

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

AGENCY: DEPARTMENT OF INSURANCE)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
)	
ACTION: Adopt sections 2538.1, 2538.2, 2538.3, 2538.4, 2538.5, 2538.6, 2538.7, and 2538.8 of Title 10 of the California Code of Regulations)	(Government Code section 11349.3)
)	OAL File No. 06-1130-03 S
)	

BACKGROUND

The Department of Insurance (Department) proposed the adoption of regulations to make specific the obligation of health insurers under Insurance Code sections 10133.8 and 10133.9, to develop a language assistance program and provide translation of documents and interpretation assistance to insured persons who have limited English proficiency in accordance with the program. On November 30, 2006, the regulations were submitted to OAL for review in accordance with the Administrative Procedure Act (APA) and on January 16, 2007, OAL disapproved them. This Decision of Disapproval explains the reasons for OAL’s action.

DECISION

OAL disapproved the Department’s proposed regulations for failure of the record to demonstrate necessity, duplication of statutes, lack of clarity and for defective documentation.

DISCUSSION

(1) Necessity

OAL reviews proposed regulations for compliance with the necessity standard pursuant to Government Code section 11349.1. The standard is defined in Government Code section 11349, subdivision (a):

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

Generally, information in support of the necessity for a regulation is included in the statements of reasons, but it may also be found in other places in the record, for example in a report relied upon, or in the rationale presented by the agency in the course of responding to a public comment. Sections 10 and 11 of title 1 of the California Code of Regulations (CCR) may be helpful in understanding the requirement. Section 10, subdivision (b), provides that information explaining why each provision of the regulation is needed must be included.

The Department prepared both an initial and a final statement of reasons as required by the APA, and an attempt to address the necessity standard was made. There the Department prepared comprehensive summaries of the effect that each subdivision of the proposed rule would have, each followed by a statement identifying the general need for a rule to accomplish that result. In these statements the Department refers, for example, to the need to notify insurers of requirements, to inform affected persons, and the like. Insurance Code section 10133.8, subdivision (a), requires the adoption of these rules, but the Legislature left the substance of the standards up to the Commissioner. In formulating the rules originally proposed and in some cases modifying them to meet the concerns of commenters, he had to choose among competing alternatives. The Department's rationale for the particular provisions included in the rules and choices that were made should be revealed in the statements of reasons in order to show in the record, by substantial evidence, that each provision of the final rule is necessary.

(2) Nonduplication

A significant number of the proposed regulations reiterate or duplicate provisions found in the statutes these regulations implement, namely Insurance Code sections 10133.8 and 10133.9. Under the APA, Government Code section 11349.1, subdivision (a)(6), OAL is obliged to review proposed regulations for compliance with the nonduplication standard. Nonduplication is defined in section 11349, subdivision (f):

"'Nonduplication' means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation."

From the foregoing, it is apparent that duplication such as that in the Department's proposed regulations is permissible if it is shown to be necessary for clarity. OAL has adopted section 12 of title 1 of the CCR to specify how it applies the nonduplication standard. In subdivision (b), it provides:

“A regulation which duplicates a state or federal statute or regulation shall, nonetheless, meet the ‘nonduplication’ standard of Government Code section 11349.1 if any one of the following conditions is met:

“(1) The proposed regulation duplicates or overlaps a state or federal statute or regulation which is cited as "authority" or "reference" for the proposed regulation and the duplication or overlap is necessary to satisfy the "clarity" standard of Government Code section 11349.1(a)(3). Justification for such duplication shall be provided by inclusion of facts, explanations, expert opinions or other information in the rulemaking record which establish that the overlap or duplication is necessary in order for the regulation to satisfy the requirements of Government Code section 11349.1(a)(3);”

The Department has not included any information to justify the duplication of statutory material in the proposed regulations.

(3) Clarity

(a) Proposed section 2538.3, subdivision (b), is not clearly organized. The introductory sentence indicates that a language assistance program must include policies and procedures that describe four elements, and then it lists them. It is followed by seven numbered paragraphs that describe matters that must be addressed in the policies and procedures. It is readily apparent that any selection from the seven matters to be addressed will not apply to all of the four elements, but it may apply to more than one of them. The absence of any coordination between the seven matters to be covered and the required four elements makes the documentation requirement unclear.

(b) Proposed section 2538.3, subdivision (c), is not clear. It describes a notice that health insurers will be obliged to provide to insureds. It begins with the following:

“Health insurers shall develop a written notice that discloses the availability of language assistance services . . .”

Later in the same paragraph, the rule provides:

“The Commissioner may develop a notice advising LEP insureds of the availability of language assistance services and how to access those services. Health insurers shall provide the notice developed by the Commissioner to their insureds on an annual basis.”

The obligations of an insurer under this rule are uncertain. If the Commissioner does prepare a notice, it seems likely that there would be no need for separate notices prepared by insurers and that compliance with the requirement of the first sentence would probably be excused. On the other hand, the rule contains no provisions to coordinate the first requirement with the possibility that the Commissioner will prepare the notice. Finally, because the last sentence would oblige insurers to provide “the notice developed by the

Commissioner,” the rule does not clearly indicate whether this provision would apply to a notice developed by an insurer if the Commissioner does not prepare one. This is only a small clarity problem, but greater coordination between the mailing requirement and the two different possibilities for preparation of the notice or notices is advisable.

(4) Defective Documentation

The Department included in the rulemaking record a declaration concerning its mailing of a notice and text displaying proposed changes from its originally proposed action. This notice was mailed on October 25, 2006, and the proposed changes were made available for public comment until November 9, 2006. Although the mailing may have been satisfactory, the declaration concerning it does not correctly identify the persons entitled to receive the notice. The declaration states that the Department “complied with the provisions of Government Code section 11346.4 (a) (1) through (4)” and that the [required materials] were “mailed to all those specified in California Government Code section 11346.4 (a) (1) through (4) and to all those persons listed on the attached lists.” The citations provided in the declaration identify the law concerning mailing of a notice at least 45 days prior to the close of a public comment period. Instead, the declaration concerning the mailing of a 15 day notice must conform to the requirements of title 1, CCR, section 44, wherein the list of addressees may be different.

For the foregoing reasons, OAL disapproved the above-mentioned filing. We also note that there is a potential clarity problem in addition to the ones mentioned above, and that another regulatory provision may be necessary to clarify it. The proposed regulations require all health insurers to prepare a language assistance program and submit a report to the Department describing its implementation in detail, but neither these regulations nor the statements of reasons indicate whether the Department plans to review the adequacy of the programs described in the reports. A conversation with the Department’s contact person revealed that the Department plans to review and approve or disapprove a health insurer’s language assistance program. Since this is the case, a regulation that includes an approval requirement or process should be added to these regulations.

Date: January 23, 2007

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For William L. Gausewitz
Director