STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

In re:	
DEPARTMENT OF INSURANCE	DECISION OF DISAPPROVAL OF REGULATORY ACTION (Gov. Code, section 11349.3)
REGULATORY ACTION: Title 10, California Code of Regulations	OAL File No. 05-0624-01S
Adopt sections 2592, 2592.01, 2592.02, 2592.03, 2592.04, 2592.05, 2592.06, 2592.07, 2592.08, 2592.09, 2592.10, 2592.11, 2592.12, 2592.13, and 2592.14	

SUMMARY OF REGULATORY ACTION

In this regulatory action, the Department of Insurance ("DOI") adopts regulations pursuant to Insurance Code section 11761 establishing minimum standards of training, experience and skill that workers' compensation claims adjusters, including adjusters working for medical billing entities, must possess to perform their duties with regard to workers' compensation claims. The regulations further provide for the process by which insurers certify to the Insurance Commissioner that the personnel employed by an insurer to adjust workers' compensation claims meet the minimum standards established by the Insurance Commissioner.

On August 8, 2005, the Office of Administrative Law ("OAL") notified DOI of the disapproval of the above-referenced regulatory action. OAL disapproved the regulations for the following reasons: (1) failure to comply with the "Clarity" standard of Government Code section 11349.1, (2) failure to comply with the "Consistency" standard of Government Code section 11349.1, (3) the rulemaking file does not include an adequate summary and response to all public comments received regarding the proposed regulatory action, and (4) a number of required rulemaking documents are omitted from the rulemaking file or are defective as submitted.

DISCUSSION

Regulations adopted by DOI must generally be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act (the "APA;" Gov. Code, secs. 11340 through 11361). Any

regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the act from compliance with the APA. (See Gov. Code, sec. 11346.) No exemption or exclusion applied to the regulatory action here under review. Consequently, before these regulations could become effective, the regulations and the rulemaking record were reviewed by OAL for compliance with the procedural requirements and the substantive standards of the APA, in accordance with Government Code section 11349.1.

CLARITY

OAL must review regulations for compliance with the substantive standards of the APA, including the "Clarity" standard, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines "Clarity" as meaning "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."

The "Clarity" standard is further defined in section 16 of title 1 of the California Code of Regulations ("CCR"), OAL's regulation on "Clarity," which provides the following:

> "In examining a regulation for compliance with the 'clarity' requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:
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> "(a) A regulation shall be presumed not to comply with the 'clarity' standard if any of the following conditions exists:
> (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
> (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or
> (3) the regulation uses terms which do not have meanings generally familiar to those 'directly affected' by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
> (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
> (5) the regulation presents information in a format that is not readily understandable by persons 'directly affected;' or
> (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.
>
> "(b) Persons shall be presumed to be 'directly affected' if they:
> (1) are legally required to comply with the regulation; or
> (2) are legally required to enforce the regulation; or
> (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
> (4) incur from the enforcement of the regulation a detriment that is not common to the public in general."

In this workers' compensation claims adjuster rulemaking, numerous provisions of the proposed regulations fail to meet the Clarity standard. Examples of problems with the clarity of the regulations include the following:

Example #1: Proposed regulation section 2592.02(f) provides, in part, the following: "A workers' compensation insurance company or self-insured employer shall certify that the course of instruction provided to its own staff or which is provided to the claims adjusters who work for a third party administrator which adjusts claims for the insurance company or self-insured employer meets all the requirements set forth in this Article and that all of the claims adjusters who adjust claims on behalf of the insurance company or self-insured employer have actually attended the training for the required number of hours." This provision is unclear because it is not easy to determine exactly the manner or format in which the certification is to be made and to whom. Another proposed regulation, section 2592.08, sets forth a form for an annual insurer certification to the Insurance Commissioner, but it is not clear that this is the format to be used for the section 2592.02(f) certification. Sections 2592.02(f) and 2592.08 do not reference each other. Furthermore, the pertinent language on the section 2592.08 certification form does not track with the language in 2592.02(f) quoted above. The section 2592.08 certification form includes the following certification statement: "All persons adjusting claims on behalf of this organization are certified to do so or are in training." These certification requirements need to be clarified and coordinated (and the certification to the Insurance Commissioner must, of course, be fully consistent with Insurance Code section 11761(b)).

Example #2: Proposed regulation section 2592.01(l) defines the key term "medical billing entity" for purposes of these regulations. However, a number of the regulation sections (including regulation sections 2592.01, 2592.04, 2592.05, 2592.06, 2592.07, 2592.09, 2592.11, 2592.13, and 2592.14) use a somewhat different term "medical bill review entity" in one or more places. The term "medical bill review entity" is not defined in these regulations. The use of the alternative, undefined term "medical bill review entity" can be confusing because the user of the regulations may be left wondering whether "medical bill review entity" has the same meaning as the defined term "medical billing entity" or whether some other meaning is intended. Because of the potential confusion, these provisions do not meet the Clarity standard.

Example #3: Proposed regulation sections 2592.05(a), 2592.05(b), 2592.05(c), 2592.05(d), 2592.07(a), and 2592.07(b) contain references to various required documents and certificates being "in the form and manner determined by the commissioner." This language is unclear since directly affected persons may not be able to easily determine from the regulation text itself exactly what all of the specific requirements for the various documents and certificates might be. Directly affected persons may be left uncertain from this language as to what additional form and manner regulatory requirements might be applicable. (Language such as "in the form and manner determined by the commissioner" also raises concerns regarding so-called "underground regulations" under Government Code section 11340.5.) For clarity, this language must be deleted and any additional regulatory requirements not already set forth in the regulations need to be specified in the regulation text. Note: The need for this "in the form and manner determined by the commissioner" language may have been addressed since DOI elected in its March 2005

15-day notice to add specific certification and document formats to the workers' compensation claims adjuster regulations in proposed regulation sections 2592.08 through 2592.14.

Example #4: In proposed regulation sections 2592.08 through 2592.14, the regulation text contains citations (cross-references) to other sections of the CCR which are incomplete and in some cases inaccurate, thereby making the regulation text not easily understood and violating the clarity standard. The citations are not complete in that they do not refer to the specific title of the CCR – "title 10." In addition some of the section citations appear to be inaccurate or incomplete. For example, regulation section 2592.08 refers to "California Code of Regulations Section 2592.05." The complete, correct citation would appear to be: "California Code of Regulations, Title 10, Sections 2592.02 and 2592.07." Similarly, regulation section 2592.09 refers to "California Code of Regulations 2592.05." The complete, correct citation would appear to be "California Code of Regulations, Title 10, Sections 2592.04 and 2592.07."

These examples of clarity problems and all other clarity problems with the regulations must be resolved before the regulations can be approved by OAL. Other specific clarity problems have been discussed with DOI staff.

CONSISTENCY

OAL must review regulations for compliance with the "Consistency" standard of the APA, in accordance with Government Code section 11349.1. Government Code section 11349, subdivision (d), defines "Consistency" as meaning "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." As discussed below, one aspect of the proposed workers' compensation claims adjuster training regulations is inconsistent with the governing statute, Insurance Code section 11761.

Insurance Code section 11761, subdivision (b), provides: "Every insurer shall certify to the [Insurance Commissioner] that the personnel employed by the insurer to adjust workers' compensation claims, or employed for that purpose by any medical billing entity with which the insurer contracts, meet the minimum standards adopted by the commissioner pursuant to subdivision (a)." (Emphasis added.) This statutory language indicates that the insurer makes the required certification to the Insurance Commissioner, both with respect to personnel employed by the insurer and with respect to personnel employed by any medical billing entity with which the insurer contracts.

Examining the legislative history for the bill which enacted Insurance Code section 11761 – A.B. 1262, Chapter 637, Statutes of 2003 – the Senate Rules Committee Report and the Conference Report both state (among other matters) that the bill: "[Mandates that] every insurer admitted to transact workers' compensation insurance that contracts with a separate entity to review or adjust workers' compensation medical bills shall certify to the [Insurance Commissioner] that the medical billing entity meets minimum standards of training, experience, and skills in lawfully performing workers' compensation claims practices." (Emphasis added.) This legislative history language is further confirmation that the insurer (not the medical billing entity) makes the

required certification to the Insurance Commissioner with respect to personnel employed by the medical billing entity with which the insurer contracts.

Looking at the proposed workers' compensation claims adjuster regulations, some regulatory language appears to indicate that the medical billing entity rather than the insurer must or may make the certification to the Insurance Commissioner with respect to the medical bill reviewer personnel employed by the medical billing entity with which the insurer contracts. For example, proposed regulation section 2592.04(c) provides, in part, the following: "The medical bill review entity or the insurer that employs its own medical bill reviewers shall certify that the course of instruction it provides or that is provided by another entity meets all the requirements set forth in this section and that all of its medical bill reviewers have actually attended the training." (Emphasis added.)

Proposed regulation section 2592.07(b) provides the following with respect to the annual medical bill reviewer certification to the Insurance Commissioner: "The [certification] document, which shall be on the form specified in Section 2592.09, shall be signed under penalty of perjury by the executive officer responsible for the medical bill review entity or insurer's claims operations." (Emphasis added.) The "Annual Certification Form – Medical Bill Reviewer," as set forth in proposed regulation section 2592.09, is worded so as to allow an officer or owner of a medical bill review entity (presumably meaning a "medical billing entity") to certify to the Insurance Commissioner with respect to medical bill reviewers reviewing bills at that entity.

The proposed regulations are inconsistent with (i.e., in conflict with and contradictory to) Insurance Code section 11761, subdivision (b), to the extent that the regulations require or allow the medical billing entity to make the required certification to the Insurance Commissioner with respect to medical bill reviewer personnel employed by the medical billing entity to adjust workers' compensation claims. The statute requires the insurer to make the certification with respect to such personnel employed by any medical billing entity with which the insurer contracts.

SUMMARY AND RESPONSE TO PUBLIC COMMENTS

Government Code section 11346.9, subdivision (a), provides that an agency proposing regulations shall prepare and submit to OAL a "final statement of reasons." One of the required contents of a final statement of reasons is a summary and response to public comments. Specifically, Government Code section 11346.9, subdivision (a)(3), requires that the final statement of reasons include:

> "A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action . . . ."

In the case of this workers' compensation claims adjuster rulemaking, DOI received substantial public comments regarding the regulations, both in written form and in the form of testimony at the October 28, 2004 public hearing. DOI correctly included a sufficient summary and response to many of the public comments in its final statement of reasons. However, a detailed review of the final statement of reasons indicates that (1) a good number of public comments did not receive a summary and response, and (2) some public comments were summarized and responded to, but the summary and response contained errors, was incomplete, or was otherwise not fully responsive to the comments received. Examples of problems with summary and response to public comments include the following:

Example #1: Theo Pahos of the Association of California Insurance Companies ("ACIC") submitted to DOI written comments (dated October 28, 2004) regarding this rulemaking during the initial public comment period. The final statement of reasons does not appear to include summaries and responses to ACIC comments (at least under ACIC) regarding the following regulation sections: (1) 2592.01(h), definition of "instructor"; (2) 2592.01(i), definition of "insurer"; (3) 2592.02(a)(2), hours of training for medical-only claims adjusters; (4) 2592.04(b), medical bill reviewers post-certification training; (5) 2592.04(e), medical bill reviewers training topics; (6) 2592.05(c), providing experienced claims adjuster certificate; and (7) 2592.07, submission of documents.

Example #2: Cheryl Hanger of AccuMed submitted to DOI written public comments (dated October 22, 2004) regarding this rulemaking during the initial public comment period. The final statement of reasons does not appear to include summaries and responses to the AccuMed comments (at least under AccuMed) regarding the following regulation sections: (1) 2592.01, add definition of "experienced medical bill reviewer"; (2) 2592.04(b), post-certification training of medical bill reviewers; and (3) 2592.04(e), training topics for medical bill reviewers.

Example #3: Several commenters raised various objections and recommendations pertaining to the regulations needing more detailed and/or uniform curriculum for the workers' compensation claims adjuster training. These commenters included Terry Re (e-mail of October 28, 2004 and pages 42 through 46 of the October 28, 2004 public hearing transcript), Allan Blakney of the California Workers' Compensation Interpreters Association (written comments dated October 28, 2004), and David Chetcuti (pages 34 through 36 of the October 28, 2004 public hearing transcript). For each of these comments, DOI's response was the following (or a substantial equivalent of this response): "The Commissioner has considered this comment and rejected it because he does not have the authority to mandate a specific curriculum." These brief responses are incomplete and not fully responsive to the commenters. At a minimum, the responses should provide a more complete explanation as to why DOI believes it lacks authority to require a more specific or uniform curriculum.

Example #4: With regard to a requirement that copies of certain documents be submitted to DOI under regulation section 2592.07 as that section was originally proposed in the 45-day notice, Sheila Garcia of StrataCare stated (in written comments dated October 4, 2004): ". . . we see no reason to include medical bill review entities within this section." The final statement of reasons

summarizes the comment as: "Medical bill review entities should be included in this section." The final statement of reasons gives the following response to the comment: "The commissioner has considered this comment and has accepted it. A subparagraph was added specifying reporting requirements regarding medical bill reviewers." The summary and response appear to be in error and non-responsive to the comment, since the commenter was essentially saying that medical billing entities should not be included within the reporting requirements of the regulation section.

These examples and all other public objections and recommendations directed at DOI's proposed action must be substantively summarized and responded to before the regulations can be approved by OAL. Other specific problems relating to summarizing and responding to public comments have been discussed with DOI staff.

OMITTED AND DEFECTIVE RULEMAKING FILE DOCUMENTS

In addition to the problems discussed above, the rulemaking file for these workers' compensation claims adjuster regulations raises a number of problems pertaining to omitted and defective required rulemaking documents. These problems include the following:

1. Updated Informative Digest

Government Code section 11346.9, subdivision (b), provides that a rulemaking agency shall: "Prepare and submit to [OAL] with the adopted regulation an updated informative digest containing a clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation. The informative digest shall be drafted in a format similar to the Legislative Counsel's Digest on legislative bills." The rulemaking file for the workers' compensation claims adjuster regulations did not include a separate updated informative digest as required by and in accordance with Government Code section 11346.9, subdivision (b). Note: In the final statement of reasons, DOI did include a section entitled "Update of Informative Digest," but this section of the final statement of reasons was in actuality an "update" of the information contained in the initial statement of reasons as required by Government Code section 11346.9, subdivision (a)(1), rather than an updated informative digest in accordance with Government Code section 11346.9, subdivision (b).

2. 45-Day Notice as Published in the Notice Register

Government Code section 11347.3, subdivision (b)(2), requires that a rulemaking file include: "All published notices of proposed adoption, amendment, or repeal of the regulation . . . ." Based upon the rulemaking file for these workers' compensation claims adjuster regulations and a review of the California Regulatory Notice Register (Register 2004, No. 33-Z), it appears that DOI may have published one version of the 45-day notice in the Notice Register and then mailed a second version of the 45-day notice (with changed, later dates for the public hearing and for the deadline for receipt of written public comments) to its mailing list under Government Code section 11346.4, subdivisions (a)(1) through (a)(4). The version of the 45-day notice with the

changed, later dates is included in the rulemaking file. The version of the 45-day notice as published in the Notice Register is not included in the rulemaking file. In order to meet the requirement of Government Code section 11347.3, subdivision (b)(2), that all published notices be included in the rulemaking file, DOI needs to include in the rulemaking file a copy of the version of the 45-day notice that was published in the Notice Register.

In addition, OAL needs to confirm that all of the notice requirements of Government Code sections 11346.4, subdivision (a), and 11346.8, subdivision (b), were appropriately met in this situation where there were apparently two versions of the 45-day notice and where the hearing date was changed. Consequently, please include an explanatory statement in the resubmitted rulemaking file regarding the procedures DOI utilized here for (1) the publication and mailing of the 45-day notice, and (2) the notice of the postponed and rescheduled hearing under Government Code section 11346.8, subdivision (b). OAL reserves judgment as to whether proper notice procedures were followed until OAL reviews the resubmitted rulemaking file.

3. Declaration of Mailing 15-Day Notice

When an agency proposing regulations modifies its proposal after the initial 45-day public comment period, Government Code section 11346.8, subdivision (c), generally requires public availability of sufficiently related but substantial changes to the regulations for a minimum of 15 days to allow for an opportunity for public comment regarding the proposed modifications. CCR, title 1, section 44, sets forth the specific public availability requirements such as the content of the 15-day notice, the persons to whom the notice must be mailed, and other related matters. Section 44(b) provides: "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."

In the case of the workers' compensation claims adjuster rulemaking, DOI made modifications to the regulations available to the public in March 2005; however, the rulemaking file does not include the required statement in the form and manner required by section 44(b) confirming that DOI complied with CCR, title 1, section 44. Note: The rulemaking file does include a "Declaration of Mailing" pertaining to the March 2005 notice, but the declaration does not mention section 44 or otherwise conform to section 44(b) requirements. In addition, the non-conforming "Declaration of Mailing" that is in the rulemaking file refers to a notice mailing date of March 8, 2005, which raises concerns regarding whether the modified regulations were, in fact, made available to the public for a full 15-day public availability period. We note that the 15-day notice in the rulemaking file indicates that the public comment period closed on March 21, 2005. OAL reserves judgment as to whether proper 15-day notice procedures were followed until OAL reviews the resubmitted rulemaking file.

4. Public Comments

Government Code section 11347.3, subdivision (b)(6), requires that a rulemaking file include all ". . . written comments submitted to the agency in connection with the adoption, amendment, or

repeal of the regulation." Generally, the public comments received by DOI in connection with this rulemaking are properly included in the rulemaking file. However, it appears that the copy of the written comments (dated March 11, 2005) from Steve Cattolica, on behalf of the California Society of Industrial Medicine and Surgery and several other organizations, is incomplete. Mr. Cattolica's e-mail, regarding the March 2005 15-day notice version of the regulations, references an attached annotated copy of the regulations. The copy of the attached annotated regulations with Mr. Cattolica's comments which is in the rulemaking file is missing a number of pages (possibly every other page). The resubmitted rulemaking file needs to include a complete copy of these comments in order to satisfy the requirement of Government Code section 11347.3, subdivision (b)(6). All comments made by Mr. Cattolica on the attached annotated regulations should be reviewed to ensure that there is an adequate summary and response to the comments in the final statement of reasons, in accordance with Government Code section 11346.9, subdivision (a)(3).

5. Form 400

On the Form 400 accompanying the regulations and in the rulemaking file, Section B.2. of the form does not properly list all of the individual regulation section numbers for the sections being adopted as required by CCR, title 1, section 6(b) and the Form 400 instructions.

ADDITIONAL CONCERNS

OAL notes the following additional concerns with the regulations and rulemaking file:

1. The table of contents at the beginning of the rulemaking file should identify each item in the rulemaking file in accordance with Government Code section 11347.3, subdivision (b)(12). Where there are multiple public notices relating to the rulemaking, please identify each specific notice in the index (although multiple notices can certainly be placed under one index tab). Where there are multiple declarations of mailing, please identify each specific declaration in the index (although multiple declarations can certainly be placed under one index tab).

2. In the regulation text, please utilize the standard CCR format for authority and reference citations. For example: "Note: Authority cited: Section 11761, California Insurance Code. Reference: Section 11761, California Insurance Code."

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-4237.

Date: August 12, 2005

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BRADLEY J. NORRIS
Counsel

for: WILLIAM L. GAUSEWITZ
Director

Original: John Garamendi, Insurance Commissioner
cc: Christopher Citko, Senior Staff Counsel