

DEPARTMENT OF SAFETY AND HOMELAND SECURITY
OFFICE OF HIGHWAY SAFETY

Statutory Authority: 21 Delaware Code, Section 4185(b), and 29 Delaware Code, Chapter 101
(21 Del.C. §4185(b) & 29 Del.C., Ch. 101)

FINAL

ORDER

1206 Approved Motorcycle Helmets and Eye Protection

I. NATURE OF PROCEEDINGS

Pursuant to its authority under 21 Del. C. §4185(b) and 29 Del. C., Ch. 101, the State of Delaware, Department of Safety and Homeland Security proposed to amend regulations. The Department's purpose in proposing amended regulations was to more clearly specify what motorcycle helmet and eye protection are approved for use in Delaware by the Secretary of the Department.

Notice of public comment period of thirty (30) days related to the Department's proposed amended regulations was published in the Delaware Register of Regulations for November 1, 2010.

II. PUBLIC COMMENTS

The Department received the following public comments in response to its notice of intention to adopt the proposed amended regulations and offers the following responses thereto:

A public comment was received concerning the Federal Motor Vehicle Safety Standards (FMVSS) and their application to importers, manufacturers, distributors, and retailers of new motor vehicles and new motor vehicle equipment. The commenter asserts that the Code of Federal Regulations, FMVSS, and USC Title 49, Chapter 301 is the jurisdiction of the Federal government. The commenter further asserts that if states adopt an FMVSS they are required to adopt it in its entirety. Congress did not intend to preempt all state laws regarding motorcycle helmet use. The State of Delaware is adopting the safety standard in FMVSS 218 in its entirety.

A public comment was received asserting that without a reference to any standard applicable to consumers and end users, no list of approved helmets (by make and model number), no instructions to the citizens of Delaware who choose to manufacture and certify helmets for their own use, and no instructions pertaining to used helmets, the regulation will be unenforceable. The commenter further asserts this regulation will not withstand judicial scrutiny and cites the 1972 US Supreme Court case *Grayned v. City of Rockford*. The language used in the proposed amended regulation is not vague because all that is required of a person buying a motorcycle helmet is to look at the helmet to see if it has the required labels. The court in *Grayned* held that a statute is void for vagueness if its prohibitions are not clearly defined such that the average consumer does not have adequate notice as to what is prohibited. In the case of *City of Bremerton v. Spears*, 949 P.2d 347, Jan., 1998, the Washington Supreme Court held, en banc, that the state's Motorcycle Helmet law was not unconstitutionally vague in that it provided fair and adequate notice to the defendant of what the Motorcycle Helmet requirements were and upheld the defendant's conviction for his failure to comply with the Motorcycle Helmet law. The language in the proposed rules and regulations, developed by the Office of Highway Safety and the Department of Safety and Homeland Security, reflects the language of the regulations in *City of Bremerton* and, therefore, meets the standard set forth in *City of Bremerton*.

Two public comments were received asking the following questions:

Does the State intend to apply these standards to used motor vehicles and used motor vehicle equipment? No, this regulation is not intended to govern the sale of used equipment. It is responsibility of the consumer to ensure they are purchasing compliant equipment.

Will the State mandate additional requirements for consumers and motor vehicle operators and passengers? We cannot comment on what may or may not happen in the future.

Will the State "grand-father in" existing motor vehicles and motor vehicle equipment? If not, does the State intend to initiate a "buy-back" program of existing non-compliant equipment? The regulation will apply to all motorcycle riders on its effective date. There will not be a buy-back program.

A public comment was received concerning the possibility of setting a bad precedent with regard to enforcement against consumers and motor vehicle operators. The commenter suggested the burden should lie with manufacturers, importers, distributors, and retailers and that was the intent of USC Title 49, Chapter 301. While there is a burden on the manufacturers, etc to be compliant, it is also the responsibility of the consumer to ensure they are making purchases from a reputable retailer.

A public comment was received asserting the label terminology in the proposal is repetitive of the label section of FMVSS 218 and seems unnecessary. The intent of this regulation is to clarify the necessary requirements for helmets and eye protection as indicated in Title 21, Section 4185(b).

A public comment was received concerning the question of the State's intent to introduce regulations to govern labeling of used items, when the Federal government does not. The commenter believes this is beyond the proper role of government. This regulation is not intended to govern the sale of used merchandise. It is responsibility of the consumer to ensure they are purchasing compliant equipment.

A public comment was received regarding the difficulty of the average citizen or law enforcement officer to read the standard set forth in FMVSS 218, and understand its requirements. The commenter believes this will lead to arbitrary enforcement. Delaware law enforcement officers are professionals and will enforce the law as appropriate.

A public comment was received concerning riders being forced to comply with various helmet laws from state to state when traveling and indicated this violates 14th Amendment protections. There are other laws that vary from state to state (such as seat belt use and permits to carry concealed weapons). It is incumbent on the traveler to be know the laws of any state through which they intend to travel and to comply with those laws.

A public comment was received asserting that the current law in Title 21 stipulates the Secretary of Safety and Homeland Security will establish a list of approved helmets and eye protection. This regulation does neither. The commenter sees this regulation as an attempt to correct an illegal rule currently in Title 21. The intent of this regulation is to clarify the necessary requirements for helmets and eye protection as indicated in Title 21, Section 4185(b).

A public comment was received requesting how the State proposes to guarantee the public a helmet meeting the proposed standards will protect a rider in a collision. No helmet manufacturer makes the claim that any helmet will unequivocally protect a rider in the event of a collision. The State of Delaware will not make that guarantee either.

A public comment was received suggesting motorcyclists be allowed their civil liberties, including their 9th Amendment right to self-governance, particularly in making decisions regarding their own safety and selection of safety equipment. The proposed amended regulations are reasonable public safety measures designed to reduce the costs to society of avoidable head and eye injuries.

A public comment was received asking if there is a difference between non-breakable and safety or shatter-proof eye wear. Further, the commenter asked how a law enforcement officer will test for this or inspect the eye wear at a roadside stop. In an effort to further clarify the intent of the Title 21, Section 4185(b), the Department of Safety and Homeland Security will amend the Regulation by changing Section 2.1 to read, "2.1 Any goggles or glasses with protective lenses. Protective lenses are those that at least cover the orbital bone of the eye. This excludes contact lenses." The Department contends that these enhancements to the Regulation do not substantively change the meaning as outlined in the Regulation published November 1, 2010.

A public comment was received asserting that carrying a helmet is "stupid" and that other neighboring states are rescinding their motorcycle helmet laws. The commenter indicates there are studies to both support and contradict the benefit of helmet use. Delaware law is not routinely established or changed based on what our neighboring states are doing. The latest NHTSA studies indicate a motorcyclist increases his/her odds of surviving a crash by 37% when wearing a helmet. Riders who choose to carry the helmet rather than wear it do so at their own risk.

A public comment was received indicating that helmet laws adversely affect motorcycle sales, thereby reducing the income of the State through motorcycle registrations. The commenter cited "many economic studies." The Division of Motor Vehicles participated in the revision of this regulation and cited no concerns.

The Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities both commented that motorcycle helmets have an overall effectiveness of 37% in preventing fatalities in potentially fatal crashes and that riders who crash without helmets are three times more likely to have brain injuries. NHTSA studies indicate this is true.

The Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities both also commented that there is a major problem with novelty helmets and fake "DOT" stickers. The Council asserts that this makes enforcement difficult. The Council suggests addressing novelty helmets and fake "DOT stickers in the regulation and offered the following suggestions:

Without limitation, the following helmets are categorically disapproved:

1.2.1.1. "Novelty" helmets which do not meet or exceed the standards in §1.1.1;

1.2.1.2. Helmets affixed with a DOT symbol not installed by the helmet's manufacturer; and

1.2.1.3. Helmets with counterfeit labels in lieu of the label affixed by the helmet's manufacturer pursuant to the Federal standards identified in §1.1.1.

The Department rejects the request to amend the regulation as outlined above.

While Department recognizes the escalating problems with novelty helmets, if applied as outlined in Exhibit A, this regulation will not recognize novelty helmets as acceptable.

The Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities both suggested inserting the language "most current" before the phrase "FMVSS 218" throughout the regulation in the event the existing Federal standard changes. The Department agrees this is a logical inclusion in the regulation and will add the recommended language.

III. FINDINGS AND CONCLUSIONS

The public was given the required notice of the Division's intent to adopt the proposed amended regulations and was given the opportunity to provide the Division with comments concerning them. Thus, the Division concludes that its consideration of the proposed regulations was entirely within its prerogatives and statutory authority and, having received and considered public comments that did not lead to substantive change, is now free to adopt the proposed regulations.

IV. ORDER

AND NOW, this _____ day of December, 2010 it is hereby ordered that:

The proposed regulations are adopted;

The text of the proposed regulations shall be in the form attached hereto as Exhibit A;

The effective date of this Order is ten days from the date of its publication in the Delaware Register of Regulations in accordance with 29 Delaware C. §10118(e); and

The Department reserves unto itself the authority to issue such other and further orders concerning its practices and procedures as may be just and proper.

IT IS SO ORDERED.

By: Elizabeth Olsen, Deputy Secretary

Department of Safety and Homeland Security

By: Jana Simpler, Director, Office of Highway Safety

Department of Safety and Homeland Security

Regulation 30 1206 Approved Motorcycle Helmets and Eye Protection

1.0 Types of Approved Helmets.

1.1 Pursuant to **21 Del.C., §4185**, the types of helmets approved by the Secretary of the Department of Public Safety and Homeland Security are ones that:

1.1.1 ~~[Helmets which]~~ Meet or exceed the Federal Motor Vehicle Safety Standard (FMVSS) 218 (D.O.T.) Standard located at 49 Code of Federal Regulations Section 571.218; and meet the [following] Federal Motor Vehicle Safety Standard 218, labeling requirements.

~~Helmets which meet or exceed the A.N.S.I. Z90.1A-1973 Standard has amended.~~

~~Helmets used in the State should be labeled so that enforcement officers can identify approved helmets. This label, indicating the helmet, manufacturer's name or brand name (where brand name is different from the manufacturer's name) and the model name or number, should be placed at the outside or inside lower rear of each helmet in letters of not less than one quarter inch in height.~~

~~All helmets are to be either reflectorized by the manufacturer, or reflectorized by material purchased by owner and applied to the helmet. It must be applied so it is legible from all angles and the helmet when being worn. It must be securely affixed to left side, right side and rear of helmet, and should cover an area of at least four square inches in each of the specified areas.~~

1.2.1 Each helmet shall be labeled permanently and legibly, in a manner such that the label(s) can be read easily without removing padding or any other permanent part, with the following:

1.2.1.1 Manufacturer's name or identification.

1.2.1.2 Precise model designation.

1.2.1.3 Size.

1.2.1.4 Month and year of manufacture. This may be spelled out (e.g., June 1988), or expressed in numerals (e.g. 6/99).

1.2.1.5 The symbol DOT, constituting the manufacturer's certification that the helmet conforms to the applicable Federal Motor Vehicle Safety Standard. This symbol shall appear on the outer surface, in a color that contrasts with the background, in letters at least three-eighths inch (one centimeter) high.

1.2.2 Each helmet shall include the following information for the purchaser:

1.2.2.1 Shell and liner constructed of (identify type(s) of materials).

1.2.2.2 Helmet can be seriously damaged by some common substances without damage being visible to the user. Apply only the following: (Recommended cleaning agents, paints, adhesives, etc., as appropriate.)

- 1.2.2.3 Make no modifications to the helmet. Fasten helmet securely. If helmet experiences a severe blow, return it to the manufacturer for inspection, or destroy it and replace it.
- 1.2.2.4 Any additional relevant safety information should be included at the time of purchase by means of an attached tag, brochure, or other suitable means.
- 1.2.2.5 If a motorcycle helmet meeting the above federal requirements is equipped with an electronic device for transmitting sound, the speaker portion affixed to the helmet, must not enter or completely block the ear canals.

2.0 Approved Types of Eye Protection

- 2.1 Pursuant to **21 Del.C., §4185**, the types of eye protection approved by the Secretary of the Department of Public Safety and Homeland Security are as follows:
 - 2.1.1 Any type of goggles ~~[equipped with non-breakable lenses or glasses with protective lenses. Protective lenses are those that at least cover the orbital bone of the eye. This excludes contact lenses; or]~~
 - 2.1.2 A face shield. ~~for~~
 - 2.1.3 Safety glasses excluding contact lenses.** ~~Do NOT approve contact lens or any type of eye glasses unless the eye glasses are equipped with unbreakable lens. Windshields are highly recommended as an additional measure.~~

3.0 Reaffirming original eye protection requirement.

This Regulation reaffirms the original approval for eye protection, as issued by the Motor Vehicle Division on July 11, 1968, and updates the types of helmets which were also approved at that time.

14 DE Reg. 670 (01/01/11)