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VIA EMAIL AND FEDERAL EXPRESS

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RE: Catastrophe Modeling and Ratemaking, OAL Notice File No. Z-2024-0806-05; CDI Regulation File No. REG-2023-00010

In its November 13, 2024 Cover Memo to the Office of Administrative Law ("OAL"), the California Department of Insurance ("Department") claims its entire "package of proposed regulatory amendments establishes or fixes rates, prices, or tariffs and therefore falls under the 'rate-setting exemption' established under Government Code section 11340.9, subdivision (g)." (P. 1.) While Consumer Watchdog believes that both courts and the Department have construed section 11340.9(g) more expansively than the plain language can bear, even under the case law cited by the Department, at least two of the proposed regulations here are indisputably outside the scope of the exemption—**Section 2648.5**, concerning the pre-application required information determination ("PRID") procedure, and **Section 2644.4.8**, concerning "insurer commitments."

The Administrative Procedure Act ("APA") consists of a foundational set of consumer and taxpayer protections against government overreach. It requires all agencies of the State of California to adopt regulations in accordance with proscribed procedures and standards through a public hearing process, and it requires that OAL review regulations for clarity and consistency with existing statutes and regulations. (Gov. Code § 11349.1.) The APA specifies a very limited number of exemptions from these consumer protections. Here, the Department relies on Government Code section 11340.9, subdivision (g), which exempts "[a] regulation that establishes or fixes rates, prices, or tariffs." However, newly proposed **Sections 2648.5 and 2644.4.8** do not "establish" or "fix" insurance rates in any way, nor are they "essential" or "integral" parts of insurance ratemaking under the statutory requirements of Proposition 103, and thus are not exempted.

Proposed **Section 2648.5** creates an entirely new "pre-application required information determination" ("PRID") process completely separate from the statutory prior approval rate review and approval process under Insurance Code section 1861.05. The regulation purports to delegate authority to a "Model Advisor" to determine the information that would be necessary to show computer models used to estimate catastrophic losses are reliable (Section 2648.5, subdivisions (a)(8), (f), (k)), and a process for the public to participate in that process that would take place entirely behind closed doors separate from the review and approval of rates as

mandated by Insurance Code section 1861.05. (Section 2648.5, subdivisions (a)(2), (a)(7), (b), (c), (d), (e), (j)(2).) Nothing in the Insurance Code expressly permits or requires such models to be used by insurers or the CDI to conduct such a secret model review process. A regulation that creates a secret process to review model information does not "establish[] or fix[] rates" merely because it is part of a regulation that pertains to rates. That would be like saying that a regulation that pertains to procedures for how tax returns are filed establishes a tax.

Proposed **Section 2644.4.8** provides that an insurer that "opts to make, fulfill, and document" certain specified commitments to sell insurance in high-risk wildfire areas "may" use catastrophe models in ratemaking as permitted by proposed Section 2644.4.5. The plain text of the proposed Section 2644.4.8 and the Department's Final Statement of Reasons make clear that insurers need not make any commitments to sell more policies in order to file a complete rate application and get a rate approved, given that insurers are not required to use catastrophe models. (Final Statement of Reasons, Responses to Comments, p. 32 ["Participation in the commitment program is optional"].) Thus like Section 2648.5, Section 2644.4.8 itself has nothing to do with fixing or establishing rates.

The cases relied upon by the Department do not support a contrary conclusion. *Winzler* found that "the determination of the classification or type of work covered is an essential step in the wage determination process and a rate cannot be fixed without such a determination." (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128.) *Vector* found "the Important Notice and Stamp establish prevailing wage rates for shifts outside of normal working hours . . . . As integral parts of the prevailing wage determination process, the Important Notice and Stamp are exempt from the notice and hearing requirements of the APA." (*Vector Resources, Inc. v. Baker* (2015) 237 Cal.App.4th 46, 56.)

Neither case is apposite here. Neither the newly created PRID procedure under **Section 2648.5** nor the insurer commitments under **Section 2644.4.8** involve a determination without which "a rate cannot be fixed," as in *Winzler*. While *Vector* characterized the Notice and Stamp as "integral parts of the prevailing wage determination process," it appears the Notice and Stamp were directly "establishing rates"—"the Important Notice and Stamp establish prevailing wage rates . . . ." (*Supra*, 237 Cal.App.4th at p. 56.) Clearly, neither the PRID procedure nor insurer commitment regulations are "establishing rates" in any way, nor are they "an essential step" or "integral parts" of the rate determination process. Both sections operate outside the scope of the regular rate review and approval process as mandated by Insurance Code section 1861.05 and are thus not subject to the exemption.

Notably, both the PRID procedure and insurer commitments to sell more policies are entirely optional and non-binding. Models are not *required* to be used in developing an insurer's proposed rate (see proposed Section 2644.4.5 [setting forth permissible uses of models]) and need not undergo a PRID procedure to be used in ratemaking (see proposed Section 2648.5(g) and (h) [providing that the Department "may initiate" or other persons "may petition to initiate" a PRID procedure]), and the Commissioner is not bound by a PRID determination and retains ultimate discretion in deciding what information to require an insurer to produce regarding a model during the ratemaking process. (See Final Statement of Reasons, pp. 6–7.) Clearly, an

optional pre-application procedure, the result of which can be completely disregarded during the actual ratemaking process, is not an "essential step" or "integral part" of ratemaking.

Similarly, providing an option to sell policies in high-risk wildfire areas as a prerequisite to using a catastrophe model in ratemaking, the use of which is not itself required, clearly falls outside the scope of the exemption, as the commitments to sell more policies are neither an "essential step" nor an "integral" part of the ratemaking process.

Particularly now, when the insurance industry has fomented insurance shortages across the state and is threatening further widespread economic disruption unless Commissioner Lara rolls back current regulatory requirements, it is crucial that the APA's bedrock protections against arbitrary government action be respected. At minimum, the Office of Administrative Law should reject the Department's reliance on the ratemaking exemption to excuse OAL review of Sections 2644.4.8 and 2648.5.

Sincerely,

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