October 11, 2016

Damon Diederich
California Department of Insurance
300 Capitol Mall, 17thFloor Sacramento CA 95814
Email: Damon.Diederich@insurance.ca.gov

RE: Notice of Availability of Revised Text And of Addition to Rulemaking File– Auto Body Repair Labor Rates Surveys - CDI Regulation File: Reg-2012-00002

Dear Mr. Diederich:

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." At the outset, we appreciate the Department's time spent with us discussing the revisions to the proposed labor rate survey regulation and recognize that some of these proposed revisions appear to clarify some parts of the proposed regulation. Based on the feedback we have received, however, overall the proposed labor rate survey regulation (even with the revisions to Sections 2695.81, 2695.82, 2698.91) fails to satisfy the authority, clarity, consistency, necessity, and reference standards under Government Code section 11349. Therefore, we are opposed to the proposed labor rate survey regulation, and urge the Department to reconsider moving forward given our ongoing concerns as discussed below.

I. Authority - The September 26, 2016, proposed revisions to sections 2695.81, 2695.82, and 2698.91 fail to comply with the authority standard.

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." The Department's continued reliance on Insurance Code sections 758, 790.03, 790.10, 12921, and 12926 as authorities for the September 23 revisions to section 2695.81, 2695.82, and 2698.91 fails to satisfy the authority standard.

Office of Administrative Law Precedent Decision on Insurance Code Sections 790.03, 790.10, 12921, And 12926 as a Basis for Authority Applies

In 2007, the Office of Administrative Law (OAL) rejected a substantially similar Department proposed labor rate survey regulation. Specifically, in finding that the Department had no authority for its

proposed labor rate survey regulation in 2007, the OAL concluded the following:

1) Insurance Code Section 790.03- "[It] is a broad statute defining unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. It contains no provisions to specifically related to auto body repair shop labor rate survey;"

2) Insurance Code Section 790.10- "[It] is a general authorization for the commissioner to adopt regulations necessary to administer the Unfair Practices article of the Insurance Code…. The inclusion of IC 790.10 as an authority section for 10 CCR 2698.92 is therefore improper;" and

3) Insurance Code Sections 12921 and 12926- "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."

In our view, the OAL ruling in 2007 applies today because the Department's 2016 proposed labor rate survey regulation (including the proposed revisions) are substantially similar to the Department's 2006 proposal as compared in the chart below:

2006 Department's Proposed Labor Rate Regulation	**2016 Department's Proposed Labor Rate Regulation**
Declares that the regulations do not require insurers to conduct labor rate surveys.	Section 2698.91 (j) "Nothing in this section shall be construed to require an insurer to conduct an auto body repair labor rate survey."
Declares that the regulations do not prevent an insurer from negotiating for a specific rate.	Section 2698.91 (i) "Nothing in this section shall be construed to prohibit an insurer from negotiating and/ or contracting with auto body repair shop for a ~~**specific**~~ labor rate that is higher or lower than the prevailing auto body rate."
Requires labor rate survey results reported to the DOI to include the following information that will NOT be made available to the public: The labor rate of each shop that responded to the survey.	Section 2698.91 (g) (6) **The labor rates reported by each shop that responded to the survey.**
Prohibits insurers from including any rates in their surveys if the rates are used in any direct repair program.	Section 2695.81 (d)(6) "No Standardized Labor Rate Survey shall use any discounted rate negotiated or contracted for with members of ~~**it's**~~ **the insurer's** Direct Repair Program, on any other Repair Program as defined in Section 2698.90…."

Requires surveys to be done not less than annually if "survey data used by an insurer is changing on a regular basis."	Section 2695.81 (d) (1) (C) (1) also refers to currentness of the survey: "No longer a period than two (2) ~~**calendar**~~ years has elapsed since the data was submitted to the Department."

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.

Lack of Authority Under 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." Therefore, the authority granted to the Department by Insurance Code 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. It 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, it 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.

Also, the Department has long conceded that it has limited authority under Insurance Code section 758. In fact, the Department summed up its limited authority on Insurance Code section 758 in its "Final Statement of Reasons" Direct Repair Programs and Labor Rate Surveys File No. RH01013503 (July 29 2002) in the following manner:

> Section 758 does not authorize the Department of Insurance ***to dictate or set how any insurer*** conducting an auto body repair labor rate survey should conduct its survey or ***what method it should use to determine prevailing auto body rate in a specific geographic area***. It simply says that [if] [an] insurer conducts an auto body repair labor rate survey to determine and set a specified prevailing auto body labor rate in a specific geographic area, they must provide the results of the survey to the Department of Insurance (pages 7, 13-14, 30-31, and 38-39). (Emphasis Added)

After reviewing the Department's proposed labor rate survey regulations (including the September 26 revisions) and subsequent discussions with the Department, it is our view that the Department has exceeded its statutory authority under Insurance Code section 758.

Consider the proposals under section 2695.81: The entire section is about setting how an insurer conducts labor rate surveys as evidenced by the title "Standardized Auto Body Repair Labor Rate Survey;" Also, it specifies "one" method (Geographic Information System like the ArcGIS developed by Environmental Systems Research Institute, Redlands) (d) (8) (B) and requires detailed geographic boundaries for an insurer labor rate survey, which includes a core area of six auto body repair shops and a periphery (d) (8) (A) (4), (d) (8) (C), (d) (8) (E), and (d) (8) (F); and the regulation further dictates the use of the Standardized Labor Rate Survey under (e) (1) (A), (B), (C).

While we recognize that the proposed labor rate survey regulation uses the word "recommends" under section 2695.81 to suggest that the regulation is voluntary, we do not believe that the proposed labor rate

survey regulation is voluntary based on our discussions with the Department. First, if the goal is to truly recommend a methodology, then there is no need for a regulation as the Department can simply inform insurers their preferred methodology. We have been on record requesting that the Department include additional or other acceptable methodologies (besides Geocoding) to show that there is more than one methodology that would work. For example, we have inquired about whether the "cost of living adjustment" (currently used by some companies) would still be acceptable, and the Department has given no assurances that such approach or any other methodologies would be acceptable. The implication is that only geocoding is the acceptable methodology. It also has become apparent that this is a workload issue for the Department as there are numerous methodologies utilized by insurers today, and thus one of the primary purposes of the proposed labor rate survey regulation is to standardize the labor rate survey process for the convenience of the Department. In sum, designating the proposed labor rate survey as voluntary in the regulation does not cure the fundamental issue that the Department lacks authority under Insurance Code section 758 for such regulations.

Relevance of California Supreme Court Ruling in the Association of California Insurance Companies v. Jones Case (2015) 235 Cal.App.4th 1009

In citing Insurance Code sections 790.03 and 790.10 as authorities for the proposed sections (including the September 26 revisions) 2695.81, 2695.82, and 2698.91, the Department ignores the Court of Appeal's holding in *Association of California Insurance Companies v. Jones* that the Legislature has defined unfair and deceptive acts in Insurance Code section 790.03 and that the Insurance Commissioner has no authority to create additional definitions by regulation. The principles established by the Court of Appeal in the *Jones* case prevent the Department from relying on sections 790.03 and 790.10 as authority for the adoption of the proposed regulation. It would be imprudent to adopt the proposed regulation before the California Supreme Court issues a ruling in the *Jones* case.

The rebuttable presumption that would be created by proposed sections 2695.81 and 2695.82, in essence, would define the failure to use the standardized labor rate survey as presumably an unfair trade practice as set forth in Insurance Code section 790.03 (h)(5). The authority to adopt regulations that define an unfair trade practice is exactly what the Court of Appeals concluded cannot be done and is an issue that the Supreme Court is considering in the *Jones* case.

The Supreme Court will hear oral argument on the *Jones* case on November 2nd, 2016. The Court will hand down a decision in the case no later than February 1, 2017. We urge the Department to delay the adoption of any regulations purporting to be authorized by the Unfair Insurance Practices Act until the Department has the benefit of the Supreme Court's ruling in the *Jones* case.

II. Reference - The September 26, 2016, proposed revisions to sections 2695.81, 2695.82, and 2698.91 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."

The September 26 revisions to proposed sections 2695.81, 2695.82, and 2698.1 continue to rely on Insurance Code sections 758 and 790.03 as reference for the regulation; however, neither statute is a proper reference for the proposed regulations. The principles established by the Court of Appeal in the *Association of California Insurance Companies v. Jones* prevent the Department from relying on sections 790.03 and 790.10 as reference for the adoption of the proposed regulation. It would be imprudent to adopt the proposed regulation before the California Supreme Court issues a ruling in the *Jones* case.

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, 2695.82, and 2698.91 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 regulations go beyond any interpretation or implementation of the three duties delegated to the Department in subdivision (c) of section 758. Therefore, the citation of section 758 as reference for sections 2695.81, 2695.82, and 2698.91 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, 2695.82, and 2698.91, the Department is taking the position that the proposed labor rate survey regulation is 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, "[o]nce 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, 2695.82, and 2698.91 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 falls 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.

The Supreme Court will hear oral argument on the *Jones* case on November 2nd, 2016. The Court will hand down a decision in the case no later than February 1, 2017. We urge the Department to delay the adoption of any regulations purporting to be referenced by the Unfair Insurance Practices Act until the Department has the benefit of the Supreme Court's ruling in the *Jones* case.

III. Consistency - The September 26, 2016, revisions to sections 2695.81, 2695.82 and 2698.91 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."

The September 26 revisions to sections 2695.81, 2695.82, and 2698.91 fail to address the inconsistency issue with the Court of Appeal's decision in *Association of California Insurance Companies v. Jones*. It would be imprudent to adopt the proposed regulation before the California Supreme Court issues a ruling in the *Jones* case.

Inconsistent with Association of California Insurance Companies 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, 2695.82, and 2698.91 to delineate conduct that may fall outside the meaning of section 790.03 (h) is at odds with the holding of the *Jones* case. The Supreme Court will hear oral argument on the *Jones* case on November 2nd, 2016. The Court will hand down a decision in the case no later than February 1, 2017. We urge the Department to delay the adoption of these regulations until the Department has the benefit of the Supreme Court's ruling in the *Jones* case.

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 section 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 may not require an administrative law judge to follow

a presumption that is created by regulation. Therefore, 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.

IV. Clarity - The September 26, 2016, proposed revisions to sections 2695.81, 2695.82, and 2698.91 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."

As noted in our introductory comments above, some of the amendments help clarify parts of the proposed amendments to sections 2695.81, 2695.82, and 2698.91, but overall other parts of the proposed regulation still fail to comply with the clarity standard because insurers will have difficulty understanding, and therefore compliance with several of the provisions in the regulations.

Section 2695.81 Subdivisions (d) (8) (4) (C), (E), and (F) - Geocoding Core Area and Periphery
While we recognize and appreciate the Department's two webinars on geocoding and its offer to make the "geocoding proof of concept demonstrator available," we have received feedback that the regulation itself on paper does not necessarily provide the clarity needed for persons directly affected by the regulation. Also, it is unclear how the geocoding would work in a rural area where auto body repair shops may be sparse. For the industry, the biggest issue regarding "clarity" is, how does this regulation offer any compliance guidance to insurers not adopting the standardized survey? This is especially important when we consider the likelihood that most insurers will want to use their current survey methods and not adopt the geocoding methodology.

If "geocoding" is the only permissible methodology for determining a geographic market area, then these proposed regulations will be unsuccessful. Use of geocoding will lead to inflated auto body repair rates and will promote collusion. This will have a direct effect on costs for insurers and consumers needing auto body repairs. This one issue, alone, will disqualify the vast majority of the marketplace from qualifying for the presumption of compliance in the regulations, and will lead to instances of dispute. Without the Department providing additional direction on other acceptable methodologies, this lack of clarity will exist. It is our sense that it is highly unlikely that the latest proposed regulation is likely to be widely adopted in the marketplace. There is uncertainty with what happens if an insurer chooses not to use the standardized survey and continues with its current methods. In the absence of the Department providing a reasonable pathway for voluntary compliance with a "best practices" standard for labor rate surveys, insurers will conduct labor rate surveys in a diverse set of ways. This will not be a workable result and is a recipe for further disputes where some insurer, eventually, will be treated poorly enough that it chooses to become a test case on Department authority. The proposed regulations offer no compliance guidance to insurers not adopting the standardized survey

Sections 2695.81 Subdivisions (d) (8) (A) (3) (a-f) and 2695.82 Question 3 (g) and (h) - Types of Labor
In both sections additional rates were added for carbon fiber and fiberglass. The proposed regulation appears to require a different repair technician for each type of repair outlined in both sections. If so, this may not be reflective of most auto body repair shops. How would insurers comply with these requirements?

Section 2695.81 Subdivisions (e) (2) (C) - Adjustment of Labor Rates
While part of the discussion with the Department was to address verification of the auto body repair shops, upon further review of the proposed changes in this subdivision we have concerns if insurers can actually comply with the proposed revisions. For example, how would an insurer obtain "three repair invoices" from an auto body repair shop that the insurer has not previously worked with or have worked with once or twice in the past? What if the auto body shop is unwilling to provide previous invoices?

Other Additional Questions:

1) What happens if not every auto body shop responds to each type of labor in the survey, how would insurers comply?
2) How many times is an insurer required to rewrite its estimates?
3) If an inspection is performed at a residence, how is the insurer to find a closest shop under geocoding in that instance?
4) How would an insurer address challenges with the re-estimation process that could lead to numerous supplemental estimates and thereby lead to more mistakes and delay resolution of claims?

V. Necessity – The September 26, 2016, proposed revisions to sections 2695.81, 2695.82, 2698.91 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.

We have reviewed the excerpts of the 45 complaints that the Department included in "Notice of Availability of Revised Text" and submit that those complaints indicate a one sided representation of a particular case and thus fail to satisfy the necessity standard. The complaints are allegations and do not indicate whether such complaints were justified or any enforcement action ensued. Of the 45 complaints, it appears 15 are from policyholders, and 30 from auto body repair shops.

In reviewing the policyholder complaints, one theme is that an insurer did not pay the "posted labor rate" of the auto body repair shop chosen: "I would like insurer [X] to pay the posted rates at [Y] collision." It is difficult to tell based on these allegations what the reasons for the non-payment, but perhaps paying the posted labor rate of an auto body shop is not part of the policyholder's contract. Maybe the auto body shop told the policyholder that the repairs are covered without mentioning that there may be a difference in labor rates if the shop is a non-direct repair shop.

As we have raised before, we disagree that auto body shops are consumers. They are businesses with a direct financial stake in these proposed regulations. Consider some of the basis of their complaints: "[Insurers] will not pay posted rates of shop;" "The insurance company should pay us our posted labor rate;" and "[i]t would also be nice to make a profit doing so." Generally, the payment of claims is governed by the terms of the contract, not by whatever the vendor wants the labor rate to be.

Also, a majority of the complaints raised by the auto body shops tend to focus on the price difference of the repair of the customer's automobile (in part due to higher posted labor rates). It has been brought to our attention that the nature of these complaints may run afoul of Business and Professions Code section 9884.9 subdivision (d). That section allows for a customer to *designate another person to authorize work or parts in excess of the estimated price*, but it also states in part that *"a designee shall not be the automotive repair dealing providing repair services* or an insurer involved in a claim that includes the motor vehicle being repaired or an employee or agent or person on behalf of the dealer or insurer." We urge the Department to work with the Bureau of Automotive Repair to address the implications of these complaints to Business and Professions Code section 9884.9 subdivision (d).

Section 2698.91 – Reporting Auto Body Repair Labor Rate Surveys

We also feel that the reporting requirements under this section are particularly onerous, unnecessarily cumbersome, with no justifiable necessity. This section will require the preparation of two different reports one public and one private for information that goes far beyond the authority authorized in 758(c). We do not

view this section as necessary for the Department to perform any task that they are authorized to perform. The revisions to the reporting rule will only create more work for insurers, especially the need to report the names of auto body repair shops who responded and those who do not, with no obvious benefit to consumers. This clearly fails to compile with the necessity test.

Section 2698.91(g) – Reporting Auto Body Repair Labor Rate Surveys
This past legislative session AB 2591 passed allowing insurers to transmit policy information electronically. This section requires insurers to "mail" a written survey to shops. Several of our members do phone or electronic surveys. We do not believe the Department has the authority to regulate the form of our survey or the method in which we execute it. We are willing to provide data on the shops we surveyed, as well as the survey questions. But we are not willing to only mail surveys to shops. The statue does not even require submission of our survey to the Department rather it only requires the results. Under the same section, we fail to see the necessity for disclosing our DRP shops as part of the report.

Policy and Cost Implications
As we have indicated in our previous comments and subsequent meetings with the Department, one of our ongoing and significant concern is that the proposed labor rate survey regulation (including the revisions) could drive up costs for our policyholders. It is a rather simple equation: higher labor rates leads to higher claims costs, which could then drive up the cost of insurance premiums for our policyholders.

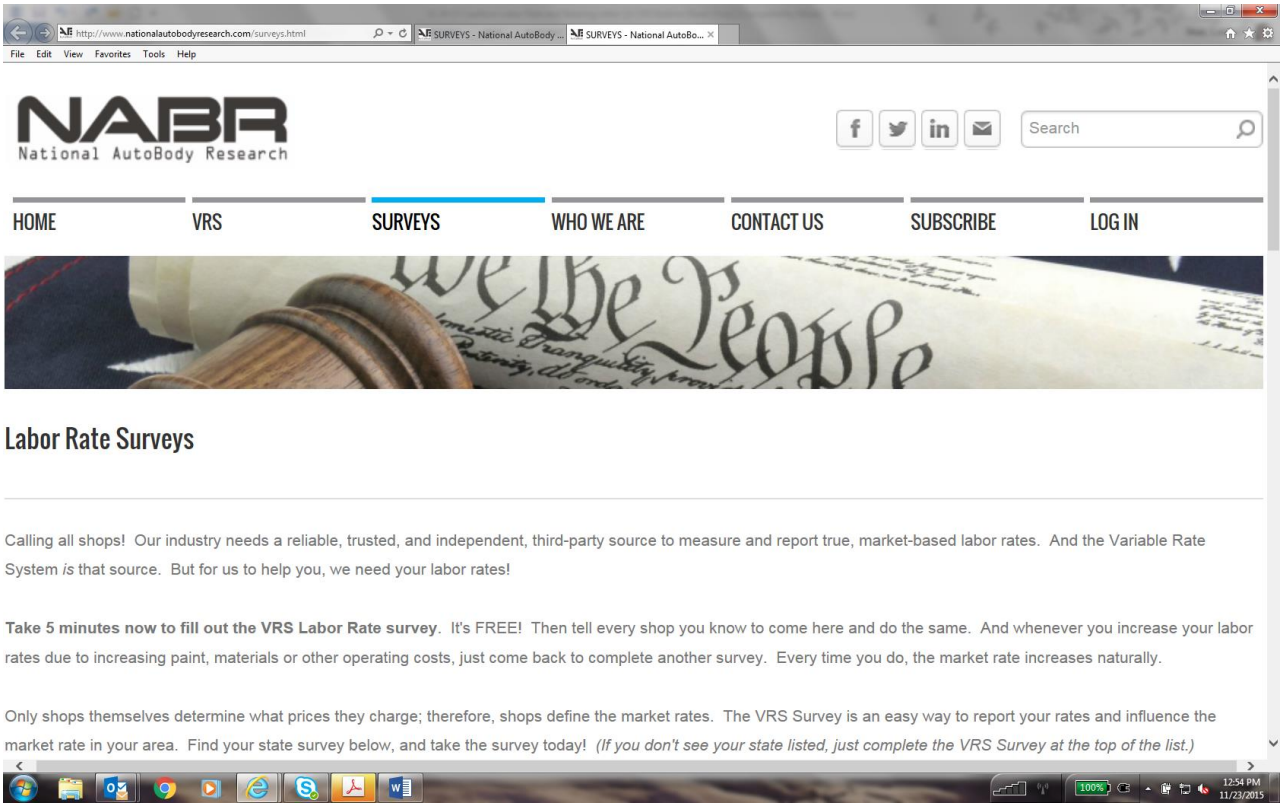
As we continue to reiterate, the Department's preferred software ("geocoding") could facilitate inappropriate labor rate comparisons among body shops. We recognize that the Department is proposing to revise the reach or range of the geocoding software, which would allow a starting point of six core auto body shops to be surveyed and up to 20 or more depending on the reach of the mile or density of auto body shops within a given area. Even if that were the case, we believe that it is insufficient to address our concerns because in places like Los Angeles six auto body shops can be within a couple of streets and 20 or more could be within a mile or two miles of the core area to be surveyed, which could lead to inappropriate labor rate comparisons thereby higher labor rates and claims costs.

The Department insists that the cost of the labor rate survey regulation is about $2,500 for the geocoding software based on its own experience using the software, and a $1.15 million anticipated benefits passed on to the auto body shops and their customers. We continue to disagree with this miniscule estimate. It is important to note that the Department's estimated increase in cost to the industry is limited to one year; however, we believe that it is an insufficient time frame projection because we expect such costs to multiply in the following years.

There are two costs that the Department has not accounted for, implementation and higher claims costs. Implementation costs will vary but they generally include information technology update, staff time to input the information required under the regulations, and maintenance of the software. One company determined that historically, their claim costs increase after a survey by $12.9 million while the increase after an inflationary adjustment is $4.1 million, a difference of $8.8 million. If the rest of the industry had a similar experience, the result would be a $116.6 million increase in industry total California physical damage claims costs over and above the effects of inflation.

Based on the excerpts of complaints the Department has made available, a good number of auto body shops are pushing for payment based on their "posted labor rate," and this is the implication of the proposed regulation. Posted labor rate has never been reflective of the "market rate." The analogy here is that posted labor rates are like hotel full-price rack rates. Here, posted labor rate do not reflect what an auto body shop will accept based on how busy it may or may not be, so the posted labor rate rarely represents the "market rate" or reflects the competition in the market place.

More broadly, it appears that some in the body shop community are already looking for ways to drive up labor rates[1]:



To date, we have continually asked the Department about our recourse if we witness inappropriate labor rate comparisons by the auto body shops due to the proposed labor rate survey regulation, and we have not received any assurances that would alleviate our concerns. If anything, the Department maintains that it has no jurisdiction on auto body shops.

Also, the proposed labor rate survey regulation could stifle innovation because it will in effect memorialize one, uniform survey method which will ultimately restrict insurers from continuing to innovate their claims processes. Insurers continue to use technological advances to make claim resolution easier and quicker for consumers.

For example, some insurers now allow insureds to use an “app” to send photographs of their damaged vehicles to settle their claims, rather than having to visit a repair shop or meet with an adjuster to receive an estimate. This is not only easier for the consumer, but also cuts down significantly on costs. The geocoding methodology is based on the current (though perhaps soon outdated) premise that estimates are only written at auto body shops. If these regulations are passed, insurers will be forced to decide between innovating their processes for the benefit of consumers or maintaining an outdated claims settlement model to secure the presumption of fair and equitable settlement.

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 shops and could lead to the unintended consequence of higher insurance costs for our policyholders. We reiterate that auto body shops are not policyholders of private passenger auto insurance. They do not pay any premium, purchase coverage, or make claims against a private passenger automobile insurers as a result of an accident with a policyholder. Stated

[1] "*SURVEYS." National AutoBody Research. N.p., n.d. Web. 24 Nov. 2015.*

differently, the effectuation of the proposed labor rate survey regulation would adversely impact the true consumers of private passenger auto insurance (those who pay premiums, purchase policies, and have accidents and the resulting claims and claimants with policyholders, not third party vendors who are at arms' length in their dealings with insurers). Policyholders are the consumers which the CDI has authority to protect by its regulations, and none other. To do so otherwise, as being proposed under the labor rate survey regulation, is simply inconsistent with the Department's core mission and lead to utter absurdities (e.g., Does the Department contend that it has authority to insert itself into the dealings of insurers with any vendor with which an insurer contracts?) In sum, we urge the Department to take a closer look how its proposed auto labor survey regulation could adversely impact the cost of insurance for policyholder.

Other Challenges

As we have stated above, we have serious concerns about what statutory authority allows for the proposed labor rate survey regulation and the policy implications of the proposed regulation moving forward. Below is a list of additional concerns, challenges, and issues.

2695.81 – The Standardized Auto Body Repair Labor Rate Survey

- (d) (1) (A) (1) We fail to see the necessity for the survey to be done annually as there is no authority for this in the statute.
- (d) (1) (A) (2) As a whole, this section is confusing and further complicates the regulations.
- (d) (1) (B) Given the extensive nature of the survey requirements, four months is insufficient time to prepare the information.
- (d) (1) (C) This section would enable an insurer to extend the life of a survey if they use the Consumer Price Index for all urban consumers for CA (CPI-U). If an insurer uses CPI-U to extend a survey, an insurer should get some benefit, like a commensurate increase in property damage, collision and comprehensive premiums. The point being here is that the Department's responsibility is to regulate insurance and control insurance rates to the benefit of consumers, but instead these proposed regulations do the opposite increasing costs for insurers that are ultimately passed on to consumers. The Department cannot expect to simultaneously increase costs for insurers and hold down costs for consumers.
- (d) (2) – The sample size section is too onerous to survey all shops in California. Sampling should be allowed because it is statistically valid. It is ironic that insurers have to survey everyone, but can only use six shops to make determine a prevailing rate. This may lead to collusion by the auto body repair shops. Other questions include:
    - Where do we get accurate information on all licensed bar shops?
    - The Bureau of Automotive Repair (BAR) website indicates they handle over 36,000 "automotive repair dealers" (includes body shops, mechanic shops, smog stations, tire shops, exhaust shops, etc.). Are we required to survey all 36,000? If it is only "body shops", how do we identify those?
    - The regulations do not address how an insurer handles new or closed shops. If we have information that a shop shut down, can/should they be removed from the prevailing rate calculation? How is a newly registered BAR licensed shop handled?
    - Is there a difference between licensed and registered shops?

- (d) (3) – Under this section, why are insurers required to ask the auto body shops if they are licensed but we have no method to verify it? What is the process for holding the shops accountable?
- (d) (4) – This section would limit rates that could be used to include only those that meet certain standards but there is no accountability for shops to verify they meet those standards. A downside to this section is that it will preclude shops that insurers know can complete some work without the ability to verify similar rates from other shops. This section basically will be a way to exclude shops that

carriers work closely with but who are not in our direct repair programs (DRP).

- (d) (5) – In this section, some insurers believe that a "median" is more appropriate and statistically valid, and that simple majority only add to the statistical confusion.
- (d) (6) – This section exclude DRP rates which reflect actual negotiated market rates between market participants, while requiring the inclusion of non-negotiated arbitrary rates without any check or accountability. A DRP rate is a much more valid market rate than the posted rate, particularly since insurers are often charged more than individual consumers by shops. A good example here is the "billed vs paid" on injury claims in the medical field. Health insurers do not pay the billed amount on hospital claims. Neither do workers compensation insurers. The prevailing rate is what is actually paid by customers and not what shops wish they could get. In the proposed labor rate survey regulation, the written survey itself precludes any discount rates even those outside of DRPs. Why would only non-discounted rates apply (beyond DRPs)? Why not allow insurers to use the discounts available to customers?
- (d) (7) – This section would specifically preclude the ability to provide "checks and balances" to the responses of shops. This will lead to simple inflation of labor rates and costs to consumers. This section also clearly contradicts with section 2695.8 (4) (c) for total loss calculation, which specifically accepts the comparable cost from a computerized valuation service to determine market values. Why is that an acceptable market value for one type of claim, but not the prevailing rate for the other type of claim? Isn't that 'unfair' to a claimant choosing to get their vehicle repaired?
- (d) (8) – Geo-coding methodology is too cumbersome to implement, relies on too few shops and will facilitate collusion in a given geographic area on responses to the survey. Insurers do not agree that a different labor rate is required for each category the CDI is requiring on the survey. This just does not reflect the reality of claims handling because it results in different rates for shops that may be right next to each other. Every shop will have a different rate. Also, why do insurers have to survey all licensed shops if the core area for a given shop is 6 shops?
- The listing of rates to be surveyed is not complete and we do not think the separate rate(s) is required or appropriate. For example, "Paint & Materials" and "Daily Storage Rate" are not on the list and are very contentious issues with the shops. However, we do not think there should be any distinction in labor rates at all.
- We have concerns about when a shop opens, closes, loses licensing, or has their paint booth go down for week, etc.
- How come an insurer cannot use the previously provided rate by a shop, if they don't respond? No response should be seen as no change in rates. That gives the shops a right to change their rates, but also reduces the burden on the shops and carriers to keep collecting information. They will need to respond to dozens of carriers in a short window.
- (d) (9) Under this section, the standard questionnaire will provide no checks and balances. It must be mailed or e-mailed, no in person or phone surveys. Every insurer in the state will be sending surveys to every shop. There is no ability to prevent the shop from entering a rate that does not reflect a rate they really charge and no way for a carrier to dispute it.
- (d) (9) (e) (1) This section is too cumbersome and does not reflect the real marketplace. It would make insurers do an estimate when not at a shop and then have to change the estimate when a customer chooses a different shop. This is not realistic and is impractical and costly. The proposed labor rate survey regulation do not account for evolving claims handling and that inspections often occur at locations different than where the estimates are written and may be different than where the vehicle is located. Furthermore, as written, it enhances "gaming" opportunities for the shops. They can coach an insured to indicate a more expensive location where they want their vehicle repaired and then later get the vehicle repaired at a shop that is less expensive.
- (d) (9) (e) (1) (b) (2) – Under this section, it is not clear what the shortest driving distance is? This is different than prior straight line distance, and not very practical to implement. Insurers would have to have every licensed shop mapped for every adjuster so that they can figure out the closest shop.
- (d) (9) (e) (2) (C) – This section provides an insurer with the only "check and balance" in the entire

regulation. Is an insurer really going to maintain a file on every BAR licensed shop that has three repair invoices from the prior 60 days? Why is it limited to 60 days? Why not the same time period the survey is in effect? This is impractical and difficult to implement. Also, the last sentence in this section effectively says that if we have evidence a shop charges less than what the labor rate is that is charged or quoted on an invoice, the lowest we could take the labor rate is to the posted rate since the shop would argue any other rate is a discounted rate and we cannot use invoices with discounted rates. Why do insurers have a standard for three invoices, but shops do not need to provide any proof?

- Section 2695.82 Survey Questionnaire. Why does it prohibit the shop from including discounts offered to customers (non-direct repair rates)? It assumes that all shops have three types of rates (non-discount, discount and direct repair). A better solution is that the questionnaire should ask the question, "What are the rates charged by your shop" or ask for the "prevailing rate you "charge" your customers on your invoices." The language in the questionnaire is confusing and will result in invalid responses. There should be a provision for the shop to have an option to call the carrier and provide the response over the phone. The requirement for carriers to only mail this to all shops is unlikely to work. From a practical standpoint, shops and carriers should be able to decide between themselves on what is the most convenient way to respond.

Conclusions

Given the fundamental differences between the industry and Department on the proposed labor rate regulation and because the *Association of California Insurance Companies v. Jones* is pending before the California Supreme Court, which could partly address the authority, reference, and consistency issues raised here, we urge the Department not to move forward with the proposed labor rate regulation. In our view, not addressing the issues here is tantamount to "regulatory overreach."

In lieu of adopting this proposed labor rate regulation survey, we reiterate our offer to work with the Department in convening a task force involving all the stakeholders (legislative policy staff of the Senate and Assembly Insurance Committees, Bureau of Automotive Repair, Governor's Office) to discuss a more comprehensive approach to these issues rather than moving forward with a one sided regulation. At this point, we are respectfully opposed to these proposals.

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), Katherine Pettibone, AIA Vice President (916-402-1678/kpettibone@aiadc.org), or Marti Fisher, California Chamber of Commerce, (916-930-1265/marti.fisher@calchamber.com).