

**State of California
Office of Administrative Law**

In re:

Department of Insurance

**Regulatory Action: Title 10
California Code of Regulations**

Adopt sections:

**Amend sections: 2202(b), 2202(c),
2202(d), 2203(b)**

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2009-0527-01 FP

SUMMARY

On May 27, 2009, the Department of Insurance (Department) submitted this action to the Office of Administrative Law (OAL) to amend the fees the Department charges insurance providers for reviewing insurance policy documents and forms proposed for use by insurance providers in California. The submitted action amended the document fees set forth in title 10, California Code of Regulations (CCR), sections 2202(b), 2202(c), 2202(d), and 2203(b). The amendments to these sections represented increases in the document fees by approximately 350 percent (350%). The Department submitted this action to OAL for filing with the Secretary of State and publication in the CCR as a "File and Print" action, as provided by Government Code section 11343.8 and CCR, title 1, section 6(b)(3)(G).

DECISION

On July 8, 2009, OAL disapproved the File and Print action because there is not an express statutory exemption that authorizes the Department to amend CCR, title 10, sections 2202(b), 2202(c), 2202(d), and 2203(b) as submitted in this action without complying with the California Administrative Procedure Act (APA).¹ Government Code section 11346 provides that all quasi-legislative actions are subject to the APA unless there is an express statutory exemption. Therefore, OAL did not file the fee amendments with the Secretary of State and did not publish them in the CCR.

¹ The rulemaking requirements of the APA administered by OAL are located in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

DISCUSSION

A regulation submitted to OAL as a File and Print action pursuant to Government Code section 11343.8 and CCR, title 1, section 6(b)(3)(G) authorizes OAL to file regulations with the Secretary of State and publish them in the CCR in cases when the adopting agency is exempt from the procedural and substantive requirements of the APA. Government Code section 11343.8 provides:

Upon the request of a state agency, the office may file with the Secretary of State and the office may publish in such manner as it believes proper, any regulation or order of repeal of a regulation *not required by this article*² to be filed with the Secretary of State. [Emphasis added.]

The Legislature enacted the following provision in Government Code section 11346(a) in 1947,³ which generally requires all state agencies to comply with the APA when adopting, repealing, or amending regulations:

(a) It is the purpose of this chapter to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations.... [T]he provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this chapter repeals or diminishes additional requirements imposed by any statute. *This chapter shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.* [Emphasis added.]

As set forth in a May 26, 2009 cover memo to OAL, the Department submitted the fee amendments as a File and Print action based upon Bulletin 2009-5, issued by the Insurance Commissioner on March 26, 2009. Both the memo and the bulletin rely on Insurance Code section 12973.9 and CCR, title 10, section 2202(e), discussed more fully below.

Department's May 26, 2009 Cover Memo

The Department included a cover memo dated May 26, 2009, explaining that the submitted fee increases should be a File and Print action and exempt from the APA because the Department

² Government Code section 11343.8 refers to article 3, sections 11343-11343.8. Section 11343 requires the following:

Every state agency shall:

(a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one that is a building standard.

(b) Transmit to the office for filing with the Secretary of State a certified copy of every order of repeal of a regulation required to be filed under subdivision (a).

....

³ Originally, Government Code section 11420, added by Stats.1947, c. 1425, p. 2988, § 1. This section has remained virtually unchanged since its enactment in 1947.

followed its own procedure for amending the fees under CCR, title 10, section 2202(e). Page one of the memo states:

The revisions which the Department of Insurance is effectuating are revisions to fees which are charged for documents filed with the Department of Insurance. The fee amounts were amended pursuant to 10 CCR section 2203(e),^[4] which provides in part that the Commissioner “may increase or decrease the fees established in this Article by issuing a Bulletin setting forth the modified fees at least 90 days prior to their effective date.” The Commissioner issued Bulletin 2009-5 setting forth the modified fees on March 26, 2009, more than 90 days before the July 1, 2009 effective date for the new fees.

Bulletin 2009-5 Issued By Commissioner On March 26, 2009

In Bulletin 2009-5, the Department based the fee amendments on Insurance Code section 12973.9 and CCR, title 10, section 2202(e). Page one of Bulletin 2009-5 states:

Background. The subject cost recovery rates are set forth in regulations promulgated under the authority granted to the Insurance Commissioner by Insurance Code § 12973.9, which also grants the Commissioner authority to establish standards by which the Commissioner may determine “amended fee schedule(s)”. Those standards and the mechanism to implement them are set forth in § 2202(e) of the cited Article. . . . Pursuant to Insurance Code § 12973.9 the subject cost recovery rates are paid by insurers to cover the actual expenses incurred by the Department in processing the subject forms. . . . [Bold font omitted.]

CCR, Title 10, Section 2202(e) and Insurance Code Section 12973.9

None of the eight authority citations to CCR, title 10, sections 2202 and 2203⁵ contain statutory language that can be construed as an express APA exemption. Additionally, the primary rulemaking authority upon which the Department relies in Bulletin 2009-5, and which CCR, title 10, section 2202(e) appears to implement, is Insurance Code section 12973.9. Instead of providing an express exemption to the APA, Insurance Code section 12973.9 expressly *requires* the Department to adopt increases or decreases to fees for documents set forth in CCR, title 10, sections 2202 and 2203 pursuant to the APA:

The commissioner shall, after notice and hearing, promulgate such reasonable rules and regulations as are necessary to establish the standard or standards by which the commissioner shall determine the original fee schedule or any amended fee schedule. *Any rule or regulation shall be promulgated in accordance with the procedure provided in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code* and shall be effective 90 days after

⁴ The intended citation is to section 2202(e), not section 2203(e).

⁵ The authorities cited under title 10, sections 2202 and 2203, are identical and include Insurance Code sections 742.43, 779.21, 10195.1, 10234, 10327, 10506, 10704, and 12973.9.

adoption by the commissioner, except the first fee schedule adopted by the commissioner under such regulation may be retroactive to the effective date of this section. [Emphasis added.]

Originally enacted in 1965, Insurance Code section 12973.9 was amended only once in 1981. Throughout the history of the APA, the Legislature was fully aware of how to create an express statutory APA exemption⁶ for a state agency, but apparently chose not to do so in the 1981 amendment to Insurance Code section 12973.9.

The Department adopted CCR, title 10, section 2202(e) in 1996 to provide a bulletin procedure for amending fees established in article 1, titled “Document Submission And Approval Procedures; Fees,” of CCR, title 10, chapter 5, subchapter 2. Section 2202(e) provides:

(e) The Commissioner *may* increase or decrease the fees established in this Article by issuing a Bulletin setting forth the modified fees at least 90 days prior to their effective date. The Commissioner shall not issue more than one such Bulletin in a fiscal year. Any fee increases or decreases made pursuant to this subdivision shall be by a uniform percentage for all fees established in this Article rounded to the next ten dollars, except that the Commissioner *may* establish different uniform percentage changes for all documents described in subdivisions (1) through (11) of Section 2202(a), except for subdivision (4)(D); for all documents described in subdivisions (4)(D), (12) and (13) of Section 2202(a); or for all documents described in subdivisions (14) through (16) of Section 2202(a). . . . [Emphasis added.]

Because Government Code section 11346 requires a state agency to amend its regulations through APA rulemaking unless and to the extent any *legislation* provides an express exemption, a regulation adopted by a state agency cannot operate as an APA exemption. Accordingly, the language in Section 2202(e) cannot be construed as an APA exemption for purposes of amending fees. Moreover, nothing in Section 2202(e) suggests any procedure that cannot be conducted concurrently or in harmony with APA rulemaking. Therefore, in order to amend fees, the Department “may” use the bulletin procedure in CCR, title 10, section 2202(e) to implement Insurance Code section 12973.9, provided the Department follows the APA to make the amendments as required by the APA and Insurance Code section 12973.9.

Insurance Code Section 12978

In contrast to the above, Insurance Code section 12978⁷ appears to provide an APA exemption for fee amendments. Insurance Code section 12978 provides:

Notwithstanding any other provision of law, the commissioner may increase or decrease the fees set forth in this code as necessary to allow the department to meet the appropriation authorized by the annual Budget Act. However, any increase or decrease so made shall be made only in accordance with this section,

⁶ See, e.g., Insurance Code section 12978, discussed more fully below.

⁷ Enacted in Stats.1982, c. 722, p. 2890, § 6.

and a fee increase shall not exceed 10 percent without the prior approval of the Legislature. . . . A single annual increase or decrease in fees, on a fiscal year basis, may be made by the department at any time during the year provided it is announced by bulletin issued *at least 90 days prior to the effective date* of that increase or decrease. . . . [Emphasis added.]

The introductory clause to Insurance Code section 12978, “[n]otwithstanding any other provision of law,” would likely be construed as a broad APA exemption. Accordingly, Insurance Code section 12978 appears to authorize the Department to use a 90-day bulletin procedure similar to the procedure found in CCR, title 10, section 2202(e) to amend fees under the Insurance Code without following the APA, but only if the Department follows the procedures and criteria established in Insurance Code section 12978.

The Department provided no evidence to OAL that it was relying on Insurance Code section 12978 in amending the fees in Bulletin 2009-5 for this action. Further, the Department would have been precluded from relying on Insurance Code section 12978 in this action because increases to fees under the Insurance Code section 12978 exemption “shall not exceed 10 percent.” Bulletin 2009-5 increased the fees by approximately 350 percent (350%).

CONCLUSION

OAL disapproved this action to amend the fees in CCR, title 10, sections 2202(b), 2202(c), 2202(d), and 2203(b), which the Department submitted as a File and Print action pursuant to Government Code section 11343.8 and CCR, title 1, section 6(b)(3)(G). OAL disapproved this action because neither Insurance Code section 12973.9 nor CCR, title 10, section 2202(e) provide an express statutory exemption to the APA for amending these fees. While Insurance Code section 12978 appears to provide a broad APA-exemption for amending fees, the Department did not rely on Insurance Code section 12978 in its submission to OAL, nor did the Department follow the procedures and criteria set forth in Insurance Code section 12978 prior to submitting the amended fees to OAL in this action. Therefore, OAL did not file the submitted amendments with the Secretary of State and did not publish them in the CCR.

Date: July 15, 2009



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