

**STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
45 Fremont Street, 21st Floor
San Francisco, California 94105**

**NOTICE OF PROPOSED ACTION AND
NOTICE OF PUBLIC HEARING**

**RH05044654
September 8, 2006**

SUBJECT OF HEARING:

A hearing will be held regarding the adoption of proposed amendments to regulations interpreting and making specific provisions of Insurance Code Section 758(c).

AUTHORITY AND REFERENCE:

The Insurance Commissioner proposes to adopt specified portions of the subject regulations under the authority of Insurance Code Sections 758, 790.10, 12921, and 12926. The Commissioner's decision on the adoption of the amendments will further interpret and make specific provisions of Insurance Code Sections 758(c) and 790.

HEARING DATE AND LOCATION:

Notice is hereby given that public hearings will be held to permit all interested persons the opportunity to present statements or arguments, orally or in writing, with respect to these regulations as follows:

Date and time:	October 23, 2006 9:30 am*
Location:	Department of Insurance Hearing Room 45 Fremont Street, 22nd Floor San Francisco, CA 94105
	October 24, 2006 9:30 am*
Location:	Ronald Reagan State Office Building 300 South Spring Street Ground Floor Hearing Room Los Angeles, California 90013

*These hearings will continue on the dates noted until all testimony has been completed or 4:00 p.m., whichever is earlier.

PRESENTATION OF WRITTEN AND/OR ORAL COMMENTS; CONTACT PERSONS:

All persons are invited to present oral and/or written comments at the scheduled public hearings. Written comments not presented at the scheduled public hearings should be addressed to the following contact person:

Teresa R. Campbell, Staff Counsel
California Department of Insurance
45 Fremont Street, 21st Floor
San Francisco, CA 94105
Telephone: (925) 518-7057

Questions regarding the hearing, comments, or the substance of the proposed action should be addressed to the above contact person. If she is unavailable, inquiries may be addressed to the following backup contact person:

Tony Cignera, Division Chief, Consumer Services Division
California Department of Insurance
300 South Spring Street, 14th floor
Los Angeles, CA 90013
Telephone: (213) 346-6360

DEADLINE FOR WRITTEN COMMENTS:

All written materials, unless submitted at the hearings, must be received by the Insurance Commissioner, c/o the contact person at the address listed above, no later than **4:30 p.m. on October 24, 2006**. Any written materials received after that time will not be considered.

COMMENTS TRANSMITTED BY E-MAIL OR FACSIMILE:

The Commissioner will accept written comments transmitted by e-mail provided they are sent to the following e-mail address: campbellt@insurance.ca.gov. If you are sending a comment via e-mail in ODF format, please include a Word form of the document in addition to the PDF version. The Commissioner will also accept written comments transmitted by facsimile provided they are sent to the contact person listed above at the following facsimile number: (415) 904-5490. **Comments sent to other e-mail addresses or other facsimile numbers will not be accepted. Comments sent by e-mail or facsimile are subject to the deadline for written comments set forth above.**

ACCESS TO HEARING ROOMS:

The facilities to be used for the public hearing are accessible to persons with mobility impairments. Persons with sight or hearing impairments are requested to notify the contact person (listed below) for these hearings in order to make special arrangements, if necessary.

ADVOCACY OR WITNESS FEES:

Persons or groups representing the interests of consumers may be entitled to reasonable advocacy fees, witness fees, and other reasonable expenses, in accordance with the provisions of Subchapter 4.5, Title 10, of the California Code of Regulations, in connection with their participation in this matter. Interested persons should contact the Office of the Public Advisor at the following address, in order to inquire about the appropriate procedures:

California Department of Insurance
Office of the Public Advisor
300 Capitol Mall, 17th Floor
Sacramento, CA 95814
(916) 492-3559

A copy of any written materials submitted to the Public Advisor regarding this rulemaking must also be submitted to the contact person for this hearing, listed above. Please contact the Office of the Public Advisor for further information.

INFORMATIVE DIGEST:

SUMMARY OF EXISTING REGULATIONS AND POLICY STATEMENT OVERVIEW:

Ins. Code section 758(c) requires any insurer that conducts an auto body repair labor rate survey to determine and set a specified prevailing rate in a specific geographic area to report the results of the survey to the Department of Insurance. The Department of Insurance is required to make the information available upon request. The statute, however, was unclear as to what constituted an auto body repair labor rate survey, what constituted a prevailing rate, what information had to be reported to the department, where the results of the survey should be reported, and how to obtain a copy of surveys submitted pursuant to the statute.

Title 10 of the Cal. Code of Regulation sections 2698.1, operative October 25, 2002, provided some guidance in these areas by defining “labor rate survey” and “prevailing auto body rate” as used in the statute. Section 2698.1 further provides a clarification of what information should be included in the results reported to the Department.

Although the current regulations provide some broad definitions, outline what information should be included in the surveys, and provide a procedure for submitting the surveys to the Department of Insurance, based on the information, reports, and complaints we have received from consumers, insurers, and the auto body industry, there are several areas that require further clarification. For example, because there is no standard methodology specifically outlined in the statute (i.e. should insurers use the average rate of the shops surveyed or the median of rates obtained by survey), the surveys tend to produce inconsistent results, creating confusion when the insurers rely on the results to support their adjustment of the body shop estimate as

reasonable within the meaning of CCR 2695.8(f) of the Fair Claims Settlement Practices regulations. As a result of the labor rates disputes that arise, the consumer is often placed in a position where they have to pay the difference between the shops labor rate and the rate the insurer will pay before the body shop releases the car. The proposed amendments will further define specific terms and more clearly set out the purpose and use of the surveys.

The Commissioner has determined that the adoption of an amendment to the existing regulations is necessary in order to effectively administer Insurance Code Sections 758(c) and 790. The regulations would do the following:

- 1) Further define “labor rate survey” and “prevailing auto body rate.”
- 2) Outline what additional information must be included in labor rate survey results reported to the Department of Insurance and where those results should be sent.
- 3) Clarify the criteria, purpose and use of each type of survey identified in the regulations.
- 4) Clarify how to request labor rate survey results submitted to the Department of Insurance.

The specific purpose of each adoption and amendment, and the rationale for the determination that each adoption and/or amendment is reasonably necessary to carry out the purpose for which it is proposed, together with a description of the public problem, administrative requirement, or other condition or circumstance that each adoption is intended to address, is set forth below.

EFFECT OF PROPOSED ACTION:

The major effects of the regulations are as follows:

Proposed section 2698.91(a): (Amend)

Existing 2698.91(a) defines the term “auto body repair labor rate survey” as used in Ins. Code section 758(c). The proposed amendment would make the definition apply to the term “survey” as well. Additional language and punctuation changes have been made for clarification and consistency purposes. The change to this section is necessary to further define and clarify these terms in order to assist the reader in understanding the statute and regulations.

Proposed section 2698.91(b): (Amend)

Existing 2698.91(b) defines “prevailing auto body rate” as employed in Ins. Code section 758(c). Confusion has arisen regarding the current definition. The proposed amendment clarifies the definition by more specifically describing the term. Webster’s New World Dictionary, Third College Edition (1991), defines “prevailing” as “predominant....widely existing....prevalent”. The proposed definition clarifies that “prevailing auto body rate” means the rate at or below which, the majority of surveyed shops charge in a geographic area. Further, in order that the rate described above does not fall below the average of rates in an area, the prevailing rate must be at least equal to or greater than the average rate. Additional language and punctuation changes

have been made for clarification and consistency purposes. The change to this section is necessary to further define and clarify these terms in order to assist the reader in understanding the statute and regulations.

Proposed section 2698.91(c): (Amend)

Existing 2698.91(c) requires the insurer to provide a description of what geographic areas were surveyed, a description of the methodology used to reach the prevailing rate, and the prevailing rate established for each geographic area surveyed. This information provides a context for the information specifically outlined in the statute. The proposed amendment further requires that the submitting insurer provide the labor rate charged by each particular shop surveyed, the total number of shops that responded to their survey, and the date the survey was completed.

Additional language and punctuation changes have been made for clarification and consistency purposes. The change to this section is necessary to further clarify the statutory provisions and for organizational purposes and consistency.

Current section 2698.91(d): (Repeal)

This section is repealed, as the submission requirements to the Department have been clarified in the adoption of proposed section 2698.91(f).

Proposed section 2698.91(d): (Adopt)

The proposed adoption of 2698.91(d) is intended to clarify the distinction between public information, as described in section 2698.91(c) and non-public information. The non-public information required to be submitted to the Department includes the (1) the labor rate reported by each shop that responded to the survey; (2) the name and address of each shop sent a survey, but that did not respond to the survey, reported for each geographic area surveyed; and (3) a copy of the survey questionnaire used to survey the auto body repair shops.

Proposed section 2698.91(e): (Adopt)

This adoption clarifies the requirement that the survey must be conducted in writing or the insurer must maintain written records of the information gathered by any method other than writing. Upon request, the department shall have access to all records, data, computer programs, or any other information used by the insurer or any other source to determine geographic area labor rate information. This adoption is necessary to ensure that the Commissioner is able to obtain and review the documentation to ensure that the surveys were conducted in compliance with the standards set forth in these regulations.

Proposed section 2698.91(f): (Adopt)

This proposed section sets forth the submission requirements that insurer must adhere to when submitting the surveys to the department. The change to this section is necessary to better implement the statutory provisions and simplify the submission and publication of the statutory requirements.

Proposed section 2698.91(g): (Re-letter and Amend)

Existing 2698.91(e) sets out the procedure for making copies of the surveys available to the public. Minor changes have also been made to complete the citation to the California Public Records Act. This section is re-lettered to section 2698.91(g) and amended to further clarify what information will be made public and what information will not be made public.

Proposed section 2698.91(h): (Adopt)

This new section declares that an insurer shall not use any discounted rates, obtained from Direct Repair Program (DRP) shops, in its surveys. This adopted section clarifies the Department's position that a survey is not reliable if it contains labor rates that are artificially low and that do not reflect the retail market for auto body repairs that consumers, who do not have DRP arrangements, must pay for repairs.

Proposed section 2698.91(i): (Adopt)

The proposed section clarifies the primary purpose of a survey submitted pursuant to Insurance Code section 758, which is to inform the public about the prevailing labor rates charged in a specific geographic area and to provide insurers with a starting point in negotiating labor rates with auto body repair shops. It further clarifies that a survey shall not be used to cap or reduce the labor rate charged on an estimate or repair order prepared by the claimant's chosen auto body repair shop or to support the reasonableness of an insurers' adjustment of a written estimate provided by a claimant pursuant to section 2695.8(f)(3) of California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, except as provided in Section 2698.92 of these regulations. This amendment is necessary to describe the limited purpose of a survey submitted pursuant to Insurance Code section 758 in order to distinguish it from the purpose and scope of a survey conducted pursuant to proposed section 2696.92.

Proposed section 2698.91(j): (Adopt)

This proposed section is intended to clarify that nothing in these regulations shall be construed to require an insurer to pay more than the amount necessary to perform workmanlike repairs.

Proposed section 2698.91(k): (Adopt)

The proposed amendment clarifies that nothing in these regulations prohibits an insurer from voluntarily negotiating or contracting with an auto body repair shop for a specific labor rate. The change to this section is necessary to clarify the statutory provisions.

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.

Proposed section 2698.91(m): (Adopt)

The Bureau of Automotive Repair does not require auto body repair shops to post the labor rates they charge to customers. Also, in some cases, where auto body repair shops do post a labor rate, these shops do not charge this posted rate on any consistent basis. The purpose of this amendment is to recognize this reality and clarify that insurers are not required to use a shop's posted labor rate, unless that shop charges its posted labor rate on a consistent basis.

Section 2698.91 (Note):

The "Note" for this section is amended to add the reference cite for Insurance Code section 790.03, as the Unfair Practices Act is the basis for the department's regulation of how surveys are conducted is based upon the premise that these surveys should be reliable, fair and reasonable. Also, Section 2695.8(f)(3) of California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5. (Fair Claims Settlement Practices Regulations) was added as this section was referenced in our proposed section 2698.91(i).

Proposed section 2698.92(a): (Adopt)

This section is adopted in order to set forth additional standards and processes that would result in a more reliable survey, than a survey conducted pursuant to the minimal standards of a survey conducted pursuant to Insurance Code Section 758(c). The additional standards set forth in this new section (2698.92), are based upon the authority granted under Insurance Code Section 790.10. This proposed amendment seeks to set forth the method by which an insurer may support its compliance with Insurance Code section 790.03(h)(5) and the associated Fair Claims Settlement Practices Regulations section 2695.8(f)(3), which requires insurers to reasonably adjust an estimate prepared by the claimant's shop. If an insurer chooses to conduct a survey pursuant to this newly adopted section, the Department may consider this survey in determining whether an insurer has offered a fair and reasonable claims settlement. As these may be some differences in the standards or requirements of a survey conducted pursuant to section 2698.91 and section 2698.92, additional language is adopted to clarify that in instances where the standards in this section and Section 2698.91 conflict, the provisions of this section shall

supersede the provisions of Section 2698.91.

Proposed section 2698.92(b): (Adopt)

The Department recognizes that overhead and other costs that determine a labor rate may change over time. Survey data may become stale and not properly represent the going market rate for repairs. This subsection is proposed to set forth the standard that, unless otherwise authorized by the Department, a survey compliant with this section must be submitted to the Department no less than annually.

Proposed section 2698.92(c): (Adopt)

According to the Bureau of Automotive Repair, there are approximately 5,000 automotive repair dealers licensed to perform automobile collision repair services in this state. Given this relatively low number of shops, especially when broken down into smaller geographic areas, surveying too few shops would result in an unreliable prevailing rate for any given area. This subsection is adopted to ensure that all qualified shops be surveyed to ensure the most accurate and reliable results. This language also reduces the possibility that the shops with known lower labor rates are used in a survey to the detriment of higher (but still reasonably) priced shops. To be a statistically valid survey, the insurer must survey, or send a survey questionnaire to, all known auto body repair shops licensed by the Bureau of Automotive Repair in a specific geographic area. All shops that respond to the survey, and which meet the standards set forth in subsection 2698.92(f) of these regulations, shall be used to determine the prevailing auto body rate in that geographic area.

Proposed section 2698.92(d): (Adopt)

This subsection is proposed to ensure that repair facilities, which may not be duly licensed by the Bureau of Automotive Repair, should not be used in the survey. Also, this subsection shall not require an insurer to verify the licenses status of surveyed shops with the Bureau of Automotive Repair, in cases where the survey questionnaire or survey format asks the repair shop to respond as to whether it is duly licensed to perform auto body collision repairs in this state.

Proposed section 2698.92(e): (Adopt)

The general premise is that shops that do not have all the standard equipment necessary to effect proper repairs may charge rates below the market rate due to cheaper operating costs. This subsection is intended to ensure that shops that do not meet certain standards shall not be used in a labor rate survey. An insurer may only use labor rates in a survey reported by shops that meet the enumerated specific standards. These standards were obtained from (1) the equipment requirements for auto body repair shops, as required by the Bureau of Automotive Repair and as described in California Code of Regulations, Title 16, Division 33, Chapter 1, Article 6, Section 3351.5, Equipment Requirements for Auto Body Repair Shops; and (2) the "Minimum

Recommended Requirements for a ‘Class A’ Collision Center”, as published by the Collision Industry Conference (CIC) in 2005. This subsection also recognizes that it would be burdensome on insurers if required to inspect each surveyed shop to determine if it meets these specific criteria. Therefore, additional language permits an insurer to ask the repair shop in the survey whether it meets the specifically identified standards. Lastly, language is added to clarify that these standards are only to be used to determine which shops’ labor rates may be included in a survey and it must not be used to prohibit a shop from performing repairs on a vehicle. Insurance Code Section 758.5 provides that all claimants have a right to have their vehicle repaired in the shop of their choice. The fact that a shop does not meet these standards should not be construed as permission for insurers to imply that the shop is inferior or should not be used by the claimant to perform repairs.

Proposed section 2698.92(f): (Adopt)

This subsection adds the additional standard that the survey results shall contain the labor rate amount charged by each particular shop that responded to the survey. The purpose of this subsection is to provide the Department with sufficient information it needs to verify the accuracy of the survey conducted by the insurer. This information will be considered non-public information and will not be subject to public disclosure, as described by these regulations in section 2698.91(g).

Proposed section 2698.92(g): (Adopt)

The purpose of this subsection is to clarify that the “prevailing auto body rate”, as defined in Section 2698.91(b), of these regulations, is the same standard that shall apply for a survey conducted pursuant to this section. Further, the department recognizes that other methods may result in fair and reasonable settlement offers. Therefore, this subsection also permits other methods, but only after review and approval by the Commissioner.

Proposed section 2698.92(h): (Adopt)

This subsection clarifies that the additional data and survey information provided in accordance with this section shall not be the subject of a Public Records Act request, pursuant to the California Public Records Act, Government Code section 6250 et seq. The additional intent of this subsection is to provide a mechanism for compliance with Insurance Code section 758(c), on making a survey public, while acknowledging that the additional information is not subject to public disclosure.

Proposed section 2698.92(i): (Adopt)

This subsection clarifies that the geographic area must be based upon the specific description of each area as cited in subsection 2698.92(j).

Proposed section 2698.92(j): (Adopt)

This subsection defines each geographic area zone. The purpose is to ensure consistency and reliability among insurers in their surveys.

Proposed section 2698.92 (Note): (Adopt)

The Note is proposed to add the Authority cites for Sections 758, 790.03, 12921, and 12926, Insurance Code and Reference: Sections 758 and 790.03, Insurance Code; Section 6250-6276.48, Government Code; and Section 2695.8(f)(3) of California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5.

MANDATES ON LOCAL AGENCIES OR SCHOOL DISTRICTS:

The proposed amendments to the regulations do not impose any mandate on local agencies or school districts. There are no costs to local agencies or school districts for which Part 7 (commencing with Section 17500) of Division 4 of the Government Code would require reimbursement.

COST OR SAVINGS TO STATE/LOCAL AGENCY OR SCHOOL DISTRICT OR IN FEDERAL FUNDING:

The Commissioner has determined that the proposed amendments to the regulations will result in no cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code, no other nondiscretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State.

ECONOMIC IMPACT ON BUSINESSES AND THE ABILITY OF CALIFORNIA BUSINESSES TO COMPETE:

The Commissioner has made an initial determination that the proposed amendments to the regulations do not have a significant, statewide adverse economic impact directly affecting business or the ability of California businesses to compete with businesses in other states.

POTENTIAL COST IMPACT ON PRIVATE PERSONS OR ENTITIES/BUSINESSES:

The Commissioner is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

FINDING OF NECESSITY:

The Commissioner finds that it is necessary for the welfare of the people of the state that the regulations apply to businesses.

EFFECT ON JOBS AND BUSINESSES IN CALIFORNIA:

The Commissioner is required to assess any impact the regulations may have on the creation or elimination of jobs in the State of California, the creation of new businesses, the elimination of businesses, and the expansion of businesses currently operating in the state. The Commissioner does not foresee that the proposed amendments to the regulations will have an impact on any of the above but invites interested parties to comment on this issue.

IMPACT ON HOUSING COSTS:

The matters proposed herein will have no significant effect on housing costs.

ALTERNATIVES:

The Commissioner must determine that no reasonable alternative considered by the Commissioner or that has otherwise been identified and brought to the attention of the Commissioner would be more effective in carrying out the purposes for which the regulations are imposed or would be as effective and less burdensome to affected private persons than the proposed regulations. The Commissioner invites public comment on alternatives to the regulations.

IMPACT ON SMALL BUSINESS:

The Commissioner has determined that the proposed regulations do not significantly affect small businesses in that the regulations pertain primarily to insurers and do not require any significant action on the part of any auto body shop or other small business.

COMPARABLE FEDERAL LAW:

There are no existing federal regulations or statutes comparable to the proposed regulations.

TEXT OF REGULATIONS AND INITIAL STATEMENT OF REASONS:

The Department has prepared an initial statement of reasons that sets forth the reasons for the proposed adoption of the amendments to the regulations. Upon request, the initial statement of reasons will be made available for inspection and copying. Written requests for the initial statement of reasons or questions regarding this proceeding should be directed to the contact person listed above. Upon request, the final statement of reasons will be made available for inspection and copying once it has been prepared. Written requests for the final statement of reasons should be directed to the contact person listed above.

The file for this proceeding, which includes a copy of the proposed regulations, the statement of reasons, the information upon which the proposed action is based, and any supplemental information, including any reports, documentation and other materials related to the proposed action that is contained in the rulemaking file, is available for inspection and copying at 45 Fremont Street, 21st Floor, San Francisco, California 94105, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday.

AUTOMATIC MAILING:

A copy of this notice, including the informative digest, which contains the general substance of the proposed regulations, will automatically be sent to all persons on the Insurance Commissioner's mailing list.

WEBSITE POSTINGS:

Documents concerning this proceeding are available on the Department's website. To access them, go to <http://www.insurance.ca.gov>. Find near the top of the page the major heading 'Protecting Consumers.' In this section, scroll down until you see the subheading 'BE INFORMED.' Click on the nearby 'Search for Proposed Regulations' link. When the search field appears, enter 'RH05044654' (the Department's regulation file number for these regulations). Alternatively, search for the California Insurance Code number of a code section that the regulations implement (for instance, "758"), or search by key word (for example, 'labor rate'). Then, click on the "Submit" button to display links to the various filing documents.

To browse, click on the "Browse All Regulations" button near the bottom of the screen. A list of the names of regulations for which documents are posted will appear. Find in the list the "Auto Body Repair Labor Rate Surveys" link, and click it. Links to the documents associated with these regulations will then be displayed.

MODIFIED LANGUAGE:

If the regulations adopted by the Department differ but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Interested persons should request a copy of these regulations prior to adoption from the contact person listed above.