

**State of California  
Office of Administrative Law**

**In re:  
Department of Insurance**

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

**Adopt sections:  
Amend sections: 2498.4.9  
Repeal sections:**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2009-1007-01 S**

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**SUMMARY OF REGULATORY ACTION**

The Department of Insurance (Department) proposed this regular rulemaking action to amend 22 forms, repeal one form, and adopt one form (24 forms total) that pertain to the Commercial Auto Part of the California Automobile Assigned Risk Plan (CAARP) Plan of Operations. The CAARP Plan of Operations is incorporated by reference in title 10, California Code of Regulations, section 2498.4.9.

**DECISION**

On November 9, 2009, the Office of Administrative Law (OAL) notified the Department that the proposed regulatory action was disapproved due to noncompliance with the California Administrative Procedure Act (APA) because the proposed regulations failed to meet the APA “necessity” standard and failed to comply with APA procedural requirements.

**DISCUSSION**

The adoption of regulations by the Department must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Government Code section 11346.) No exemption or exclusion applies to the Department’s proposed regulatory action.

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code sections 11349 and 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the

rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided a meaningful opportunity to comment on rules and regulations before they become effective. (Government Code sections 11340.1 and 11349.1.)

This decision discusses the APA issues resulting in OAL's disapproval that need to be resolved. Because the regulation text and rulemaking documents will require substantial revision or supplementation, OAL reserves the right to conduct a complete APA review when the Department resubmits this regulatory action.

#### **A. FAILURE TO MEET THE NECESSITY STANDARD**

Government Code section 11349(a) provides the following definition of the "necessity" standard:

(a) Necessity means the record of the rulemaking proceeding **demonstrates by substantial evidence the need for a regulation** to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.  
[Emphasis added.]

Title 1, California Code of Regulations, section 10(b) elaborates on the Government Code section 11349(a) "substantial evidence" requirement for satisfying the necessity standard:

(b) In order to meet the "necessity" standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) A statement of the specific purpose of each adoption, amendment, or repeal; and
- (2) information **explaining why each provision** of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.  
[Emphasis added.]

In order to provide the public with a meaningful opportunity to review and comment upon an agency's perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons. (Government Code section 11346.2(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption,

amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. (Government Code section 11346.2(b)(1).) The initial statement of reasons must be submitted to OAL with the notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Government Code sections 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably. The initial statement of reasons and all data and other factual information, studies or reports upon which the agency is relying in the regulatory action must also be included in the rulemaking file. (Government Code section 11347.3(b)(2) and (7).)

The initial statement of reasons provided with this proposed regulatory action fails to provide sufficient necessity for all of the form amendments. The 24 forms in this action comprise 86 pages of regulation text. Several forms are contained on a single page, others are three to six pages, and about six forms are 10 to 16 pages in length. The initial statement of reasons for this action is only one page and contains several statements in a single paragraph to explain the need for the 86 pages of amended forms in this action. The essential reason given by the initial statement of reasons for the form amendments is “to allow CAARP to stay updated with changes that have been made by the federal and state governments to the forms.” However, none of the rulemaking documents cites any state or federal law mandating these forms or the amendments made to them in this action, nor do they elaborate on what the Department means by “changes that have been made by the federal and state governments to the forms.”

Additional statements explaining the need for this action were apparently placed on pages three and four of the 45-day notice of proposed action, in the informative digest discussion. These statements allude to most, but not all, of the 24 forms and generally use only the form number to refer to the form, followed by a short descriptive statement of the proposed form amendments. Several of these statements are incomplete sentences, making them unintelligible, and include several instances where the form numbers or other information necessary for reviewing the amendments are inaccurate. The Department is describing what the amendments are, not the need for the amendments as required by Government Code section 11346.2(b)(1). Additionally, OAL’s review of the amended forms revealed a significant number of amendments that are not discussed in either the initial statement of reasons or the 45-day notice of proposed action.

Aside from the fact that Government Code section 11346.2 specifies that the necessity statements should be placed in the initial statement of reasons, given the number of regulatory provisions involved in this action, the statements provided in the initial statement of reasons and the 45-day notice for this action provide, at best, conclusory statements of “what” most of the proposed form amendments do. The rulemaking documents wholly fail to provide the substantial facts and information required by the APA to demonstrate “why” the proposed form amendments are needed and “how” this action fills that need.

For the above reasons, the Department must prepare and make available a clear and comprehensive statement of reasons in a 15-day notice for public comment to demonstrate the

facts and information required to meet the necessity standard, pursuant to Government Code section 11347.1(b) and title 1, California Code of Regulations, section 44.

## **B. FAILURE TO COMPLY WITH APA PROCEDURAL REQUIREMENTS**

### **1. THE PROPOSED FORMS CONTAIN CHANGES THAT WERE NOT ADEQUATELY ILLUSTRATED TO THE PUBLIC**

Government Code section 11346.2(a) requires that an adopting agency make available to the public, upon request, the express terms of the proposed regulation during the 45-day comment period of the proposed action. Government Code section 11346.2(a)(3) provides:

(3) The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.

Additionally, title 1, California Code of Regulations, section 8(b) provides:

(b) The final text of the regulation shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations. Underline or italic is not required for the adoption of a new regulation or set of regulations if the final text otherwise clearly indicates that all of the final text submitted to OAL for filing is added to the California Code of Regulations.

The express terms must clearly indicate any additions or deletions to any text being amended, adopted, or repealed in the proposed action. All of the changes made to the 24 forms in this action must also comply with this requirement even though the CAARP Plan of Operations and the 24 forms are not published in the California Code of Regulations. Title 1, California Code of Regulations, section 20(b) requires that “[m]aterial proposed for ‘incorporation by reference’ shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations. . . .”

The reason for these requirements is so that a member of the public reading the initial text of the regulation made available to the public would understand what changes are being proposed by this rulemaking. While many of the form amendments described in the initial statement of reasons and the 45-day notice for this action are shown with appropriate underlining and strikeout, there are numerous instances of changes in the forms that have no corresponding underlining or italics and strikeout. One newly adopted form has nothing to indicate clearly that the express terms of it are being adopted. Accordingly, a member of the public reading the initial form text made available during the 45-day comment period would not have been able to understand all of the additions or deletions to the forms that were subject to public comment.

For the above reasons, all of the changes made to the 24 forms in this action need to be shown clearly and accurately, and be made available for public comment pursuant to Government Code section 11346.8(c) and title 1, California Code of Regulations, section 44. The Department must

clearly indicate the form changes by using underlining or italics and strikeout or by using an alternative method that clearly indicates additions and deletions to the forms.

## 2. INCORPORATION BY REFERENCE

OAL adopted title 1, California Code of Regulations, section 20 to assure that material incorporated by reference in regulations conforms to the requirements of the APA. Title 1, section 20 specifies the requirements for clearly incorporating material by reference that will satisfactorily address the public participation and rulemaking record requirements of the APA. Incorporated by reference material must be reviewed according to the same standards and procedural compliance as any other regulation.

Title 1, section 20 provides:

(a) "Incorporation by reference" means the method whereby a regulation printed in the California Code of Regulations makes provisions of another document part of that regulation by reference to the other document.

(b) Material proposed for "incorporation by reference" shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations. Except as otherwise specified in section 11 of these regulations, OAL shall not review material proposed for "incorporation by reference" for compliance with the applicable standards of Government Code section 11349.1 when a California statute or other applicable law specifically requires the adoption or enforcement of the incorporated material by the rulemaking agency.

(c) An agency may "incorporate by reference" only if the following conditions are met:

(1) The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations.

(2) The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained.

(3) The informative digest in the notice of proposed action clearly identifies the document to be incorporated by title and date of publication or issuance. If, in accordance with Government Code section 11346.8(c), the agency changes the originally proposed regulatory action or informative digest to include the incorporation of a document by

reference, the document shall be clearly identified by title and date of publication or issuance in the notice required by section 44 of these regulations.

(4) The regulation text states that the document is incorporated by reference and identifies the document by title and date of publication or issuance. Where an authorizing California statute or other applicable law requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, no specific date is required.

(5) The regulation text specifies which portions of the document are being incorporated by reference.

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Although most of the 24 forms were identified in the notice of proposed action (discussed above), the Department identified them only by each form's designated number. The numbers appear to include the version date of each form (e.g., "03 06" at the end of a form number appears to indicate the version date of that form is March 2006). Notwithstanding, the form titles are not identified, and in all other respects the Department failed to comply with the incorporation by reference requirements in title 1, section 20. Accordingly, the Department will need to make substantial revisions to the rulemaking documents to comply with title 1, section 20 before resubmitting this action. This includes the public notice requirements under title 1, section 20, which will need to be incorporated into the 15-day notice pursuant to Government Code section 11347.1(b) and title 1, California Code of Regulations, section 44.

### CONCLUSION

For the foregoing reasons, OAL disapproves the Department's proposed rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-6809.

Date: November 25, 2009



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