

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
45 Fremont Street, 21st Floor
San Francisco, California 94105

File No. REG-2010-00013
Date: August 13, 2010

INITIAL STATEMENT OF REASONS

TITLE 10. INVESTMENT
CHAPTER 5. INSURANCE COMMISSIONER
SUBCHAPTER 4.3. "PROCEDURES FOR NONCOMPLIANCE HEARINGS"
ARTICLE 1. "GOVERNING PROCEDURE FOR NONCOMPLIANCE HEARINGS"
SECTION 2614. "PROCEDURE FOR NONCOMPLIANCE HEARINGS"

Insurance Commissioner Steve Poizner ("Commissioner") will consider various amendments of Title 10, Chapter 5, Subchapter 4.3, Article 1 (commencing with section 2614) of the California Code of Regulations ("10 C.C.R. § 2614 et seq.").

SPECIFIC PURPOSE OF THE AMENDMENT

10 C.C.R. § 2614 et seq. contains the procedure for "notice of noncompliance" hearings conducted under California Insurance Code sections 1858, 1858.01, 1858.1 and 1858.2. These Insurance Code sections address adherence by insurers and others to California's insurance rate regulation law.

The proposed amendments to the regulation are necessary for the reasons stated below.

Proposed amendment to section 2614.13:

Section 2614.13 currently requires parties to file written prepared direct testimony ("PDT"), in narrative or question and answer format, for each direct witness expected to be called to testify. PDT must be signed under penalty of perjury.

PDT must be filed by the Department or an intervenor forty (40) business days before the first day of an evidentiary hearing. PDT must be filed by respondents no later than twenty (20) business days after service of the PDT by the Department or intervenor.

The PDT requirement was intended to expedite hearings by: Providing a period for prehearing evaluation of complex testimony involving rating, underwriting, economic and actuarial matters, of both percipient and expert witnesses, by hearing officers, opposing counsel, and experts retained by opposing counsel; Allowing motions to strike to be heard before the evidentiary hearing.

In originally promulgating section 2614.13, the Department implicitly intended, and

believed it was obvious that, the regulation should apply only to witnesses who could reasonably be expected to: 1. Sign the PDT voluntarily; 2. Collaborate willingly with the party planning to call that witness to tailor the wording, length, and detail of the PDT, and who would defer to the party on tactical issues such as which testimony to include in the PDT and which to reserve for oral testimony.

Compliance with the PDT requirement in existing section 2614.13 from an adverse witness or a witness not under the control of a party is unreasonable and either impractical or impossible. A witness who has no affinity with or other incentive to assist the party calling that witness (i.e., a witness “not under the control of the party”) may be unwilling to sign PDT. A witness who is an employee or agent of an adverse party (i.e., an “adverse witness”) will usually be positively disinclined to assist his or her employer’s or principal’s opponent by signing PDT.

Even if, hypothetically, one of these witnesses professed, or were purported by opposing counsel, to be willing to *sign* PDT, the witness likely would not defer to the party required to file the PDT as to the wording of the PDT.

In a recent case, an administrative law judge ruled that the PDT requirement applies to adverse witnesses and other witnesses not under the control of a party. That ruling creates the necessity for this rulemaking.

In order to clarify the original intent that section 2614.13 does not apply to adverse witnesses and witnesses not under the control of a party, and to prevent a future ruling that the section does so apply, the Commissioner proposes to amend subdivision (a) of that section to state:

(a) Prepared direct testimony, in narrative statement or question and answer format, of each direct witness expected to be called to testify by the Department or intervenor or participant in a proceeding, shall be filed and served on all parties at least forty (40) business days before the first day of the evidentiary hearing. Prepared direct testimony, in narrative statement or question and answer format, of each direct witness expected to be called to testify in a proceeding by respondent, shall be filed and served on all parties no later than twenty (20) business days after service of the prepared direct testimony by the Department or intervenor or participant. Prepared direct testimony shall be signed under penalty of perjury under the laws of the state of California. Expert witness testimony shall be accompanied by the witnesses' curriculum vitae and list of authored or co-authored publications. Additionally, any documents reviewed by the expert for purposes of testifying in the specific case that were not previously provided to the other parties shall be produced with the testimony. Prepared direct testimony is required only for witnesses

who, at the time the testimony is offered, are employees, agents, officers, directors, or independent contractors of the party offering the testimony or experts retained by the party offering the testimony.

Any witness in one of the categories in the above sentence should ordinarily be willing to sign PDT out of affinity or some other incentive. For the same reasons, they should be willing to cooperate fully with counsel in drafting the PDT.

Proposed technical amendment: Delete each reference to “chapter” in 10 C.C.R. § 2614 et seq. and replace with “subchapter.”

Section 2614 *et seq.* of Title 10 of the C.C.R. is entitled “Procedure For Noncompliance Hearings.” It constitutes its own article (Article 1 – “Governing Procedure For Noncompliance Hearings”). In other words, the article contains no section other than Section 2614 *et seq.* Article 1, in turn, is found in its own subchapter (Subchapter 4.3. “Procedures For Noncompliance Hearings”). Again, the subchapter has no article besides Article 1. Thus, Subchapter 4.3, Article 1, and Section 2614 *et seq.* of Title 10 of the C.C.R. are substantively identical. However, the Chapter in which Subchapter 4.3 appears contains dozens of other subchapters; in fact, the Chapter contains all of the regulations promulgated by the Insurance Commissioners. It is therefore erroneous for Section 2614 *et seq.* to refer to “Chapter” when it should refer to Subchapter.” There are two such mistaken references. The Commissioner proposes to correct these errors, as follows:

§ 2614. Definitions

In this ~~chapter~~ subchapter unless the context or subject matter otherwise requires:

§ 2614.7. Discovery: Exclusive Provisions

The provisions of Section 2614.8 provide the exclusive right to and method of discovery as to any proceeding governed by this ~~chapter~~ subchapter.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The Commissioner did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption and amendment of these regulations.

SPECIFIC ACTIONS, PROCEDURES, TECHNOLOGIES OR EQUIPMENT

Adoption of the proposed changes would not mandate the use of specific technologies or equipment.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

No other alternatives to the proposed amendments (including alternatives to lessen any adverse impact on small business) were presented to or considered by the Commissioner. The Commissioner has determined that the proposed amendments will only affect insurance companies and will therefore not affect or impact small business. Pursuant to Government Code section 11342.610(b)(2), insurers are not small businesses.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The Commissioner has initially determined that adoption of the proposed amendment will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The Commissioner has initially determined that adoption of the proposed regulation will not have a significant, statewide adverse economic impact directly affecting small businesses. The Commissioner has identified no reasonable alternatives to the proposed regulations, nor have any such alternatives been brought to the attention of the Department, that would lessen any impact on small business. However, the Department invites public comments on the question of the economic impact on small businesses.

Date: _____

STEVE POIZNER
Insurance Commissioner

By: _____
Alec Stone
Staff Counsel