



December 2, 2009

Ms. Natasha Ray, Senior Staff Counsel
California Department of Insurance
300 Capitol Mall, 17th Floor
Sacramento, CA 95814

Sent via email to:

rayn@insurance.ca.gov

RE: Proposed Regulation 2009-00006, Concerning the Community Service Statement and Commissioner's Report on Underserved Communities – *Written comments from the National Association of Mutual Insurance Companies (NAMIC), the Pacific Association of Domestic Insurance Companies (PADIC), and the Personal Insurance Federation of California (PIFC)*

Dear Ms. Ray:

The National Association of Mutual Insurance Companies (NAMIC), the Pacific Association of Domestic Insurance Companies (PADIC), and the Personal Insurance Federation of California (PIFC) appreciate the opportunity to respond to your notice contemplating revisions governing the regulations concerning the Community Service Statement and Commissioner's Report on Underserved Communities.

PADIC member companies write approximately \$1 billion in property and Casualty premium almost exclusively in California. Because the vast majority of PADIC insurance business is written in California, insurance regulation has a much greater impact on our members and, more importantly our policyholders, than companies who write insurance throughout the country. Approximately one half of the premium written by PADIC is in personal lines, including homeowners insurance.

NAMIC is a full-service national trade association with more than 1,400 member companies that underwrite 43 percent (\$196 billion) of the property and casualty insurance premium in the United States. NAMIC membership includes four of the seven largest property and casualty insurance carriers in the nation, and every size regional, national and state specific property and casualty insurer, including hundreds of farm mutual insurance companies. NAMIC has 106 member insurance carriers writing business in the state of California who write approximately 23% of the property and casualty insurance business in the state.

PIFC member companies provide auto, home, flood and earthquake insurance for millions of Californians. Our members, State Farm, Allstate, Farmers, Liberty Mutual Group, Progressive, and NAMIC, write over 60% of the all the home and auto insurance sold in the state.

NAMIC, PADIC, and PIFC oppose the implementation of these proposed amendments because: (a) they do not comply with procedural and substantive requirements of the Administrative Procedures Act (APA), Government Code Section 11349.1; and (b) the proposed amendments would expose insurers to unfair, unnecessary and excessive civil penalties.

Both NAMIC and PADIC are also concerned that the proposed regulation will create an undue economic burden on insurance companies, especially small to mid-size property and casualty insurers, who are already disproportionately impacted by the technical aspects of the current regulatory reporting requirements of 10 CCR 2646.6, that do not conform to standard small business administrative practices and accounting processes.

The proposed amendments to 10 CCR 2646.6 do not comply with Government Code Section 11349.1

Any regulatory act a state agency adopts through the exercise of a quasi-legislative power delegated to the agency by statute is subject to the APA unless statutorily exempted or excluded. (Gov. Code, Sec. 11346). Since no exemption applies in this instance, the proposed regulatory actions of the California Department of Insurance (CDI) must be in compliance with the “necessity, authority, clarity, consistency, reference and non-duplication standards” set forth in Government Code Section 11349.1(a).

NAMIC, PADIC and PIFC contend that the proposed amendments to 10 CCR 2646.6 fail the “necessity”, “authority”, and “clarity” requirements necessary for the proposed amendments to be approved by the Office of Administrative Law (OAL).

Necessity

Pursuant to Government Code Section 11349 (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. [emphasis added].

NAMIC, PADIC and PIFC do not believe that the CDI has demonstrated that the proposed amendments are "necessary" to effectuate the purposes of or compliance with the Commissioner's Report on Underserved Communities.

Government Code Section 11346.2(b)(1) provides that an Initial Statement of Reasons for a proposed regulatory action shall include a "statement of the specific purpose of the adoption, amendment, or repeal, and the rational for the determination by the agency that the adoption, amendment, or repeal is **reasonably necessary....**" [emphasis added].

The CDI has not presented any data, documentation or evidence to support a reasonable conclusion that insurance carriers have not been complying with the disclosure requirements of the regulation relating to Commissioner's Report on Underserved Communities, or that the proposed administrative penalties/fines are necessary to enforce insurance company compliance with 10 CCR 2646.6.

In addition to NAMIC's, PADIC's and PIFC's concern that the proposed regulatory "penalties/fines amendment" is unwarranted in light of the fact that insurance carriers engage in "good faith" compliance with the current regulation, our members are also concerned with the excessiveness of the dollar amount (aggregate penalty not to exceed \$100,000) of the proposed penalties/fines, and the broad and unfettered discretion granted to the department to decide the amount of the civil penalty/fine.

The Department has provided no statement of need or credible evidence that *substantial* civil penalties for non-compliance are necessary and appropriate.

Authority

Although the Department has regulatory authority to reasonably amend 10 CCR 2646.6 so as to clarify its current disclosure requirements or amend provisions of the reporting requirements, NAMIC, PADIC, and PIFC question the Department's authority to add a civil penalty/fine provision to the current regulation and submit that such authority resides in the legislative process.

Additionally, the CDI already has the regulatory authority to impose sanctions against an insurer, who fails to timely comply with disclosure and reporting requests from the Department; therefore, these additional penalties are not warranted.

Clarity

Government Code Section 11349(c) defines "Clarity" to mean "written or displayed so that the meaning of regulations will be **easily understood** by those persons directly affected by them." [emphasis added].

The current language of the proposed amendments is rife with vagueness and ambiguity. Specifically, the proposed amendments to 2646.6(e) state that "[a] person subject to the requirements of Title 10 CCR 2646.6 who fails to comply with a request for information or data pursuant to that section **shall be liable** for a civil penalty" [emphasis added].

NAMIC, PADIC, and PIFC are concerned that this *strict liability* (shall be liable) penalty provision of the proposed amendments automatically exposes insurers, who have made unintentional, aberrational, and/or minor administrative or clerical errors in their disclosure of information, to substantial regulatory penalties/fines.

What is meant by "a failure to comply"? If a carrier accidentally leaves out a *single piece* of information or misunderstands an information request or doesn't have all of the data requested, will this trigger the imposition of a civil penalty?

The way the proposed amendment is worded, a simple and meaningless reporting mistake will expose an insurer to a strict liability penalty/fine without affording the insurer a "common courtesy" opportunity to timely amend the report to correct the negligible human error, before being subject to a regulatory penalty/fine.

NAMIC, PADIC, and PIFC believe that the "fails to comply with a request for information or data" provision should be amended so as to exclude unintended clerical or administrative misstatements, aberrational reporting mistakes, and inconsequential disclosure errors from the purview of the strict liability penalties/fines provision.

Additionally, the proposed amendments set forth a penalty/fine for *mere tardiness* in timely compliance with a Department's request for information or data. The stated civil penalty for "unintentional" tardiness shall not exceed \$5,000 for each 30-day period, and the civil penalty/fine for "willful" tardiness shall not exceed \$10,000 for each 30-day period.

Further, the proposed amendment is unclear as to whether an insurer's reasonable request for an extension of time to comply would prevent or trigger the imposition of a civil penalty. What if the insurer's request for an extension of time is granted? If the insurer's request for an extension of time is denied is the 30-day period of time tolled until after the insurer has received notice that its request for an extension of time has been denied?

Also of concern to NAMIC, PADIC, and PIFC is the fact that the proposed regulation does not set forth the legal standard the CDI will use in determining whether the insurer committed a "willful violation" of the information request. What if the CDI requests certain data that the insurer does not maintain or requests data in a form that differs from the internal practices of various sized insurers? Would the failure to tender this data be a "willful violation" of the information request?

The fact that there is no stated effective date could be interpreted to mean that any filing that is currently due or in the hands of the CDI could be subject to the newly proposed penalties.

NAMIC, PADIC and PIFC are concerned that the proposed civil penalties could be retroactively imposed on carriers without the insurers being afforded notice of the potential exposure to penalties and/or the benefit of due process protections.

If the CDI's concern is really about procuring CSS information in a timely manner, the department should focus its attention on making the information and data requests easier to understand and comply with, as opposed to imposing unreasonable civil penalties on carriers.

Since the proposed amendments pertain to the imposition of significant civil penalties/fines, the Department should be clear and specific as to the procedural and substantive due process protections that will be afforded to insurers, who are to be assessed a civil penalty/fine. The proposed amendments fail to provide any meaningful guidance to insurers as to what standard the Department will use for determining when there is a "failure to comply". Is the legal test one of "substantial compliance"? What if the insurer's error or oversight relates to a "non-material" aspect of the reporting requirement that does not adversely impact the rest of the insurer's report?

If the Department is able to satisfy the "necessity" and "authority" test required to support the proposed regulation during the public discussion, NAMIC, PADIC, and PIFC suggest that the CDI schedule a specific workshop to address the aforementioned due process concerns. The Department and insurance carrier representatives should have an opportunity to discuss these procedural issues in greater detail and craft language that sets forth clear guidelines for insurers to follow and provides insurance carriers with appropriate constitutional law protections.

In closing, NAMIC, PADIC, and PIFC appreciate being afforded this opportunity to tender the aforementioned comments and suggested revisions to the proposed amendments to the Community Service Statement and the Commissioner's Report on Underserved Communities, and respectfully request that the Department consider the importance of drafting amendments that do NOT penalize insurer's for unintentional and aberrational "good faith compliance" disclosure errors, create a contentious data reporting process, and impose new administrative burden and costs on insurers, especially during a time when businesses are struggling in a weak economy.

Thank you for your time and consideration. Please feel free to contact Christian J. Rataj at 303.907.0587 or at crataj@nami.org, or Milo Pearson at 530.888.6045 or miloperson@sbcglobal.net, Michael A. Gunning at 916.442.6646 or at mgunning@pifc.org, if you have any questions about NAMIC's, PADIC's and PIFC's written comments.

Respectfully,

(Signature on file with CDI)
Christian John Rataj, Esq.
NAMIC Western State Affairs Manager

(Signature on file with CDI)
Milo Pearson
PADIC Executive Director

(Signature on file with CDI)
Michael A. Gunning
PIFC Vice President