

**State of California  
Office of Administrative Law**

**In re:**

**Department of Managed Health Care**

**Regulatory Action:**

**Title 28, California Code of  
Regulations**

**Adopt sections: 1300.65.2, 1300.89.21  
Amend sections: 1300.65, 1300.65.1**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2014-0908-03S**

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**DECISION SUMMARY**

On September 8, 2014, the California Department of Managed Health Care (Department) submitted to the Office of Administrative Law (OAL) this rulemaking action which concerns regulatory provisions for health plan cancellations, rescissions, and non-renewals of coverage. The action proposed to codify a Department Guidance document on this subject which was exempt from the Administrative Procedure Act (APA) through 2013. The action also proposed regulatory provisions governing notice requirements for cancellations and non-renewals of coverage and for retroactive rescissions of coverage for fraud, as well as provisions concerning consumers' rights to initiate Requests for Review of coverage terminations and regarding grace periods and reinstatements, among other provisions.

OAL disapproved the proposed regulations for the Department's failure to comply with the necessity and clarity standards and with various procedural requirements of the APA, pursuant to Government Code sections 11349, 11349.1, 11346.2, 11347.1, 11347.3, 11346.5, and 11346.3 and certain regulations that implement those statutes.

**BACKGROUND**

Existing federal law (Title 42 U.S.C. sections 300gg-2 and 300gg-42) provides that a health insurer may only non-renew or discontinue health insurance coverage offered in the group or individual market in one of six circumstances. The federal law also restricts how and when a health insurer may rescind or retroactively cancel health coverage. The California Legislature enacted Assembly Bill 2470 (Chapter 658, Statutes of 2010) to conform state law to these federal provisions. The Department conducted this rulemaking action to implement and make specific these state law limitations on and requirements for health plan contract cancellations, rescissions, and

non-renewals. The proposed regulations also implement, interpret, and make specific requirements related to enrollee, subscriber, and contract holder Requests for Review, by health plans and/or the Department, of health plan coverage cancellations, rescissions and non-renewals by providing timelines for the submission of Requests for Review and for health plan and Department responses.

## **DISCUSSION**

Any regulation amended or adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute 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 the APA. Government Code sections 11340.5 and 11346. OAL reviews regulatory actions for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that required procedures are followed in order to provide a meaningful opportunity for public comment on regulations before they become effective.

### **A. Clarity.**

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. Government Code section 11340(b). Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349(c) defines "clarity" to mean "...written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them." Moreover, it shall be presumed that a regulation does not comply with the clarity standard if any of the following conditions exist: the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; the language of the regulation conflicts with the agency's description of the effect of the regulation; or the regulation uses language incorrectly. Title 1 California Code of Regulations (CCR) section 16(a). As a result of its review, OAL found that a number of proposed provisions failed to meet the clarity standards of Government Code section 11349(c) and/or section 16(a) of Title 1 of the CCR.

**(1) Proposed sections 1300.65(c)(1)(C), 1300.65(c)(2)(A)(ix), 1300.65(c)(4)(A)(iv), 1300.65.2(b)(2)(C), 1300.65.2(d)(4), and 1300.65.2(d)(5).**

In its proposed text of adopted and amended regulations, the Department uses the term "subsection" (and sometimes "subdivision") to make cross references to different levels of the hierarchy of subdivisions contained in these regulations but without specifying which level of the hierarchy the cross reference is restricted to. Examples of this include: section 1300.65(b)(2)(B) referring to subsection (d), section 1300.65(c)(2)(A)(viii) referring to subsection (c)(6), section 1300.65(c)(2)(A)(vi) referring to subsection (c)(3)(B), and section 1300.65(c)(4)(C) referring to subsection (c)(4)(B)(iii).

As a result of the use of the term "subsection" or "subdivision" to cross reference any one of four levels of subdivisions, it is unclear whether phrases such as "for purposes of this subsection" or "this subsection shall not apply" or "the notice required in this subdivision" are referring to the specific subdivision in which the phrase appears, or to some higher and larger level in the hierarchy of the regulation which would encompass more substantive provisions than the Department may have intended. For example, when section 1300.65(c)(1)(C) uses the phrase: "for purposes of this subsection," it is unclear if that phrase is a reference to subsection (c)(1)(C), or to all of subsection (c)(1), or to the entire subsection (c).

**(2) Proposed section 1300.65(d)(1).**

This provision gives an enrollee, subscriber, or group contract holder (hereafter "enrollee") "180 days from the Notice of Cancellation...to submit a Request for Review to the plan or to the Director...." Section 1300.65(c)(1) authorizes health plans to use U.S. Mail to send Notices of Cancellation to enrollees. It is unclear whether the phrase "180 days from the Notice of Cancellation" means 180 days from the date of the Notice of Cancellation or 180 days from the date of the enrollee's receipt of the Notice of Cancellation.

**(3) Proposed section 1300.65(d)(2).**

This provision provides: "If the enrollee...submits a Request for Review to the plan, the plan shall resolve the Request for Review by mailing a written statement of disposition to the enrollee...within three (3) days of receipt of the Request for Review."

Commenters opposed this provision on the grounds that three days was insufficient time to process a Request for Review. One commenter contended that the provision effectively allowed for no time to process a Request for Review in a situation where an enrollee filed such a request late in the day on the day before a three-day weekend. The Department made no changes to the regulation in response to these comments. The Department's explanation of its reasons for making no changes included this

statement: "If the Plan cannot resolve the matter in three days, the Director will take these complaints as direct complaints to the Department as allowed by Health and Safety Code section 1368(b)(1)(A)."

As discussed above, the APA clarity standard is not met if the language of the regulation conflicts with the agency's description of the effect of the regulation. Title 1 CCR section 16(a)(2). The language of the regulation conflicts with the effect of the regulation as described by the Department in its response to comments opposing this provision. The response implies that the text of the regulation includes something to the effect of directions to the enrollee to forward the Request for Review to the Director if a health plan fails to resolve it within three days or, perhaps, requirements for the simultaneous filing by the enrollee of the Request for Review with both the health plan and the Director and for monitoring of the processing time line by the Director and for assumption of jurisdiction over the Request for Review if it has not been completed by the health plan within three days. Neither the regulation nor Health and Safety Code section 1368(b)(1)(A) contain any such provisions or other provisions which require, enable, or facilitate the Director to take complaints filed exclusively with the plan but not processed within three days as direct complaints to the Department. The regulation, at section 1300.65(c)(6), contains suggested "notice content" language for health plans to use in Notices of Cancellation to inform enrollees of their right to submit Requests for Review. That language makes the options of filing with either the health plan or the Department exclusive of one another. The language informs enrollees what will happen if the health plan processes the Request for Review and upholds it, but it does not inform enrollees what to do after three days if, for example, the enrollee has received no response from the health plan.

The response to the commenters further confuses the purported effect of the regulation by referring to Health and Safety Code section 1368(b)(1)(A). That statute only operates after an enrollee has completed the review process with the health plan under Health and Safety Code section 1368(a) or has participated in the process for at least 30 days. The statute is silent regarding what remedy an enrollee has, if any, when their Request for Review has not been completed but they have only participated in the process for three days.

**(4) Proposed section 1300.65(e).**

Section 1300.65(e) cross references "subdivision (c)" for the paid coverage period or notice period, whichever is longer, after which the health plan may terminate the plan contract. Subdivision (c) of section 1300.65 is a relatively long subdivision and contains a number of dates and time periods. Pursuant to Government Code section 11349(c), the standard for clarity is whether the regulation will be "easily" understood by those persons directly affected by it. Both health plans and individuals are affected by these regulations. OAL has determined that individuals would not easily understand, without a more specific cross reference than all of "subdivision (c)," what the paid coverage

period or notice period is for purposes of determining when the plan contract may be terminated.

**(5) Proposed section 1300.65(c)(1)(A), (c)(1)(C), (c)(2), (c)(2)(A), and (d)(1).**

Pursuant to Title 1 CCR section 16(a)(1), the clarity standard is not met when a regulation can, on its face, be reasonably and logically interpreted to have more than one meaning.

In most locations in these regulations, the Department refers to the form: *Notice of Cancellation for Nonpayment of Premiums and Grace Period*, but in the provisions listed above the reference is to the form: *Notice of Cancellation for Nonpayment of Premiums*. This use of a different title for the form can be reasonably interpreted to mean that a second and different form is referred to in these provisions.

**(6) Proposed section 1300.65.2(e)(1) and (g).**

Similar to clarity issue number (5) above, the Department, in most instances in section 1300.65.2, refers to the "QHP Issuer." However, on three occasions the above-listed subdivisions of this section refer to "a plan" or "the plan." The use of a different term can be reasonably interpreted to mean that these references are to some entity other than the QHP Issuer.

**(7) Proposed section 1300.65(a)(1)(C).**

This provision states: "...or Cal-COBRA (sections 1366.20 through 1366.29 of this chapter)." The phrase "of this chapter" is unclear because it can be reasonably interpreted to mean of the chapter in which section 1300.65 is located, i.e., Chapter 2 of Division 1 of Title 28 of the CCR. However, there are no sections 1366.20 through 1366.29 in that chapter.

Prior to resubmission of this rulemaking action to OAL for review, the Department must revise the provisions described above so as to satisfy the clarity standard and must make the revised text of the regulations available for public comment pursuant to Government Code section 11346.8(c).

**B. Necessity.**

OAL must review regulations for compliance with the necessity standard of the APA in accordance with Government Code section 11349.1(a)(1). Government Code section 11349(a) provides that "necessity" means that the record of the rulemaking proceeding demonstrates by substantial evidence the need for the 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.

Necessity is explained primarily in the agency's Initial Statement of Reasons (ISR). Government Code section 11346.2(b)(1) requires that the ISR include a statement of the specific purpose of each adoption, amendment, or repeal and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose for which it is proposed. Title 1 CCR section 10(b) requires that the rulemaking record include a statement of the specific purpose of each adoption, amendment, or repeal and information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.

In this action, the Department failed to include statements in the ISR, or elsewhere in the record, that contained the rationale for determining that certain numbers of days specified in section 1300.65(d)(1)(2)&(4) were necessary to carry out the purposes for which they were proposed. The ISR failed to explain why it was necessary to give health plans three days to process Requests for Review and five days to provide the Director with certain information, and why it was necessary to select 180 days from the Notice of Cancellation as the period of time enrollees will have to submit Requests for Review.

Prior to resubmission of this rulemaking action to OAL for review, the Department must prepare an addendum to the ISR which includes an explanation of why the selection of these time periods was necessary to carry out the purposes for which they were proposed and must make the document available for 15 days pursuant to Government Code section 11347.1.

### **C. Administrative Procedure Act Requirements.**

The Department failed to comply with several APA procedural requirements as discussed below.

#### **(1) Failure to comply with Government Code section 11347.1.**

The Department included an "Update of Material Relied Upon" in its Final Statement of Reasons in this action and listed two additional documents. These documents were not, however, made available to the public for 15 days pursuant to Government Code section 11347.1. Prior to resubmission of this rulemaking action to OAL for review, the Department must comply with section 11347.1 if it wishes to add these documents to this record as documents upon which it relied in proposing the action.

#### **(2) Failure to comply with Government Code section 11347.3(b).**

The Department failed to include in this rulemaking record, pursuant to Government Code section 11347.3(b)(2), the notice of proposed action that complied with Government Code section 11346.5 and that was published in the California Regulatory Notice Register.

The Department also failed to include in this rulemaking record, pursuant to Government Code section 11347.3(b)(7), the Economic Impact Assessment that complied with Government Code section 11346.3.

**(3) Failure to comply with Government Code section 11346.2(a)(3).**

The Department failed to use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations pursuant to Government Code section 11346.2(a)(3). The failures occurred primarily in the Department's *Form to Request for Review of Cancellation, Rescission, or Nonrenewal of Plan Contract* which is printed at section 1300.65.1. Failures also occurred as a result of intervening changes made to section 1300.65 by another Department rulemaking action that amended that section effective July 1, 2014, but which changes were not accommodated in the text submitted to OAL for review, publication, and filing with the Secretary of State.

**(4) Failure to comply with Title 1 CCR section 86.**

The Department failed to include in this rulemaking record a statement of mailing its notice of proposed action which complied with the requirements of Title 1 CCR section 86. The statement fails to declare that the Department complied with the provisions of Government Code section 11346.4(a)(1)-(4) in the mailing of this notice.

Prior to resubmission of this rulemaking action to OAL for review, the Department must remedy the APA procedural violations listed above.

**CONCLUSION**

For the foregoing reasons, OAL disapproved the above-referenced rulemaking action. All items listed above shall be corrected in any resubmission of this rulemaking action to OAL. Pursuant to Government Code section 11349.4(a), the Department may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval. The Department shall make all substantial regulatory text changes, which are sufficiently related to the original text, and all additional documents relied upon, as well as its addendum to the ISR, available for at least 15 days for public comment pursuant to Government Code sections 11346.8 and 11347.1, respectively. The OAL reserves the right to review the Department's resubmitted regulations and rulemaking record for compliance with all substantive and procedural requirements of the APA.

Dated: October 23, 2014

  
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