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Section 10225.1	Commenter suggests that the reference to "more than one penalty award …issued by a workers' compensation administrative law judge" be changed to refer to "more than one penalty issued by the workers' compensation appeals board". This appeals board does occasionally issue penalties, and the current proposal excludes such a penalty from consideration. Appeals Board Rule 10301(v) defines the Workers' Compensation Appeals Board as the "Appeals Board, commissioners, deputy commissioners, presiding workers' compensation judges and workers' compensation judges".	Rick Dietrich Deputy Commissioner Workers' Compensation Appeals Board October 30, 2006 Written Comment	We agree to change the references from "workers' compensation administrative law judge" to "Workers' Compensation Appeals Board" throughout, and to define "Workers' Compensation Appeals Board."	The references to "workers' compensation administrative law judge" will be changed to "Workers' Compensation Appeals Board" throughout, and we will define "Workers' Compensation Appeals Board."
General Comment	An injured worker submitted correspondence that pertains directly to her workers' compensation case and her dissatisfaction with various parties associated with the litigation thereof. Her comments do not directly address the language contained in the proposed regulations.	Barbara Clark Injured Worker October 31, 2006 Written Comment	The comments do not address the proposed regulations.	None.
Section 10225.1(a)	Commenter strongly opposes the proposed modification to § 10225.1, subdivision (a). According to the "Notice of 2nd 15-Day Comment Period Changes to Proposed Text," the changes to this section "refine the minimum prerequisites for imposing an administrative penalty under this section...." Those prerequisites include the requirement that the underlying conduct being penalized must have occurred on or after April 19, 2004. Limiting penalties assessed under § 5814.6 to conduct that occurred on or after April 19, 2004 violates the intent of SB 899. The Legislature adopted the changes to §§ 5814	Linda F. Atcherley President California Applicants' Attorneys Association November 8, 2006 Written Comment	We disagree. The operative date of section 5814.6 is expressly stated in subsection (c) – June 1, 2004. The statute was enacted on April 19, 2004, so as of that date, claims administrators were on notice that their conduct could give rise to a $400,000 penalty under Labor Code section 5814.6. It is clear that the 5814.6 penalties should only apply to 5814 awards issued on or after June 1, 2004 - because the 5814	None.

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	and 5814.6 in concert. The changes to § 5814 significantly reduced the additional compensation awarded to injured workers when benefits are unreasonably delayed or denied. However, recognizing that this change also reduced the incentive on claim adjusters to promptly and accurately pay benefits, SB 899 also introduced this new administrative penalty in § 5814.6. The clear intent was to balance the reduced incentive under § 5814 with the substantial new administrative penalty under § 5814.6. Several appellate court decisions, including Green v. Workers' Comp. Appeals Bd. (2005) 127 Cal.App.4th 1426, held that the amendments to § 5814 apply to conduct that occurred *before* April 19, 2004. Clearly, where the reduced penalties (and reduced incentives on adjusters) are applicable to conduct occurring before April 19, 2004, the new administrative penalty should likewise be applicable to such conduct. Adopting the proposed changes will mean that this new penalty cannot be imposed despite a verified history of unreasonable delays or denials of compensation. This will frustrate the intent of SB 899, and can only result in added delay and unreasonable denial of benefits for injured workers. In conclusion, commenter strongly urges that the proposed change to CAC § 10225.1, subdivision (a) that limits application of the § 5814.6 penalty to conduct occurring on and after April 19, 2004 be deleted. The		awards issued prior to that operative date were based on a different penalty structure - allowing a 10% increase on the entire species of the claim. 5814.6 was enacted to make up for the fact that the 5814 penalty award amounts were being reduced. Therefore, to impose a 5814.6 penalty if the pre-6/1/2004 5814 penalty award was already imposed would be double penalizing. With regard to whether Labor Code section 5814.6 applies to conduct prior to June 1, 2004, we chose to include conduct that occurred on or after April 19, 2004 because that was the date of 899, which stated that the act shall apply prospectively. Therefore, as of April 19, 2004, claims administrators were on notice that their conduct could result in a 5814.6 penalty of up to $400,000. Applying the new section to conduct prior to June 19, 2004 would raise due process arguments. The statute states it is prospective, not retroactive. Therefore, we elected to apply the statute to conduct that occurs on	

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	administrative penalty under § 5814.6 should take into consideration all violations of § 5814 as amended by SB 899, regardless of when the conduct occurred.		or after the effective date of the statute (June 19, 2004) provided the award was issued on or after June 1, 2004.	
General Comment	Commenter thanks the Division for the opportunity to provide comments on the proposed modifications for Title 8, California Code of Regulations Section 10225 et seq. Commenter thanks the Division for considering our comments presented during the past year. Commenter concurs with the October proposed modification, and has no comments regarding the recent proposed changes. However, commenter still has concerns regarding lack of notification and procedure for a Labor Code § 5814.6 investigation or audit. His specific concern is that without a process in place the potential consequences could result in inadequate notice for an investigation/audit, unnecessary and excessive litigation and unproductive use of audit resources. Commenter strongly recommends this issue be addressed and are requesting reconsideration of his comments submitted on September 27, 2006.	Jose Ruiz Claims Operating Manager State Compensation Insurance Fund November 8, 2006 Written Comment	We disagree that additional audit procedures are required for 5814.6 audits. An audit may be conducted concurrently with a Labor Code section 129.5 audit. The regulations also allow the AD to utilize Gov. Code sections 11180 through 11191. The regulations provide a selection criteria: The regulations require that one or more 5814.6 penalty awards must have issued within a five year period at a single adjusting location.	None.
Section 10225.1(a)	**Discussion** In previous commentary, the Institute recommended that this regulation, in order to	Michael McClain General Counsel & Vice President	We disagree because the proposed language does not clarify this subdivision.	None.

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	be consistent with and not in conflict with the statute, should state: **10225.1(a): Administrative penalties shall only be imposed under this section ~~based on~~ <u>when an employer or insurer has knowingly</u> ~~violations of~~ violated Labor Code section 5814, after ~~more than one~~ penalty awards have been issued by a workers' compensation administrative law judge for unreasonable delay or refusal to pay compensation <u>with a frequency that indicates a general business practice</u>.** In the same comments, the Institute argued that only a percentage standard that considered the ratio between the number of claims managed by the audit subject and the number of section 5814 penalty awards against it could meet the statutory provisions. **A Standard of Near Perfection** Under proposed section 10225.1(a), to be considered a "clean" operation and avoid scrutiny under section 5814.6, a claims administrator could have no more than one 5814 penalty award assessed within a 5-year period, regardless of its size or the number of covered injured workers. Such a standard of perfection is unreasonable and unattainable. It demonstrates either a profound inexperience with or indifference to the real world complexities of workers' compensation claim management. It is simply not possible to manage a case load of workers' compensation claims in the state of California to that level of	California Workers' Compensation Institute November 9, 2006 Written Comment	Also, the DWC proposed definition sets forth a minimum requirement and allows for a case by case approach. The mitigation factors set forth in 10225.1(h) may be applied to adjust penalties.	

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	perfection. More importantly, that is not what Labor Code section 5814.6 mandates. For the section 5814.6 penalty to apply, the statute requires that an employer or insurer "knowingly violates Section 5814 with a frequency that indicates a general business practice." The Division defines a knowing violation as imputed corporate knowledge. The regulation establishes that "a frequency that indicates a general business practice" is "more than one" penalty award. Now, the time period to consider these sorts of violations is to be a rolling 5-year period. The plain language of the statute indicates that the section 5814.6 penalty exists in order to sanction employers and insurers who have incurred penalty awards for so many violations of Labor Code section 5814 as to indicate a general business practice of the unreasonable denial or delay in the payment of workers' compensation benefits. The current claims audit program, under Labor Code section 129 and 129.5, also recognizes that in all human endeavors of this type, a certain margin of error is reasonable and proper (See: Title 8, CCR, section 10107.1(c)(3)(B) & (C)). In these proposed regulation, there is no margin of error. Every payment must be made perfectly or you will be exposed to the largest penalty available in the system. **Proportionality**		We disagree that the regulations are inconsistent with Labor Code section 5814.6. Section 10225.1(a) sets forth certain minimum standards, timeframes, and effective dates. Section 10225.1(g) states what is required in order for an administrative penalty to issue: a finding "that an employer or insurer, or entity acting on its behalf, knowingly violated Labor Code section 5814 with a frequency that indicates a general business practice." We disagree. Labor Code section 5814.6 is not comparable to audits conducted under Labor Code section 129. Section 129 audits are checking for ordinary claims handling practices. Labor Code section 5814.5 authorizes assessing penalties when an employer or insurer knowingly violates section 5814 with a frequency that indicates a general business practice.	None. None.

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	The regulations give no consideration to the number of files managed by a claims organization. By its constrained definition of a general business practice, the Division failed to address a key element of the statute – the frequency of section 5814 penalty awards. As we have previously expressed, we believe that the Division has exceeded the scope of the statute and expanded the number of claims administrators potentially exposed to section 5814.6 penalties, which it has no authority to do.		We disagree. The regulations set forth a minimum requirement and allows for a case by case approach. The mitigation factors set forth in 10225.1(h) may be applied to adjust penalties.	None.
	The Ripple Effect of Deterrence Authority The penalty standard proposed in these regulations -- "not more than one section 5814 penalty within a 5-year period" – would have a chilling effect on otherwise permissible claim management activities across the board and is, therefore, in conflict with the statute. The art of crafting proper penalty regulations is to balance the desired deterrent effect with sufficient latitude, so that the penalties do not impede claim management activities mandated or permitted by statute. Administrative regulations that alter or amend the statute or enlarge or impair its scope are void, and courts not only may, but it is their obligation to strike down such regulations. Morris v. Williams (1967) 63 CR 689, 67 C2d 733, 433 P.2d 697. Section 10225.1(a) is not fairly balanced. The regulation imposes such a high standard that potential liability for the 5814.6 penalty will		We disagree. These penalties are pursuant to Labor Code section 5814.6 and are only awarded if there has been a finding that the employer or insurer knowingly violated Labor Code section 5814 (an unreasonable refusal or delay in the payment of compensation) with a frequency that indicates a general business practice.	None.

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	affect every aspect of the claims management. Yet, the law requires claims administrators (and they owe a duty to their policyholders) to stop excessive and unnecessary medical care, to report and investigate fraud by medical care providers and injured workers, to prevent the payment of excessive temporary disability payments, and to ensure that permanent disability is appropriately assessed and paid. If the standard by which the claims administrators will be judged is "not more than one section 5814 penalty within a 5-year period", then the administrative director is determining not only how workers' compensation claims will be managed, but also <u>whether</u> the claims organization can afford to risk using the tools provided by the statutes at all. Policyholders and system stakeholders expect workers' compensation claims to be managed and payments to be appropriate – not excessive or beyond what the law requires, not too little or too late. One can assume that the 5814.6 penalty and the implementing regulations are intended to deter incompetent, under-staffed, and ill-trained claims organizations that negligently process payments and treatment requests. But the by-product of that deterrence, when the standard is near-perfection, is that in order to avoid potentially significant penalties, all claims administrators must be more tentative and cautious. It is not sufficient for the AD to determine the scope of the enforcement scheme by ad hoc			

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	policies decisions made outside the regulations. In order to avoid the chilling effect on permissible claims activity, the regulation must determine the proper balance, must clearly state the criteria for adherence to the statute, and must establish a reasonable and fair application, or the regulations are too intrusive on the authority of the statute. **Clarity** Government Code section 11349(c): "Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them. Under CCR, Title 1, section 16(a), a regulation shall be presumed not to have complied with the clarity standard if: ▪ The regulation can, on its face, be reasonably and logically interpreted to have more than one meaning and the varying interpretations cannot be harmonized by settled rules of construction; ▪ The regulation uses language incorrectly. This includes, but is not limited, to incorrect spelling, grammar or punctuation. **Discussion** An important purpose of the Administrative Procedures Act is to ensure that the rules and regulations adopted by state agencies are easy to understand. In establishing the clarity standard, the Legislature made the following finding (Government Code section 11340(b)):			

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	"The language of many regulations is frequently unclear and unnecessarily complex, even when the complicated and technical nature of the subject matter is taken into account. The language is often confusing to the persons who must comply with the regulations..." The Institute believes that the proposed regulation, section 10225.1(a), includes both defects: the regulation can be reasonably interpreted to have more than one meaning and its structure creates this confusion. This is particularly the case for the 5-year period. It is difficult to determine whether the 5-year period is a fixed period or a rolling period. If Company A incurs two 5814 penalty awards in January 2005 and 3 more in August of 2005, one interpretation of the proposed regulation is that an investigation can be initiated in January and concluded with a section 5814.6 penalty award. Then the process would begin again in August, resulting in a new section 5814.6 penalty. Taking this interpretation to the extreme, this could happen on a weekly or daily basis. Another interpretation suggests that claims administrators would be audited over a 5-year period and any and all penalty awards would be assessed in a single section 5814.6 penalty. Or, a claims administrator that managed 8700 files and receives two qualifying awards within a 5-year period could have a section		We disagree that the section is unclear. The rolling five year period prevents using penalty awards that were already a basis for a 5814.6 finding from being the basis for a second or third finding. We disagree. As stated above, the definition of "general business practice" sets forth a minimum	None. None.

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	5814.6 penalty imposed in the same manner as a claims organization that managed 400 files and has had 27 section 5814 penalties imposed on them. Structurally, with regard to the first sentence in section 10225.1(a), there appear to be 4 or 5 prepositional phrases, some of which modify the subject of the sentence (administrative penalties), and some of which modify the verb (shall be imposed). The meaning of the sentence could be clarified if these related phrases were in proximity to the phrase they modify. If the Division cannot restructure the sentence, then it should use additional sentences or language to clarify the point.		requirement and allows for a case by case approach. The mitigation factors set forth in 10225.1(h) may be applied to adjust penalties. We disagree that section 10225.1(a) is unclear.	None.
Section 10225.1(a)	**Concern:** The structure of the penalty allows claims administrator offices of different sizes to be penalized unequally. The penalties proposed are based on the number of violations instead of the more telling and accurate measurement of the "rate of violation." The rate of violation describes more about a claims administrator's business practice than the number of violations does. **Recommendation:** Rescind the "number" of violations and adopt a process consistent with the "rate of violation" charged against a claims administrator, regardless of the size of their operation. Perhaps the DWC could consider using the ratio of the volume of violations to the volume of indemnity claims reported at that claims administrator's office. **Concern:** The five year timeframe for measuring a "business practice" seems	Christine D. Coakley Legislative/Regulatory Analyst – Workers' Compensation Safety, Health & Environmental Affairs – BOEING November 10, 2006 Written Comment	We disagree. The definition of "general business practice" sets forth a minimum requirement and allows for a case by case approach. The mitigation factors set forth in 10225.1(h) may be applied to adjust penalties. We disagree. The definition of "general business practice" sets forth	None. None.

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	arbitrary and unnecessarily lengthy. When defining a "business practice" for any particular claims organization a five year period seems excessively long, especially when the regulations only require two awards in that time period. **Recommendation:** The five year timeframe for measuring a "business practice" be reduced to one year.		a minimum requirement and allows for a case by case approach. The mitigation factors set forth in 10225.1(h) may be applied to adjust penalties.	
Section 10225.1(a)	Subdivision (a), while curing the retroactivity problem of earlier versions of the proposed rule, exacerbates a problem which has plagued all previous drafts: the failure to scale the application of administrative penalties to the size of an adjusting location and the consequent failure to implement an unambiguous statutory mandate. The Administrative Director, while enjoying some latitude in implementing and interpreting statutes, is nevertheless bound by statutory language and is required to give effect to the Legislature's intent. Labor Code Section 5814.6 reserves the largest and most severe penalties for claims administrators who so frequently violate their obligations to pay benefits when due as to indicate a general business practice. The Legislature clearly did not imply or intend that such serious penalties might be imposed for isolated instances of misconduct, but that is precisely what the proposed language would do.	Steve Suchil Assistant Vice President State Affairs Western Region American Insurance Institute November 10, 2006 Written Comment	We disagree. The definition of "general business practice" sets forth a minimum requirement and allows for a case by case approach. The mitigation factors set forth in 10225.1(h) address the number and type of the violations and the size of the claims adjusting location.	None.

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	Although the definition of a general business practice in Section 10225 is flawed, it nevertheless demonstrates some understanding that an isolated event is insufficient to constitute a general business practice; the term can only apply where a pattern of violations has been established. Subdivision (a), in its original form, would have allowed assessment of Labor Code Section 5814.6 penalty after a second Labor Code Section 5814.6 penalty had been imposed on a claims administrator, without regard to the volume of claims adjusted. As most recently revised, any two Labor Code Section 5814 penalties in a five-year period could result in a minimum $100,000 administrative penalty, whether the total number of claims adjusted were 5 or 50,000 or 500,000. The language thus renders the proposed rule itself internally inconsistent and inconsistent with statutory requirements because no pattern and practice of violations need be established. Claims administrators and their staffs are human beings. Even the hardest working, most conscientious among them, wi1l inevitably make mistakes. With 600,000 new clams each year, and an inventory of open claims from previous years, that is to be expected, and there are numerous penalties assessable for such negligence. It is the egregious violations – made over and over again with conscious knowledge that one is acting in violation of statutory and regulatory requirements – which Labor Code Section 5814.6 was targeting. This proposal, which			

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	imposes penalties for isolated misconduct, is without statutory authority, and therefore fails to comply with the Government Code Section 11349.1 standards of authority and consistency.			
Section 10225.1(a), (b) and (c)	Commenter fears that the Division will be performing myriad audits, many of which will be unnecessary. Of greater concern is that DWC does not currently have the necessary trained staff in place to perform Section 129 claims audits. In recognition of these aforementioned realities, commenter strongly recommends the Division incorporate the two functions together so that during the performance of a Section 129 audit a determination could be made if a deeper investigation should be required. There needs to be more definitive rules established for what constitutes egregious behavior. For example, AIMS regularly maintains over 7,000 open cases. Typically each case averages 100 – 150 transactions. Extrapolating these numbers (conservatively), 7,000 cases with a minimum of 100 transactions each would constitute 700,000 opportunities for potential problems. If AIMS had 2 administrative penalties assessed through Section 5814 over a three year period,	Philip M. Vermeulen Legislative Advocate on behalf of Acclamation Insurance Management Services (AIMS) and Allied Managed Care (AMC) November 10, 2006 Written Comments	We disagree. Under the proposed regulations, an audit may not even be required as the monthly Labor Code section 5814 activity reports will allow the audit unit to determine when and if more than one penalty award has been issued against a claims administrator at a specific adjusting location. For some of the investigations, the auditors will need to perform a short file review, especially if the claim file was transferred from one location to another. A PAR audit (pursuant to Labor Code section 129 and as suggested by the commenter) is not necessary to determine how many 5814 penalty awards have issued against a claims administrator. We disagree. The definition of "general business practice" sets forth a minimum requirement and allows for a case by case approach. The mitigation factors set forth in 10225.1(h) may be applied to adjust penalties.	None. None.

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	versus a company that averages 100 ongoing claims (which would translate into 10,000 transactions), why should AIMS be held to the same standard of a two claim trigger? In other words, DWC must develop a better triggering mechanism that would adjust for volume and a continuing pattern of practice.			
Section 10225(i)	The proposed definition states that a business practice that result in penalties are violations that can be distinguished by a reasonable person from an isolated event. Commenter believes this is too vague a statement that will result in subjectivity and myriad other problems. So too, there is no provision to define how many violations constitutes a pattern of practice? Commenter strongly suggests that penalties should be tied to sample size. For example, if an audit of 20 files produce 10 violations, then that could well be considered a "business practice." On the other hand if an audit of 2,000 files produces 10 violations, then is that really a "business practice?" The fines need to be weighted based on the PERCENTAGE of infractions compared to overall sample size.	Philip M. Vermeulen Legislative Advocate on behalf of Acclamation Insurance Management Services (AIMS) and Allied Managed Care (AMC) November 10, 2006 Written Comments	We disagree that the definition is too vague. Also, the mitigation factors in 10225.1 (h) address some of the commenter's concerns. The suggestion for a percentage of sample size is unnecessary because the DWC will be able to review the WCAB awards to determine how many penalty awards have issued, without the need for an audit. With regard to the definition of "general business practice," case law supports the definition: The term "general business practice" itself has been approved in several cases in other states, without requiring mathematical certainty. As set forth in *Lees v. Middlesex Insurance Co* (1994) 229 Conn. 842, 849 n.8; 643 A.2d 1282: The term "general business practice" is not defined in the statute, so we may look to the common understanding of the words as expressed in a dictionary. (citation). "General" is defined as "prevalent, usual [or] widespread"; Webster's Third New International Dictionary; and "practice" means "[p]erformance or application habitually engaged in	None.

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			... [or] repeated or customary action." The *Dodrill v. Nationwide Mutual Insurance Co*. (1996) 201 W.Va. 1, 13; 491 S.E.2d 1 court stated: "Accordingly, we hold that to maintain a private action based upon alleged violations of W.Va. code §33-11-4(9) in the settlement of a single insurance claim, the evidence should establish that the conduct in question constitutes more than a single violation of W.Va. code §33-11-4(9), that the violations arise from separate, discrete acts or omissions in the claim settlement, and that they arise from a habit, custom, usage, or business policy of the insurer, so that, viewing the conduct as a whole, the finder of fact is able to conclude that the practice or practices are sufficiently pervasive or sufficiently sanctioned by the insurance company that the conduct can be considered a "general business practice" and can be distinguished by fair minds from an isolated event." *Grove v. Orkin Exterminating Co., Inc.* (1992) 18 Kan.App.2d 369, 374-375; 855 P.2d 968, a civil suit for compensatory and punitive damages for improper termite treatment, held that a state Board of Agriculture Pesticide Inspector's testimony about similar complaints his agency had received would be relevant in deciding whether the licensee's behavior in this case was a	

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			"general business practice." "....Foster [the state inspector] stated that Orkin had completely failed to treat the ground underneath the concrete slab on the east end of the house and had only partially treated the slab underneath the north wall of the house. Foster stated the treatment was wholly inadequate, comparing it to building a four-sided corral with only three sides, making it impossible to contain anything or keep anything out. He also stated that his office had received several similar complaints regarding Orkin's Wichita branch." The court stated that this evidence was relevant to show that Orkin's Wichita branch continually engaged in wanton conduct as a general business practice and, if the evidence is believed, would have bolstered the Groves' claim that Orkin knew the house was infested. The *Grove* case thus allowed evidence of practices at a single branch of the company as proof of its "general business practice." In *Underwriters Life Insurance Co. v. Cobb* (Tex.App. 1988) 746 S.W.2d 810, 815, the insurance company's denial of other claims on the same basis and at the same time as its denial of the Cobbs' claim, was admissible to show that	

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			Underwriters' refusal to pay the Cobbs' claim was committed or performed with such frequency as to indicate a general business practice. *In re Midland Insurance Co.* (1979) 167 N.J.Super. 237, 244; 400 A.2d 813 was an appeal from a determination by the New Jersey Insurance Commissioner imposing fines and ordering an insurer to cease and desist from certain unfair claim settlement practices. The court approved a finding that 135 violations of the statute showed a "frequency of performance rising to the level of a general business practice." A violation under [New Jersey Statutes §17:29B-4](9)(f) occurs where an insurance company as a general business practice fails to attempt in good faith a prompt and fair settlement of claims in which liability is reasonably clear. .... The "claims" forming the basis of the charged violations of (9)(f) are forfeitures and judgments. With respect to judgments, the Commissioner correctly found liability under this provision. As the record discloses, there were numerous judgments which were not paid within a reasonable time, thus evincing a frequency of performance rising to the level of a general business practice. … Thus, the	

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			Commissioner's finding of liability in this regard as to judgments and the resulting order to cease and desist must be affirmed. Several California cases have construed the term "business practice" (lacking the qualifying adjective "general") on the same terms that have been used to define "general business practice". The court in *Barquis v. Merchants Collection Ass'n* (1972) 7 Cal.3d 94, 103; 101 Cal.Rptr. 745, examined Civil Code §3369 which defined "unfair competition" as "unlawful, unfair or fraudulent business practice." The court held that intentionally filing collections in improper venues, "when utilized as a general practice by a collection agency whose primary business is litigation, ... constitutes an 'unlawful ... business practice' ..." In *State of California v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1169-1170; 252 Cal.Rptr. 221, the court interpreted the term "unlawful, unfair or fraudulent business practice" as used in the Unfair Practices Act, Cal. Bus. & Prof. Code §17200 (formerly Civil Code §3369), as follows: "As we have said, the statute is directed at "on-going wrongful business conduct...." (*People v. McKale* (1979) 25 Cal.3d 626, 632 [159 Cal.Rptr. 811, 602 P.2d 731].) Thus the "practice" requirement	

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			envisions something more than a single transaction …; it contemplates a "pattern ... of conduct" (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 108 [101 Cal.Rptr. 745, 496 P.2d 817]), "on-going ... conduct" (id., at p. 111), "a pattern of behavior" (id., at p. 113), or "a course of conduct." (Ibid.) " In *People v. Casa Blanca Convalescent Homes, Inc* (1984) 159 Cal.App.3d 509, 526-527; 206 Cal.Rptr. 164, Casa Blanca, a nursing home company, was charged with multiple violations of *Cal. Bus. & Prof. Code §17200,* including allegations of an inadequate surety bond, inadequate staffing and nursing care, failing to maintain proper patient records, and permitting unsanitary conditions. Judgment was entered against Casa Blanca for 67 violations and $167,500 in civil penalties. Casa Blanca demanded the court define in its statement of decision what was meant by a "business practice." Citing *Barquis v. Merchants Collection Assn., supra*, 7 Cal.3d 94; the Casa Blanca court stated, "The Supreme Court held repeated violations of statute by acts which constituted a principal part of its business constituted an unlawful business practice and, as such, was actionable under Civil Code section	

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			3369 (now Bus. & Prof. Code, §17200 et seq.)… The facts, admitted in the pleadings, were that Casa Blanca was in the business of operating and managing patient care hospitals and the sale of nursing home services. Nursing care was its primary business activity. This admission established, without question, the series of acts complained of was a business activity or practice. The key question presented to the trial court was not whether this was a 'business practice or activity' but rather whether this particular business activity was unlawfully conducted. The trial court, based upon more than sufficient evidence, found Casa Blanca was engaged in a variety of unlawful practices in its primary business -- rendering nursing care. "We conclude there is both a factual and legal basis for finding not only were there violations of the administrative regulations in question, but its activities constituted a pattern of behavior pursued by Casa Blanca as a 'business practice.'"	
	Finally, in light of the adjuster certification process the State has implemented, some consideration should be given to holding individuals responsible for their performance. A suggestion would be to withhold or suspend		We disagree. The adjuster certification is administered by the Dept. of Insurance, not the DWC.	None.

Administrative Penalties Pursuant to Labor Code Section 5814.6	RULEMAKING COMMENTS 2ND 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	certification for a period of time depending on the gravity and/or frequency of violations on an individual basis.			
General Comment	Based on review of the proposed rules, there is concern that the burdens associated with potential audits and penalties will discourage participation in the California workers' compensation system by quality providers of services and may result in approvals of workers' compensation claims and health care that either should not be compensable or are not medically necessary.	Harry Monroe, Jr. Concentra November 10, 2006 Written Comment	We disagree. These penalties are pursuant to Labor Code section 5814.6 and are only awarded if there has been a finding that the employer or insurer knowingly violated Labor Code section 5814 (an unreasonable refusal or delay in the payment of compensation) with a frequency that indicates a general business practice.	None.
Section 10226 ; Section 10225 (l); Section 10225.1(a)	While recognizing the importance of the Division having sufficient authority to investigate and penalize entities exhibiting a pattern of violations in the handling of claims, there is concern that the expansion of the audit authority beyond the provisions of Labor Code sections 129 and 129.5, as described in §10226, as well as the broad definition of "general business practice" in §10225(l) create excessive administrative burdens for companies seeking to operate in good faith. In particular, note that the definition of "general business practice" requires that only more than one claim be handled in violation in order to trigger a potential finding that a pattern of practice exists. This definition makes no consideration of either 1) the number of claims handled by the entity involved; or 2) the amount of time that has elapsed between violations. Obviously, an entity that mishandled two out of its 100 claims in a month is in a different situation than a company that has mishandled two out of 10,000 over the same timeframe. The definition should be revised to account for	Harry Monroe, Jr. Concentra November 10, 2006 Written Comment	We disagree. Under the proposed regulations, an audit may not even be required as the monthly Labor Code section 5814 activity reports will allow the audit unit to determine when and if more than one penalty award has been issued against a claims administrator at a specific adjusting location. For some of the investigations, the auditors will need to perform a short file review, especially if the claim file was transferred from one location to another. We disagree. The definition of "general business practice" allows more latitude to claims administrators that handle more claims and merely sets forth a minimum standard. The mitigation factors address the number and type of the violations, the size of the	None. None.

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	these factors. Commenter suggests that similar alterations should be made with regard to the imposition of administrative penalties based on more than one penalty award by an administrative law judge in §10225.1(a).		claims adjusting location and the time period in which the violations occurred.	
Section 10225(l)	Commenter supports and thanks the Division for the change limiting a chargeable violation to the adjusting location in which the violation took place. With the small number of violations which constitute a "General Business Practice" under these proposed regulations, there is no justification for charging two adjusting locations with a violation for one occurrence. However, commenter strongly believes that equity demands that the number of violations constituting a "General Business Practice" should bear a direct relationship to the number of claims handled.	Stewart J. Brooker Associate Counsel CNA Insurance Companies November 9, 2006	We disagree. The definition of 'general business practice" allows more latitude to claims administrators that handle more claims and merely sets forth a minimum standard. The mitigation factors address the number and type of the violations, the size of the claims adjusting location and the time period in which the violations occurred.	None.
Section 10225(s)	Commenter supports the change to clarify that penalty awards must be subject to final orders or final awards. Commenter is presuming that this language means that settlements will not be subject to penalty awards.		We agree. No change requested.	None.
Section 10225.1(a) and (d)	The proposed changes to section 10225.1(a) appear to create a five year period standard for administrative penalties. Furthermore, this standard appears to be a "moving target." Commenter objects to the moving five year period for administrative penalty assessment as being too long as there is only a possible mitigation of penalty contained in section 102251(h) based on the number of claims at one adjusting location. CNA strives to operate within the letter and spirit of all		We disagree. The five year time period provides a maximum time period and prevents using penalty awards that were already a basis for a 5814.6 finding from being the basis for a second or third finding. Please see the discussion regarding the definition of "general business practice" above, beginning on page 14. The definition allows more	None.

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	regulations and laws; however, with 5,000 workers' compensation claims adjusted annually in the Brea claim service center, a five year statute of limitation could mean that CNA could be subject to a $100,000 administrative penalty for <u>two</u> violations out of 25,000 claims handled. Even with a one-year limitation conduct giving rise to administrative penalties, this represents 0.004% of the claims handled. In light of these examples, commenter request that the Division reconsider either the amount of the potential fine, the length of the period for which violations count towards a penalty, and/or the number of violations constituting a "General Business Practice." If the number of violations constituting a "General Business Practice" is changed to a number other than a percentage for larger claim locations, commenter requests that the number be fifteen to twenty five, which, assuming 5000 claims handled, would constitute 0.3% to 0.5% claims handled at each location. Additionally, the time period for which a violation is chargeable should be clearly defined. Commenter respectfully suggests that the beginning of the limitations period should be at the beginning of each calendar year (or a period of years) rather than, as suggested the Second 15 Day regulation text, at the date of the last penalty as this will provide a clear delineation for liability. Suggests the following language: **(a) Administrative penalties shall only be**		latitude to claims administrators that handle more claims and merely sets forth a minimum standard. Also. the mitigation factors address the number and type of the violations, the size of the claims adjusting location and the time period in which the violations occurred.	

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	imposed under this section based on violations of Labor Code section 5814, after more than one penalty award has been issued by a workers' compensation administrative law judge on or after June 1, 2004 based on conduct occurring on or after April 19, 2004 for unreasonable delay or refusal to pay compensation within a ~~five~~ one year time period. The ~~five~~ one year period of time shall begin on the date of issuance of any penalty award not previously subject to an administrative penalty assessment pursuant to Labor Code section 5814.6 first day of each calendar year.			