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***Exempt From Filing Fees Pursuant
to Gov't Code § 6103***

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF LOS ANGELES

11 **INSURANCE COMMISSIONER STEVE**
12 **POIZNER,**
13
14 **v.**
15 **OFFICE OF ADMINISTRATIVE LAW,**
16
17 **AMERICAN COUNCIL OF LIFE**
18 **INSURERS; AMERICAN INSURANCE**
19 **ASSOCIATION; ASSOCIATION OF**
20 **CALIFORNIA INSURANCE**
21 **COMPANIES; ASSOCIATION OF**
22 **CALIFORNIA LIFE AND HEALTH**
INSURANCE COMPANIES and
PERSONAL INSURANCE FEDERATION
OF CALIFORNIA
Real Parties In Interest.

Case No.

PETITION FOR WRIT OF MANDATE

Petitioner,

Respondent,

23 Petitioner Insurance Commissioner Steve Poizner alleges:

24 **INTRODUCTION**

25 1) The Insurance Commissioner of California is required to ensure that assets in
26 insurance companies' portfolios are financially sound. Financial soundness is essential for
27 policyholders, ensuring that insurance companies will be able to pay their customers' claims. In
28 recognition of this critical function, California law gives the Insurance Commissioner broad

1 discretion to act quickly and flexibly to safeguard insurer assets and the interests of policyholders.

2 2) In this matter, the Insurance Commissioner took decisive and quick action to
3 safeguard insurers' portfolios from risk arising out of investments in companies doing business
4 with the Iranian nuclear, defense, and energy sectors. Iran's pursuit of nuclear weapons, its
5 support of international terrorism, and its despotic rule not only render it unstable politically and
6 economically, but put at risk any company that does business with the Iranian nuclear, defense,
7 and energy sectors.

8 3) With assistance from experts in the field, the Commissioner evaluated thousands of
9 investments on a security-by-security basis. After months of study, the Commissioner issued a
10 list of 51 companies that are doing business with the Iranian nuclear, defense, and energy sectors,
11 and are subject to financial risk as a result of those dealings.

12 4) The Commissioner requested that all insurers doing business in California indicate
13 whether they will voluntarily agree not to invest in companies on the list in the future. The
14 Commissioner prepared a form for insurers to fill out and return indicating their willingness to
15 forgo investing in these companies in the future.

16 5) Pursuant to the Insurance Code and his direct authority to act, the Commissioner also
17 directed insurers to submit financial statements identifying their Iran-related holdings, and
18 directed that these holdings would be considered "non-admitted." Insurers may continue to hold
19 those investments in their portfolios, but for purposes of California financial statements, the assets
20 will not count toward the insurers' surplus. The action taken by the Commissioner is similar to
21 statutes passed by the California legislature and Congress to force companies to divest in Iranian
22 companies.

23 6) Almost all the 1,300 insurers admitted to do business in California responded to the
24 Commissioner's request for a response about future investments. The Commissioner has not
25 entered orders against any insurers in connection with Iran Investment matters.

26 7) Nonetheless, five trade associations of insurance companies petitioned the Office of
27 Administrative Law ("OAL") to declare the Commissioner's actions impermissible "underground
28 regulations."

1 8) Notwithstanding the fact that the actions taken by the Commissioner do not meet the
2 definition of a “regulation,” and were simply actions taken by him in his authority to act pursuant
3 to the Insurance Code, OAL determined that the actions were invalid.

4 9) The Commissioner now challenges that decision by OAL.

5 **PARTIES**

6 10) Petitioner is the Insurance Commissioner of the State of California. As Insurance
7 Commissioner, he is the chief officer of the California Department of Insurance (“Department”)
8 and controls and directs the Department.

9 11) Respondent Office of Administrative Law is an agency of the government of the
10 State of California charged with ensuring the state’s regulations are clear, necessary, legally valid,
11 and available to the public. Among other responsibilities, OAL receives petitions challenging
12 agency actions as alleged underground regulations.

13 12) Petitioner is informed and believes that real party in interest the American Council of
14 Life Insurers is an insurance-industry trade organization.

15 13) Petitioner is informed and believes that real party in interest the American Insurance
16 Association is an insurance-industry trade organization.

17 14) Petitioner is informed and believes that real party in interest the Association of
18 California Insurance Companies is an insurance-industry trade organization.

19 15) Petitioner is informed and believes that real party in interest the Association of
20 California Life and Health Insurance Companies is an insurance-industry trade organization.

21 16) Petitioner is informed and believes that real party in interest the Personal Insurance
22 Federation is an insurance-industry trade organization.

23 **HISTORY OF COMMISSIONER POIZNER’S EFFORTS TO LIMIT RISKY**
24 **INVESTMENTS IN IRAN BY INSURANCE COMPANIES DOING BUSINESS IN**
25 **CALIFORNIA**

26 **A. Data Call**

27 17) In April 2009 or shortly thereafter, Commissioner Poizner commenced an effort to
28 monitor, evaluate, and take action with respect to insurance company investments in companies

1 doing business with Iran.

2 18) In June 2009, the Department announced that it was launching an effort to probe
3 insurance company investments for ties to Iran through a data call. In July 2009, the Department
4 issued the data call to approximately 1,300 insurers licensed to do business in California. The
5 data call requested information about insurer investments in the Government of Iran, in securities
6 denominated in the currency of Iran, and in companies doing business with the defense, nuclear,
7 energy, and banking sectors of the Iranian economy. The data call stated that the Department
8 would use the requested information to evaluate the magnitude of the insurer's Iran-related
9 holdings and whether those investments are sound. The due date for responses was
10 September 30, 2009.

11 19) Insurers began submitting responses as early as July 2009. By December 31, 2009,
12 virtually all of the 1,300 insurers licensed to do business in California had filed responses.

13 **B. The List of Companies Doing Business in Iran**

14 20) Based on information from the data call and input from outside consultants, on
15 December 2, 2009, the Commissioner announced he was creating a list of companies doing
16 business in the Iranian energy, nuclear, banking, and defense sectors.

17 21) Based on a company by company analysis, consultation with experts in the area of
18 Iranian investments by multinational companies, and a review of lists prepared by California,
19 Florida, and New York pension funds,¹ the Department developed a list of 50 companies doing
20 business with the Iranian nuclear, defense, and energy sectors.² The Department also determined
21 that companies on the list are subject to financial risk (referred to as "asymmetric risk") because
22 of their involvement with the Iranian nuclear, defense, and energy sectors. The asymmetric risk
23

24 ¹ The States of California, Florida, and New York have directed their public employees'
25 pension funds to divest from holdings in companies doing business with various sectors of the
26 Iranian economy. (See Cal. Gov. Code, § 7513.7; Fla. Stats., § 215.473; Office of N.Y. State
27 Comptroller, Nov. 14, 2007 press release.)

28 ² At the request of insurers, and given the difficulty of researching the issue, the
Department agreed not to include on the list companies doing business with the Iranian banking
sector and multinational banks doing business in Iran.

1 is particularly acute in Iran because of the massive instability in its economic sectors caused by
2 the political situation.

3 22) In response to insurers' requests that the list be made public, on February 10, 2010,
4 the Department released the list of 50 companies doing business with the Iranian nuclear, defense,
5 and energy sectors. After further consideration and study, one additional company was added to
6 the list on April 16, 2010.

7 23) Following are three examples of companies on the list:

- 8 • Ulan-Ude Aviation Plant JSC is a Russian company that provides equipment to the
9 Iranian military. Ulan-Ude's military support of a terrorist regime with nuclear
10 weapons ambitions subjects Ulan-Ude to reputational and financial risk. If Iran fires
11 a weapon at another country and parts of the weapons are found that bear the label
12 "Ulan-Ude," the financial condition of Ulan-Ude could collapse.
- 13 • Royal Dutch Shell has worked with the Iranian regime in developing oil and gas
14 projects in the Persian Gulf. With the increased opprobrium Iran is coming under as a
15 result of sanctions legislation such as the Comprehensive Iran Sanctions,
16 Accountability, and Divestment Act of 2010 (22 U.S.C. §§ 8501 *et seq.*), companies
17 such as Royal Dutch Shell face reputational harm and financial risk for continued
18 support of the Iranian energy sector.
- 19 • ZiO-Podol'sk OAO is a Russian company that manufactures power machinery for
20 power plants, including nuclear power plants. Among the products developed by
21 ZiO-Podol'sk are heat-recovery steam generators for a nuclear power plant in Iran.
22 The ability of Iran to develop nuclear power is a substantial global threat. ZiO-
23 Podol'sk's collaboration with Iran to develop nuclear power plants presents financial
24 and reputational risk to ZiO-Podol'sk.

25 **C. The Department's Request that Insurers Voluntarily Agree Not to Make**
26 **Iran-Related Investments in the Future**

27 24) Given the acute financial risk from investments in companies on the list, the
28 Department requested that insurers licensed to do business in California voluntarily agree not to

1 invest in companies on the list in the future.

2 25) The Department directed that insurers notify the Department by April 2, 2010
3 whether they would agree to refrain from making future investments in companies on the list until
4 either (a) Iran is removed from the United States State Department's list of state sponsors of
5 terrorism or (b) the company and its affiliates cease doing business with Iran's nuclear, defense,
6 and energy sectors and the Department removes the company from the list.

7 26) The Department provided a form for insurers to fill out and send to the Department
8 indicating whether they agree to the requested moratorium.

9 27) More than 1,250 of the 1,300 insurers licensed in California returned the form or
10 responded with personalized letters. More than 1,000 insurers stated that they do not intend to
11 invest in listed companies in the future.

12 **D. Non-Admission of Iran-Related Assets**

13 28) To address the severe financial hazard posed by investments in companies on the list,
14 the Department directed insurers to submit financial statements identifying investments in
15 companies on the list. In addition, the Department directed insurers to report such investments in
16 "Column 2" of their Annual Statements. Insurers must file Annual Statements, in which they
17 publicly identify all investments. Column 2 is labeled "Nonadmitted Assets." The Department
18 advised that effective March 31, 2010, it will treat such investments as non-admitted. Insurers
19 may continue to hold Iran-related investments in their portfolios, but for purposes of their
20 California financial statements, the assets will not count toward the insurers' surplus.

21 29) Placement of insurers' Iran-related investments in Column 2 does not require insurers
22 to divest from those holdings. Nonetheless, some insurers voluntarily divested from companies
23 on the list. "Non-admission" of investments has not impaired any insurer's surplus to trigger any
24 action by the Department.

25 **E. The Petition and OAL Determination**

26 30) On March 29, 2010, five insurance-industry trade associations, the real parties in
27 interest here, filed with the OAL a "Petition for Determination Pursuant to California
28 Government Code Section 11340.5" ("OAL Petition"). The OAL Petition sought a determination

1 that the Commissioner's efforts to address Iran-related holdings in insurers' portfolios constitute
2 illegal "underground regulations" and are invalid.

3 31) In a letter dated May 27, 2010, OAL stated that it would consider the petition and
4 identified three specific alleged underground regulations that OAL would consider:

5 A. A statement in a letter dated February 10, 2010, which states: "Accordingly,
6 effective March 31, 2010, the Department will treat all investments by
7 insurers holding a certificate of authority to transact insurance in California
8 in companies on the List and affiliates owned 50% or more by companies on
9 the List as non-admitted on the insurer's financial statements. For all
10 financial statements filed with the Department for periods ending on or after
11 March 31, 2010, each insurer must report all of its investment holdings on
12 the List as not admitted assets."

13 B. A determination in the Department's letter of February 10, 2010, that
14 companies on the List referenced in A, above, are "subject to financial risk
15 as a result of doing business with the Iranian oil and natural gas, nuclear, and
16 defense sectors."

17 C. A document titled "Response Form" that requires insurers to agree or not to
18 agree by March 12, 2010, that they will refrain from investing in companies
19 on the List or affiliates owned 50% or more by companies on the List until
20 either (a) Iran is removed from the United States Department's list of state
21 sponsors of terrorism or (b) the company and its affiliates cease to do
22 business with Iran's oil and natural gas, nuclear, and defense sectors and is
23 removed from the List.

24 32) On July 27, 2010, the Department of Insurance filed a response to the OAL Petition.

25 33) On August 27, 2010, OAL received the insurers' Reply.

26 34) Petitioner is informed and believes that there was a public comment process
27 available, but no comments were received from the public on this matter.

28 35) OAL issued a determination regarding this matter on October 11, 2010, 2010 OAL
Determination No. 21 ("Determination").

36) In the Determination, OAL combined the three issues into two and determined that
each of the issues falls within the definition of "regulation" and should have been adopted
pursuant to the Administrative Procedure Act ("APA").

37) Specifically the two issues considered by OAL were the following:

A. The rule, expressed in a letter dated February 10, 2010, stating that effective
March 31, 2010, the Department will treat all investments by insurers
holding a certificate of authority to transact insurance in California in
companies on the List (which is incorporated by reference in the letter) and
affiliates owned 50% or more by companies on the List, as non-admitted on

1 the insurer's financial statements in that they are subject to financial risk as a
2 result of doing business with the Iranian oil and natural gas, nuclear, and
3 defense sectors. It further states that for all financial statements filed with
4 the Department for periods ending on or after March 31, 2010, each insurer
is required to report all of its investment holdings in companies on the List
as not admitted assets.

- 5 B. A document titled "Response Form" that requires insurers to agree or not to
6 agree by March 12, 2010, that they will refrain from investing in companies
7 on the List or affiliates owned 50% or more by companies on the List until
8 either: (a) Iran is removed from the United States State Department's list of
state sponsors of terrorism, or (b) the company and its affiliates cease to do
business with Iran's oil and natural gas, nuclear, and defense sectors and is
removed from the List.

9 **CALIFORNIA LAW GOVERNING UNDERGROUND REGULATIONS**

- 10 38) The APA defines "regulation" as:

11 "Regulation" means every rule, regulation, order, or standard of general
12 application or the amendment, supplement, or revision of any rule, regulation,
13 order, or standard adopted by any state agency to implement, interpret, or
14 make specific the law enforced or administered by it, or to govern its
15 procedure. [Gov. Code § 11342.600.]

- 16 39) As the Supreme Court elaborated in *Tidewater Marine Western, Inc. v. Bradshaw*
17 (1996) 14 Cal.4th 557, 571 [citations omitted]:

18 A regulation subject to the APA thus has two principal identifying
19 characteristics. First, the agency must intend its rule to apply generally,
20 rather than in a specific case. The rule need not, however, apply universally;
21 a rule applies generally so long as it declares how a certain class of cases will
22 be decided. Second, a rule must "implement, interpret, or make specific the
23 law enforced or administered by [the agency], or . . . govern [the agency's]
24 procedure."

- 25 40) Government Code section 11342.600 defines "regulation" as "every rule, regulation,
26 order, or standard of general application or the amendment, supplement, or revision of any rule,
27 regulation, order, or standard adopted by any state agency to implement, interpret, or make
28 specific the law enforced or administered by it, or to govern its procedure." Any regulation
adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute
to implement, interpret, or make specific the law enforced or administered by it, or to govern its
procedure, is subject to the APA unless a statute expressly exempts the regulation from APA
review. (Gov. Code, §§ 11340.5, 11346.)

1 41) Government Code section 11340.5, subdivision (a), provides:

2 No state agency shall issue, utilize, enforce, or attempt to enforce any
3 guidelines, criterion, bulletin, manual, instruction, order, standard of general
4 application, or other rule, which is a regulation as defined in [Government
5 Code] Section 11342.600, unless the guideline, criterion, bulletin, manual,
6 instruction, order, standard of general application, or other rule has been
7 adopted as a regulation and filed with the Secretary of State pursuant to [the
8 APA].

9 42) Government Code section 11346, subdivision (a) states:

10 It is the purpose of this chapter to establish basic minimum procedural
11 requirements for the adoption, amendment, or repeal of administrative
12 regulations. Except as provided in Section 11346.1, the provisions of this
13 chapter are applicable to the exercise of any quasi-legislative power conferred
14 by any statute heretofore or hereafter enacted, but nothing in this chapter
15 repeals or diminishes additional requirements imposed by any statute. This
16 chapter shall not be superseded or modified by any subsequent legislation
17 except to the extent that the legislation shall do so expressly.

18 43) When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of
19 section 11340.5, it creates an underground regulation as defined in California Code of
20 Regulations, title 1, section 250, subdivision (a):

21 “Underground regulation” means any guideline, criterion, bulletin, manual,
22 instruction, order, standard of general application, or other rule, including a
23 rule governing a state agency procedure, that is a regulation as defined in
24 Section 11342.600 of the Government Code, but has not been adopted as a
25 regulation and filed with the Secretary of State pursuant to the APA and is not
26 subject to an express statutory exemption from adoptions pursuant to the
27 APA.

28 44) OAL may issue a determination as to whether or not an agency has issued, utilized,
enforced, or attempted to enforce a rule that meets the definition of “regulation” as defined in
section 11342.600 and should have been adopted pursuant to the APA. (Gov. Code, § 11340.5.)
An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an
underground regulation is entitled to “due deference” in any subsequent litigation of the issue
pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422.

CAUSES OF ACTION

45) Petitioner Commissioner Poizner has no other plain, speedy, or adequate remedy at
law.

1 46) Petitioner Commissioner Poizner seeks a writ of mandate on the following grounds,
2 and for the following matters:

3
4 **FIRST CAUSE OF ACTION**

5 **Improper Determination By OAL that Creation of the List was an Underground Regulation**
6 (Writ of Mandate – Code of Civil Procedure § 1085)

7 47) OAL abused its discretion when it improperly determined that the creation of the list
8 was an underground regulation.

9 48) Contrary to OAL's determination, creation of the list did not involve quasi-legislative
10 action by the Commissioner.

11 49) OAL failed to consider separately the analysis that went into creating the list. In
12 doing so, OAL failed to recognize that the list was created by the Department after a company-
13 by-company analysis of entities doing business with the Iranian nuclear, defense, and energy
14 sectors.

15 50) OAL failed to recognize that the list, as a stand-alone exercise, is not a "standard of
16 general application." The Department reviewed the characteristics of specific companies, based
17 on consultation with experts and the Department's own research. The Department made a
18 company-by-company assessment of the geopolitical risk that each company faces and
19 determined that urgent action was needed to protect policyholders. No single criterion or
20 methodology applies uniformly to each company on the list.

21 51) OAL failed to consider that the Department continually examines the circumstances
22 of individual companies, and may remove a company if, based on relevant sources of
23 information, the Department finds that the company no longer maintains a level of contact with
24 Iran presenting financial risk.

25 52) OAL failed to recognize that the list does not "implement, interpret, or make specific"
26 any particular laws.

27 53) The list was issued pursuant to the Commissioner's direct authority to act pursuant to
28 Insurance Code section 12921.5.

1 63) Rather, pursuant to the Commissioner’s direct authority to act, and pursuant to
2 Insurance Code sections 729, 730, 733, 734, and 736, the Department, at the Commissioner’s
3 direction, created the response form in order to gather information regarding insurers’ plans for
4 Iran-related investments.

5 64) Additionally, OAL abused its discretion when it failed to determine that the creation
6 of the response form is exempted from APA rulemaking pursuant to Government Code section
7 11340.9, subdivision (c):

8 A form prescribed by a state agency or any instructions relating to the use of the
9 form, but this provision is not a limitation on any requirement that a regulation be
10 adopted pursuant to this chapter when one is needed to implement the law under
11 which the form is issued.

12 65) The Commissioner created the form as a means to gather information regarding
13 insurers’ plans for Iran-related investments.

THIRD CAUSE OF ACTION

14 Improper Determination by OAL that the Directive to Insurers to File Financial Statements
15 Identifying Iran-Related Investments and the Treatment of those Investments as “Non-Admitted”
16 was an Underground Regulation

17 (Writ of Mandate – Code Civil Procedure § 1085)

18 66) OAL abused its discretion when it improperly determined that the directive to
19 insurers to file financial statements identifying Iran-Related Investments and the treatment of
20 those investments as “non-admitted” was an underground regulation (“Non-Admitted
21 Determination”).

22 67) Contrary to OAL’s determination, the Non-Admitted Determination did not involve
23 quasi-legislative action by the Commissioner.

24 68) OAL failed to recognize that the Non-Admitted Determination did not apply
25 generally as the information included in the financial statements did not dictate how a certain
26 class of cases will be decided. The financial statements merely provide information from insurers
27 doing business in California.
28

1 69) OAL failed to determine that the Non-Admitted Determination by the Department is
2 done pursuant to the Commissioner's authority to act and he was not implementing, interpreting,
3 or making specific any law.

4 70) Rather, pursuant to the Commissioner's direct authority to act, and pursuant to
5 Insurance Code section 923, the Department, at the Commissioner's direction, required Iran-
6 related investments to be treated as non-admitted assets. This action by the Commissioner needed
7 to be taken quickly because of the instability in Iran, and the possible risk to policy holders.

8 71) Specifically, Insurance Code section 923 provides the Commissioner with the ability
9 to "make changes from time to time in the form of the statements and the number and method of
10 filing reports as seem to him or her best adapted to elicit from the insurers a true exhibit of their
11 condition." In this particular case, the Commissioner's quick and decisive action was needed in
12 order to ascertain the asymmetric risk posed to policy holders through insurance companies'
13 investments in companies on the list.

14 72) OAL failed to determine that in this case, the APA does not apply to the direct action
15 taken by the Commissioner pursuant to Insurance Code section 923.

16 73) Additionally, OAL abused its discretion when it failed to determine that the
17 notification about financial statement reporting is exempted from APA rulemaking pursuant to
18 Government Code section 11340.9, subdivision (c) because it involves a form prescribed by the
19 Department.

20 **PRAYER FOR RELIEF**

21 WHEREFORE, Petitioner Insurance Commissioner Steve Poizner prays that upon
22 submission of the verified petition by Petitioner, that this Court issue a peremptory writ of
23 mandate, under Code of Civil Procedure § 1085, commanding:

24 1. That respondent OAL, upon service of the writ, set aside its 2010 OAL Determination
25 No. 21, dated October 11, 2010 and determine that the actions taken by the Commissioner and the
26 Department, at the Commissioner's direction, did not constitute underground regulations;

27 2. That petitioner recovers his costs in this case; and
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3. That such other relief be granted as the Court considers just and proper.

Dated: November 9, 2010

Respectfully Submitted,

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