

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

In re:	)	
	)	
DEPARTMENT OF INSURANCE	)	DECISION OF DISAPPROVAL OF CERTIFICATE OF COMPLIANCE
	)	
REGULATORY ACTION:	)	(Gov. Code, sec. 11349.6 (d))
	)	
Title 10, California Code of Regulations	)	OAL File No. 00-1121-01 C
ADOPT SECTION: 2498.6	)	
	)	
	)	
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	)	

**DECISION SUMMARY**

The regulatory action is the Certificate of Compliance for section 2498.6 of Title 10 of the California Code of Regulations (“CCR”) which incorporates by reference the California Automobile Insurance Low Cost Program Plan of Operations” (“Plan”). Section 2498.6 and the incorporated by reference Plan became effective March 27, 2000 and was readopted as an emergency without amendment effective July 25, 2000. (Prior OAL files 00-0218-06 E, 00-0317-02 EE and 00-0724-01 EE; Department of Insurance File Number ER 37.) The Certificate of Compliance contains amendments of section 2498.6 and the incorporated by reference plan. On January 8, 2001 the Office of Administrative Law (“OAL”) notified the Department of Insurance (“Department”) that the Certificate of Compliance was disapproved because it did not comply with the “necessity” standard contained in Government Code section 11349.1 and for incorrect procedure. Please note that in order to keep existing section 2498.6 and the incorporated by reference Plan that was effective since March 27, 2000 in effect while the Department resolves the issues contained in this opinion a readopt request was submitted to OAL that was approved and effective January 8, 2001 (OAL File 01-0105-01EE; Department of Insurance File Number RH – 391.)

**DISCUSSION**

**A. NECESSITY**

Government Code section 11349.1, subdivision (a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349, subdivision (a) defines “necessity” to mean that

“ . . . 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 purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

Please note when resubmitting, the standard in section 10 that became effective January 1, 2001 must be met. It provides that in order to meet the “necessity standard” the rulemaking record must include:

“(1) A statement of the specific purpose of each adoption, amendment, or repeal; and

(2) information explaining why each provision of the adopted regulation 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 knowledge by reason of study or experience which is relevant to the regulation in question.”

1. Section 30 deals with procedures for the renewal or nonrenewal of low cost auto policies and it was added during the 15 day public availability period. The Final Statement of Reasons (“FSR”) summarizes all of the provisions but did not have “. . . information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision . . .”

2. Section 4 deals with the cost of administering the Plan. Section 4A states in relevant part that

“The reasonable costs of administering this Program for each year shall be determined annually by the Manager and approved by the Advisory Committee. Such costs shall be apportioned and assessed to all insurers in the same proportion as their obligations pursuant to this Program. The minimum annual assessment shall be \$250.” (Emphasis added.)

The Updated Information Digest on page 7 addresses why a minimum assessment is needed to apportion the administrative costs but this generalized statement does not address why or how \$250 was selected.

3. The rulemaking record does not contain necessity for the underlined portion of section 26 C 3 which states “At any point during the installment billing period, the policy holder may elect

to pay the balance outstanding and the insurer shall include installment charges only for those installments billed.” (Emphasis added.)

## **B. INCORRECT PROCEDURE**

OAL must review rulemaking records submitted to it in order to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, sec. 11349.1, subd. (a).)

1. Subsection (a) of section 20 of Title 1 of the CCR defines “incorporation by reference” as 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.”

Subsection (b) of section 20 requires OAL to review incorporated by reference material “. . . in accordance with procedures and standards for a regulation published in the California Code of Regulations.”

Section 20, subsection (c) declares in relevant part that

“(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 Regulation.

(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.”

Section 2498.6 incorporates by reference the Plan and the Plan incorporates by reference six forms. The FSR does not contain the information required by subsections (c)(1) and (c)(2) of section 20 for the Plan and for each of the incorporated by reference forms.

Additionally, in order to comply with subsection (e) of section 20 and Government Code section 11343 subdivision (c) the resubmittal needs to have the following forms attached to the Form 400. These forms were available during the 45 day public availability period or are forms that were subsequently revised during the 15 day public availability period: AIP 128 (3/00), AIP 1254 (Rev. 4/96), AIP 1255 (Rev. 4/96) AIP 101 (Rev. 1/99) AIP 126 E (7/00) and AIP 127 (3/00).

2. Government Code section 11347.3 subdivision (b)(8) mandates that the rulemaking record contain “A transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of the regulation.”

The Notice of Proposed Action stated that hearings were scheduled, on October 2, 2000 in San Francisco and on October 3, 2000 in Los Angeles. The rulemaking record does not contain a transcript, recording or minutes of the October 2, 2000 hearing.

3. Section 86 of Title 1 of the CCR requires that

“The rulemaking record shall contain a statement confirming that the agency complied with the provisions of Government Code Section 11346.4(a)(1) through (4) regarding the mailing of notice of proposed action at least 45 days prior to public hearing or close of the public comment period, and stating the date upon which the notice was mailed. This section is not intended to require an agency to provide a copy of its mailing list to support the statement.”

Government Code section 11346.4, subdivisions (a)(1) through (4) that were in effect at that time the 45 day public availability period occurred required that:

“(a) At least 45 days prior to the hearing and close of the public comment period on the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be:

(1) Mailed to every person who has filed a request for notice of regulatory actions with the state agency.

(2) In cases in which the state agency is within a state department, mailed or delivered to the director of the department.

(3) Mailed to a representative number of small business enterprises or their representatives which have been identified as being affected by the proposed action.

(4) When appropriate in the judgment of the state agency, mailed to any person or group of persons whom the agency believes to be interested in the proposed action and published in the form and manner as the state agency shall prescribe.” (Emphasis added.)

The rulemaking record contains the following verification:

“On July 31, 2000 at my place of business at 45 Fremont Street, San Francisco, California, the following documents: RH-391 Notice of Proposed Action and Notice of Public Hearing were placed for deposit in the United States mail at San Francisco, California, in sealed envelopes

with proper postage thereon fully prepaid, to the last known address of the following persons: All interested persons pursuant to Government Code Section 11346.4” (Emphasis added.)

This declaration could be read to mean that only persons in subdivision (a)(4) of Government Code section 11346.4 (“ . . . any person or group of persons whom the agency believes to be interested in the proposed action . . .”) were mailed the Notice instead of verifying that the Notice was mailed in compliance with Government Code section 11346.4, subdivision (a)(1) through (a)(4).

4. Section 44 of Title 1 of the CCR declares in relevant part that

“(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code Section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
  - (2) all persons who submitted written comments at the public hearing; and
  - (3) all persons whose comments were received by the agency during the public comment period; and
  - (4) all persons who requested notification from the agency of the availability of such changes.
- (b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period . . . .” (Emphasis added.)

(a) The rulemaking record contains a declaration that

“On November 1, 2000, I served a true and correct copy of the following document: RH-391 Notice of Availability of Changed Text; Proposed Revisions to Text of Low Cost Automobile Insurance Program Plan of Operations to all parties in this action by placing a copy of the same on that date in the place for collection and mailing at the office of the California Department of Insurance at 45 Fremont Street, 21<sup>st</sup> Floor, San Francisco, California, with proper postage to be prepaid, in a sealed envelope(s), addressed as follows: Richard Manning, CAARP [address], Douglas Heller, The Foundation for Taxpayer and Consumer Rights [address], James E.

Masek, Regional Director, Insurance Services Office, Inc. [address],  
Samuel Sorich Vice President, NAI, [address]”

The rulemaking record verifies that the four people listed above submitted written comments during the public comment period (category (a)(2) of section 86) but the declaration does not address whether there were persons in the other three categories of section 86 and if so if they had the 15 day notice and text mailed to them. Because the October 2, 2000 hearing transcript is not in rulemaking record we do not know if there were persons not on this list who testified or submitted comments at that hearing.

5. Government Code section 11347.3, subdivision (b)(12) requires that the rulemaking record includes:

“(12) An index or table of contents that identifies each item contained in the rulemaking file. The index or table of contents shall include and affidavit or a declaration under penalty of perjury in the form specified by Section 2015.5 of the Code of Civil Procedure by the agency official who has compiled the rulemaking file, specifying the date upon which the record was closed, and that the file or the copy, if submitted, is complete.”

The rulemaking record consists of four folders labeled “Public Comments”, “Folder 1 of 3”, “Folder 2 of 3” and “Folder 3 of 3.” Each folder has an individual nonconsecutively numbered index. The required declaration is not part of any of the indexes but is elsewhere in the file. When resubmitting, please have one composite index which should include all four of the folders and also the items in the resubmittal folder and have the declaration as part of the index in order to eliminate any issue regarding the completeness of the record.

6. Although not a basis for disapproval the Table of Contents for the Plan should be revised to add “Renewal/Nonrenewal of Low Cost Auto Policies” as the Title for new Section 30 instead of the now obsolete caption of “Reserved For Future Use.” Additionally the typographical error on page L-21, section 30 A.2.b. “nonewnewal” should be corrected to “nonrenewal.” Additionally when resubmitting the disapproved Certificate of Compliance please incorporate by reference all prior files in order to comply with section 84 of Title 1 of the CCR.

## **CONCLUSION**

For the reasons set forth above, OAL has disapproved the proposed adoption of section 2498.6 of Title 10 of the California Code of Regulations. If you have any questions, please contact me at (916) 323-6809.

January 12, 2001

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BARBARA ECKARD  
Senior Staff Counsel

For:

DAVID B. JUDSON  
Deputy Director/Chief Counsel

Original: Harry W. Low, Commissioner  
Cc: Elizabeth Mohr