

**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. 2009-1007-04 S

SUMMARY OF REGULATORY ACTION

The Department of Insurance (Department) proposed this regular rulemaking action to amend Sections 23 and 41 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 any of the amendments in this action. The initial statement of reasons is only one page and contains several statements in a single paragraph that indicate the amendments in this action are necessary to make sections 23 and 41 of the CAARP Plan of Operations consistent with corresponding provisions in the Department's online "EASi" applications. (EASi is an acronym for Electronic Application Submission Interface.)

Additional statements pertaining to the amendments to this action are on page three of the 45-day notice of proposed action, in the informative digest discussion. The informative digest repeats the paragraph from the initial statement of reasons pertaining to sections 23 and 41 of the CAARP Plan of Operations and the Department's EASi applications. The informative digest then provides single-sentence statements that summarize each amendment to sections 23 and 41. These statements merely describe what the amendments are, not the need for the amendments as required by Government Code section 11346.2(b)(1) and, accordingly, fail to meet the necessity standard.

Additionally, nothing in the initial statement of reasons or the notice of proposed action provide any details regarding the specific EASi applications and provisions that are the purported bases for the proposed action. Accordingly, the rulemaking documents fail to provide the substantial facts and information required by the APA to demonstrate "why" the proposed 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 AMENDMENTS 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. . . .

The express terms must clearly indicate any additions or deletions to any text being amended, adopted, or repealed in the proposed action, including changes to section numbers, punctuation, and grammar. All of the changes made to amended text must comply with this requirement even though the CAARP Plan of Operations is a document incorporated by reference and is 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. OAL’s review of the amended regulation text revealed numerous errors and omissions in the Department’s usage of underlining and strikeouts to show changes in the amended text.

For the above reasons, all of the changes made to the amended text need to be shown clearly and accurately in accordance with Government Code section 11346.2(a)(3) and title 1, California Code of Regulations, section 8(b) before the Department resubmits this action.

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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