.’ Changing these words would not affect the requirements of the proposed regulation. Further, adding a condition in Mr. Salas’ proposed (f)(2) of ‘preventing use of the biometric device’ would allow for an ambiguous interpretation of the preconditions necessary for alternative enrollment. It is the Bureau’s intention to limit alternative enrollment to situations in which the biometric device itself functions properly but, due to issues with data collection from the individual, cannot be used by that individual. Finally, the Bureau does not believe it is necessary to split proposed subdivision (f) into two subdivisions; such a change is organizational only and would have no effect on the requirements of the regulation.

Comment 2: Thomas Bogue, April 16, 2022: On April 16, 2022, the Bureau received a comment from Mr. Bogue via email. Mr. Bogue’s comment is a general comment about the rulemaking as a whole, in continuation of his comment made during the 45-day comment period, and is outside the scope of the modified text. Per the Administrative Procedure Act, this comment does not require a response in this Final Statement of Reasons. However, Mr. Bogue opposes the rulemaking and does not agree with the Bureau’s Initial Statement of Reasons; the Bureau has incorporated that document herein, which speaks for itself. The Bureau also incorporates its responses to Mr. Bogue’s prior letter, above.

Documents Incorporated by Reference

The following documents are incorporated by reference: Smog Check Manual (January 2021), Notice on Collection of Personal Biometric Information and Its Use (New 1/2021), and the Biometric Data Collection Consent Statement (New 1/2021). It would be cumbersome, unduly expensive, or otherwise impractical to publish these documents in full in the California Code of Regulations, as the manual and forms contain formatting elements that would be difficult to fully describe in plain text. Further, the forms are intended primarily to be used in electronic systems that may require specific display parameters that cannot be easily reproduced in the Code of Regulations.