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RE: Notice of Proposed Rulemaking and Notice of Public Hearing – Auto Body Repair Labor Rates Surveys - CDI Regulation File: Reg-2012-00002

Dear Ms. Potts:

On behalf of all the property casualty insurance trade organizations listed above, and the California Chamber of Commerce, we are writing to express our comments and questions to the California Department of Insurance's ("Department") proposed regulations on "Labor Rate Surveys."

Introduction
This issue is very familiar to the Department and our organizations. By our count, this is the fourth time the Department has considered how to regulate labor rate surveys of auto repair shops in California.

Each time these previous discussions have occurred, insurers have attempted to outline the scope of the Department's power to regulate and then provide practical solutions consistent with this authority. We respect the important public function of the Department and take seriously the obligations which insurers have to society. We are concerned, however, that this latest proposal exceeds the Department's power to regulate insurers and represents unnecessary and expensive policy choices which we hope the Department will improve.

In these comments, we will, first, outline our view of the scope of the Department's legislatively-granted power to regulate in these areas. Thereafter, we will offer suggestions and questions which we hope will help the Department to improve the proposals.

A core objective of the regulation is inconsistent with the Department's mission statement. On the Department's website, it plainly states that "consumer protection continues to be the core of [the Department's] mission." In reviewing the Department's Policy Statement Overview of the regulation on pages 6 and 8, and the Department's Initial Statement of Reasons pages 37 and 40 we believe the following statements are inconsistent and inappropriate with the Department's mission:

> Conducting fair and equitable Standardized Labor Rate Surveys will benefit auto body shops and policy-holders (households). Currently when the labor rate paid by the insurer doesn't cover the work

performed by the shop, the shop either incurs a financial loss or bills the consumer the unpaid amount. While some shops may pass this cost on to the consumer; others work with the consumer in an attempt to increase the probability of repeat business. ***The Department projects $1.15 million in benefits will be passed on to the auto body shops and policyholders (households)*** (Emphasis Added.)

The proposed regulations will benefit the health and welfare of California's consumers and businesses. Owners who suffer insured damage will receive an amount that is reflective of the market labor rate in a specific geographic area. ***It will also prevent auto body repair shops from facing the dilemma of whether to accept a financial loss, or bill the consumer for the shortfall between the insurance payment and the estimated cost of repair.*** (Emphasis Added.)

In our view it is simply not the role of the Department to interfere in the free market system and propose laws that could financially benefit the auto body repair shops. We disagree that auto body repair shops are "consumers," and we also disagree that the regulations will necessarily benefit consumers as "higher labor rates" could increase insurance premiums. The scenario of financial disagreements between a non-direct repair shop, policyholder, and insurer is not exclusive to the property casualty insurer setting as the same financial disagreement occurs whenever a patient uses an out-of-network provider in the context of health insurance. This issue is often governed by the contract between the policyholder and insurer, and at the policy level legislatures have intervened in such situations even here in California. The point is if one of the goals of the Department is to "prevent auto body repair shops from facing the dilemma of whether to accept a financial loss, or bill the consumer," then that is a policy question that should be addressed by the legislature as many stakeholders need to be involved in that policy question. The regulatory process is not the appropriate venue to address these changes.

Proposed sections 2695.81 and 2695.82 and the proposed amendments to existing section 2698.91 fail to comply with the standards of authority, reference, consistency, clarity and necessity.

Sections 2695.81 and 2695.82
Section 2695.81 describes the Standardized Auto Body Repair Labor Rate Survey. Subdivision (d) sets forth the requirements for the survey. Subdivision (e) describes how an insurer may use the survey. Subdivision (c) provides that a survey that complies with the requirements in subdivision (d) and that is used pursuant to subdivision (e) shall result in a rebuttable presumption that the insurer "has attempted in good faith to effectuate a fair and equitable" settlement of the claim.

The quoted language in subdivision (c) is based on Insurance Code section 790.03(h)(5) which defines "Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear" as an unfair and deceptive insurance practice.

Although the provisions of section 2695.81 do not expressly oblige insurers to conduct and use the survey, the Informative Digest explains that "the Department anticipates that insurers will comply with the proposed regulations, and conduct labor rate surveys that are compliant with the Standardized Labor Rate Surveys."

Authority - The Department has no authority to adopt Sections 2695.81 and 2695.82.
Government Code section 11349.1 requires all regulations to comply with the standard of authority. Government Code section 11349(b) provides, "'Authority' means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation."

Insurance Code sections 758, 790.03, 790.10, 12921, and 12926 are cited as the authority for sections 2695.81 and 2695.82. However, none of the cited statutes permit the adoption of the two regulatory sections.

Absence of Authority in Insurance Code Section 758

Insurance Code section 758 includes only two sentences relating to auto body repair labor rate surveys. Subdivision (c) states, "Any insurer that conducts an auto body repair labor rate survey to determine and set a specified prevailing auto body rate in a specific area shall report the results of that survey to the Department, which shall make the information available upon request. The survey information shall include the names and addresses of the auto body repair shops and the total number of shops surveyed."

The authority granted to the Department by section 758 is limited. The Department is authorized to receive the survey results from insurers, to verify that the survey information includes the names and addresses of the shops surveyed and the total number of shops surveyed, and to make the survey information available upon request.

Sections 2695.81 and 2695.82 are beyond the authority granted to the Department by Insurance Code section 758. Section 758 does not permit or obligate the Department to set requirements for labor rate surveys, or to specify how surveys are to be used, or to determine the questions that the surveys must ask. Moreover, section 758 does not give the Department any authority to create a rebuttable presumption regarding an insurer's use of a labor rate survey to effectuate a fair and equitable settlement of a repair claim.

Absence of Authority in Insurance Code Sections 790.03 and 790.10

Sections 2695.81 and 2695.82 would create a rebuttable presumption that an insurer that uses the standardized survey has not violated Insurance Code section 790.03(h)(5). This attempt to adopt a regulation that defines conduct which may fall outside the definition in section 790.03(h)(5) is not authorized.

In *Association of California Insurance Companies v. Jones* (2015) 235 Cal.App.4th 1009, the Court of Appeal invalidated a regulation that sought to define conduct as violative of one of the unfair and deceptive acts listed in section 790.03. Sections 790.03 and 790.10 are part of the Unfair Insurance Practices Act (UIPA). The court in *Jones* explained, "The language of the UIPA reveals the Legislature's intent to set forth in statute what unfair or deceptive practices are prohibited, and not delegate that function to the Commissioner." (*Jones*, at p.1029.)

The Court of Appeal in *Jones* ruled that the Legislature has defined unfair and deceptive acts in section 790.03 and that the Insurance Commissioner has no authority to create additional definitions by regulation. The court rejected the Insurance Commissioner's assertion that the Commissioner's power in section 790.10 to promulgate regulations to "administer" the UIPA gives the Commissioner the authority to define conduct that is unfair or deceptive. The court reviewed the provisions of the UIPA and concluded, "Read together, these provisions demonstrate that the Legislature did not give the Commissioner power to define acts or conduct not otherwise deemed unfair or deceptive in the statute." (*Jones*, at p. 1030.)

The court particularly relied on the UIPA's section 790.06 which sets forth the procedures the Commissioner must follow to determine that an act not defined in section 790.03 should be declared to be unfair or deceptive.

The Commissioner took the position that his power under section 790.10 to administer the provision in section 790.03 regarding misleading statements gave him the authority to adopt a regulation requiring homeowners insurers to use a standard replacement cost estimate methodology. The court responded that the Commissioner's interpretation of the UIPA would make section 790.06 superfluous. The court explained, "Put differently, under the Commissioner's interpretation of its authority under the UIPA, he would never have to resort to the procedures in section 790.06 regarding practices not 'defined' in section 790.03 because the Commissioner could always argue that conduct not meeting standards in a regulation promulgated under the cover of the Commissioner's power to administer under section 790.10 would be 'misleading.'" (*Jones*, at p. 1031.)

Jones held that neither section 790.03 nor section 790.10 gave the Commissioner the authority to adopt a regulation that used a standardized cost estimate methodology to define an unfair or deceptive practice. Similarly, sections 790.03 and 790.10 do not give the Commissioner the authority to adopt a regulation that

uses a standardized labor rate survey to define conduct that presumably falls outside the unfair and deceptive acts set forth in the UIPA.

The Commissioner may believe that it is important to determine that certain practices relating to labor rate surveys are unfair and deceptive. However, that determination may not be made through the adoption of a regulation pursuant to section 790.10.

Instead, section 790.06 provides the Commissioner with procedures to determine that acts not defined in section 790.03 are unfair and deceptive. The court noted in *Jones*, "We are also not suggesting that the Commissioner could not use the administrative and court processes in section 790.06 to seek a determination that replacement cost estimates not including certain information are unfair and deceptive." (*Jones*, at p. 1036.) The Commissioner may use the processes available under section 790.06 to determine that an insurer's labor rate survey practices are unfair, but he may not make such a determination by adopting a regulation.

The principles established by the Court of Appeal in the *Jones* decision prevent the Department from relying on sections 790.03 and 790.10 as authority for the adoption of sections 2695.81 and 2695.82.

Absence of Authority in Insurance Code Sections 790.10, 12921 and 129261
It is important to note that the Office of Administrative Law (OAL) rejected a similar Department proposal to standardize insurer auto labor rate survey in 2007. Because nothing in 790.10 discusses auto labor rate survey, the OAL deemed it “improper” for the Department to use it as authority. The OAL further concluded that sections 12921 and 12926 did not authorize the adoption of the regulation as stated in part. "These sections are proper authority citations for the purpose of demonstrating that the Department has general authority under the law to adopt regulations. Neither section, however, grants any authority specific to the issue of auto body repair shop labor rate surveys." We urge the Department to review the OAL Decision of Disapproval of Regulatory Action File No. 06-1114-04 S (January 5, 2007) because it has precedential value.

Reference - Sections 2695.81 and 2695.82 fail to comply with the reference standard.
Government Code section 11349.1 requires a regulation to comply with the standard of reference. Government Code section 11394(e) provides, "'Reference' means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation."

Insurance Code sections 758 and 790.03 are cited as reference for sections 2695.81 and 2695.82. However, neither statute is a proper reference for the proposed regulations.

Absence of reference in Insurance Code section 758
Auto body repair labor rate surveys are addressed in subdivision (c) of section 758. The subdivision imposes three duties on the Department of Insurance: 1) receive the survey results from insurers, 2) make the survey information available upon request, and 3) verify that the survey information includes the names and addresses of the auto body repair shops and the total number of shops surveyed.

The Department may adopt a regulation that interprets or implements the provisions of subdivision (c) of section 758, but the Department's regulation may not go beyond the scope of the three elements of subdivision (c).

Proposed sections 2695.81 and 2695.82 create requirements for a standardized labor rate survey, describe how an insurer may use the standardized survey, and establish a rebuttable presumption when the survey is used. The matters addressed by the two regulations go beyond any interpretation or implementation of the three duties delegated to the Department in subdivision (c) of section 758.

The citation of section 758 as reference for sections 2695.81 and 2695.82 is improper and unwarranted.

Absence of reference in Insurance Code 790.03
Insurance Code section 790.03(h)(5) defines "Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear" as an unfair and deceptive insurance practice.

By citing section 790.03 as reference for sections 2695.81 and 2695.82, the Department is taking the position that the two proposed regulations are interpreting or implementing section 790.03. The *Jones* decision rejected the reasoning behind the Department's position.

In the *Jones* case, the Insurance Commissioner pointed to two California Supreme Court decisions which held that statutes gave two state agencies the authority to adopt regulations to fill in the details of the statutes. The Commissioner argued that the UIPA gave him similar authority to adopt a regulation in order to fill in the details as to what is "misleading" under section 790.03.

The Court of Appeal rejected the Commissioner's argument. The first case on which the Commissioner relied, *Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3^{d} 347, upheld a DMV regulation that defined prohibited practices that were identified in the Vehicle Code. The Court of Appeal distinguished the Commissioner's regulation from the DMV's regulation. The court explained, "We do not doubt that the Legislature could have delegated the Commissioner the kind of broad authority conferred on the DMV in *Ford Dealers*; it did not do so in the UIPA." (*Jones* at p. 1033)

The second case relied on by the Commissioner, *Credit Ins. Gen. Agents Assn. v. Payne* (1976) 16 Cal.3^{d} 651, upheld the Insurance Commissioner's authority to adopt a regulation interpreting credit insurance statutes. The Court of Appeal concluded that the *Payne* decision was not applicable to the Commissioner's authority to adopt a regulation which sought to interpret or implement Insurance Code section 790.03. The court observed, "Once again, these statutes governing credit insurance do not contain the same language or fit the same statutory context as section 790.03 does in the UIPA." (*Jones* at p. 1033)

Sections 2695.81 and 2695.82 may not be adopted under the guise of implementing Insurance Code section 790.03. In ruling that the Legislature did not give the Commissioner the authority to adopt a regulation defining an unfair or deceptive practice set forth in section 790.03, the *Jones* decision concluded that "under the guise of 'filling in the details,' the Commissioner therefore could not do what the Legislature has chosen not to do." (*Jones* at p. 1036.)

Sections 2695.81 and 2695.82 would define conduct that fall outside the definition of an unfair or deceptive practice in Insurance Code section 790.03(h)(5). This is more than interpreting, implementing or filling in the details of section 790.03. Therefore, citing section 790.03 as reference for sections 2695.81 and 2695.82 is improper and unwarranted.

Consistency - Sections 2695.81 and 2695.82 fail to comply with the consistency standard.
Government Code section 11349.1 requires a regulation to comply with the standard of consistency. Government Code section 11349(c) provides, "'Consistency' means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."

Sections 2695.81 and 2695.82 do not comply with the consistency standard because the regulations are in conflict with a Court of Appeal decision and an Insurance Code statute.

Inconsistent with ACIC v. Jones
The fundamental holding in the Court of Appeal's *Jones* decision is that "the Legislature did not give the Commissioner power to define by regulation acts or conduct not otherwise deemed unfair or deceptive in the [UIPA]." (*Jones* at p. 1029.)

The attempt in sections 2695.81 and 2695.82 to delineate conduct that may fall outside the meaning of section 790.03(h) is at odds with the holding in *Jones*.

Inconsistent with Insurance Code section 790.05
Subdivision (c) of section 2695.81 would create a rebuttable presumption that an insurer has complied with Insurance Code section 790.03 if the insurer uses the regulation's standardized labor rate survey.

Section 2695.81's creation of a rebuttable presumption is inconsistent with Insurance Code 790.05 which provides that a hearing to determine whether an insurer has engaged in an unfair or deceptive act defined in section 790.03 must be conducted in accordance with the Administrative Procedure Act (APA). The APA describes how the administrative law judge is to conduct the hearing and the process for issuing the judge's decision. The APA does not direct the judge to follow a rebuttable presumption of compliance with 790.03 when a decision is developed. Section 2695.81's attempt to impose a rebuttable presumption on the judge's decision is inconsistent with the mandate in section 790.05 that hearings must be conducted in accordance with the APA.

An administrative hearing on an insurance enforcement matter may be subject to a rebuttable presumption when so directed by the Legislature. Insurance Code section 1738 requires that a hearing on the revocation of a producer license must be conducted in accordance with the APA. The Legislature has directed in Insurance Code 1623 that there is a rebuttable presumption that a person is acting as an insurance broker if certain conditions exist. An administrative judge is required to follow the Legislature's direction when the judge makes his or her decision.

In contrast to the statutorily created rebuttable presumption of broker status, there is no statute that creates a rebuttable presumption that an insurer has complied with Insurance Code section 790.03. In the absence of a statute that establishes a presumption, the Department of Insurance may not require an administrative law judge to follow a presumption that is created by regulation.

Section 2695.81's inconsistency with Insurance Code section 790.05 and the provisions of the APA prohibits the Department's adoption of the regulation.

Clarity - Sections 2695.81 and 2695.82 fail to comply with the clarity standard.
Government Code section 11349.1 requires a regulation to comply with the standard of clarity. Government Code section 11349(c) provides, "'Clarity' means written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them."

Sections 2695.81 and 2695.82 fail to comply with the clarity standard because insurers will have difficulty understanding several of the provisions in the regulations.

Section 2698.91 and Subdivisions (c), and (e)(4) of section 2695.81—Negotiating Rates
Proposed subdivision (i) of section 2698.91 provides that nothing in the section "shall prohibit an insurer from negotiating and/or contracting with an auto body repair shop for a specific labor rate." The terms of subdivision (i) allow an insurer to negotiate a rate that is lower than the prevailing rate established by the standardized labor rate survey.

However, if the insurer wants the benefit of the rebuttable presumption promised in subdivision (c) of section 2695.81, subdivision (c) provides that the insurer must use the standardized survey according to the provisions of subdivision (e) of section 2695.81.

Subdivision (e)(4) only allows the insurer to negotiate a rate that is higher than the rate determined by the standardized labor rate survey.

The various subdivisions create confusion for insurers. On one hand, a subdivision tells an insurer that it is free to negotiate with an auto body repair shop for a specific rate, including a rate lower than the prevailing rate established by the standardized labor rate survey. On the other hand, other subdivisions require an insurer to use the standardized labor rate survey in a manner that only allows the negotiation of a rate that is higher than the rate established by the standardized labor rate survey. The result is an absence of clarity. Also, what if the rates for the same area are different on the surveys conducted by different carriers? How will the Department address that issue?

Section 2695.81(d)(4)—Repair Shop Standards

Subdivision (d)(4) tells an insurer that in conducting the standardized labor rate survey, the insurer may only use the rates reported by auto body repair shops that meet specified standards, including equipment requirements mandated by the Bureau of Automotive Repair, proof of liability and workers' compensation insurance, and possession of a spray booth that meets federal, state and local requirements. Subdivision (d)(4)(B) tells the insurer that it is not required to inspect a shop to confirm that the shop meets the specified standards.

The two subdivisions put the insurer in a confusing position. The repair shop's responses to the questionnaire that asks the shop whether the shop meets the standards do not provide the insurer with assurance that the shop really meets the standards. Since the insurer may only use the reported rates of shops that meet the standards, the insurer may feel compelled to conduct an inspection, making the advice in subdivision (d)(4)(B) an empty declaration. It is difficult to understand how the two subdivisions are to be reconciled.

Section 2695.81(d)(1)(C)3—Consumer Price Index

Section 2695.81(d)(1)(C)3 requires an insurer to adjust reported rates and prevailing rates upward when the Consumer Price Index (CPI) increases, but the subdivision prohibits downward adjustment when the CPI decreases. It is difficult to understand the logic that could support this different treatment.

The Coalition is concerned that the proposed regulations create confusion as to whether or not an insurer is required to conduct a labor rate survey in order to comply with its regulatory duty to make sure that there is a reasonable and appropriate basis for the insurer's position on a particular labor rate asserted by an auto repair shop in an insurance claim.

Insurance Code Section 758(c) states:

(c) *Any insurer that conducts* an auto body repair labor rate survey *to determine and set a specified prevailing auto body rate in a specific geographic area* shall report the results of that survey to the department, which shall make the information available upon request. The survey information shall include the names and addresses of the auto body repair shops and the total number of shops surveyed. (Emphasis added)

The plain meaning of the language of Insurance Code Section 758(c) clearly supports the conclusion that an insurer has the *option* of using a labor rate survey to determine and set specified prevailing auto body rate in a specific geographic area, but the language does not specifically *require* the use of a labor rate survey in an insurer's claims settlement practices. The Department does not have the regulatory authority to now deny insurers of their discretionary right to make the business decision not to use a labor rate survey in their claims practices.

The phrase "*[a]ny insurer that conducts* an auto body repair labor rate survey" does not support the conclusion that an insurer *shall conduct* a labor rate survey, nor does it reasonably support the Department's recent interpretation that any collecting or gathering of labor rate information associated with the insurer's adjustment of an insurance claim is in effect a "labor rate survey".

Moreover, the language of Insurance Code Section 758(c) clearly pertains only to labor rate surveys used "*to determine and set a specified prevailing auto body rate in a specific geographic area."* If an insurer is not using their auto repair labor rate information and claims experience to "***determine or set** a specified prevailing auto body rate in a specific geographic area"* the labor rate survey proposed regulation should not apply to them.

The coalition is concerned by the Department's recent change in their interpretation of the code. Specifically, that Insurance Code Section 758 creates a "defacto" requirement for insurers to conduct a labor rate survey merely because the insurer gathers and collects auto repair labor information necessary for the insurer to properly adjust an automobile insurance claim. This new interpretation of the definition of a "survey" is inconsistent with the Department's prior and longstanding pronouncement back in 2006, when it amended the Auto Body Repair Labor Rates Regulations (File No. RH05044654, 9/8/2006, *Initial Statement of Reasons – Proposed Amendments to the Auto Body Repair Labor Rate Surveys Regulations*):

Proposed section 2698.91(l): (Adopt)

Insurance Code Section 758(c) does not require an insurer to conduct a labor rate survey. The proposed amendment clarifies this legislative intent in stating that nothing in these regulations shall require an insurer to conduct an auto body labor rate survey.

Further, the CDI's recent position on the definition of a "survey" is incompatible with the common parlance understanding of what a "survey' means and entails from a methodology standpoint.

Necessity - Sections 2695.81 and 2695.82 fail to comply with the necessity standard.

Government Code 11349.1 requires a regulation to comply with the necessity standard. Government Code 11349(a), which defines the necessity standard, provides that the need for the regulation must be demonstrated in the rulemaking record "by substantial evidence." Tittle 1 CCR section 10(b) explains that in order to meet the necessity standard, the rulemaking file must include "facts, studies, or expert opinion." Several aspects of the proposed regulations fail to satisfy the necessity standard.

Complaints and enforcement actions supporting the need for the regulations

The Informative Digest asserts that that the Department of Insurance has received "hundreds of complaints from consumers and auto body shops" regarding auto body labor rate surveys. The Informative Digest contends that issues related to surveys "culminated in several enforcement actions which the Department filed against several insurers."

These generalities fall far short of substantial evidence required to establish the need for the regulations. The Informative Digest fails to compare the number of complaints to the total number of auto body repair claims; fails to specify how many complaints came from body shops versus consumers; fails to explain how many of the complaints were justified; fails to provide the exact number of enforcement actions which were related to surveys; and fails to explain whether any enforcement action resulted in a finding that an insurer violated Insurance Code section 790.03 because of its survey practices.

These failures need to be addressed with specific facts in order to satisfy the necessity standard.

Sample size

Section 2695.81(d)(2) requires that an insurer must send the survey questionnaire to all licensed auto body shops. Scientific sampling practices produce valid and reliable survey results. The department has failed to provide any facts or studies that justify the rejection of proven sampling methodologies.

Direct Repair Program Rates

Section 2695.81(d)(6) excludes contracted rates under direct repair programs from the standardized labor rate survey. A significant portion of auto body repair claimants use insurer direct repair programs to repair their vehicles. The Department has failed to provide any studies or other substantial evidence proving that direct repair program rates do not reflect prevailing market rates.

Limitation to direct responses from repair shops
Section 2695.81(d)(5) explains that the standardized labor rate survey's prevailing rate is calculated on the basis of the rates "charged" by repair shops. In establishing the rates charged, section 2695.81(d)(7) imposes the limit of "[o]nly direct responses" from repair shops and excludes "[a]ny source other than direct responses provided by an auto repair shop on a survey questionnaire."

A shop is required to declare that its responses are true and correct; but the declaration is not made under oath and the Department of Insurance has no authority to confirm that a shop's answers to questions about the rates it charges are accurate.

The Department has failed to provide any substantial evidence that direct responses from repair shops are the best method for determining the rates that shops really charge. There are no facts or studies put forward to justify subdivision (d)(7)'s exclusion of other sources of information to determine the rates which are being charged by repair shops.

Amendments to Section 2698.91
Insurance Code section 758 is cited as the authority for the proposed amendments to section 2698.91. As explained in the discussion of sections 2695.81 and 2695.82, subdivision (c) of section 758 grants the Department of insurance limited authority. The Department is required to 1) receive the labor rate survey results from insurers, 2) make the survey information available upon request, and 3) verify that the survey information includes the names and addresses of the auto body repair shops and the total number of shops surveyed. The Informative Digest acknowledges the Department's limited role by explaining "that the Department is acting as a 'clearing house' for surveys submitted to the Department pursuant to Ins. Code section 758(c)."

Several provisions in the proposed amendments are beyond the scope of the limited authority granted to the Department in section 758(c). Other provisions fail to satisfy the necessity standard.

Subdivision (d)(5)
The first part of the amendments to subdivision (d)(5) makes reference to proposed section 2695.81 which, as explained above, the Department lacks authority to adopt.

The final clause in the amendments to the subdivision would require an insurer to describe any geographic area where a survey will not be used. This requirement is not authorized by section 758(c). Section 758(c) requires an insurer that conducts a survey to determine a rate in a specific geographic area to report survey results. The section makes no mention of geographic areas where surveys are not used to determine a prevailing rate.

Subdivision (d)(7)
Subdivision (d)(7) would require an insurer to submit to the Department the labor rate reported by each shop that responded to the survey. This requirement is not authorized by section 758(c). Section 758(c) requires an insurer to submit survey "results" to the Department. The section does not authorize the Department to mandate an insurer to submit the survey responses.

Subdivision (d)(8)
Subdivision (d)(8) would require an insurer to submit to the Department the license number for each auto body repair shop that responded to the insurer's survey. This requirement is not authorized by section 758(c). Section 758(c) only requires the survey information submitted by the insurer to include "the names and addresses of the auto body repair shops."

Subdivision (d)(8) also would require an insurer to indicate whether a shop is a member of the insurer's direct repair program. There is no authority for this requirement. Section 758(c) makes no mention of direct repair programs.

Subdivision (e)
Subdivision (e) would require an insurer to submit the results of its labor rate survey within 30 days of completing the survey. This requirement does not comply with the necessity standard. The Department has failed to provide substantial evidence that there is a need for compliance with the 30-day mandate in order to effectuate the purposes of section 758(c).

Subdivision (g)
Subdivision (g) would require an insurer to submit information that is not required to be submitted by section 758(c). There is no requirement in the statute that an insurer must submit any of the information listed in subdivision's four subparagraphs.

Subdivision (h)
Subdivision (h) provides for a confidentiality provision. There is a need for a confidentiality provision but the provision should be achieved without the subdivision's reference to subdivision (g) of section 2695.81. First, there is no subdivision (g); the reference probably was meant to be to subdivision (f). Second any reference to section 2695.81 is improper because the Department does not have authority to adopt the section.

Industry Proposed Changes to the Auto Body Repair Labor Rate Surveys
The coalition offers the following changes to the proposed regulations:

In the section, Adopt Section 2695.81. The Standardized Auto Body Repair Labor Rate Survey;

The coalition is concerned that the proposed regulations create confusion as to whether or not an insurer is required to conduct a labor rate survey in order to comply with its regulatory duty to make sure that there is a reasonable and appropriate basis for the insurer's position on a particular labor rate asserted by an auto repair shop in an insurance claim.

- Add "Nothing in this section shall be construed to require an insurer to conduct an auto body labor rate survey."

In Section 2695.81 (d) The Standardized Labor Rate Survey, (1) Currentness, (A) Time since submittal of survey to the Department, (1) and (2);

This section states that labor rate surveys are only valid for one year, requiring insurers to conduct a survey every year. The surveys are lengthy and conducting them on an annual basis will require a substantial investment of employee labor and expense. Our concern is that the auto body shops could ask for substantial rate increases each year. The survey should be valid for 24 months.

- In Section (d)(1)(A)(1) and (d)(1)(A)(2): change "calendar year" to "twenty-four (24) months"
- Change any requirement that the survey be completed at the end/beginning of a calendar year so that not all surveys are occurring simultaneously

In Section 2695.81 (d) The Standardized Labor Rate Survey, (2) Sample size;

The regulations would require insurers to send a survey to every licensed auto body shop in California. The number of body shops in California is over 7,000. Surveying every shop is unnecessary and costly. The survey should be a statistically supportable number, perhaps 25% of the auto body shops, for example.

- In Section (d)(2): "…<u>at least twenty-five (25) percent of</u> all auto body repair shops registered with, or licensed by, the Bureau of Automotive Repair…"

In Section 2695.81 (d) The Standardized Labor Rate Survey, (4) Standards;

The regulations require auto body shops to meet certain standards established by the California Bureau of Automotive Repair ("BAR") to participate in the survey. Insurers are not required to physically inspect the shop to confirm the repairs, but the insurer must check the body shop's submitted labor rate form to ensure the shop qualifies to participate in the survey. This is burdensome and costly on insurers to check the accuracy and validity of the auto body shop's submission. We suggest that the regulations either allow the unequipped shops to participate in the survey, or to pay those unequipped shops a lower rate than the participating "properly equipped" shops.

- In Section (d)(4): Add that if a shop does not meet the specific standards set forth in (d)(4)(A), then the shop does not receive the benefit of the established survey rate

In Section 2695.81 (d) The Standardized Labor Rate Survey, (5) Prevailing Auto Body Rate;

The regulations propose that insurers use the greater of the arithmetic mean or average, or a rate of the simple majority of shops, whichever is greater. This method has the effect of skewing labor rates in favor of the auto body shops. This could lead to inconsistent methods being used by insurers to survey auto body shops. There should be one consistent method for all auto body shops - make the calculation based upon one or the other, but not both. And if no other protection against outliers is added, the calculation should be based upon the simple majority, since this will inherently minimize distortion from outliers.

In addition, insurers should be allowed the option to pursue greater accuracy in determining a market rate by weighting survey responses according to shop capacity. In most markets, larger shops with greater repair volume capacity (number of vehicle bays, for example) will repair proportionally more vehicles. For instance, if a city had 5 shops with 1 bay each and 1 shop with 5 bays, as many as half of all vehicle repairs might be completed by the latter. On a per vehicle basis, then, the larger shop will mathematically play a larger role in the prevailing labor rate in that market than the other shops. But the proposed regulation precludes a standardized survey from considering that reality, and instead requires a "one shop, one vote" approach, making no allowance for the practical effect of shop capacity on the prevailing labor rate in a given market.

- In Section (d)(5): Rather than the clearly biased "greater of" language, either use the simple majority standard or use the arithmetic mean but with some protections against outliers (e.g., removal of the lowest and highest rate).
- Add: "A Standardized Labor Rate Survey may, at the insurer's option, account for the relative volume of each responding shop's repair capacity in calculating the prevailing rate."

In Section 2695.81 (d) The Standardized Labor Rate Survey, (6) Use of Direct Repair Rate;

The regulations propose that insurers use the posted labor rates of direct repair shops and not its negotiated rate. This is unfair because our experience is that most auto body shops do not charge the posted labor rates. Further, a body shop can change its posted labor rate as often as it wants, for as much as it wants. The posted labor rate does not reflect what the market is willing to pay (e.g. posted rate on the back of the hotel door).

- In Section (d)(6): Strike this section banning the inclusion of discounted direct repair shop rates

In Section 2695.81 (d) The Standardized Labor Rate Survey, (7) Use of Survey Data Only;

The regulations do not allow insurers to conduct a labor rate survey via any other method than the proposed survey. Insurers should be allowed to perform a labor rate survey from estimating data, subrogation demands or other means.

- In Section (d)(7): Delete the word "shall not be used" and instead insert: Labor rates from the following sources shall be allowed in a Standardized Labor Rate Survey. Any other methodologies, other than a labor rate survey, previously approved by the Department shall also be permitted.

In Section 2695.81 (d) The Standardized Labor Rate Survey, (8)(B)(C)(D) Geographic Area;

The regulations would require insurers to establish individual body shop markets based upon geocoding. The proposal provides that "the geographic area for an auto body repair shop shall comprise six (6) Responding Qualified Auto Body Repair shops," based on the nearest 5 such shops (or 6, if the shop in question isn't one). In other words, by its own terms, the regulation requires that every shop – even those not licensed by BAR or otherwise qualified to respond to the survey – be assigned its own, individual "prevailing" labor rate. With over 7000 shops licensed by BAR, and an indeterminate number of additional unlicensed shops, this amounts to THOUSANDS of individual "geographic areas" that must be surveyed and THOUSANDS of individual "prevailing" labor rates that must be calculated. This runs fundamentally counter to the concept of a true "prevailing" labor rate based on market areas, such as might be used in Los Angeles and the San Fernando Valley, for example, which are generally considered to be in the same market and to have consistent labor costs. It could also lead to some illogical results, such as where one remote shop is included in a labor rate calculation with five shops a great distance away which are nevertheless the 'nearest' to that shop. The labor rate for the remote shop may be higher or lower than the remote market dictates.

Furthermore, such a proposal allows, and even encourages, labor rate manipulation and collusion by body shops. If just one or two shops choose to respond to the survey in self-interested bad faith (and there's nothing in the regulations that would seem to dissuade such activity), it could have a significant effect on the rates an insurer would have to pay to those same shops and surrounding shops. Such a name-your-price mechanism will only lead to higher labor rates than the market would naturally yield, to the detriment of consumers.

Finally, the proposal does not indicate who will apply the geocoding or who will pay for it. Geocoding would be extremely burdensome to the insurer in terms of labor and expense. This is well illustrated by the 23 lines of intricate detail in the regulations describing how to determine which qualifying shops are the closest, using sophisticated latitude and longitude tools and software requiring precision down to the nearest thousandth of a mile, with tie-breaker provisions.

- In Section 2695.81 (d)(8)(B)(C)(D): Eliminate the geo coding requirement and use the language from the previous (Public Discussion Draft of 3/30/15) labor rate survey geographic area: *"(k) Any geographic area used by an insurer in a labor rate survey shall enable the labor rate survey to consistently yield prevailing labor rates that, when used in paying or adjusting an automobile insurance claim, ensure that the labor rate component of the claim settlement is fair and equitable."*

Reasonable Alternatives

On November 18, 2015, we submitted an alternative that the Department has yet to acknowledge as we do not see it under the "Reasonable Alternatives and Performance Standard." We reiterate the following alternative: Given the many unresolved questions and issues with the Department's proposed regulations on auto labor rate surveys, we would like to work with the Department to convene a task force involving all the stakeholders to discuss a more comprehensive approach to these issues rather than moving forward with an incomplete regulation.

Conclusions

The execution and administration of the proposed labor rate survey regulations is burdensome and expensive to the insurance industry. Further, the survey will lead to inflated labor rates, which will increase claim costs. The labor rate survey process of asking the shop to submit their posted rates on an annual basis will encourage the frequent and artificial inflation of repair costs which do not reflect the actual market value of auto body repairs. The "CPI method" of calculating body shop labor rates will increase the cost of auto body repairs disproportionately to most other goods, or the increased cost of labor for other industries. The proposed labor rate survey regulations will add to the cost of insurance policies for California consumers.

The insurance industry and the California Chamber of Commerce have significant issues with the propose regulations on labor rate surveys. Given the contentious history of previous efforts to regulate in this area, we urge the Department to work cooperatively with all stakeholders to identify a set of solutions that will prevent further disagreement following submission to the OAL.

Insurers do not need to support each and every requirement in order to accept them; rather, they request consideration of the practical implications of the regulations and an ability to implement the final regulations without undue costs or unfair results. At this point, the proposed regulations represent an unlawful overreach into the legitimate business activities of insurers and include several provisions which merit further improvement.

Further, the Department has not provided any evidence demonstrating the necessity for these proposed regulations, other than its own Informative Digest that asserts it has received "hundreds of complaints from consumers and auto body shops" regarding auto body labor rate surveys and these generalities fall far short of the substantial evidence required to establish the need for the regulations.

We look forward to continued dialogue with the Department on these this proposal and respectfully urge the Department to consider significant revisions based upon the above.

Should you have any questions or concerns, please feel free to contact any of the following: Michael Gunning, PIFC Vice President (916-442-6646/mgunning@pifc.org), Armand Feliciano, ACIC Vice President (916-205-2519/armand.feliciano@acicnet.org), Shari McHugh, on behalf of PADIC, (916-769-4872/smchugh@mchughgr.com), Christian Rataj, NAMIC Senior Director (303-907-0587/crataj@namic.org), or Steve Suchil, AIA Assistance Vice President (916-718-9568/ssuchil@aiadc.org), or Marti Fisher, California Chamber of Commerce, (916-930-1265/marti.fisher@calchamber.com).