

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:

DEPARTMENT OF MANAGED
HEALTH CARE

REGULATORY ACTION:
Title 28, California Code of
Regulations

ADOPT SECTIONS 1300.49.1.1,
1300.49.1.2, 1300.49.1.3, 1300.49.1.4,
1300.49.1.5, 1300.49.1.6, 1300.39.1.7,
1300.49.1.7, 1300.49.1.8, 1300.49.1.9,
1300.49.1.10, 1300.49.1.11,
1300.49.1.12 AND 1300.51.01

DECISION OF DISAPPROVAL
OF REGULATORY ACTION

(Gov. Code, sec. 11349.3)

OAL File No. 2010-1112-03S

SUMMARY OF REGULATORY ACTION

The Department of Managed Health Care (Department) proposed to adopt sections 1300.49.1.1 through 1300.49.1.12 and 1300.51.01 of title 28 of the California Code of Regulations establishing licensing requirements and standards for discount health plans. On November 12, 2010, the Department submitted the proposed adoption to the Office of Administrative Law (OAL) for review in accordance with the California Administrative Procedure Act (APA). On ~~December 28, 2010, OAL disapproved the proposed adoption. This Decision of Disapproval of~~ Regulatory Action explains the reasons for OAL's action.

DECISION

The Office of Administrative Law disapproved the above referenced regulatory action for the following reasons: failure to comply with the consistency and clarity standards of Government Code section 11349; the regulatory file did not contain all required documents; required documents included in the file are defective; and the agency failed to summarize and respond to each comment made regarding the proposed action.

DISCUSSION

The adoption of regulations by the Department must satisfy requirements established by the part of the California Administrative Procedure Act 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. (Gov. Code, sec. 11346.)

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 section 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 with a meaningful opportunity to comment on rules and regulations before they become effective.

1. CONSISTENCY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the "consistency" standard. (Gov. Code, sec. 11349.1(a)(4).) "Consistency" as defined by Government Code section 11349(d) means "...being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."

Subdivision (a) of section 650 of the Business and Professions Code provides:

Except as provided in Chapter 2.3 (commencing with Section 1400) of Division 2 of the Health and Safety Code, the offer, delivery, receipt, or acceptance by any person licensed under this division or the Chiropractic Initiative Act of any rebate, refund, commission, preference, patronage dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation or inducement for referring patients, clients, or customers to any person, irrespective of any membership, proprietary interest, or coownership in or with any person to whom these patients, clients, or customers are referred is unlawful.

In 82 Ops.Ca.Atty.Gen.1, the Attorney General of the State of California was asked the following question by a member of the State Senate:

May a corporate entity licensed as a health care service plan enter into an agreement with a network of providers of cosmetic medical services, a specialty not covered by any of the entity's health benefit plans, according to the terms of which the entity would (1) refer its enrollees to a participating provider, or to a provider selected by the enrollee from a directory of participating providers, for medical services at a discounted rate and

(2) collect and forward to the provider the fees for such medical services after deducting an “administrative fee”?

The Attorney General determined that a corporate entity could not enter into such an agreement, finding that the entity would derive a benefit from the discounted services rendered to the majority of participants and would be in violation of section 650 of the Business and Professions Code.

In 84 Ops.Cal.Atty.Gen.113, the Attorney General of the State of California was asked the following question by a member of the State Assembly:

May a corporation charge an annual subscription fee, including a reasonable profit, for furnishing a list of physicians willing to provide medical services at discounted rates to uninsured indigent persons?

The Attorney General concluded that a corporation may not charge an annual subscription fee, including a reasonable profit, for furnishing a list of physicians willing to provide medical services at discounted rates to such persons citing section 445 of the Health and Safety Code.

Section 445 of the Health and Safety Code provides in part:

No person, firm, partnership, association or corporation, or agent or employee thereof, shall for profit refer or recommend a person to a physician, hospital, health-related facility, or dispensary for any form of medical care or treatment of any ailment or physical condition. The imposition of a fee or charge for any such referral or recommendation creates a presumption that the referral or recommendation is for profit.

Subdivision (a) of new section 1300.49.1.2 as proposed by this rulemaking provides in pertinent part:

No person shall engage in business as a discount health plan or offer a discount health plan product in this state unless such person has first secured from the Director a license....

Subdivision (b) of new section 1300.49.1.1 as proposed by this rulemaking provides in pertinent part:

The term “discount health plan” means a person who, in exchange for a prepaid or periodic charge by or on behalf of subscribers and enrollees, undertakes to arrange for discounts on health care services on behalf of subscribers and enrollees who retain financial responsibility to pay the discounted cost of health care services....

The licensing of persons or entities meeting the definition of a “discount health plan” as that term is defined in subdivision (b) of new section 1300.49.1.1 as proposed in this rulemaking would appear to authorize activities in conflict with or contradictory to the prohibitions contained in section 650 of the Business and Professions Code and section 445 of the Health and Safety Code

and therefore fails to comply with the “consistency” standard in Government Code section 11349(d).

2. THE RULEMAKING FILE DOES NOT INCLUDE A COPY OF ALL OF THE REQUIRED DOCUMENTS AND REQUIRED DOCUMENTS INCLUDED IN THE RULEMAKING FILE ARE DEFECTIVE.

- a. Subdivision (b)(6) of Government Code section 11347.3 requires that the rulemaking file include:

All data and other factual information, any studies or reports, and **written comments** submitted to the agency in connection with the adoption, amendment, or repeal of the regulation. (Emphasis added.)

The document containing the summaries and responses to the comments in the first 15 day comment period for this regulatory action is entitled “Discount Health Plan Proposed Regulations 2d Comment Period” and is located in Tab 20 of the rulemaking file. This document includes summaries and responses to a comment number 16. This writer was unable to find this comment in Tab 19 of the rulemaking file where the comments submitted during the first 15 day comment period are located.

- b. Subdivision (b)(2) of Government Code section 11347.3 requires that the rulemaking file include:

All published notices of proposed adoption, amendment, or repeal of the regulation, and an updated informative digest, the **initial statement of reasons**, and the final statement of reasons. (Emphasis added.)

The Initial Statement of Reasons prepared for this rulemaking as provided on the Department’s website is 15 pages long. Only the first 10 pages of this Initial Statement of Reasons are included in the rulemaking file in Tab 5.

- c. Section 11346.9 of the Government Code provides in part:

Every agency subject to this chapter shall do the following:

(a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:

(1) An update of the information contained in the initial statement of reasons. If the update identifies any data or any technical, theoretical or empirical study, report, or similar document on which the agency is relying in proposing the adoption,

amendment, or repeal of a regulation that was not identified in the initial statement of reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period, the agency shall comply with Section 11347.1.

(2) **A determination as to whether adoption, amendment, or repeal of the regulation imposes a mandate on local agencies or school districts.** If the determination is that adoption, amendment, or repeal of the regulation would impose a local mandate, the agency shall state whether the mandate is reimbursable pursuant to Part 7 (commencing with Section 17500) of Division 4. If the agency finds that the mandate is not reimbursable, it shall state the reasons for that finding.

(3) 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. The agency may aggregate and summarize repetitive or irrelevant comments as a group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group. For the purposes of this paragraph, a comment is "irrelevant" if it is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.

(4) **A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation....** (Emphasis added.)

The Final Statement of Reasons included in Tab 32 of the rulemaking file did not include the determinations required by subdivisions (a)(2) and (a)(4) of Government Code section 11349.6.

- d. New subdivision (b)(1) of section 1300.49.1.4 of title 28 of the California Code of Regulations as proposed by this rulemaking incorporates by reference "the 2009 Medicare Physician Fee Schedule as set forth in 73 Federal Register 69726-70237 (November 19, 2008) and amended by 73 Federal Register 80302-80305 on December 31, 2008..." A copy of the incorporated document must be included in the rulemaking record. (Cal. Code Regs., tit. 1, section 20(b).)

3. THE FINAL STATEMENT OF REASONS DOES NOT CONTAIN A SUMMARY AND RESPONSE TO ALL OF THE COMMENTS SUBMITTED DURING THE PUBLIC COMMENT PERIOD.

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA requires that rulemaking agencies provide notice and at least a forty-five day comment period prior to adoption of a proposed regulatory action. (Gov. Code, secs. 11346.4 and 11346.5). By requiring the state agency to summarize and respond in the record to comments received during the comment period, the Legislature has clearly indicated its intent that an agency account for all relevant comments received, and provide written evidence of its meaningful consideration of all timely, relevant input. Section 11346.9(a)(3) of the Government Code requires that the adopting agency prepare and submit to OAL a final statement of reasons which shall 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 reason for making no change.”

Tab 10 in the rulemaking file contains the written comments submitted during the 45 day comment period. Within these comments, is a four page comment, dated February 22, 2010, from the California Association of Dental Plans with a 23 page table of comments designated as “Attachment A.” The summaries and responses to the comments submitted during the 45 day comment period are located in Tab 11 of the rulemaking file. This reviewer was unable to find summaries and responses in Tab 11 of the rulemaking file for any comments made in Attachment A beginning with, and following, number 52.

CONCLUSION

~~For the reasons set forth above, OAL has disapproved this regulatory action.~~

With respect to clarity, please note that Part I of section 1300.51.01 as proposed by this rulemaking would have provided:

As Exhibit I, please attach the applicant’s provider directory of all individual providers in the applicant’s California network, containing the information required by Section 1300.49.1.5(c).

The information intended to be required by Part I of section 1300.51.01 is contained in subdivision (b), not (c), of section 1300.49.1.5 as proposed by this rulemaking.

Please also note that the text as proposed by this rulemaking for sections 1300.49.1.5(b), 1300.49.1.9(a) and (b), 1300.49.1.11(c)(2), and Part A.4 of section 1300.51.01, refers to section numbers without specifying that the sections are located in the Health and Safety Code.

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With respect to the authority and reference citations, please note that (1) Health and Safety Code section 1351 which is listed in the authority citations for new section 1300.49.1.2 as proposed by this rulemaking more properly belongs in the reference citations and (2) the reference citations provided for Part S of new section 1300.51.01 as proposed by this rulemaking are duplicative in citing both "1300.49.1.10(b)-(d)" and "1300.49.1.10".

If you have any questions, please contact me at (916) 323-6808.

Date: December 31, 2010


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