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From: Rex Frazier, President
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RE: Proposed Principally At-Fault Regulations – (10 C.C.R. Section 2632.13)

The Personal Insurance Federation of California (PIFC) greatly appreciates the opportunity to submit comments on the California Department of Insurance's (CDI) proposal to amend Section 2632.13 of the California Code of Regulations ("Section 2632.13") regarding a driver's eligibility for a Good Driver Discount and the principally at-fault regulations.

PIFC previously submitted comments to the CDIs informal workshop on June 22, 2007. Our comments emphasized the need to improve accuracy of the first mandatory rating factor and modernize the principally at-fault regulations. We raised then, and reiterate with the current proposed regulations, concerns that the regulations undermine insurers' ability to produce accurate risk-based auto insurance rates.

As we now review the proposed regulations, we must ask the question why the CDI is proposing regulations that reduce the ability of insurers to adequately rate a driver's safety record. The proposed regulations seem particularly inconsistent with the CDIs current efforts with the Pay-as-You-Drive regulations. Under the proposed Pay-Drive regulations, the CDI is making an effort to improve an insurer's ability to more accurately evaluate and rate the second mandatory factor–miles driven annually. In contrast, we view the proposed changes to Section 2632.13 as a serious impediment to accurately rate the first mandatory rating factor – driving safety record. We believe the proposed regulation will hinder insurers in their efforts to thoroughly assess prior auto accidents that are relevant to and an important part of an insurance applicant's driver safety record.

Our primary concern continues to be the application of the principally at-fault regulations beyond the Good Driver Discount, as required in Proposition 103, to the First Mandatory Factor (Driver Safety Record).

Proposition 103 introduced the concept of "principally at-fault" only with respect to "Good Driver Discount policies." Insurance Code Section 1861.025 uses the concept of "principally at-fault" for purposes of qualifying for a Good Driver Discount policy. Under this concept, a driver's status as a "good driver" is only determined based upon

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accidents in which the driver is at least 51% at fault. An accident in which the driver is 50% or less at fault may not be used to determine "good driver status."

However, the current principally at-fault regulations also apply the "principally at-fault" concept to the assessment and evaluation of a driver's safety record for purposes of calculating auto insurance rates. But nowhere does Proposition 103 link the concept of "principally at-fault" with driver safety record. Insurance Code Section 1861.02(a)(1), which mandates that insurers use driver safety record as a rating factor, fails entirely to mention the concept of "principally at-fault." Nonetheless, the CDI has grafted, in excess of its statutory authority, the concept of "principally at-fault" onto the First Mandatory Factor. This improperly limits insurers' ability to comprehensively evaluate a consumer's driver safety record, which could adversely impact the weight of the driver safety record rating factor.

By broadening the principally at-fault regulations and misapplying this concept to the First Mandatory Factor, the CDI is making it more difficult to accurately determine an "insured's driving safety record." The proposed regulations limit insurers' access to, and use of, pertinent and necessary underwriting information related to an insurance applicant's driver safety record. In addition, the proposed regulation expand the exceptions to when a driver may be considered to be "principally at-fault" for the Good Driver Discount. The result of the proposed regulation will be contrary to the purpose and intent of Proposition 103, because the proposed regulations will diminish the value of the Good Driver Discount by artificially broadening the class of drivers eligible, as well as the accuracy of classifications for the First Mandatory Factor – driver safety record.

Overall, the proposed regulations improperly raise the burden of proof regarding a driver's safety record, making it more difficult for the insurer to provide consumers with insurance rates that accurately reflect the insurance applicant's risk of loss exposure. The proposed regulations undermine the rating impact of the First Mandatory Factor - driver safety record. The added restrictions on use of available data sources will create the need for costly systems changes within companies, along with other associated costs. The proposed regulations will create unnecessary delays in the processing of insurance applications, lead to needless underwriting conflict, and adversely impact an insurer's ability to calculate insurance rates in a timely manner. We also are troubled by the apparent lack of communication with the Department staff responsible for rate and class plan filings, given the probable impact on those filings and inconsistency with class plan regulations.

Given the extent of our concerns with the Proposed Regulations and our belief that the Proposed Regulations fail to meet the standards set forth in Government Code Section 11349.1 with regard to several of the specific proposals, we respectfully request the Proposed Regulations be withdrawn.

In the alternative, PIFC submits the following comments and suggestions for your consideration :

We previously proposed and respectfully request now, that CDI consider removing reference to driver safety record in the principally at-fault regulations. Such an amendment would retain Proposition 103's mandate that the "good driver" discount be determined with respect to "principally at-fault accidents," while increasing the potential to develop a more accurate determination of driver safety record.

We suggest the following:

> 2632.13. ~~Eligibility to Purchase Good Driver Discount Policy and~~ Guidelines for Determination of "Principally At-Fault~~.~~" Accidents and Eligibility to Purchase Good Driver Discount Policy.
>
> (a) An insurer shall use the following method to ~~In~~ determine~~ing a driver's qualification to purchase a good driver discount policy pursuant to California Insurance Code Section 1861.025, an insurer shall determine the driver's violation points and~~ whether a driver may be charged with a principally at-fault accident~~:~~
>
> ~~(1)E~~*f*or the purpose of determining the driver's eligibility for the Good Driver Discount policy pursuant to *Insurance Code Section 1861.025* ~~s as set forth in this section~~. ~~This section shall also apply in determining whether a driver was principally at fault in an accident for the purpose of determining~~ ~~, and~~
>
> ~~(2) For the purpose of determining~~ the driver's ~~safety record (First Mandatory Factor) pursuant to section 2632.5.~~

2632.13(b) ~~(c) a driver~~ A driver may be considered to be principally at fault in an accident occurring not more than three years preceding the effective or renewal date of the policy if the driver's actions or omissions were at least 51 percent of the proximate cause of the accident, subject to the exceptions set forth in Subsection (c~~d), and, in accidents not resulting in death, if the damage to the property of any one person caused by the accident exceeded $750.00.~~) and provided that:

We object to the proposed amendment adding the language *"occurring not more than three years preceding the effective or renewal date of the policy."* This proposed regulation would arbitrarily eliminate an insurer's ability to include in its class plan extra discounts for drivers with clean driving records for a period longer than three years. Not only is this contrary to the purpose of Proposition 103, it is in direct conflict with CDI's own class plan regulations, which expressly allow for discounts "based on a driver safety record longer than 36 months as long as the insurer verifies the driver's record as set forth in this section." 10 C.C.R. Section 2632.5(c)(1)(A). As implicitly recognized by the class plan regulations governing classification criteria for class plans, pertinent auto accident information relevant to an applicant's present risk of loss exposure should not be excluded from the underwriting process merely because it is older than 3 years. The Department has offered no justification to support its proposed change to an established underwriting practice that provides consumers with a comprehensive assessment of their particular risk of loss exposure, and the potential benefit of additional discounts for good driving beyond the 3 year period. We believe this proposed change is contrary to the intent and language of Proposition 103, and fails to meet the standards set forth in Government Code Section 11349.1, including authority and necessity to promulgate this regulation.

Additionally, the proposed regulation is inconsistent with other statutory language (1861.025 (c)), allowing a look back of 10 years for violations related to driving under the influence.

We suggest removing the proposed language: *"occurring not more than three years preceding the effective or renewal date of the policy."*

> Section 2632.13(b) ~~(c) a driver~~ A driver may be considered to be principally at fault in an accident ~~occurring not more than three years preceding the effective or renewal date of the policy~~ if the driver's actions or omissions were at least 51 percent of the proximate cause of the accident, subject to the exceptions set forth in Subsection (c~~d), and, in accidents not resulting in death, if the damage to the property of any one person caused by the accident exceeded $750.00.~~) and provided that:

(b)(1)For an accident that resulted only in damage to property, the total loss or damage caused by the accident exceeded $1000, or, for an accident that resulted in bodily injury, the insurer obtains reasonable evidence of bodily injury.

We would like additional clarity as to the meaning of the phrase, "the insurer obtains reasonable evidence of bodily injury."

(b)(2) For the insurer at the time of the accident, reasonable evidence of bodily injury shall always include medical records received by the insurer during the claims process for the accident. For subsequent insurers or where medical records are unavailable, bodily injury damages must exceed $1000.

The term "medical records" is too restrictive. Insurers receive medical and health care information from a variety of sources. We suggest a broader term, such as *"medical and health care information, documentation or evidence."*

Again, we would like additional clarity to the term "bodily injury damages." Does this mean medical, rehabilitation, wage losses, diminished earning capacity, pain and suffering, payment of essential services?

Finally, as to both (1) and (2), we question whether CDI has the authority to change the threshold to $1000 when it has not been changed in the relevant statute (Vehicle Code 1600). The increase in the threshold loss for property damage from $750 to $1000 is not justified by the statement contained in the Initial Statement of Reasons, *"Vehicle Code section 1600 was last revised from $500 to $750 in 2002. Given that it has not been changed for over 7 years, it does not properly reflect current repair costs. So, the amount has been revised upward to rule out de minimus damage."* Neither this statement, nor any other information of which we are aware from the CDI is sufficient to meet the standards set forth in Government Code Section 11349.1. We suggest the following:

> (b)(1)For an accident that resulted only in damage to property, the total loss or damage caused by the accident exceeded ~~$1000~~ ***$750*** or, for an accident that resulted in bodily injury, the insurer obtains reasonable evidence of bodily injury.

> (2) For the insurer at the time of the accident, reasonable evidence of bodily injury shall always include medical ~~records~~ ***information, documentation or evidence*** received by the insurer during the claims process for the accident. For subsequent insurers or where medical records are unavailable, bodily injury damages must exceed ~~$1000~~ ***$750.***

We also suggest adding a (3) to clarify that there is no minimum damage requirement for accidents involving death:

> ***(3) There is no minimum damage requirement for accident resulting in a death.***
>
> *(c)(~~7~~6) The accident was a solo vehicle accident that was principally caused by a hazardous condition of which a driver, in the exercise of reasonable care, would not have noticed (for example, "black ice~~.~~"") or could not have avoided (for example, an accident that occurs when a driver maneuvers to avoid a passing vehicle making an unsafe lane change).*

PIFC objects to the proposed language, particularly as it would be applied to the driver safety record. The existing regulation, allowing an exception to principally at-fault where the accident is "principally caused" by a hazardous condition of which the driver "in the exercise of reasonable care, would not have noticed (for example, "black ice")" is already problematic from a causation assessment standpoint. The new language further undermines the ability of insurers to evaluate and use an applicant's driver safety record in a manner that is consistent with the rating weight intended by Proposition 103. The proposed standard is far too broad in scope, ambiguous in legal meaning, and rife with potential for claims manipulation and abuse by insureds who would misuse the proposed standard to mask their legal responsibility for an auto accident. In effect, the proposed standard would create a giant loophole for every insured involved in a solo auto accident to argue the accident "*could not have been avoided."* The example cited is one that, given solo accidents often involve no independent witnesses, could be put forward in an overwhelming number of cases, thereby shifting the legal burden to the insurer to prove avoidability – a legally difficult and costly proposition given the broad language of the proposed standard. As for the existing language, a driver choosing to drive in a hazardous condition but who loses control of the vehicle due to the hazard (i.e. "black ice") cannot be considered "principally at-fault" when the driver is, in reality, 100% at fault. We continue to believe that this exception should be deleted in its entirety.

(e)(4) If the driver confirms in writing facts sufficient to find that the driver is principally at fault for the accident, as defined by subsection (b).

The phrase requiring confirmation "in writing" does not reflect the numerous ways an insurer may communicate with their insured. We suggest the language should allow for other means of communication, including "recordings". Additionally, we suggest the term "driver" be replaced with "insured" – as it is the insured that would communicate with the insurer, not necessarily the driver.

> (e)(4) If the ~~driver~~ ***insured*** confirms ~~in writing~~ facts sufficient to find that the driver is principally at fault for the accident, as defined by subsection (b).

(f~~g~~) If a driver did not have insurance that provided coverage for an accident, and if no other insurer of any person involved in the accident made a determination that any other driver was at least 51% of the proximate cause of the accident, an insurer to whom an application for the issuance or renewal of a policy of automobile insurance is made may consider a driver to be principally at-fault if the insurer has sufficient information to make that determination or if the

driver confirms in writing that the driver is principally at fault for the accident as defined by subsection (b). For the purpose of this Subsection, the following shall apply:

Consistent with the comments above, we suggest the following changes to the new sentence above:

> (f~~g~~) If a driver did not have insurance that provided coverage for an accident, and if no other insurer of any person involved in the accident made a determination that any other driver was at least 51% of the proximate cause of the accident, an insurer to whom an application for the issuance or renewal of a policy of automobile insurance is made may consider a driver to be principally at-fault if the insurer has sufficient information to make that determination or if the ~~driver.~~ ***insured*** confirms ~~in writing~~ that the driver is principally at fault for the accident as defined by subsection (b). For the purpose of this Subsection, the following shall apply:

(f)(1) the insurer shall make reasonable efforts to obtain information concerning the accident from any insurer of a person involved in the accident;

We suggest you add an "or" to the end of the first sentence.

> (1) the insurer shall make reasonable efforts to obtain information concerning the accident from any insurer of a person involved in the accident~~;~~ ***or***

(f)(2) the insurer shall request sufficient information from the driver~~;~~

~~(3) upon reasonable request by the insurer, a driver shall provide sufficient information concerning the accident to the insurer for the insurer~~ to determine whether the driver was principally at-fault~~. If~~ if the driver fails or refuses to provide such information within 20 days of receipt of an insurers' written request, then the insurer may ~~count a violation point for the accident or may~~ consider the driver to be principally at-fault. The insurer may not count the accident as one involving bodily injury or death based solely on an MVR or C.L.U.E. report.

We strongly oppose the addition of the last sentence in (2), "The insurer may not count the accident as one involving bodily injury or death based solely on an MVR or C.L.U.E. report." Section 1861.025 states that if a violation is required to be reported, an insurer may use said information in determining an insured's insurance rate. It is important for insurers to be able to have the benefit of the data bases available. We are not clear as to what is the problem with using the MVRs as a data base. This restriction impedes the insurers' ability to conduct its business and comport with the requirements of the statute mandating driver safety record as the first mandatory rating factor. We believe the CDI has exceeding its authority in promulgating this proposed regulation. We request the last sentence be deleted. Additionally, we believe the language in the prior sentence may create an unintended and unfair outcome by allowing a driver to withhold important information about an accident involving bodily injury, so that the insurer can only assess the claim as a property damage accident, thereby allowing the driver to unfairly qualify for a Good Driver Discount. We suggest the following:

(2) the insurer shall request sufficient information from the driver~~;~~

~~(3) upon reasonable request by the insurer, a driver shall provide sufficient information concerning the accident to the insurer for the insurer~~ to determine whether the driver was principally at-fault~~. If~~ if the driver fails or refuses to provide such information within 20 days of receipt of an insurers' written request, then the insurer may ~~count a violation point for the accident or may~~ consider the driver to be principally at-fault ***of either a property damage or bodily injury accident, based upon the driver's refusal to provide sufficient information***. ~~The insurer may not count the accident as one involving bodily injury or death based solely on an MVR or C.L.U.E. report.~~

(h~~i~~) Notwithstanding any other provision of this section, in determining a driver's at-fault accident history, a driver's declaration, under penalty of perjury, attesting to his or her at-fault accident history, shall be sufficient proof of that accident history in the absence of contrary information from an independent source. If an insurer discovers ~~that~~ contrary information from an independent source disputing the driver's declaration ~~contains a fraudulent or material misrepresentation, the insurer may~~, and wishes to use ~~that~~ said information to rate the policy, the insurer shall notify the driver in writing and request that the driver confirm the accuracy of the contrary information within 20 days of receipt. If the driver confirms the accuracy of the contrary information, the insurer may determine the driver's at fault history as confirmed by the driver and rate the policy accordingly. If the driver does not confirm the accuracy of the contrary information in writing, the insurer may use the contrary information as follows: ~~may cancel the policy pursuant to California Insurance Code sections 661 and 1861.03(c)(1) and take any other action authorized by law.~~

(1) if the insurer that provided coverage at the time of the accident determined the driver to be principally at fault for the accident in accordance with this Section, the insurer may consider the driver to be principally at fault; or

(2) if the driver did not have insurance that provided coverage for an accident and if no other insurer of any person involved in the accident made a determination that any other driver was a least 51% of the proximate cause of the accident, the insurer may consider a driver to be principally at-fault if the insurer has sufficient information to make that determination. For the purposes of this subsection, an accident reported solely on an MVR shall not be considered "sufficient information."

Nothing in this subdivision shall prevent an insurer from using information available from the public record of traffic violation convictions as set forth in section 2632.5(c)(1)(A), principally at-fault accidents as set forth in this section, or information from a subscribing loss underwriting exchange carrier. Nothing in this subdivision shall prevent an insurer from asking follow-up questions about the information contained in the declaration, and nothing in this subdivision shall authorize a driver to refuse to answer a reasonable follow-up question.

Again, the last sentence of (h)(2) restricting the use of the MVR is not supported by the Initial Statement of Reasons, nor any other information supplied by the CDI. There is no evidence as to a problem with using the MVRs as a data base. This restriction impedes the insurers' ability to conduct its business and comport with the requirements of the statute mandating driver safety record as the first mandatory rating factor. We believe the CDI has exceeded its authority in promulgating this proposed regulation. We request the last sentence in (h)(2) be deleted as follows:

(2) if the driver did not have insurance that provided coverage for an accident and if no other insurer of any person involved in the accident made a determination that any other driver was a least 51% of the proximate cause of

the accident, the insurer may consider a driver to be principally at-fault if the insurer has sufficient information to make that determination. ~~For the purposes of this subsection, an accident reported solely on an MVR shall not be considered "sufficient information."~~

PIFC appreciates the opportunity to comment on the proposed regulations. We cannot overemphasize the concerns we have highlighted here, along with our belief that several of the changes, as indicated, are outside the authority of the CDI and fail to meet the standards set forth in Government Code Section 11349.1, as well as being in direct conflict with Proposition 103. As to the Good Driver Discount, many of the proposed changes will negatively impact that segment of consumers who are actual good drivers by diluting the requirements and expanding the eligibility for the discount with broad exceptions and narrowed ability to rely on certain types of information. If the principally at-fault regulations are allowed to dictate the First Mandatory Factor (driver safety record) as well, the result is an evisceration of Proposition 103. For these reasons, PIFC strongly recommends the CDI reconsider the proposed regulations.