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Proposed Regulatory Action Commented Upon:		Authority for Proposed Amendments and Adoption	
<b>John Metz</b>	<p>Mr. Metz' written comment took the form of proposed additions to the Commissioner's proposed regulatory amendments and adoption. Specifically, Mr. Metz commented that the proposed amendment to CCR section 2651.1(h) should add the phrase "without limitation" to the proposed description of "proceeding", thereby broadening the definition of "proceeding" even further. Mr. Metz commented that the authority notations for the proposed regulatory amendments and adoption should all be amended to include CIC section 1861.03 for the purpose of incorporating unfair business practices actions into the category of proceedings which would be subject to compensation pursuant to CIC 1861.10. Mr. Metz also commented that CIC section 1861.01 should be included as authority for the proposed amendment of CCR 2662.1(h).</p>	<p>Mr. Metz' comment on the record at the public hearing was generally supportive of the oral comments of the Foundation for Taxpayer and Consumer Rights, <i>infra</i>. Mr. Metz also presaged his written comments, stating his opinion that additional points of authority could be added and specifically, that CIC 1861.03 could be enforced under the terms of CIC 1861.10 along with "other situations...other than rate hearings...connected with the determination of whether or not a rate is excessive and adequately [sic] or unfairly discriminatory...."</p>	<p>CIC 1861.10 includes, by its terms, "any proceeding permitted or established pursuant to this chapter", which includes CIC 1861.03 as well as "actions of the Commissioner" and "Provisions of [article 9]" which includes CIC 1861.03 and therefore, incorporates "unfair business practices" as set forth in Cal. Bus. &amp; Prof. Code sections 16600 <i>et seq.</i> [Preservation and Regulation of Competition], and 17500 <i>et seq.</i> [Representations to the Public]. The Department declines to include CIC 1861.03 in its definition of "rate proceedings" as CIC sections 1861.03 and 1861.10 are not specifically related to insurance rate applications. Mr. Metz also commented that there is a typographical error in the text of the proposed amendments/adoption in section 2662.1. That will be corrected.</p>

<p><b>The Association of California Insurance Companies; The Personal Insurance Federation of California; The American Insurance Association; The Pacific Association of Domestic Insurance Companies and the California Association of Professional Liability Insurers (ACIC, et al)</b></p>	<p>ACIC <i>et al.</i>, commented that there is no statutory authority for proposed section 2653.6 and the proposed regulation is not reasonably necessary to effectuate the purpose of section 1861.10 and it cannot be reasonably implied from CIC sections 1861.05, 1861.055 or 1861.10 that insurers must seek prior approval to withdraw a rate regulation. ACIC <i>et al.</i>, also commented that imposing a new prior approval requirement affects insurers' rights and fundamentally changes the dynamics involved in rate filings and the Commissioner has no authority to add such a substantive requirement which is not found in the Insurance Code.</p>	<p>ACIC <i>et al.</i>'s comment on the record was that the regulations violate the authority, consistency and necessity standards of the Cal. Government Code applicable to amendments of regulations and new proposed regulations; the proposed amendments/adoption are arbitrary and not supported by fair or substantial reason and the regulation would have the effect of precluding a ruling of the Superior Court, holding that in order to receive compensation for advocacy, a hearing must be granted and party status must be awarded through intervention in a rate hearing proceeding.</p>	<p>It is the Commissioner's view that the proposed adoption and amendments are authorized by Proposition 103. Section 1861.10(b) requires: (1) that the person seeking advocacy and witness fees "represents the interests of consumers" and (2) that the person has "made a substantial contribution to the adoption of any order, regulation, or decision by the commissioner or a court." Requiring insurers to request to withdraw an application that has been the subject of pre-hearing advocacy avoids the unfair result highlighted by the Superior Court's ruling, which can occur when consumer advocates are involved, along with the Department, in pre-hearing review of rate applications. As Judge Janavs' ruling points out, requests for compensation must be denied under the existing regulations when a carrier unilaterally withdraws the disputed filing prior to a hearing.</p>
<p><b>State Farm Insurance Companies (State Farm)</b>  <b>State Farm (cont'd)</b></p>	<p>State Farm commented that there is no authority for this proposed amendment to require prior approval to withdraw a rate application and the insertion of such a requirement is unlawful and distorts the system so that rate regulation exists for the purpose of providing income to</p>		<p><i>See</i>, the Department's response to ACIC <i>et al.</i>'s comment on this issue, <i>supra</i>.</p>

	lawyers and other forensic professionals, rather than allowing the compensatory provisions of CIC 1861.10(b) to serve their intended purpose of rewarding persons who contribute to rate regulation.		
<b>American Insurance Association (AIA)</b>		AIA echoed the comments of ACIC, <i>et al.</i> , and commented that the regulatory proposal lacks regulatory authority with respect to CIC sections 1861.10 and 1861.05. AIA commented further that the regulations impose a chilling effect on filings for rate decreases and artificially interferes with the rate making process. AIA commented that the Commissioner's proposal to approve the withdrawal of a rate filing is unprecedented and not contemplated by the statute. The decision whether to go forward with a rate application or to withdraw it is solely a business decision. These regulations will encourage the filing of baseless challenges to rate filings and do nothing to further consumer protection. Finally, AIA commented that it is opposed to the Commissioner's adoption of any regulations prior to the arrival of the next Insurance Commissioner.	<i>See</i> , the Department's response to ACIC <i>et al.</i> 's comment on the authority issue, <i>supra</i> . AIA's comment on the Commissioner's general authority to adopt regulations prior to the arrival of a new Commissioner is not a comment on the proposed regulatory action; therefore the Department makes no response to this comment.
<b>Foundation for Taxpayer and</b>	FTCR commented that the proposed regulations are clearly		The Department concurs with FTCR's comments.

<p><b>Consumer Rights (FTCR)</b></p>	<p>within the Commissioner's authority, are consistent with the plain language of sections 1861.05 and 1861.10 and are necessary to further the Proposition 103's goals of consumer participation in the ratemaking process.</p>		
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<p><b>Proposed Regulatory Action Commented Upon:</b></p>		<p><b>General Comments</b></p>	
<p><b>FTCR</b></p>	<p>FTCR commented that it supports the Commissioner's proposed amendments to these regulations as necessary to conform the rules of practice and procedure for participation in rate proceedings to the statutory requirements of Proposition 103.</p>		<p>The Department concurs with FTCR's comment.</p>
<p><b>Public Advocates, Inc.</b></p>	<p>Public Advocates supports the Commissioner's adoption of section 2653.6 and amendments of sections 2651.1, 2661.1, 2661.3, 2662.3 and 2662.5. The amendments will clarify that consumers, who participate in the approval process for an application for proposed rate changes or for review of a current rate, after having filed a petition for hearing, may seek an award of reasonable advocacy fees.</p>		<p>The Department concurs with Public Advocates' comment.</p>
<p><b>Richard J. Roth, Jr.</b></p>	<p>Mr. Roth made no comment on the proposed amendments and adoption, but suggested that</p>		<p>Mr. Roth made no comment on the proposed regulatory action; therefore, the Department</p>

	<p>intervenors should be required to submit the Fair Political Practices Commission Form 700 to reveal conflicts of interest and to protect the interests of consumers.</p>		<p>makes no response to this comment.</p>
<p><b>Center for Public Interest Law, University of San Diego (CPIL) CPIL (cont'd)</b></p>	<p>CPIL supports the Commissioner's proposal to adopt new section 2653.6 and amend sections 2651.1, 2661.1, 2661.3, 2662.3 and 2662.5. These regulatory changes will clarify the Department's intervenor compensation regulations, which are critical to ensuring that consumers are adequately represented in Department ratemaking and rulemaking proceedings as mandated by Proposition 103. These regulations will redefine the meaning of the term "proceeding" to ensure that consumer groups that expend time and resources to challenge a rate increase application which is then withdrawn without a hearing (or which is approved at a different, often lower, rate due to the consumer group's advocacy) are compensated for their work as their participation has resulted in the abandonment of a rate increase request without the necessity of a time-consuming hearing, which constitutes a "substantial contribution" within the meaning of CIC section 1861.10. The proposed changes to the definition of "proceeding" are necessary to ensure that</p>		<p>The Department concurs with CPIL's comment.</p>

	<p>compensation to deserving groups is determined by the Commissioner and not by the actions of the insurer. CPIL also cited case law in support of the proposition that "a plaintiff should not be denied attorneys' fees because resolution in the plaintiff's favor was reached by settlement...a plaintiff is considered the prevailing party if his lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior".</p>		
<b>State Farm</b>	<p>The Commissioner's drastic and illegal action to solve the perceived "fairness" problem [arising when carriers unilaterally withdraw a pending rate application, obviating the need for a formal proceeding and thereby eliminating the "proceeding" required for compensation pursuant to CIC 1861.10] would distort the entire system, making it into a system with a primary objective of paying money to consumer groups, and making the rate review function subservient to this goal. State Farm commented further that intervenors do not have a cognizable right to attorney's fees (or other advocacy compensation).</p>		<p><i>See</i>, the Department's response to ACIC <i>et al.</i>'s comment on the authority issue, <i>supra</i>. In support of its comment, State Farm cites <i>Californians for Disability Rights v. Mervyn's LLP</i>, 39 Cal 4<sup>th</sup> 223 (2006) for the proposition that an intervenor has no cognizable interest in a right to attorney's fees. However, the <i>Mervyn's</i> case turned on attorneys' fees sought pursuant to CCP 1021.5 (private attorney general). This argument is inapposite. CIC 1861.10's "substantial contribution" standard is separate and distinct from the CCP 1021.5 requirements.</p>
<b>ACIC, et al. ACIC, et al (cont'd)</b>	<p>ACIC <i>et al.</i>, commented generally that the proposed regulations ignore the proper role of the Department and the</p>	<p>ACIC <i>et al.</i>, commented that the industry's position is that CIC 1861.10 is clear that with respect to challenges to</p>	<p><i>See</i>, the Department's response to ACIC <i>et al.</i>'s comment, <i>supra</i>, with respect to the Commissioner's authority</p>

Commissioner in the rate application review process as compared to the role of consumers and the proposed amendments and adoption are unlawful in that they conflict with CIC section 1861.10 and completely reverse the Department's long-standing application of that statute as reflected in the existing regulations. ACIC *et al.*, also commented that none of the cases cited by the Commissioner in support of the proposed amendments and adoption state that consumer groups should be encouraged to participate in the rate application review phase and that, to the contrary, those cases indicate that Proposition 103 only intends to permit consumer groups to participate in rating matters through a public hearing. ACIC *et al.*, commented further that the proposed amendments unlawfully expand the scope of 1861.10(a) and (b) by establishing that a "proceeding" commences upon a request for a hearing, effectively making the rate application itself a "proceeding"; improperly provide that a "decision" on the rate application may include the Commissioner's approval of the withdrawal of the application and unlawfully include class plans within the scope of CIC 1861.10. ACIC *et al.*, commented further that the proposed regulations conflict with Proposition

rate applications, 1861.10 (a) permits consumers to participate through intervention in a section 1861.05 rate hearing proceeding only. ACIC *et al.*, cited four cases in support of its opposition as well as the superior court ruling in *AHI/SCPIE v. Garamendi*. ACIC *et al.*, commented that Proposition 103 intends that the rate application review function will be performed by the Department of Insurance and giving consumer groups the right to act as a party in a rate application [review] process elevates the consumer representative to an advocacy organization in violation of the court's ruling in *Calfarm*.

to require prior approval for the withdrawal of a pending rate filing prior to a formal hearing. The Commissioner's disagrees with ACIC *et al.*'s assertion that Proposition 103 only intends to permit consumer groups to participate in rating matters through formal public hearings. To the extent that class plans are subject to article 10 of chapter 9, referenced by CIC section 1861.10, it is within the Commissioner's authority and the scope of Proposition 103 to amend the regulations to include class plans. None of the cases cited by ACIC *et al.*, in its opposition preclude consumer participation in a pre-hearing review of a filed rate application. Moreover, a close reading of the cited cases reveals that the courts have in fact referred to Proposition 103's provisions as allowing for public participation not only in the context of a formal hearing, but also generally, in the "rate-setting process" (*State Farm v. Garamendi*, (2004) 32 Cal. 4<sup>th</sup> 1029, at p. 1045.) ACIC *et al.*'s comment that the proposed amendments and adoption run afoul of the *Calfarm* ruling are inapposite. The *Calfarm* court severed an original provision of Proposition 103 (1861.10(c)) on the

	103, which intended specific limits on consumers ability to obtain compensation and that such limitation violates no public policy.		ground that an initiative cannot identify a private person or corporation to perform a function. The decision has no bearing on advocacy organizations, <i>per se</i> .
<b>Proposed Regulatory Action Commented Upon:</b>		<b>Proposed Amendments to CCR sections 2651.1 (h), 2661.1(f), (h)-(i)</b>	
<b>FTCR</b>	FTCR commented that the proposed amendments to these sections are necessary to clarify that a rate proceeding is initiated when a petition for hearing is filed, regardless of whether the proceeding results in a formal rate hearing conducted under the Administrative Procedures Act (APA) and is consistent with the statutory language and purpose of sections 1861.05 and 1861.10.		The Department concurs with FTCR's comment.
<b>ACIC, et al. ACIC, et al, (cont'd)</b>	ACIC <i>et al.</i> , commented that proposed section 2661.1(h) makes the rate application review process a proceeding in which consumers can obtain compensation and as such, this proposed amendment is in conflict with section 1861.10 which does not contemplate that an informal rate application review is a proceeding which consumers can "initiate" or in which they can "intervene". ACIC <i>et al.</i> , commented further that the plain meaning of "proceeding" denotes a more formal process than is afforded in a rate review		<i>See</i> , the Department's response to ACIC <i>et al.</i> 's comments, <i>supra</i> , on the issue of the Commissioner's authority to expand the regulations' definition of "proceeding" to include pre-hearing review.



<p>and that the voters' choice of the terms advocacy, witness, order and decision all indicate that the "proceeding" in which a consumer may intervene, is a hearing or similar formal adjudicatory proceeding. ACIC <i>et al.</i>, commented further that CIC 1861.05 sets forth the requirements relating to the Commissioner's review of a rate application and clearly contemplates that the appropriate avenue for consumer participation is a rate hearing and that none of the California cases cited by the Commissioner in support of the proposed amendments and adoption contradict this conclusion.</p>	
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<b>Proposed Regulatory Action Commented Upon:</b>		<b>Proposed Amendments to CCR sections 2661.3 (a), (e), (f) and (g)</b>	
<b>FTCR</b>	<p>FTCR commented that the proposed amendment to this section is necessary to conform the regulations to the statute, which provides for an unconditional right to intervene in matters to enforce Proposition 103.</p>		<p>The Department concurs with FTCR's comment.</p>
<b>ACIC, et al.</b>	<p>ACIC <i>et al.</i>, commented that proposed amendments to CCR section 2661.3 improperly apply the consumer compensation rules to insurer class plans by permitting consumers to "intervene and become a party to a rate or class plan proceeding" where CIC section 1861.10 requires insurers to compensate for</p>		<p><i>See</i>, the Department's response to ACIC <i>et al.</i>'s comments, <i>supra</i>, on the issue of the Commissioner's authority to specifically refer to class plans in the intervenor regulations.</p>

	<p>advocacy only in connection with rate applications, which are filed pursuant to CIC section 1861.05 and not class plans, which are filed pursuant to CIC section 1861.02. ACIC <i>et al.</i>, also commented that neither the Insurance Code nor the regulations permit consumers to request or demand a hearing on a class plan application.</p>		
<p><b>Proposed Regulatory Action Commented Upon:</b></p>		<p><b>Proposed Amendments to CCR section 2653.6</b></p>	
<p><b>FTCR</b></p>	<p>FTCR commented that the proposed amendment to this section is necessary to prevent an insurer from using its withdrawal as a basis to argue that a consumer is not eligible for compensation for any advocacy performed prior to the insurer's withdrawal and that the Commissioner's order allowing an insurer to withdraw its application clearly constitutes an `order' or `decision' within the meaning of section 1861.10 (b).</p>		<p>The Department concurs with FTCR's comment.</p>
<p><b>ACIC, et al ACIC, et al. (cont'd)</b></p>	<p>ACIC <i>et al.</i>, commented that proposed section 2653.6(c) conflicts with CIC 1861.10(b) because the courts have interpreted the statute to require a "decision on the merits" and which clearly refers to a determination made after an adversarial proceeding in which each side is able to present arguments and evidence in support of its position and no "decision" or "order" can reasonably result from informal discussions</p>		<p>The Superior Court's ruling in the <i>AHI/SCPIE</i> matter is limited to its facts. Consumer advocates had filed a Petition for Hearing (PTF) on the SCPIE filing, but the application was withdrawn and the PTF dismissed prior to the Department's grant of the Petition to Intervene (PTI). As a result, no decision on the merits was issued. The proposed amendments to the regulation address this</p>

	<p>during the rate review process. ACIC <i>et al.</i>, also commented that the Commissioner is attempting to create a "decision" by requiring insurers to obtain prior approval to withdraw an application and by allowing consumers to file a "response" to the insurer's request to withdraw.</p>		<p>issue by providing that a PTF and a PTI may be combined in one document. Judge Janavs' ruling points out the unfair result that obtains under the existing regulations when a carrier unilaterally withdraws the disputed filing prior to a hearing. The proposed amendments and adoption will remedy this situation.</p>
<p><b>State Farm</b></p> <p><b>State Farm (cont'd)</b></p>	<p>State Farm commented that there is no authority for this proposed amendment to require prior approval to withdraw a rate application and that it is the "worst aspect" of the proposed regulatory action because it distorts the whole rate regulatory system in order "to favor an aspect of the system that should be ancillary." State Farm commented further that the regulation operates on the assumption that any withdrawal of a rate application equals an admission that the applied-for rates would be excessive, such that a putative intervenor's filing objecting to aspects of the applied-for rates benefits the public when the rate application is withdrawn, but as a constitutional matter, that assumption cannot be made a binding presumption by regulation. Unless there is a hearing, the law does not permit an inference that a proposed rate does not meet the standard of CIC section 1861.05(a). Pursuant to that section, the Commissioner may only approve an application or call a hearing.</p>		<p><i>See</i>, the Department's response to ACIC <i>et al.</i>'s comment on the authority issue, <i>supra</i>. The regulations do not provide, and State Farm incorrectly asserts that any withdrawal of a rate application pursuant to the proposed amendments would "equal[] an admission that the applied-for rates [were] excessive". The Commissioner's decision disposing of a rate application prior to a hearing would, if appropriate, contain facts regarding the Department's review of the application. CIC 1861.10 and the intervenor regulations do not define "substantial contribution" in the context of the contents or disposition of a rate filing. Whether or not the intervenor has made a substantial contribution and is therefore entitled to compensation is a separate issue, which is determined by the Department's Public Advisor based upon the intervenors' Request for Compensation and supporting documents.</p>

	<p>There can be no disapproval without an APA proceeding, per CIC section 1861.08. The assumption that any withdrawal equals a "substantial contribution" within the meaning of CIC section 1861.10(b) cannot be reconciled with the statutory system or principles of due process and thus fails the authority prerequisite for administrative approval.</p>		
<p><b>Proposed Regulatory Action Commented Upon:</b></p>		<p><b>Proposed Amendments to CCR sections 2662.1, 2662.3 and 2662.5</b></p>	
<p><b>FTCR</b></p>	<p>FTCR commented that the proposed amendment to these sections clarify that compensation pursuant to CIC 1861.10 may be applied for by one "initiating" a proceeding in addition to one that is "intervening" in a proceeding.</p>		<p>The Department concurs with this comment.</p>