SUMMARY OF COMMENTS RECEIVED AFTER 45-DAY NOTICE AND RESPONSES

REG-2010-00011
January 3, 2011

Commenter	Summary of Written Comment	Summary of Oral Comment	Department of Insurance's Response to Comments
Proposed Regulatory Action Commented Upon: Amendment to the October 5, 2010 Text of Section 2632.13(a)			
Personal Insurance Federation of California	The proposed regulation requires clarification concerning whether the term "driver" means the actual driver or the applicant. For example, subsections (f)(3) and (f)(5)(i) both use the term "driver."	The term "driver" as used in subsection (f)(3) and (f)(5)(i) should be read to include both the actual driver and the applicant.	The Commissioner agrees in part and disagrees in part. As stated in this subsection, the term means both the actual driver and/or the applicant. The only exception is in subsection (f)(5)(i), which restricts the meaning to the actual driver. To further clarify the exception, the regulation is amended accordingly.
Proposed Regulatory Action Commented Upon: Amendment to the October 5, 2010 Text of Section 2632.13(b)			
American Insurance Association	As drafted, "substantial factor" is susceptible to different interpretations and it will be difficult for insurers to determine what is required. It should be amended to provide direction and clarity to insurers subject to the regulation.		The Commissioner agrees in part and disagrees in part. The term substantial factor is defined in the case law. However, the Department has changed the standard to "legal cause." The term "legal cause" includes the two elements to be considered, cause in fact and proximate cause: ' "Legal cause" exists if the actor's conduct is a "substantial factor" in bringing about the harm and there is no rule of law relieving the actor from liability.' Lombardo v. Huysentruyt, 91 Cal. App. 4th 656, 665-666 (Cal. App. 1st Dist. 2001); Nola M. v. University of Southern California, 16 Cal. App. 4th 421, 427 (Cal. App. 2d Dist. 1993); Restat 2d of Torts, § 431. In order to maintain consistency between court decisions and insurer principally at-fault determinations, "legal cause" is the proper term because it encompasses all the elements considered by a court in

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			determining causation.
Association of California Insurance Companies/Personal Insurance Federation of California	The new threshold will require insurers to reprogram their systems. The new threshold should apply only to accidents after the effective date of the amendments to Section 2632.13 and the effective date of the amendments should be set at 270 days after the amendments are filed with the Secretary of State.	It will take a significant amount of time to test and implement the changes in subsection (b). As a result, the effective date of the amendments should be set at 270 days from the date the amendments are filed with the Secretary of State.	The Commissioner accepts this comment and agrees that the regulation should be implemented as recommended. The Commissioner will submit the regulation to OAL accordingly.
Association of California Insurance Companies	Subsection (b) fails to address whether loss underwriting exchange data that reflects a determination made under a prior version of Section 2632.12 may be relied on by an insurer to support a principally at-fault determination.	Subsection (b) does not address an insurer's reliance on loss underwriting exchange data that reflects an earlier determination.	The Commissioner disagrees. If ACIC means that the regulation fails to address whether an insurer may rely solely on loss underwriting data that was reported by another insurer prior to the effective date to find that a driver is principally at-fault for an accident, the proposed regulation clearly prohibits such reliance pursuant to subsection (f). If ACIC means that the regulation fails to address whether the insurer may use any data from a loss underwriting exchange report that was reported by another insurer prior to the effective date, the proposed regulation clearly permits reliance pursuant to subsection (h). It should be noted that it is the Departments position that the current regulation prohibits any reliance on loss underwriting exchange data.
Robert Peterson, Professor Center for Insurance law and Regulation, Santa Clara University School of Law	Subsection (b) fails to state that a driver must be at fault, which may be implicit by the context of the underlying statutory authority, but it should be made explicit.		The Commissioner disagrees. This regulation is intended to limit when a driver may be considered "principally at-fault" and is not intended to require fault. As referenced in subsection (a), the requirement for principally at-fault

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			determinations is set forth in Insurance Code Section 1861.025 and 10 CCR Sections 2632.5 and 2632.13.1. Restating those requirements here is unnecessary and would be duplicative.
Robert Peterson, Professor Center for Insurance law and Regulation, Santa Clara University School of Law	The addition of the "substantial factor" requirement accomplishes nothing. Mitchell v. Gonzales was not dealing with a rule of law that requires 51% causation. It is hard to imagine a driver whose act or omission was at least 51% the cause of the accident yet whose act or omission was not a substantial factor.		The Commissioner agrees in part and disagrees in part. The term "substantial factor" is intended to denote cause in fact. However, the term "legal cause" includes the two elements to be considered in determining liability, cause in fact and proximate cause: ' "Legal cause" exists if the actor's conduct is a "substantial factor" in bringing about the harm and there is no rule of law relieving the actor from liability.' Lombardo v. Huysentruyt, 91 Cal. App. 4th 656, 665-666 (Cal. App. 1st Dist. 2001); Nola M. v. University of Southern California, 16 Cal. App. 4th 421, 427 (Cal. App. 2d Dist. 1993); Restat 2d of Torts, § 431. In order to maintain consistency between court decisions and insurer principally at-fault determinations, "legal cause" is the proper term because it encompasses all the elements considered by the court in determining causation. Accordingly, the Department has changed the standard to "legal cause."
Robert Peterson, Professor Center for Insurance law and Regulation, Santa Clara University School	Carrying forward the 51% requirement is neither compelled nor consistent with the purpose of the Good Driver Discount. The 51% requirement results in bad drivers enjoying the good driver		The Commissioner disagrees. Without a threshold for comparative fault, insurers may disqualify anyone from the good driver discount. For example, someone whose comparative fault is 5% in

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of Law	discount, which is unfairly discriminatory and not actuarially sound.		an accident involving bodily injury could be considered ineligible for the good driver discount based upon that accident alone. Therefore, the Commissioner must set a threshold. The 51% threshold was already considered and settled upon in a prior rulemaking and there is no need to amend the threshold in this rulemaking.
Robert Peterson, Professor Center for Insurance law and Regulation, Santa Clara University School of Law	"Total loss or damage" for property damage only claims is inconsistent with the loss/damage requirements under subsection (f)(2)(i)(D) and (ii)(D).		The Commissioner accepts this comment and further amends subsection (f) to make the requirements consistent with the "total loss or damage" requirement in subsection (b).
Proposed Regulatory Action Commented Upon: Amendment to the October 5, 2010 Text of Section 2632.13(c)			
American Insurance Association	The amendment fails to comply with the necessity standard because the initial statement of reasons does not provide sufficient information as to why the presumption is needed.		The Commissioner disagrees. The current regulation treats each described exception as a conclusive presumption. However, as provided in the initial statement of reasons, facts may demonstrate that what may be usually true is not true in every instance. As a result, the Commissioner believes that the exceptions should be treated as rebuttable presumptions that an insurer can refute following a reasonable investigation
Association of California Insurance Companies		The changes from exclusive exceptions to rebuttable presumptions will help insurers make better and fairer determinations about fault.	The Commissioner accepts this comment.
Association of California Insurance Companies	There is no justification for the subsection (c)(4) presumption that a driver is not at fault when the driver's	Insurer experience shows that hit and run drivers leave the scene because they do not want contact with law enforcement	The Commissioner disagrees. There is no justification for presuming that a driver is principally at-fault in an accident with a hit-

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	vehicle was damaged as a result of contact from a hit and run operator of another vehicle.	and not necessarily because they are at-fault.	and-run driver. Insurers may overcome the presumption in the proposed regulation with evidence that the driver was principally at-fault.
Association of California Insurance Companies	The new language in subsection (c)(6) concerning accidents that could not have been avoided would allow a driver in a solo vehicle accident to escape fault when the driver was at-fault.	The new language in subsection (c)(g) concerning hazardous conditions creates situations where a driver can be presumed not at fault when the driver caused the accident.	The Commissioner disagrees. An insurer should not conclude that a driver is principally at-fault for an accident involving a hazardous condition without evidence to the contrary. The insurer can overcome the presumption in the proposed regulation with evidence that the driver was principally at-fault.
Robert Peterson, Professor Center for Insurance law and Regulation, Santa Clara University School of Law	The presumptions should be further clarified to state whether it is a presumption affecting the burden of producing evidence or the burden of proof.		The Commissioner accepts this comment. As the presumptions are primarily concerned with facilitating the principally at-fault determination, the presumption affects the burden of producing evidence. The revised proposed text of the regulation is amended accordingly.
Robert Peterson, Professor Center for Insurance law and Regulation, Santa Clara University School of Law	The presumption provided in subsection (c)(6) seems redundantly drafted. No presumption is needed.		The Commissioner disagrees. This presumption, which applies only to solo vehicle accidents, provides clarification to insurers that they cannot conclude that a driver is principally at-fault in a solo vehicle accident without evidence to the contrary.
Robert Peterson, Professor Center for Insurance law and Regulation, Santa Clara University School of Law	The presumption provided in subsection (c)(5) should apply to both falling and fallen foreign objects.		The Commissioner disagrees. Aside from creating a presumption, this provision was carried forward from the current version and there has been no evidence of a problem with the current language.

Proposed Regulatory Action Commented Upon: Amendment to the October 5, 2010 Text of Section 2632.13(d)

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American Insurance Association	The amendment fails to comply with the necessity standard because the initial statement of reasons does not provide sufficient information as to why the presumption is needed.		The Commissioner disagrees. The current regulation establishes this exception as essentially a conclusive presumption. The initial statement of reasons clarify that the exception, which relates to Insurance Code section 488.5, remains conclusive as required by the statute.
Proposed Regulatory Action Commented Upon: Amendment to the October 5, 2010 Text of Section 2632.13(e)			
American Insurance Association	A "thorough, fair and objective investigation" is undefined and unclear and would be difficult for insurers to understand. This subsection should be amended to provide clarity.		The Commissioner disagrees. The "thorough, fair and objective" standard provides clear direction to insurers. 10 CCR Section 2695.7(d) contains similar language in relation to claims settlement. Borrowing language from this provision was suggested by another trade group as an alternative to the addition of an investigation checklist that was being considered by the Department.
Robert Peterson, Professor Center for Insurance law and Regulation, Santa Clara University School of Law	The "thorough, fair and objective investigation" standard is open ended and should contain a listing of common sources of information, such as police reports, statements from the driver, etc. that would give rise to a "safe harbor" for insurers if the investigation utilized the common sources.		The Commissioner disagrees. The thorough, fair and objective" standard provides clear direction to insurers. Due to the variety of circumstances that occur in each accident, there should not be a "safe harbor" for consulting a few commonly used resources. Some accidents will require insurers to make a more extensive investigation.
Robert Peterson, Professor Center for Insurance law and Regulation, Santa Clara University School	Reconsideration under section (e)(2) should be an independent review, perhaps by a panel of reviewers from insurance companies or the California Department of Insurance. Failing that, it		The Commissioner disagrees. Independent review would be impractical and costly and there is no reason to believe that a review would be conducted by a subordinate. This provision currently exists in the regulation

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of Law	should be done by a superior in the company.		and the Department has no information indicating that reconsideration by the insurer is problematic. Furthermore, if an insured does not obtain a fair result, the insured can always contact the Department's Consumer Services division for assistance.

Proposed Regulatory Action Commented Upon: Amendment to the October 5, 2010 Text of Section 2632.13(f)

Association of California Insurance Companies		An insurer should be permitted to charge a driver with an at-fault accident if the driver does not respond to a follow-up question under subsection (f)(5)(i) as currently provided in subsection (g)(3).	The Commissioner disagrees. Insurers' remedies are limited to those authorized by law. Insurance Code Section 1861.03(c) permits cancellation for a substantial increase in hazard, which includes the refusal or failure of an insured to provide information necessary to underwrite or classify risk pursuant to 10 CCR Section 2632.19(b)(1). No authority exists that would allow an insurer to determine a driver is principally at-fault for an accident without enough evidence to make that determination.
Association of California Insurance Companies		An insurer should be allowed to use information concerning a fraudulent or material misrepresentation to rate a policy.	The Commissioner disagrees. Insurers' remedies are limited to those authorized by law. Insurance Code Section 1861.03(c) permits cancellation for a fraud or material misrepresentation affecting the policy or insured. No authority exists that would allow an insurer to determine a driver is principally at-fault for an accident due to fraud or misrepresentation.
Personal Insurance Federation of California		An insurer should be allowed to rate as well as cancel a policy.	The Commissioner disagrees. Insurers' remedies are limited to those authorized by law. Insurance Code Section 1861.03(c) permits cancellation for a substantial increase in hazard, which includes the

			refusal or failure of an insured to provide information necessary to underwrite or classify risk pursuant to 10 CCR Section 2632.19(b)(1). No authority exists that would allow an insurer to determine a driver is principally at-fault for an accident without enough evidence to make that determination.

Proposed Regulatory Action Commented Upon: Amendment to the October 5, 2010 Text of Section 2632.13(g)

Association of California Insurance Companies/ Personal Insurance Federation of California	Under subsection (g)(2), insurers should be allowed to solely rely on an MVR in situations where the MVR shows that on a particular day a driver was involved in an accident that resulted in property damage in excess of $750 or a bodily injury and also shows that the driver was cited and convicted of a moving violation.	An insurer should be allowed to rely solely on an MVR where the MVR shows that on the same day that the driver was involved in an accident, the driver was convicted of a moving violation.	The Commissioner disagrees. MVRs do not currently contain enough information to be solely relied upon. For example, they do not state whether the accident is subject to any of the presumptions set forth in subsection (c) of this regulation. In addition, if allowed to presume that the moving violation indicates fault for the accident, an insurer can disregard any other evidence in that is available in making the initial determination. An insured would be required to take an extra step to challenge such a determination.

Proposed Regulatory Action Commented Upon: Amendment to the October 5, 2010 Text of Section 2632.13(h)

Association of California Insurance Companies/ Personal Insurance Federation of California	This subsection should state that an insurer's consideration of loss underwriting exchange data is permissible justification for at fault determinations under Insurance Code section 1857.		The Commissioner disagrees. Subsection (f)(2) already authorizes the insurer to solely rely on a subscribing loss underwriting exchange report if certain conditions are met. There is no need to repeat this elsewhere in the regulation.

Proposed Regulatory Action Commented Upon: Amendment to the October 5, 2010 Text of Section 2632.13(j)

Personal Insurance Federation of California	If a driver refuses to answer a reasonable follow-up question, the insurer should be allowed to consider the driver to be	The regulations should allow the insurer to rate as well as cancel the policy.	The Commissioner disagrees. Insurers' remedies are limited to those authorized by law. Insurance Code Section 1861.03(c)

principally at-fault.	permits cancellation for a substantial increase in hazard, which includes the refusal or failure of an insured to provide information necessary to underwrite or classify risk pursuant to 10 CCR Section 2632.19(b)(1). No authority exists that would allow an insurer to determine a driver is principally at-fault for an accident without enough evidence to make that determination.