

1 HARVEY ROSENFELD (SBN 123082)  
 2 PAMELA M. PRESSLEY (SBN 180362)  
 3 TODD FOREMAN (SBN 229536)  
 4 THE FOUNDATION FOR TAXPAYER  
 5 AND CONSUMER RIGHTS  
 6 1750 Ocean Park Boulevard, Suite 200  
 7 Santa Monica, California 90405  
 8 Tel. (310) 392-0522  
 9 Fax (310) 392-8874

10 Attorneys for Intervenor  
 11 The Foundation for Taxpayer and Consumer Rights

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 13 COUNTY OF LOS ANGELES

14 THE ASSOCIATION OF CALIFORNIA  
 15 INSURANCE COMPANIES, THE PERSONAL  
 16 INSURANCE FEDERATION OF CALIFORNIA,  
 17 THE AMERICAN INSURANCE ASSOCIATION,  
 18 AND THE PACIFIC ASSOCIATION OF  
 19 DOMESTIC INSURANCE COMPANIES

20 Insurance Association  
 21 Petitioners and Plaintiffs,

22 v.

23 STEVE POIZNER, in his capacity as Insurance  
 24 Commissioner of the State of California; and  
 25 CALIFORNIA DEPARTMENT OF INSURANCE,

26 Respondents and Defendants.

Case No. BS109154

**THE FOUNDATION FOR  
 TAXPAYER AND CONSUMER  
 RIGHTS' [PROPOSED]  
 COMPLAINT IN INTERVENTION**

Date Action Filed: May 25, 2007

1 By leave of Court, The Foundation for Taxpayer and Consumer Rights ("FTCR" or  
2 "Intervenor") hereby intervenes in this action and joins with Respondents Steve Poizner and the  
3 California Department of Insurance in resisting what is sought by the petition for writ of mandate and  
4 complaint for declaratory and injunctive relief as follows:

#### 5 NATURE OF ACTION

6 1. This action seeks to invalidate the Commissioner's amendment in November of 2006 of  
7 certain sections of the procedural regulations implementing Insurance Code sections 1861.05 and  
8 1861.10 (namely sections 2651.1, 2661.1, 2661.3, 2662.1, 2662.3, and 2662.5 of Title 10 of the  
9 California Code of Regulations ("10 CCR"), which govern administrative rate proceedings and  
10 consumer intervention in such proceedings ("Intervenor Regulations"). The amendments are necessary  
11 to conform to the statutory requirements of section 1861.10, which does not restrict consumer  
12 participation to "hearings" or awards of advocacy for a substantial contribution to "decisions on the  
13 merits." Specifically, the challenged amendments to the Intervenor Regulations, which took effect on  
14 January 28, 2007, primarily do the following:

15 (a) clarify that a "proceeding" on a rate application is not limited to a "hearing" (10 CCR §§  
16 2651.1(h) and 2661.1(f), (h), (i), and (k));

17 (b) provide that petitions to intervene may be submitted at the same time as a petition for  
18 hearing or after a hearing is granted, shorten the timelines for responses to and replies in support of  
19 petitions to intervene, and provide that the Commissioner as well as an administrative law judge may  
20 rule on a petition to intervene (10 CCR § 2661.3(a), (e)-(g));

21 (c) specify additional documentation that may support a "substantial contribution" showing in  
22 seeking an award of compensation (10 CCR §§ 2662.3(b) and 2662.5(a)(1)); and

23 (d) make clear that the Intervenor Regulations apply equally to persons who initiate  
24 proceedings, i.e. "petitioners", as well as "intervenors" and "participants" in Departmental proceedings  
25 (10 CCR §§ 2661.1(d), 2662.1, 2662.3(a) and (b)(3), 2662.5(a)(1)-(2) and (b).)<sup>1</sup>

26  
27 <sup>1</sup> A true and correct copy of the Final Text of Regulation in RH06092874, dated November 8, 2006 as  
28 submitted to the Office of Administrative Law is attached hereto as Exhibit A. Note that Section 2653.6  
as submitted to OAL for adoption was ultimately withdrawn by the Commissioner. (Cal. Reg. Notice

1           2.       The need for these clarifying amendments to the Intervenor Regulations arose out of  
2 several instances in rate challenges wherein insurers claimed that persons who represented the interests  
3 of consumers, performed advocacy in response to rate applications, and made a substantial contribution  
4 to a decision by the Commissioner were not entitled to seek compensation pursuant Insurance Code  
5 section 1861.10(b) because no formal hearing was held or a petition to intervene had not yet been  
6 granted.

7           3.       The amendments conform to the express mandate of section 1861.10(b), which requires,  
8 without any limitation, that the Commissioner or a court award reasonable advocacy and witness fees to  
9 “any person who demonstrates that (1) the person represents the interests of consumers, and (2) that he  
10 or she has made a substantial contribution to the adoption of any order, regulation or decision by the  
11 commissioner or a court.” Because the Commissioner has no authority to curtail by regulation these  
12 statutory criteria for awards of compensation, the amendments were reasonably necessary to eliminate  
13 any perceived restrictions not found in the statute. The amendments are also “consistent with  
14 Proposition 103’s goal of fostering consumer participation in the rate-setting process.” (*State Farm*  
15 *Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029; see also *Donabedian v. Mercury Ins. Co.*  
16 (2004) 116 Cal.App.4th 968, 982 “[t]he statutes and regulations provide for consumer participation in  
17 the administrative ratesetting process”.) Moreover, the California Supreme Court has twice  
18 recognized in upholding regulations adopted by the Commissioner to implement Proposition 103 that,  
19 “[m]uch is necessarily left to the Insurance Commissioner, who has broad discretion to adopt rules and  
20 regulations as necessary to promote the public welfare” and that “[i]t is well settled in this state that  
21 [administrative] officials may exercise such additional powers as are necessary for the due and efficient  
22 administration of powers expressly granted by statute, or as *may fairly be implied* from the statute  
23 granting the powers.” (*Calfarm Insurance Company, et al. v. Deukmejian, et al.* (1989) 48 Cal.3d 805,  
24  
25

26 Register 2007, No. 2-Z, Jan. 12, 2007, page 48  
27 [[http://www.oal.ca.gov/notices/January2007\\_notice\\_pdf.htm](http://www.oal.ca.gov/notices/January2007_notice_pdf.htm)].) Thus, that section is not at issue in this  
28 proceeding. A true and correct copy of the relevant amended regulations, which became effective on  
January 28, 2007 is attached hereto as Exhibit B.

1 824-825, citations and internal quotations omitted, italics in original; *20<sup>th</sup> Century Insurance Company*  
2 *v. Garamendi* (1994) 8 Cal.4th 216, 245.)

3 4. Insurance Association Petitioners/Plaintiffs The Association of California Insurance  
4 Companies, The Personal Insurance Federation of California, The American Insurance Association, and  
5 The Pacific Association Of Domestic Insurance Companies (collectively "Insurance Association  
6 Petitioners") commenced this action against Respondents Steve Poizner, as the California Insurance  
7 Commissioner (the "Commissioner") and the California Department of Insurance ("CDI" or  
8 "Department") (collectively, "Respondents") on May 25, 2007 not to challenge the Commissioner's  
9 authority to adopt Intervenor Regulations, but to allege that the Intervenor Regulations as amended  
10 conflict with and are not reasonably necessary to effectuate the purposes of the statutes. Insurance  
11 Association Petitioners seek a writ of mandate and/or injunction ordering the Commissioner not to  
12 enforce the amended regulations on the grounds that they violate Government Code section 11342.2.  
13 Insurance Association Petitioners also seek a declaration from the Court of the invalidity of the  
14 amended regulations.

15 5. Respondents filed an answer to the petition and complaint on July 20, 2007, essentially  
16 denying each and every allegation by Insurance Association Petitioners.

#### 17 UNCONDITIONAL RIGHT TO INTERVENE

18 6. FTCR has an unconditional right to intervene in this action pursuant to section  
19 1861.10(a) of the Insurance Code, which states that, "[a]ny person may initiate *or intervene* in any  
20 proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner  
21 under this article, and enforce any provision of this article." Section 1861.10(a) thus authorizes any  
22 person to intervene in a lawsuit to enforce any provision of Division 1, Part 2, Chapter 9, Article 10 of  
23 the Insurance Code as added by Proposition 103. FTCR seeks to intervene in this action to enforce  
24 sections 1861.05 and 1861.10.<sup>2</sup> This action is a "proceeding permitted or established" pursuant to  
25 Proposition 103, as Insurance Association Petitioners have "initiate[d]" it after a rulemaking  
26

27  
28 <sup>2</sup> The "article" [article 10 of chapter 9 of Division 1 of the Insurance Code] referenced in section  
1861.10(a) contains Insurance Code sections 1861.01-1861.16.

1 proceeding adopting regulations to implement provisions of Proposition 103 and thus to “challenge [an]  
2 action of the commissioner under” Proposition 103. (Ins. Code § 1861.10(a).) More specifically,  
3 Insurance Association Petitioners’ complaint and petition for writ of mandate seeks to invalidate  
4 amendments to the Intervenor Regulations.

5 7. Courts have consistently granted consumer groups leave to intervene pursuant to section  
6 1861.10(a) in a number of cases involving the enforcement of Proposition 103. (See, e.g., *State Farm*  
7 *Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1038; *Amwest Surety Ins. v. Wilson*  
8 (1989) 11 Cal.4th 1243, 1250; *20<sup>th</sup> Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 241.)<sup>3</sup>  
9 Insurers have also invoked the provision to intervene in challenges to amendments to Proposition 103.<sup>4</sup>

10 8. FTCR also has the right to intervene in this action pursuant to California Code of Civil  
11 Procedure section 387(b) which provides that a court shall grant a timely request to intervene when 1)  
12 the person has an interest relating to the property or transaction which is the subject of the action; 2)  
13 without intervention, the protection of that interest may, as a practical matter, be impaired or impeded  
14 by the disposition of the action; and 3) the person’s interest is not adequately represented by an existing  
15 party.

16 \_\_\_\_\_  
17 <sup>3</sup> FTCR also has initiated and/or intervened extensively in numerous administrative proceedings  
undertaken by the California Department of Insurance pursuant to Proposition 103

18 <sup>4</sup> For example, in 2004, Mercury Insurance Company invoked section 1861.10(a) to seek leave of this  
19 Court to intervene in *The Foundation for Taxpayer and Consumer Rights v. Garamendi* (No.  
20 BS086235). In 1998, State Farm sought and was granted leave to intervene in an original petition for  
21 writ of mandate action brought by FTCR and others in Alameda County (*Spanish Speaking Citizens*  
*Foundation, et al. v. Quackenbush* (Consolidated Case Nos. 796082-2 and 796071-6)) challenging the  
22 validity of regulations promulgated pursuant to section 1861.02 of Proposition 103. State Farm’s  
motion argued: “Supporting State Farm’s right to intervene here is an express statute, Insurance Code  
§1861.10(a).” State Farm then stated:

23 Chapter 9 of Part 1 Division 2 of the Insurance Code governs property/casualty rates and  
24 rating practices, and Article 10 contains the provisions adopted by Proposition 103,  
including Insurance Code § 1861.02(a). This action is itself one brought under §  
25 1861.10(a), “challeng[ing] ... action of the commissioner under [Article 10].”  
26 [Footnote]. There is no question but this action is one to which § 1861.10(a) applies, and  
in which State Farm can intervene.

27 (*Id.* at 12.)  
28

1           9.       Insurance Association Petitioners herein seek to invalidate the amendments to the  
2 Intervenor Regulations that ensure that persons representing the interests of consumers who make a  
3 substantial contribution to a decision of the Commissioner on a rate application are compensated for  
4 their advocacy performed "in response to a rate application" pursuant to section 1861.10(b), even if no  
5 hearing is held. Thus, FTCR, as a frequent petitioner and intervenor in Departmental proceedings, has  
6 a direct financial interest in the resolution of this matter. FTCR seeks intervention in this action in  
7 order to protect its own interest and those of the consumer policyholders whose interests it represents.  
8 Though the Commissioner is adequately represented by the Attorney General in this matter, FTCR has  
9 a direct financial interest in the denial of the instant writ petition. Moreover, FTCR has a broader  
10 organizational interest in this action in that part of its core mission is to protect the rights of all  
11 consumers to participate in insurance regulatory and enforcement actions on an equal footing with  
12 insurers, including the right of consumer representatives to be compensated for their advocacy efforts  
13 pursuant to the mandate of section 1861.10(b). It is also possible that FTCR's interests may at some  
14 point conflict with the separate interests of the Commissioner's in resolving this litigation.

15           10.       FTCR also meets the requirements for permissive intervention set forth in Code of Civil  
16 Procedure section 387(a). FTCR clearly has "an interest in the matter in litigation," specifically, the  
17 validity of the challenged regulatory amendments that provide for intervenors to seek compensation in  
18 rate proceedings that do not proceed to a formal hearing when they otherwise meet the statutory  
19 requirements. FTCR has established its interest by its participation in the proceedings that led to the  
20 Commissioner's adoption of the amendments now challenged by the Insurance Association Petitioners  
21 through the submission of oral and written comments. FTCR also expends substantial resources to  
22 participate in rate proceedings in which it has substantially contributed to the Commissioner's decisions  
23 to deny or greatly reduce insurers' requested rate hikes. Were Insurance Association Petitioners to  
24 succeed in overturning the Commissioner's amendments, FTCR would stand to not be compensated for  
25 its substantial contribution in rate proceedings that conclude without a formal hearing. As a result,  
26 FTCR would not be able to represent the interests of consumers in rate proceedings on an equal footing  
27 with insurers and aid the Commissioner in making his final decisions, as Proposition 103 intended. For  
28

1 the same reasons, FTCR also claims an interest in the success of the Commissioner in defending the  
2 amended regulations.

3 11. This action was filed on May 25, 2007 and the petition and complaint were served on  
4 FTCR on June 5, 2007. Respondents filed their answer on July 20, 2007. Thus, this Complaint in  
5 Intervention is undeniably timely under Code of Civil Procedure section 387, as it is being filed just  
6 one week after Respondents filed their Answer and, to FTCR's knowledge, before any date on the  
7 petition has been set or noticed. FTCR has not unreasonably delayed seeking leave to intervene.  
8 FTCR's intervention will in no way delay or impede the progress of this matter or prejudice any party.

9 **PARTIES**

10 12. Intervenor FTCR is a 501(c)(3) non-profit, non-partisan public benefit corporation  
11 founded by the drafter and proponent of Proposition 103, and organized to represent the interests of  
12 consumers. FTCR is dedicated to the protection of the interests of all insurance consumers in matters  
13 concerning Proposition 103 before the Legislature, the courts and the CDI.

14 13. Insurance Association Petitioners The Association of California Insurance Companies,  
15 The Personal Insurance Federation of California, The American Insurance Association, and The Pacific  
16 Association Of Domestic Insurance Companies (collectively "Insurance Association Petitioners") are  
17 insurance trade associations whose members include property-casualty insurers doing business in the  
18 State of California.

19 14. Respondent Steve Poizner is the elected California Insurance Commissioner (the  
20 "Commissioner") is the state official charged with enforcing the Insurance Code and Respondent the  
21 California Department of Insurance ("CDI") is the state agency under the direction of the  
22 Commissioner.

23 **GENERAL ALLEGATIONS**

24 Proposition 103 and Regulations Governing Rate Proceedings.

25 15. Proposition 103 requires all property-casualty insurers to submit rate applications to the  
26 Insurance Commissioner for public review and regulatory approval prior to the proposed rates taking  
27 effect. (Ins. Code §§ 1861.01(c); 1861.05(b).) The Commissioner is required to reject rates that are  
28

1 “excessive, inadequate, unfairly discriminatory, or otherwise in violation of [Proposition 103].” (Ins.  
2 Code §§ 1861.01(c); 1861.05(a) and (b).) The “prior approval” provision of Proposition 103, section  
3 1861.05 reads, in relevant part, as follows:

4 (a) No rate shall be approved or remain in effect which is excessive, inadequate,  
5 unfairly discriminatory or otherwise in violation of this chapter. In considering whether a  
6 rate is excessive, inadequate or unfairly discriminatory, no consideration shall be given to  
7 the degree of competition and the commissioner shall consider whether the rate  
8 mathematically reflects the insurance company's investment income.

9 (b) Every insurer which desires to change any rate shall file a complete rate  
10 application with the commissioner. A complete rate application shall include all data  
11 referred to in Sections 1857.7, 1857.9, 1857.15, and 1864 and such other information as  
12 the commissioner may require. The applicant shall have the burden of proving that the  
13 requested rate change is justified and meets the requirements of this article.

14 (c) The commissioner shall notify the public of any application by an insurer for a  
15 rate change. The application shall be deemed approved sixty days after public notice  
16 unless (1) a consumer or his or her representative requests a hearing within forty-five  
17 days of public notice and the commissioner grants the hearing, or determines not to grant  
18 the hearing and issues written findings in support of that decision, or (2) the  
19 commissioner on his or her own motion determines to hold a hearing, or (3) the proposed  
20 rate adjustment exceeds 7% of the then applicable rate for personal lines or 15% for  
21 commercial lines, in which case the commissioner must hold a hearing upon a timely  
22 request.

23 (Ins. Code § 1861.05(a)-(c).)

24 16. Pursuant to subdivision (c) of section 1861.05 and the procedural regulations adopted by  
25 the Commissioner, the rate application review and approval process may proceed to a final decision by  
26 the Commissioner in each of the following ways:

27 a) If no hearing is requested, the Commissioner must review and issue a decision on a rate  
28 application within 60 days, or the application is deemed approved (Ins. Code § 1861.01(c); 1861.05(c));  
upon the conclusion of the review process, unless the application is deemed approved, the  
Commissioner must determine to approve or reject the rate filing, or indicate the highest rate that would  
not be excessive or the lowest rate that would not be inadequate (10 CCR § 2644.1);

b) If a timely request for a hearing is filed by any person on a rate application for a  
proposed rate adjustment of less than 7% of the existing rate for personal lines or 15% for commercial



1 lines, the Commissioner may determine to hold a hearing (Ins. Code § 1861.05(c)(1); Ins. Code §  
2 1861.10(a)); upon the conclusion of the hearing, the Commissioner's decision adopting, rejecting or  
3 modifying the administrative law judge's proposed decision (Ins. Code § 1861.08) must approve or  
4 reject the rate filing, or indicate the highest rate that would not be excessive or the lowest rate that  
5 would not be inadequate (10 CCR § 2644.1);

6 c) If a timely request for a hearing is filed by any person on a rate application for a  
7 proposed rate adjustment of less than 7% of the existing rate for personal lines or 15% for commercial  
8 lines, the Commissioner may determine *not* to hold a hearing, but he must nonetheless "issue written  
9 findings in support of that decision" (Ins. Code § 1861.05(c)(1)), and that decision is considered "final"  
10 for purposes of seeking judicial review (Ins. Code § 1861.09); moreover, the Commissioner still must  
11 complete the rate review and approval process and determine to approve or reject the rate filing, or  
12 indicate the highest rate that would not be excessive or the lowest rate that would not be inadequate (10  
13 CCR § 2644.1);

14 d) The Commissioner may determine on his own motion to hold a hearing on a rate  
15 application (Ins. Code § 1861.05(c)(2)); upon the conclusion of the hearing, the Commissioner's  
16 decision adopting, rejecting or modifying the administrative law judge's proposed decision (Ins. Code §  
17 1861.08) must approve or reject the rate filing, or indicate the highest rate that would not be excessive  
18 or the lowest rate that would not be inadequate (10 CCR § 2644.1);

19 e) Upon a timely request for a hearing on a rate application for more than 7% for personal  
20 lines or 15% for commercial lines, the Commissioner *must* grant a hearing (Ins. Code § 1861.05(c)(3));  
21 upon the conclusion of the hearing, the Commissioner's decision adopting, rejecting or modifying the  
22 administrative law judge's proposed decision (Ins. Code § 1861.08) must approve or reject the rate  
23 filing, or indicate the highest rate that would not be excessive (10 CCR § 2644.1).

24 Accordingly, no matter which of the procedures above is followed, unless the application is "deemed"  
25 approved by the expiration of the relevant timelines, the Commissioner issues a decision approving or  
26 rejecting the rate filing, or indicating the highest rate an insurer may charge.

27 Proposition 103 and Regulations Governing Intervention.

1 17. Consumer participation in the review and approval of insurers' rates is central to the  
2 reforms enacted by the voters. (See *State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th  
3 1029, 1045 [interpreting section 1861.07 in a manner "consistent with Proposition 103's goal of  
4 fostering consumer participation in the rate-setting process.]

5 18. To ensure consumers' participation in Proposition 103 matters, the voters added section  
6 1861.10 to the Insurance Code. Subdivision (a) of that section provides as follows:

7 Any person may initiate or intervene in any proceeding permitted or established pursuant  
8 to this chapter, challenge any action of the commissioner under this article, and enforce  
9 any provision of this article.

10 (Ins. Code § 1861.10(a).) By its plain language, subdivision (a) refers to "any proceeding permitted or  
11 established pursuant to this chapter", and not "an adjudicative proceeding" or "hearing".

12 19. Insurance Code section 1861.10(a) thus accords members of the public broad concurrent  
13 standing rights in the judicial branch and before the Department. Relevant to the administrative context  
14 here is the standing granted to any person to "initiate or intervene" in a "proceeding," including by  
15 filing a petition requesting a hearing on a rate application pursuant sections 1861.05(c) and 1861.10(a)  
16 and by filing a petition to intervene in a rate proceeding pursuant to section 1861.10(a).

17 20. Section 1861.10(b) establishes, *without any limitation*, the right to compensation for  
18 "any person" who "represents the interests of consumers" and who makes a "substantial contribution"  
19 to the adoption of an order or decision by the commissioner or a court. Section 1861.10(b) reads:

20 The commissioner or a court *shall* award reasonable advocacy and witness fees and  
21 expenses to any person who demonstrates that (1) the person represents the interests of  
22 consumers, and, (2) that he or she has made a substantial contribution to the adoption of  
23 any order, regulation or decision by the commissioner or a court. *Where such advocacy*  
24 *occurs in response to a rate application*, the award shall be paid by the applicant.

25 (Ins. Code 1861.10(b), emphasis added.) Taken together, sections 1861.05 – 1861.09. and 1861.10 set  
26 forth a comprehensive statutory scheme to encourage effective and professional public participation in  
27 the implementation and enforcement of the provisions of the Insurance Code enacted by Proposition  
28 103 relating to the approval of rates.

29 21. Numerous courts have emphasized the purposes and goals of the public participation  
30 provisions enacted by Proposition 103, and how Proposition must be construed to effectuate those

1 purposes. (See generally, e.g., *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805; *20th Century Ins.*  
 2 *Co. v. Garamendi* (1994) 8 Cal.4th 216; *Amwest Surety Insurance Co. v. Wilson* (1995) 11 Cal.4th  
 3 1243; *State Farm Mutual Automobile Insurance Co. v. Garamendi, supra*, 3 Cal.4th 1029; *Donabedian*  
 4 *v. Mercury Insurance Co.* (2004) 116 Cal.App.4th 968.) Moreover, implementation by the  
 5 Commissioner of section 1861.10 in a manner that best facilitates compensation so as to encourage  
 6 consumer participation in the rate-setting process is to be favored over undue restrictions. (See  
 7 *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 686 [courts “should  
 8 seek an interpretation of the statute which best facilitates compensation”]; *State Farm Mut. Auto. Ins.*  
 9 *Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1045 [interpreting section 1861.07 in a manner “consistent  
 10 with Proposition 103’s goal of fostering consumer participation in the rate-setting process”].) The  
 11 measure itself requires that it be “liberally construed and applied in order to fully promote its  
 12 underlying purposes” (Proposition 103, Section 8 [uncodified].)

13 The Necessity of the Amendments to the Intervenor Regulations.

14 22. The Intervenor Regulations (sections 2661.1 - 2662.8 of Title 10 of the California Code  
 15 of Regulations), adopted in 1995 and amended by the Commissioner in 1996 and most recently in  
 16 2006, set forth the regulations implementing the provisions of Insurance Code section 1861.10 with  
 17 respect to administrative challenges to an insurer’s present or proposed rates or practices and other  
 18 administrative proceedings. These regulations implement the statutory process and criteria for (1)  
 19 allowing persons to initiate and intervene in rate and other administrative proceedings; (2) seeking an  
 20 award of compensation; and (3) determining whether a person representing the interests of consumers  
 21 has made a substantial contribution to a decision, order or regulation.

22 23. As the Commissioner stated in proposing the amendments to the Intervenor Regulations  
 23 at issue in this case, “[i]t has been the Department’s practice to encourage consumer representatives and  
 24 applicants to resolve rate challenges informally so as to avoid engaging in lengthy formal hearings that  
 25 benefit no one.” (Initial Statement of Reasons, RH06092874, Sept. 22, 2006, page 2 [attached as  
 26 Exhibit C to Verified Petition for Writ of Mandate and Complaint for Declaratory Relief, filed May 25,  
 27 2007.] The Commissioner further explained that “[o]ften during negotiations, insurers seek to  
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1 withdraw their applications. In some instances, applicants have withdrawn their applications after a  
 2 petition for hearing has been filed and after the petitioner has expended substantial time and effort  
 3 advocating its position through its advocates and experts. In these instances, the result of the informal  
 4 process has been either no rate change, or a substantial alteration in the rate ultimately approved by the  
 5 Commissioner. Such results benefit the public without the necessity of conducting a formal hearing.  
 6 [¶] In several of these instances, either the challenge was settled by the parties or the case was  
 7 dismissed as moot when the applicant chose to withdraw rather than proceed with its application and  
 8 potentially be subject to a hearing." (*Ibid.*)

9 24. These Departmental practices were summarized in an Advisory Notice issued by the  
 10 Commissioner to insurance companies subject to Proposition 103 on February 18, 2005. It stated in  
 11 pertinent part as follows:

12 The purpose of this advisory notice is to explain how the Department handles  
 13 applications for rate increases when the following two conditions exist: first, the rate  
 14 increase sought in the original rate application (the "proposed rate adjustment") exceeds  
 15 the applicable threshold set forth in California Insurance Code ("CIC") Section  
 1861.05(c)(3). Second, a consumer or his or her representative ("consumer  
 representative") has requested a hearing on the rate application.

16 When these two conditions are met, the Department will initiate joint discussions that  
 17 include the consumer representative and the applicant regarding the rate application. If  
 18 the applicant submits any written or electronic data or correspondence regarding the  
 application to the Department, the applicant must also send a copy to the consumer  
 representative.

19 If the applicant, consumer representative and Department agree to a specific rate change  
 20 the applicant may amend its rate application to request the agreed rate change. However,  
 21 if the applicant, consumer representative and Department do not all agree to a specific  
 22 rate change the applicant will have two options: the applicant may pursue the rate  
 23 increase in a public hearing pursuant to CIC Sections 1861.05 and 1861.08 before the  
 Department's Administrative Hearing Bureau, or the applicant may withdraw the rate  
 application.

24 An applicant may withdraw an unapproved rate application at any time prior to issuance  
 25 of a notice of hearing on the application. When a notice of hearing is issued the matter is  
 26 referred to the Administrative Hearing Bureau. After the matter is referred to  
 27 Administrative Hearing Bureau withdrawal may be permitted under certain  
 28 circumstances. After an applicant withdraws a rate application, the applicant may file a  
 new rate application at any time. The new rate application will be considered  
 independently and will not be prejudiced by the existence of the prior rate application or  
 any prior request for hearing.

1 (Advisory Notice, Cal. Ins. Comm'r, Feb. 18, 2005.)

2 25. Although the February 2005 Advisory Notice set forth the procedures to be followed by  
3 the Department in a proceeding subject to a mandatory rate hearing, the same basic procedures have  
4 been followed by the Department in rate proceedings in which the Commissioner's decision to grant a  
5 hearing is discretionary.

6 26. As a frequent petitioner and intervenor in Proposition 103 matters before the  
7 Department, FTCR's experience is instructive. During the period of time after submitting a petition for  
8 hearing and prior to a ruling on that petition, FTCR advocates and experts often spend significant time  
9 reviewing and analyzing the rate application and data submitted by the applicant in response to issues  
10 raised by the Department and FTCR's petition. Typically, in such cases, FTCR engages in informal  
11 discussions with the Department and the applicant and provides comments by its outside experts  
12 explaining why FTCR believes the rate proposed by the application to be excessive. These comments  
13 and discussions, in turn, are often explicitly taken into account by the Commissioner in his final  
14 decision as to whether to hold a hearing or whether to approve or disapprove the requested rate, or a  
15 more appropriate rate, without a hearing.

16 27. In some cases, the Department, after reviewing FTCR's comments, has determined that  
17 it would approve a lower rate than originally requested by the insurer, or told the insurer that it will face  
18 a hearing on the issues raised by FTCR's petition unless it withdraws the rate application. In each of  
19 these instances, FTCR's advocacy work in reviewing and challenging an application that is ultimately  
20 approved at a lower rate or withdrawn altogether has been determined by the Commissioner to have  
21 made a substantial contribution to the outcome. Nevertheless, in some cases, insurers have cited to  
22 certain of the former Intervenor Regulations defining a "proceeding" or a "party" as a bar to intervenor  
23 compensation in this context. (See, e.g., *In the Matter of the Rate Applications of American Healthcare*  
24 *Indemnity Co. and SCPIE Indemnity Co. ("SCPIE")*, PA02025379 (Cal. Ins. Comm'r, 2004); *In the*  
25 *Matter of the Rate Application of: NORCAL Mutual Insurance Co.*, PA-04037956 (Cal. Ins. Comm'r,  
26 2004); *In the Matter of the Rate Application of First National Insurance Company of America,*  
27 *SAFECO Insurance Company of America, SAFECO Insurance Company of Illinois*, PA03032612 (Cal.

1 Ins. Comm'r, 2003); *In the Matter of the Rate Application of: NORCAL Mutual Insurance Co.*,  
2 PA03032128 (Cal. Ins. Comm'r, 2003.))

3 28. In one case (*In the Matter of the Rate Applications of SCPIE*, PA02025379 (Cal. Ins.  
4 Comm'r, 2004)), the Commissioner awarded FTCR advocacy fees for its substantial contribution after  
5 the proceeding ended in the withdrawal of the rate application and a decision by the Commissioner  
6 prior to a determination of FTCR's right to intervene. The insurer sought review, and this Court  
7 overturned the Commissioner's decision "[d]espite the statutory requirement of Proposition 103 that the  
8 Commissioner *shall* award compensation to any person representing the interests of consumers who  
9 make a substantial contribution to his orders of decision." (Initial Statement, RH06092874, Sept. 22,  
10 2006, page 2.) That decision, however, was limited to the factual situation before it, relying in part  
11 upon the fact that no petition to intervene was granted on the rate application challenged, to hold that  
12 FTCR, the petitioner there, was not entitled to compensation. (Judgment Granting Petition for Writ of  
13 Mandamus [adopting interlineated Tentative Ruling attached thereto], *American Healthcare Indemnity*  
14 *Company and SCPIE Indemnity Company v. Garamendi*, Super. Ct. L.A. County, 2005, No.  
15 BS094515, page 4.) That case did not determine the issues here, i.e., whether the Commissioner's duly  
16 adopted amendments to the Intervenor Regulations, as described below, are consistent with and  
17 reasonably necessary to effectuate the purposes of Proposition 103.

18 The Rulemaking Proceeding to Amend the Intervenor Regulations.

19 29. To address the practical problems that had been occurring in the intervenor process as  
20 explained in the preceding paragraphs, on or about September 22, 2006, the Commissioner issued a  
21 Notice of Proposed Action and Notice of Public Hearing together with proposed amendments to certain  
22 portions of the Intervenor Regulations. The Commissioner set forth the purpose of the proposed  
23 amendments as follows:

24 Proposition 103, approved by California voters in 1988, established the requirement that  
25 all property-casualty insurers obtain the prior approval of the Insurance Commissioner  
26 for proposed rate changes. (Insurance Code §1861.05). Proposition 103 permits consumer  
27 participation in the approval process. (Insurance Code §1861.10(a)). It further requires  
28 the Commissioner to award reasonable advocacy and witness fees to a consumer when  
the consumer makes a "substantial contribution" to the adoption of any order, regulation,  
or decision by the Commissioner or a court. (Insurance Code §1861.10(b)).

1 As required by Insurance Code §1861.055, the Department has promulgated regulations  
2 under Title 10, Chapter 5 of the Code of Regulations (CCR) governing the prior approval  
3 process, including regulations governing consumer participation. *The Department wishes*  
4 *to amend Subchapter 4.9 (Rules of Practice and Procedure for Rate Proceedings) to*  
5 *clarify that consumers, who participate in the approval process after having filed a*  
6 *petition for a hearing, may seek an award of reasonable advocacy fees.*

7 (Initial Statement of Reasons, RH06092874, Sept. 22, 2006, page 1, bold/italics added.)

8 30. As quoted in paragraph 23 above, the Commissioner's Initial Statement of Reasons (as  
9 incorporated by reference in his Final Statement of Reasons) set forth in detail the issues sought to be  
10 addressed by and the necessity of the amendments to the Intervenor Regulations. Succinctly stated:

11 The Commissioner has determined that amendment of certain regulations in Subchapter  
12 4.9 is necessary in order to properly implement the requirements, purposes and intent of  
13 the statutes. Specifically, the regulations must be amended to make clear that *advocacy*  
14 *performed by a consumer representative (whether a "petitioner," "intervenor," or*  
15 *"participant") prior to a decision by the Commissioner to grant or deny a petition for*  
16 *hearing pursuant to Section 1861.05(c) is to be compensated so long as a consumer has*  
17 *made a "substantial contribution" to a decision or order ending the proceeding.*

18 ...  
19 The Commissioner believes that the proposed adoption and amendments are not only  
20 authorized by, but also necessitated by Proposition 103. Section 1861.10(b) contains only  
21 two prerequisites: (1) that the person seeking advocacy and witness fees "represents the  
22 interests of consumers"; and (2) that the person has "made a substantial contribution to  
23 the adoption of any order, regulation, or decision by the commissioner or a court."  
24 (Insurance Code §1861.10(b).) Subsection (b) further provides that "where advocacy  
25 occurs in response to a rate application, the award shall be paid by the applicant." (Ibid.)  
26 When these two statutory conditions are met, the Commissioner "shall award reasonable  
27 advocacy and witness fees and expenses." (Ibid..)

28 The Commissioner's view is that the statute plainly mandates that "any person" who  
"represents the interests of consumers" and who "made a substantial contribution to the  
adoption of any order, regulation, or decision by the commissioner" is entitled to an  
award of compensation for reasonable advocacy fees and expenses. An insurer's attempt  
to withdraw its application in order to avoid paying compensation defeats the purpose of  
the statutes.

...  
Denying compensation for advocacy performed by a petitioner prior to an insurer's  
withdrawal of its application would thwart the statute's plain language and its underlying  
purpose of encouraging consumers to enforce Proposition 103, and disrupt the framework

of public participation established by the Department through its regulations, in the following ways:

· It would discourage consumer representatives from challenging rate applications if the consumer representatives faced the risk that its substantial investigation and participation in the informal review process might result in no compensation, even if the outcome was the very outcome sought by the consumer representative. Without the potential for an award of compensation, few if any consumer representatives would be able to afford the resource expenditures needed to participate in a professional manner in the review of such applications.

· Conversely, if the only way to obtain compensation would be to insist upon a hearing - where a hearing is mandatory - consumer representatives will eschew the informal process. This would discourage efficient resolution of challenges.

· It could effectively place the determination of whether intervenors are compensated within the sole control of an insurer, who may unilaterally withdraw, rather than with the Commissioner.

*In summary, the Commissioner believes that, as the voters intended, the scrutiny of consumer representatives is an important tool to ensure that applicants comply with the statutory and regulatory prohibition on "excessive, inadequate, and unfairly discriminatory" rates, or rates that otherwise violate the law, and that if consumer representatives are denied the ability to seek compensation when they make a substantial contribution in pre-hearing proceedings, such scrutiny would be discouraged and curtailed.*

Such a result contravenes the public policy underlying section 1861.10 and analogous intervenor compensation statutes of encouraging consumer participation in administrative and court proceedings, and thereby aiding regulators and courts in their decisions. (See *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 836 [voters for Prop. 103 "favored a measure that provides for public regulatory hearings with consumer participation"]; *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 686 [courts "should seek an interpretation of the statute which best facilitates compensation"]; *State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1045 [interpreting section 1861.07 in a manner consistent with Proposition 103's goal of fostering consumer participation in the rate-setting process"].)

(*Id.*, pages 1-4.)

31. In their final form, the regulatory amendments to Subchapter 4.9 of Chapter 5 of Title 10 of the California Code of Regulations as adopted by the Commissioner and filed with the Secretary of State were narrowly tailored to achieve the important purposes of Proposition 103 as delineated by the Commissioner, as follows:



1 (a) The definition of “proceeding” in **Section 2651.1(h)** was amended to specify that  
2 proceedings conducted pursuant to Article 10 of Chapter 9 of Part 2 of Division 1 of the California  
3 Insurance Code include “a rate proceeding established upon the submission of a petition for hearing  
4 pursuant to California Insurance Code section 1861.05 and section 2653.1 of this subchapter.”

5 (b) The definitions contained in **Section 2661.1** were modified as follows:

- 6 ■ Subdivisions (f) and (h) were amended to change the defined terms from  
7 “proceeding other than a rate *hearing*” and “rate *hearing*” to “proceeding other than  
8 a rate *proceeding*” and “rate *proceeding*”. Further clarifying language was added to  
9 subdivision (h), as follows: “For purposes of section 1861.05, a “rate proceeding” is  
10 established upon the submission of a petition for hearing in accordance with section  
11 2653.1 of this subchapter, or if no petition for hearing is filed, upon notice of  
12 hearing.”
- 13 ■ The definition of “rate hearing” was modified and added as subdivision (i) to mean  
14 “a hearing noticed by the Commissioner on his own motion or in response to a  
15 petition for hearing pursuant to Insurance Code section 1861.05, which is conducted  
16 pursuant to the applicable procedural requirements of Insurance Code section  
17 1861.08, and subchapters 4.8 and 4.9 of this chapter.”
- 18 ■ A sentence was added to the definition of “substantial contribution” in subdivision  
19 (k) to state: “A substantial contribution may be demonstrated without regard to  
20 whether a petition for hearing is granted or denied.”

21 (c) **Section 2661.3** regarding the procedure for intervention in rate proceedings was  
22 modified to also apply to “class plan proceedings”; additionally the following amendments were made  
23 to this section:

- 24 ■ Subdivision (a) was amended to specify that, “A person who petitions for a hearing  
25 may combine a petition to intervene with a petition for hearing in one pleading.”
- 26 ■ Subdivision (e) was amended to allow a petition to intervene to be submitted at the  
27 same time as a petition for hearing as follows: A Petition to Intervene shall be in a  
28

1 rate or class plan proceeding may be submitted to the Rate Enforcement Bureau  
 2 concurrently with a petition for hearing submitted pursuant to section 2653.1 of this  
 3 subchapter or filed with the Administrative Hearing Bureau after a hearing is  
 4 granted, ... .”

- 5 ■ Subdivision (f) was amended to shorten the timeline for a response to a petition to
- 6 intervene from 10 to 5 days, and the timeline for any reply from 8 to 3 days; and
- 7 ■ Subdivision (g) was amended to provide that “If a person who petitions for a hearing  
 8 meets the requirements of this section, represents the interests of consumers and is  
 9 otherwise eligible to seek compensation in proceedings before the Department  
 10 pursuant to Insurance Code section 1861.10(b) and section 2662.2 of this  
 11 subchapter, that person's Petition to Intervene shall be granted within fifteen (15)  
 12 days of its submission.” If a hearing has already been granted at the time a person  
 13 petitions to intervene, then the regulation specifies as before that the administrative  
 14 law judge has 20 days to rule upon the petition.

15 (d) **Section 2662.3** governing requests for intervenor compensation awards was amended as  
 16 follows:

- 17 ■ Subdivision (b)(3) was amended to specify additional items that may cited as
- 18 supporting documentation of a substantial contribution, “including but not limited to,  
 19 documents such as: declarations by advocates and/or witnesses, written or oral  
 20 comments of the petitioner or intervenor or its witnesses regarding a rate application  
 21 provided to the Department, correspondence with the parties, stipulations or  
 22 settlement agreements regarding the outcome or material issues in the proceeding,  
 23 and decision or order by the Department or Commissioner concerning a petition for  
 24 hearing or rate or class plan application issued without a formal hearing, ... .”
- 25 Subdivision (b)(3) was further amended to provide that confidential documents may  
 26 be submitted to the Public Advisor for purposes of supporting a fee award and  
 27 specifies that such documents will retain their confidential status.

- Subdivision (c) was added to clarify that parties may stipulate to a person's intervenor status who is eligible to seek compensation, but not to whether a person has made a substantial contribution for purposes of being entitled to a fee award.

(e) **Section 2662.5(a)(1)** governing requirements for awards was amended to conform to the amendments to Section 2662.3(b) to specify additional items that may evidence a person's substantial contribution declarations by advocates and/or witnesses, to include "written or oral comments of the intervenor or its witnesses regarding a rate application provided to the Department correspondence with the parties, stipulations or settlement agreements, and decision or order by the Department or the Commissioner on a petition for hearing or rate or class plan application issued without a formal hearing, . . . ."

(f) **Sections 2661.1(d), 2662.1, 2662.3(a) and (b)(3), 2662.5(a)(1)-(2) and (b)** were amended to add the word "petitioner" in addition to "intervenor" and "participant" to make clear that the provisions apply to petitioners as well as intervenors. This change simply tracks the statutory language of Insurance Code section 1861.10.  
(10 CCR §§ 2651.1, 2661.1, 2661.3, 2662.1, 2662.3, and 2662.5, effective Jan. 28, 2007 [Exhibit B].)

32. These amendments to the Intervenor Regulations were properly and lawfully adopted pursuant to the authority granted to the Insurance Commissioner in accordance with Insurance Code sections 1861.05, 1861.055, and 1861.10 and the discretion accorded to the Insurance Commissioner under *Calfarm Insurance Company, et al. v. George Deukmejian, et al.* (1989) 48 Cal.3d 805, 824, 20th *Century Insurance Company v. John Garamendi* (1994) 8 Cal.4th 216, 245).

33. FTCR and other consumer organizations, including Public Advocates and the Center for Public Interest Law, submitted written comments and testified in support of the Commissioner's proposed regulations at the November 6, 2006 public rulemaking hearing. (Summary and Response to Public Comments, RH06092874, Sept. 22, 2006, pages 4-7, 10, 12, 13, 15.) Insurers were also well represented by individual companies and their trade associations, Insurance Association Petitioners here, who also participated in the rulemaking proceedings by submitting written and oral comments in

1 opposition to the amendments to the Intervenor Regulations. Those comments, setting forth the same  
2 arguments as made in the instant writ petition, were rejected by the Commissioner. (*Id.* at 1-3; 8-15.)

3 34. On or around November 13, 2006, the Commissioner submitted the amendments to the  
4 Intervenor Regulations to the Office of Administrative Law, together with the administrative  
5 rulemaking record. On or about December 29, 2006, the Office of Administrative Law approved the  
6 Amendments and filed them with the Secretary of State. The amendments became effective on January  
7 28, 2007. (Cal. Reg. Notice Register 2007, No. 2-Z, Jan. 12, 2007, page 48  
8 [[http://www.oal.ca.gov/notices/January2007\\_notice\\_pdf.htm](http://www.oal.ca.gov/notices/January2007_notice_pdf.htm)].)

9  
10  
11 **PRAYER FOR RELIEF**

12 WHEREFORE, Intervenor prays for relief as follows:

- 13 1. That Insurance Association Petitioners' petition for writ of mandate against the  
14 Commissioner and the Department be denied;
- 15 2. That this Court deny Insurance Association Petitioners' prayer for declaratory and  
16 injunctive relief as set forth in Plaintiffs' first and second causes of action in their Complaint for  
17 Declaratory and Injunctive Relief;
- 18 3. For Intervenor's reasonable attorneys' fees and expenses incurred in this action pursuant  
19 to Insurance Code section 1861.10(b) and Code of Civil Procedure section 1021.5.
- 20 4. For such other and further relief as the Court may deem just and proper.

21 Dated: July 26, 2007

Respectfully Submitted

22 The Foundation for Taxpayer and Consumer Rights  
23 Harvey Rosenfield  
24 Pamela Pressley  
25 Todd Foreman

26 BY: 

Pamela Pressley