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PROGRESSIVE

ALLSTATE

NAMIC

February 26, 2010

Michael Tancredi
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RE: Proposed Regulation 2010-00001, Concerning the Contemplated Regulations Governing Standards and Training for Estimating Replacement Value on Homeowners' Insurance—*Written Comments from the Personal Insurance Federation of California*

Dear Mr. Tancredi:

Thank you, on behalf of the members of the Personal Insurance Federation of California ("PIFC"), for the opportunity to provide comments on the contemplated regulation referenced above ("regulation").

PIFC member companies provide auto, home, flood and earthquake insurance for millions of Californians. Our members, State Farm, Allstate, Farmers, Liberty Mutual Group, Progressive, and NAMIC, write over 60% of the all the home and auto insurance sold in the state.

First let me say, that should the CDI move forward with a formal regulatory process, PIFC will of course participate fully in that process and we would anticipate providing more extensive comments based upon the specifics in any proposed regulation. We appreciate the opportunity at this time, in response to CDI's invitation, to provide our thoughts based upon the draft and the workshop discussion. We hope you will consider the issues we raise as you contemplate potential revisions to the language currently under discussion.

PIFC acknowledges CDI's desire for a more rigorous training curriculum. PIFC and its member companies support this direction and may provide more specific comments to this section if this regulation is promulgated.

Proposed Section 2695.183, however, as written, is troubling. It does not appear to recognize that current practice, and current law, places the responsibility of determining the amount of insurance on the insured. It is important to note that neither agents, brokers nor insurers set policy limits (a term, troubling to us, that is used throughout the regulation). They do, however, use information provided by the applicant or insured to provide an estimate of what it would cost to replace the property to its original condition, up to the policy limits.

PIFC is very concerned that the regulation, as currently drafted, will have the impact of shifting the responsibility for establishing policy limits from the insured to the insurer, in conflict with established California law. "It is up to the insured to determine whether he or she has sufficient coverage for his or her needs." (*Everett v. State Farm*). As you know, *Everett* also affirmed that Insurance Code sections 10101 and 10102 do not require an insurer to set policy limits that equal the cost to replace the property, nor is an insurer duty bound to set policy limits for insureds.

Our read of this shift in responsibility occurs whether the licensee provides an estimate of replacement cost or the licensee simply relies on an estimate to "set" (again, insurers do not "set") or even "recommend" a policy limit.

The regulation then goes on to specify a detailed, yet open ended ("including but not limited to...") list of required components to be included in the estimation process. Taken together, the requirements and implied shift in responsibility, create an unacceptable risk of future liability for an insurer, as well as what is likely an unintended consequence of the regulation: a situation that would lead licensees to be reluctant to offer any information to the insured about estimated replacement cost - or to even rely on an estimate by another qualified person. In fact, the likely scenario is that a licensee will be compelled to accept only a stated amount by the applicant or insured as the coverage amount, without providing or relying on an estimate.

This reluctance to offer any help that could later be determined to have been "an estimate of replacement cost," and therefore subject to the strict requirements of the regulation, is based upon the fact that while the responsibility to determine adequate coverage lies with the insured (*Everett*), there is a recognized exception to that general rule that may apply if an agent makes an affirmative representation of adequate coverage, misrepresents to the insured that an amount is adequate under all circumstances, or fails to provide the coverage requested by the policyholder. The language in the regulation appears to set up this situation.

Finally, we recognize these regulations are an effort by CDI to attempt to reduce the possibility of an insured lacking adequate coverage following a loss. However, PIFC questions the Commissioner's statutory authority to promulgate the regulation

(specifically Section 2695.183) as currently drafted. As drafted, this section appears to regulate the underwriting of homeowners insurance – an authority that clearly does not lie with the Commissioner or the CDI. “The Insurance Code provides no express authority for regulating the underwriting of homeowners insurance, nor can such expansive authority be implied. Unlike automobile insurance, homeowners insurance is subject to only a few restrictions, all clearly set forth in the Insurance Code. Reading the Insurance Code to give the Commissioner broad authority to regulate underwriting beyond these specific provisions is inconsistent with the legislative scheme as a whole.” (*AIA v. Garamendi*).

PIFC appreciates the opportunity to comment on these proposed regulations and would appreciate your consideration of our concerns prior to moving forward with a formal rulemaking.

Respectfully,

A handwritten signature in black ink, appearing to read 'Ermelinda Ruiz', with a large, sweeping flourish at the end.

Ermelinda Ruiz, Legislative Advocate
Personal Insurance Federation of California (PIFC)