

DEPARTMENT OF INSURANCE**Legal Division, Rate Enforcement Bureau**

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**NOTICE OF WORKSHOP
REGARDING THE SCOPE OF PRIOR APPROVAL**

OV-2011-00076

September 21, 2011

Pursuant to California Government Code section 11346.45, the California Department of Insurance ("Department") hereby invites all interested persons to attend a workshop to discuss potential revisions to the regulations concerning the prior approval process for class plan and rate applications. The workshop is scheduled to be held as follows:

Thursday, November 10, 2011 -- 10:30 a.m.
California Department of Insurance
45 Fremont Street, 22nd Floor Hearing Room
San Francisco, CA 94105

The purpose of the workshop will be to discuss the following topics:

1. The Differences Between a "Rate," "Premium" a "Rating Factor" and an "Underwriting Rule"

The terms referenced above are often used loosely to describe the effects of insurance pricing and eligibility. By way of example, the Court of Appeal once noted in a 1984 decision:

"Since ratemaking affects premiums, we sometimes use the terms 'rates' and 'premiums' interchangeably. As used in section 1858, the rate charged obviously refers to the premium charged for the policy of insurance, which may cause an aggrieved party to complain. Technically, a premium and a rate differ in insurance law. A premium means the amount paid to the company for insurance. [Citations omitted.] A rate 'is the formula by which a premium is calculated,' the latter being the product of applying 'the rate to the specific risk presented by the insured.'" (Citations)" (*Karlin v. Zalta* (1984) 154 Cal. App. 3d 953, 971, fn. 12.)

In the context of the changes to the Insurance Code and regulations made in the intervening years, however, the terms "rate," "premium," "rating factor" and "underwriting rule" have fundamentally distinct meanings. In an effort to ensure that the terms are understood and used properly, the Department invites participants to discuss a regulation that would define these terms. The Department welcomes input regarding whether definitions for these terms would be beneficial.

2. Effect of Department's Approval of a Rate or Class Plan Filing Which Contains an Unlawful Practice

Over the course of a given year, the Department approves hundreds, and sometimes, thousands of rate and class plan filings. Each filing can contain hundreds of documents and records, including attachments and exhibits, some of which may not have been disclosed to the public. Despite the Department's best efforts to review the file to ensure that it complies with California law, a filing that contains practices that do not comport with California law may nevertheless be approved. If the unlawful practice is part of the approved portion of a given filing, the question then becomes the effect – if any – of the Department's approval of the filing. If an unlawful practice is contained within an approved filing, is the unlawful nature of the practice still subject to correction and remediation? If so, what is the proper balance to strike in such a situation? The Department invites participants to discuss a regulation designed to address these questions.

3. Clarification of the Meaning of California Code of Regulations section 2632.2(a) Regarding Adoption of Automobile Rating Factors

California Code of Regulations section 2632.2(a) currently defines a "rating factor" as "any factor, including discounts, used by an insurer which establishes or affects the rates, premiums or charges assessed for a policy of automobile insurance." The purpose of section 2632.2(a) is to ensure that an insurer discloses in its class plan anything which affects rates and premiums. Section 2632.2(a) is not, however, intended to supplant the requirements of Insurance Code section 1861.02(a), which prohibits the use of any automobile rating factors except three mandatory factors and "[t]hose other factors that the commissioner may adopt by regulation..." The Department, therefore, invites participants to discuss a regulation designed to prevent any confusion about the difference between an authorized and an unauthorized rating factor.

4. The Public Filing of Underwriting Guidelines, Eligibility Criteria and Rating Rules

Insurance Code section 1861.07 requires that "[a]ll information provided to the commissioner pursuant to [Proposition 103] shall be available for public inspection..." Historically, however, some insurers have been reluctant to publicly share their underwriting guidelines, eligibility criteria and other rating rules. Some insurers have argued that these materials constitute trade secrets of the company that cannot be disclosed to the public. The Department invites participants to discuss a regulation that would require such materials to be made public, while still protecting an insurer's trade secret information, as necessary.

5. Whether Underwriting Guidelines, Eligibility Criteria and Rating Rules Should be Subject to Prior Approval

Currently, the Department's rate and class plan approval letters provide, in part, that: "This approval does not constitute an approval of underwriting guidelines nor the specific language, coverages, terms, covenants and conditions contained in any forms, or of the forms themselves. Policy forms and underwriting guidelines included in this filing were reviewed only insofar as they relate to rates contained in this filing or currently on file with the California Department of Insurance... The Commissioner may at any time take any action allowed by law if he determines that any underwriting guidelines, forms or procedures for application of rates, or any other portions of the application conflict with any applicable laws or regulations."

The Department invites participants to discuss a regulation that would require insurers to submit, and the Department to approve, all of an insurer's underwriting guidelines, eligibility criteria and rating rules.

6. Section 1858 Complaints and Primary Jurisdiction Referrals

In *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal. 4th 377, the California Supreme Court applied the primary jurisdiction doctrine to Proposition 103. According to the Court, primary jurisdiction "*applies where a claim is originally cognizable in the courts* and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views." Confusion has arisen with respect to the distinction between court ordered referrals under the primary jurisdiction doctrine, and complaints filed under Insurance Code section 1858. The Department believes that clear rules articulating the procedures by which the Department processes primary jurisdiction referrals and the process by which section 1858 complaints are reviewed would be helpful. The Department invites participants to discuss a regulation that would provide such clarity.

7. Other Similar Prior Approval Topics Must Be Raised in Written Public Comments by no Later than Thursday, October 27, 2011.

The Department is open to considering additional topics that are similar to the topics identified above. If any person wishes to identify additional topics for discussion, that person must identify the topic in writing at least 14 days prior to the Workshop. The identification of any additional topic must also include a brief description of the issue to be discussed at the Workshop. The Department will not entertain topics that are raised for the first time at the Workshop or less than 14 days prior to the Workshop.

Please do not submit topics relating to the prior approval formula, the class plan rating factor weighting process, or to the adoption of new or different rating factors, as topics such as these are beyond the scope of this Workshop and will not be discussed.

The Department invites all interested participants to present oral or written comments at the workshop to address the topics set forth above. Submission of written comments in advance of the workshop, preferably by e-mail, is encouraged and in any event is required if the commenter wishes to raise an issue in addition to the topics set forth in the Notice above.

The Department plans to develop a service list for this proceeding. Any person who would like to be added to the e-mail service list for this matter will have an opportunity to designate an e-mail address on the sign-in sheet which will be provided at the workshop. Alternatively, any person who would like to be added to the e-mail service list may send an e-mail request to Bryant Henley at the e-mail address printed below.

Any questions regarding this Notice, and any written comments submitted, should be directed to:

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