

**STATE OF CALIFORNIA  
DEPARTMENT OF INSURANCE  
300 Capitol Mall, 16th Floor  
Sacramento, California 95814**

**FINAL STATEMENT OF REASONS AND UPDATED INFORMATIVE DIGEST**

**Auto Body Repair Labor Rate Surveys**

**Date: October 14, 2016**

**CDI Regulation File: REG-2012-00002**

**UPDATED INFORMATIVE DIGEST (Government Code § 11347.9(b))**

Except as set forth below, there have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Rulemaking dated March 04, 2016.

**Amended Text of Regulations**

On September 26, 2016, a Notice of Availability of Revised Text and of Addition to Rulemaking File and Amended Text of Regulations were issued in this matter. The proposed regulations were amended as follows:

Section 2695.81, subdivision (d)(1)(C)1. was amended to further clarify the meaning of two (2) years, for extending the useful life of a survey. The term “calendar” was deleted from the first sentence for clarity and consistency purposes.

Section 2695.81, subdivision (d)(1)(C)3.b. was amended to further clarify when the Consumer Price Index for All Urban Consumers for California (“CPI-U”) is to be applied. The terms “or decreased” was added to clarify that the CPI-U is to be applied even when there is a decrease in the CPI-U to address Commenters’ concerns that only applying the CPI-U for increases was unfair. Additionally, the terms “greater than zero, but” and “lower than” were deleted, and the words “however” and “at the same level” were added for clarity and consistency purposes.

Section 2695.81, subdivision (d)(2) was amended to further clarify “auto body repair shops.” The term “to perform automotive repairs” was deleted, and was replaced with “as an auto body and/or paint shop” for clarity and consistency purposes, as “auto body and/or paint shop” is the term used by the Bureau of Automotive Repair (BAR).

Section 2695.81, subdivision (d)(3) was amended to further clarify that the Standardized Labor Rate Survey shall only use labor rates of auto body shops registered with the Bureau of Automotive Repairs (“BAR”). The term “that, at the time the insurer sends the survey questionnaire, are” was added to the first sentence for clarity purposes.

Additionally, the term “to perform automotive repairs” was deleted, and was replaced with “as an auto body and/or paint shop” for clarity and consistency purposes, as “auto body and/or paint shop” is the term used by the Bureau of Automotive Repair (BAR).

Section 2695.81, subdivision (d)(5) was amended to change the definition of “prevailing auto body rate” as only the simple majority of surveyed shops. Any reference to “arithmetic mean or average” in calculating prevailing auto body rate was deleted for clarity purposes, and to address Commenters’ concerns for upwardly skewed prevailing rates. Further typo changes were made, and “Geographical Area” properly referencing subdivision (d)(8)(A)4. were made for consistency purposes.

Section 2695.81, subdivision (d)(5)(A) was amended to reflect the only example of “prevailing rate” – simple majority, rather than “arithmetic mean or average” for consistency and clarity purposes. Section 2695.81, subdivision (d)(5)1. was deleted and reincorporated into subdivision (d)(5)(A). An example of simple majority is provided to demonstrate how “prevailing rate” is to be calculated. Any reference to “arithmetic mean or average” was deleted for clarity and consistency purposes.

Section 2695.81, subdivision (d)(5)(A)2. was deleted since only one example demonstrating simple majority was now needed for clarity and consistency.

Section 2695.81, subdivision (d)(6) was amended for clearer reading of the subdivision and for clarity purposes. The word “its” was replaced with “the insurer’s” for clarity reasons. Additionally, subdivision (d)(8) was deleted to properly reference subdivision (g)(5), which was renumbered in Section 2698.91.

Section 2695.81, subdivision (d)(8) was amended to amended to reflect a clearer reading of the language. The word “following” was deleted for clarity purposes. Additionally, subdivision (d)(8)(D) was changed to (d)(8)(F) to reflect the addition of (d)(8)(F) into subdivision (d)(8).

Section 2695.81, subdivision (d)(8)(A)2. was amended to further clarify “auto body repair shops.” The term “to perform automotive repairs” was deleted, and was replaced with “as an auto body and/or paint shop” for clarity and consistency purposes, as “auto body and/or paint shop” is the term used by the Bureau of Automotive Repair (BAR). The word “and” was deleted at the very end of the subdivision for clarity and consistency purposes, since subdivision (d)(8)(A)4. was added to subdivision (d)(8)(A).

Section 2695.81, subdivision (d)(8)(A)3.e was amended to delete the word “and” given that additional types of labor rates were added to subdivision (d)(8)(A)4.

Section 2695.81, subdivision (d)(8)(A)3.f was amended to delete the period at the end of the subdivision given that additional types of labor rates were added to subdivision (d)(8)(A)4.

Section 2695.81, subdivision (d)(8)(A)3.g was added to include an additional type of labor rate, “carbon fiber labor” which is a common type of labor that a Commenter requested the addition of as a type of labor rate.

Section 2695.81, subdivision (d)(8)(A)3.h was added to include an additional type of labor rate, “fiberglass labor” which is a common type of labor that a Commenter requested the addition of as a type of labor rate.

Section 2695.81, subdivision (d)(8)(A)4. was added to redefine Geographic Area, so that all Responding Qualified Auto Body Repair Shops within the shop’s core area and within its periphery are considered as part of a shop’s Geographic Area. This was done to address Commenters’ concerns regarding the prior definition of Geographic Area as too small, and open to possible collusion.

Section 2695.81, subdivision (d)(8)(B) was deleted since it defined the old definition of Geographic Area, which was redefined in subdivision (d)(8)(A)4.

Section 2695.81, subdivision (d)(8)(C) was renumbered to (d)(8)(B) to reflect the deletion of the previous subdivision. Additionally, the reference to ArcGIS software was moved from the end of the subdivision to earlier in the subdivision for clarity purposes, and easier reading of the language. Additional changes to the language through the deletion of “i.e. the software must report these” was made for clarity purposes.

Section 2695.81, subdivision (d)(8)(C) was added to reflect the previous concept of Geographic Area, and has been renamed “core area.” Core area comprises of the six closest Responding Qualified Auto Body Repair Shops in a straight-line distance to the shop in question.

Section 2695.81, subdivision (d)(8)(D) was amended to reflect the addition of the concept of “core area” from subdivision (d)(8)(C). All previous references to “geographic areas” has been replaced by “core area,” and references to core area properly cite to (d)(8)(C) for consistency purposes.

Section 2695.81, subdivision (d)(8)(E) was added to reflect the new concept of “periphery area.” A geographic area, as referenced in subdivision (d)(8)(A)4., now consists of a core area and periphery area, and the method of calculating the core area radius and periphery areas are first laid out in this subdivision. Subdivision (d)(8)(E)1. was added to define how core area radius is to be calculated, which is the distance in miles, using three significant digits to the right of the decimal place, from the shop in question and the furthest Responding Qualified Auto Body Repair Shop. Subdivision (d)(8)(E)2. was added to define how to calculate the periphery area, which is calculated by adding one mile to the core area. Subdivision (d)(8)(E)3. was added to ascertain which Responding Qualified Auto Body Repair Shops are to be included in the periphery, and therefore the Geographic Area. Those shops within the periphery are included, whereas those outside are excluded.

Section 2695.81, subdivision (d)(8)(F) was added to demonstrate an example of how to calculate Geographic Area from subdivision (d)(8)(A)4., using the concepts of core area and periphery as outlined in subdivisions (d)(8)(C) and (d)(8)(E). The example lays out a hypothetical situation, outlining shops S1 – S24, with corresponding distances from the shop in question, whether or not it is a Responding Qualified Shop, and the status of the shop as a within the core area or periphery. A chart laying out the hypothetical situation is provided in subdivision (d)(8)(F) to assist the reader in their understanding of the example.

Section 2695.81, subdivision (d)(8)(F)1. was added to demonstrate how to calculate the core area radius, pursuant to subdivision (d)(8)(C). The subdivision continues using the hypothetical laid out under subdivision (d)(8)(F), and demonstrates how to calculate the core area using the provided scenario.

Section 2695.81, subdivision (d)(8)(F)2. was added to demonstrate how to calculate the periphery area, pursuant to subdivision (d)(8)(E)2. The subdivision continues using the hypothetical laid out under subdivision (d)(8)(F), and demonstrates how to calculate the periphery area using the provided scenario.

Section 2695.81, subdivision (d)(8)(F)3. was added to demonstrate how to ascertain what Responding Qualified Auto Body Repair Shops are to be included in the periphery and core areas, pursuant to subdivision (d)(8)(E)3. The subdivision continues using the hypothetical laid out under subdivision (d)(8)(F), and demonstrates how to assess the Responding Qualified Auto Body Repair Shops using the provided scenario.

Section 2695.81, subdivision (d)(8)(F)4. was added to illustrate what Responding Qualified Auto Body Repair Shops are located in the Geographic Area of hypothetical Shop S1, using the hypothetical laid out under subdivision (d)(8)(F). A graphical illustration is further provided showing the shops that are to be included in the Geographic Area, and which shops are outside the periphery that must be excluded.

Section 2695.81, subdivision (e)(1)(A) was added to further clarify and account for the use of the Standardized Labor Rate surveys to quantify the labor rate component of estimates, when the claimant has chosen a repair shop. In that case, the prevailing rate is the Geographic Area of that chosen shop.

Section 2695.81, subdivision (e)(1)(B) was added to further clarify and account for the use of the Standardized Labor Rate surveys to quantify the labor rate component of estimates, when the claimant has not yet chosen a repair shop. Subdivision (e)(1)(B)1. accounts for when an estimate is being prepared at an auto body repair shop that is registered with BAR, the prevailing rate to be used is of that shop. Subdivision (e)(1)(B)2. accounts for when an estimate is being prepared at a location, other than an auto body repair shop registered with BAR, the prevailing rate to be use is of the closest shop in driving distance to where the estimate is being prepared.

Section 2695.81, subdivision (e)(1)(C) was added to account for when a claimant does subsequently choose a repair shop. In that case, the insurer is to prepare a new estimate using the prevailing rate in the Geographic Area of the claimant's chosen shop. However, a new estimate is not required if the claimant subsequently chooses a shop that is in the same Geographic Area of the chosen shop.

Section 2695.81, subdivision (e)(2)(A) was amended to delete the "or" from the very end of the subdivision, due to the addition of subdivision (e)(2)(C).

Section 2695.81, subdivision (e)(2)(B) was amended to clarify that there are possibly multiple labor rates that could be posted by a repair shop. The phrase "of that repair shop" was deleted and replaced with "applicable to that type of labor" to account for multiple types of labor rates. Additionally, the word "or" was added to the very end of the subdivision to account for the addition of subdivision (e)(2)(C).

Section 2695.81, subdivision (e)(2)(C) was added to account for situations where a claim is higher than the labor rate actually charged by that shop for that type of labor in the past sixty (60) days. In that case, insurers are allowed to adjust the labor rate to the prevailing rate or an amount that is lower than the prevailing rate, if the insurer provides proof of three (3) invoices showing a lower rate. If the three (3) invoices are not the same, the insurer may only adjust the labor rate to the highest of the rates in the invoices. Finally, only non-direct repair program, or non-discounted rates may be used.

Section 2695.82 was amended to account for clearer reading of the section. The "Instructions" part of the section added "Please ensure that this questionnaire is" completed, for clarity purposes and for better reading of the section. In "Question 1" of section 2695.82, was amended to further clarify and be consistent with prior amendments of "auto body repair shops" in section 2695.81. In "Question 3", "carbon fiber labor rate", and "fiberglass labor rate" were added to account for the addition of types of labor rates in section 2695.81.

Section 2698.91, subdivision (c) was amended to further clarify "auto body repair shops." The term "to perform automotive repairs" was deleted, and was replaced with "as an auto body and/or paint shop" for clarity and consistency purposes, as "auto body and/or paint shop" is the term used by the Bureau of Automotive Repair (BAR).

Section 2698.91, subdivision (d) was amended to clarify and specify the heading "Reporting of survey results" to account for the fact that the subdivision detailed the reporting of survey results.

Section 2698.91, subdivision (d)(1) was amended to clarify and specify the heading "Public information" to account for the fact that the subdivision detailed the reporting of public information.

Section 2698.91, subdivisions (d)(1) – (d)(6) were renumbered to subdivisions (d)(1)(A) – (d)(1)(F) based on the change to (d)(1) that accounted for the heading “Public information.”

Section 2698.91, subdivision (d)(1)(D), previously subdivision (d)(4) was amended to account for insurers who conduct a Standardized Labor Rate Survey. As part of the public information that must be submitted under the Standardized Labor Rate Survey, insurers must report the prevailing auto body rate for each type of labor rate for each Geographic Area.

Section 2698.91, subdivision (d)(7) and (d)(8) were deleted, and moved and renumbered to (g)(6) and (g)(5) respectively.

Section 2698.91, subdivision (d)(2) was amended for clarity purposes to add the heading “Removal of nonpublic information” since the subdivision related to removal of nonpublic information.

Section 2698.91, subdivision (g)(2) was amended to delete the word “and” at the very end of the subdivision to account for the addition of subdivisions (g)(5) and (g)(6).

Section 2698.91, subdivision (g)(3) was amended to delete the period at the very end of the subdivision to account for the addition of subdivisions (g)(5) and (g)(6). The deletion is reasonably necessary for consistency purposes.

Section 2698.91, subdivision (g)(4) was amended to clarify situations where insurers conduct a Standardized Labor Rate Survey, and must report the name of any shop excluded from the survey, pursuant to section 2695.81, subdivision (d)(2). Language was added to specify that the reporting of shops excluded only applies to surveys conducted pursuant to a Standardized Labor Rate Survey to address Commenters’ concerns that reporting of this information applied to all surveys. Additionally, further punctuation changes were made for clarity and consistency purposes.

Section 2698.91, subdivision (g)(5), which was previously subdivision (d)(8), was moved from “public information” to “non-public information” to address the issue that information about an insurer’s Direct Repair Program is considered “non-public” information rather than “public information.”

Section 2698.91, subdivision (g)(6), which was previously subdivision (d)(7), was moved from “public information” to “non-public information” to address the issue that the labor rates reported by each shop that responded to the survey is considered “non-public” information rather than “public information.”

Section 2698.91, subdivision (h) was amended to fix a typo that incorrectly referenced the wrong subdivision. The language “Subdivision (g) of Section 2695.81” was replaced with “Subdivision (f) of Section 2695.81” which made the proper reference.

Section 2698.91, subdivision (i) was amended for clarity purposes, and the word “specific” was deleted for clearer reading of the subdivision. Additionally, the term “that is higher or lower than the prevailing auto body rate” was added to address Commenters’ concerns regarding consistency between this subdivision and section 2695.81(e)(4).

The public comment period closed on October 11, 2016.

### **Final Text of Regulation**

A non-substantive change was made to Section 2695.81, subdivision (d)(1)(C)3.a. The reference “subdivision (d)(1)(C)3” was changed to “subdivision (d)(1)(C)3.” to add the missing period. The change is non-substantive, and does not affect anyone’s rights or responsibilities, since it is apparent that the period was missing from the Text.

A non-substantive change was made to Section 2695.81, subdivision (d)(2). The reference “subdivision (g) of Section 2698.91” was changed to “subdivision (g)(4) of Section 2698.91.” The addition of “(4)” is non-substantive, and does not affect anyone’s rights or responsibilities, since it only made the subdivision more accurate and precise. Furthermore, subdivision (g)(4) of Section 2698.91 expressly referenced back to this subdivision (d)(2).

A non-substantive change was made to Section 2695.81, subdivision (d)(5). The reference “subdivision (d)(8)(A)4” was changed to “subdivision (d)(8)(A)4.” to add the missing period. The change is non-substantive, and does not affect anyone’s rights or responsibilities, since it is apparent that the period was missing from the Text.

A non-substantive change was made to Section 2695.81, subdivision (d)(8)(F). The Header for the chart example, labeled “Distance from Shop A” was changed to “Distance from Shop S1,” to fix a typo. The change is non-substantive, and does not affect anyone’s rights or responsibilities, since it is apparent that the example referenced Shop S1, and not Shop A.

A non-substantive change was made to Section 2695.81, subdivision (d)(8)(F)1. The words “since it is not a Qualified shop” was changed to “since it is not a Qualified Shop” to capitalize the “S” in “Shop.” The change is non-substantive, and does not affect anyone’s rights or responsibilities, since “Qualified Shop,” as referenced in subdivision (d)(8)(C)3. defined the term “Qualified Shop” and not “Qualified shop.”

Non-substantive changes were made to Section 2698.91, subdivision (d)(1)(B). The first word of the subdivision, “The” was accidentally stricken in the Amended Text of Regulation. The Final Text of Regulation adds back in the word “The” and changes “Date” to “date.” The changes are non-substantive, and does not affect anyone’s rights or responsibilities because the addition of “The” does not change the meaning of subdivision.

## **Addition of Materials to Rulemaking File**

On September 26, 2016, a Notice of Availability of Revised Text and of Addition to Rulemaking File was issued in this matter. The following additional material was relied upon by the California Department of Insurance (Department):

- 1) Excerpts from CDI Complaint File Number: CSB-7074971
- 2) Excerpts from CDI Complaint File Number: CSB-7070924
- 3) Excerpts from CDI Complaint File Number: CSB-7074895
- 4) Excerpts from CDI Complaint File Number: CSB-7069934
- 5) Excerpts from CDI Complaint File Number: CSB-7053408
- 6) Excerpts from CDI Complaint File Number: CSB-7065828
- 7) Excerpts from CDI Complaint File Number: CSB-7066140
- 8) Excerpts from CDI Complaint File Number: CSB-7066157
- 9) Excerpts from CDI Complaint File Number: CSB-7066262
- 10) Excerpts from CDI Complaint File Number: CSB-7066264
- 11) Excerpts from CDI Complaint File Number: CSB-7066340
- 12) Excerpts from CDI Complaint File Number: CSB-7066614
- 13) Excerpts from CDI Complaint File Number: CSB-7066779
- 14) Excerpts from CDI Complaint File Number: CSB-7068305
- 15) Excerpts from CDI Complaint File Number: CSB-7069169
- 16) Excerpts from CDI Complaint File Number: CSB-7070222
- 17) Excerpts from CDI Complaint File Number: CSB-7070223
- 18) Excerpts from CDI Complaint File Number: CSB-7071586
- 19) Excerpts from CDI Complaint File Number: CSB-7077647
- 20) Excerpts from CDI Complaint File Number: CSB-7078176
- 21) Excerpts from CDI Complaint File Number: CSB-7070228
- 22) Excerpts from CDI Complaint File Number: CSB-7067694
- 23) Excerpts from CDI Complaint File Number: CSB-7063425
- 24) Excerpts from CDI Complaint File Number: CSB-7061519
- 25) Excerpts from CDI Complaint File Number: CSB-7060276
- 26) Excerpts from CDI Complaint File Number: CSB-7058697
- 27) Excerpts from CDI Complaint File Number: CSB-7057044
- 28) Excerpts from CDI Complaint File Number: CSB-7056262
- 29) Excerpts from CDI Complaint File Number: CSB-7056014
- 30) Excerpts from CDI Complaint File Number: CSB-7055467
- 31) Excerpts from CDI Complaint File Number: CSB-7055168
- 32) Excerpts from CDI Complaint File Number: CSB-7054517
- 33) Excerpts from CDI Complaint File Number: CSB-7053260
- 34) Excerpts from CDI Complaint File Number: CSB-7053031
- 35) Excerpts from CDI Complaint File Number: CSB-7052803
- 36) Excerpts from CDI Complaint File Number: CSB-7052382
- 37) Excerpts from CDI Complaint File Number: CSB-7052244
- 38) Excerpts from CDI Complaint File Number: CSB-7052021

- 39) Excerpts from CDI Complaint File Number: CSB-7051250
- 40) Excerpts from CDI Complaint File Number: CSB-7050378
- 41) Excerpts from CDI Complaint File Number: CSB-7065363
- 42) Excerpts from CDI Complaint File Number: CSB-7064878
- 43) Excerpts from CDI Complaint File Number: CSB-7064616
- 44) Excerpts from CDI Complaint File Number: CSB-7064507
- 45) Excerpts from CDI Complaint File Number: CSB-7063554
- 46) Labor Rate Survey CSAA 3-7-16
- 47) Labor Rate Survey CNIC-21CCIC-FSIC 2015-2016
- 48) Labor Rate Survey Allstate Final 3-8-10 Rates by Market
- 49) Labor Rate Survey Allstate 2-5-16
- 50) Labor Rate Survey Farmers 3-30-16 Chatsworth, Northridge, Valencia
- 51) Labor Rate Survey Farmers 4-18-16 Carmel Valley – Pacific Grove Area
- 52) Labor Rate Survey Farmers 5-23-16 Escondido, San Marcos, Fallbrook
- 53) Labor Rate Survey Farmers 6-6-16 Cypress, Garden Grove, Seal Beach
- 54) Labor Rate Survey Farmers 6-29-16 Colusa
- 55) Labor Rate Survey Farmers 6-29-16 Red Bluff
- 56) Labor Rate Survey Farmers 6-29-16 Shasta & Siskiyou County
- 57) Labor Rate Survey Farmers 7-12-16 Fremont, Milpitas, Newark, San Jose
- 58) Labor Rate Survey Farmers 7-12-16 Campbell, Los Gatos, Cupertino
- 59) Labor Rate Survey Farmers 7-12-16 CM, Irvine, NP Beach, Laguna Beach
- 60) Labor Rate Survey Farmers 8-2-16 Mendocino County
- 61) Labor Rate Survey Farmers 5-16-16 San Joaquin County
- 62) Labor Rate Survey Farmers 5-16-16 Stanislaus County
- 63) Labor Rate Survey Farmers 5-20-16 Arleta, NH, Pacoima, Sunland, Sylmar
- 64) Labor Rate Survey Farmers 5-20-16 Merced County
- 65) Labor Rate Survey Farmers 5-20-16 Simi Valley
- 66) Labor Rate Survey Safeco 4-18-16
- 67) Labor Rate Survey State Farm 7-06-16
- 68) Department of Consumer Affairs, Bureau of Automotive Repair Licensing Unit  
— Application for Automotive Repair Dealer Registration, revised 05/11
- 69) Draft Autobody Analyzer [Geocoding proof of concept demonstrator], dated  
9/23/16

**UPDATE OF INFORMATION CONTAINED IN INITIAL STATEMENT OF REASONS (Government Code § 11346.9(a)(1))**

All the information set forth in the Initial Statement of Reasons dated March 04, 2016, remains accurate, and does not need to be revised. Additional material has been relied upon and added to the rulemaking file, which was outlined in the Notice of Availability of Revised Text And of Addition to Rulemaking File. In addition to the additional material, public comments, the transcript of the public hearing, and this Final Statement of Reasons has been added to the rulemaking file since the time the rulemaking record was opened.

## **Section 2695.81**

### **Subdivision (d)(1)(C)1.**

This subdivision was amended to further clarify the meaning of two (2) years, for extending the useful life of a survey. The term “calendar” was deleted from the first sentence. The changes are reasonably necessary to address potential clarity and consistency issues. The word “calendar” implied that the survey was to be conducted at the beginning of the year, however that was not the intent of the proposed regulations. Thus, the change was reasonably necessary to avoid confusion regarding when must the survey be conducted.

### **Subdivision (d)(1)(C)3.b.**

This subdivision was amended to further clarify when the Consumer Price Index for All Urban Consumers for California (“CPI-U”) is to be applied. The terms “or decreased” was added to clarify that the CPI-U is to be applied even when there is a decrease in the CPI-U. This change is reasonably necessary to address Insurers’ concerns during the 45-Day comment period that only applying the CPI-U for increases was unfair. Thus, the Department felt it was necessary to address this concern by applying the CPI-U in situations where there is a decrease in the CPI-U.

Additionally, the terms “greater than zero, but” and “lower than” were deleted. The change is reasonably necessary to address clarity and consistency issues. Since the CPI-U is to be applied even in decreases, “greater than zero, but” was unnecessary and extraneous language that should only apply to increases. The word “however” was added for easier reading of the subdivision to signal to the reader where the CPI-U is not to be applied. The words “at the same level” was added to clarify that the CPI-U is not to be applied if it remains at the same level. Furthermore, “lower than” was deleted to account for the change that the CPI-U is to be applied for decreases, and “lower than” only applied for increases. Thus, the changes in language are reasonably necessary to account for the CPI-U to apply in decreases for clarity and consistency purposes.

### **Subdivision (d)(2)**

This subdivision was amended to further clarify “auto body repair shops.” The term “to perform automotive repairs” was deleted, and was replaced with “as an auto body and/or paint shop.” The change is reasonably necessary for consistency purposes to address the manner in which California treats the registration of automotive repair shops. Businesses must apply with the Bureau of Automotive Repair (“BAR”) Licensing Unit in order to register as an automotive repair shop in the State of California, using BAR’s Application for Automotive Repair Dealer Registration. In that form, to apply and to be recognized as an automotive repair shop, the business must register their type of business as an “Auto Body and/or Paint Shop” which is on page 3 of 5 of the form. Thus, the changes are reasonably necessary to clarify to insurers and the public what shops are considered an automotive repair shop, and to be more consistent with the way that BAR and the State of California recognizes the registration of automotive repair shops in California.

**Subdivision (d)(3)**

This subdivision was amended to further clarify that the Standardized Labor Rate Survey shall only use labor rates of auto body shops registered with the Bureau of Automotive Repairs (“BAR”).

The term “that, at the time the insurer sends the survey questionnaire, are” was added to the first sentence. This change is reasonably necessary to clarify that only when the survey is sent and the shop is registered with BAR should that shop’s survey be used. This accounts for any clarity issues where a shop may not have been registered with BAR when the survey was sent, and should not be used.

Additionally, the term “to perform automotive repairs” was deleted, and was replaced with “as an auto body and/or paint shop.” The change is reasonably necessary for consistency purposes to address the manner in which California treats the registration of automotive repair shops. Businesses must apply with the Bureau of Automotive Repair (“BAR”) Licensing Unit in order to register as an automotive repair shop in the State of California, using BAR’s Application for Automotive Repair Dealer Registration. In that form, to apply and to be recognized as an automotive repair shop, the business must register their type of business as an “Auto Body and/or Paint Shop” which is on page 3 of 5 of the form. Thus, the changes are reasonably necessary to clarify to insurers and the public what shops are considered an automotive repair shop, and to be more consistent with the way that BAR and the State of California recognizes the registration of automotive repair shops in California.

**Subdivision (d)(5)**

This subdivision was amended to change the definition of “prevailing auto body rate” as only the simple majority of surveyed shops. Any reference to “arithmetic mean or average” in calculating prevailing auto body rate was deleted. The change is reasonably necessary to address Insurers’ concerns during the 45-Day comment period that the Noticed Text upwardly skewed the prevailing rate, given that the prevailing rate was to be calculated as the greater of the arithmetic mean or simple majority. Insurers’ preference was “simple majority” during the 45-Day comment period. Thus, arithmetic mean or average was deleted from the calculation of prevailing rate to eliminate this potential upward bias. Thus, the change is reasonably necessary to address this potential bias and concern.

Further typo changes were made, and “Geographical Area” properly referencing subdivision (d)(8)(A)4. were added. The change is reasonably necessary for consistency and clarity purposes, given that Geographic Area was renumbered.

**Subdivision (d)(5)(A)**

This subdivision was amended to reflect the only example of “prevailing rate,” since the deletion of “arithmetic mean or average” from the calculation of prevailing rate. Section 2695.81, subdivision (d)(5)1. was deleted and reincorporated into subdivision (d)(5)(A).

This subdivision outlines an example of simple majority to demonstrate how “prevailing rate” is to be calculated. Any reference to “arithmetic mean or average” was deleted.

The changes are reasonably necessary for consistency and clarity purposes. As previously noted, “simple majority” is the sole calculation for prevailing rate, and the example provided provides insurers, auto body shops, and members of the public a guide to calculating prevailing rate.

**Subdivision (d)(5)(A)2.**

This subdivision was deleted since only one example demonstrating “simple majority” was needed. The deletion is reasonably necessary for clarity and consistency purposes.

**Subdivision (d)(6)**

This subdivision was amended for clearer reading of the subdivision and for clarity purposes. The word “its” was replaced with “the insurer’s.” The change is reasonably necessary for clarity purpose since it was unclear what “its” referenced to. Additionally, subdivision (d)(8) was deleted and replaced to properly reference subdivision (g)(5), which was renumbered in Section 2698.91. The changes are reasonably necessary for consistency purposes.

**Subdivision (d)(8)**

This subdivision was amended to reflect a clearer reading of the language. The word “following” was deleted for clarity purposes. Since it was already clear that (d)(8)(A) through (d)(8)(F) were following, and thus not needed, due to redundancy. Additionally, subdivision (d)(8)(D) was changed to (d)(8)(F) to reflect the addition of (d)(8)(F) into subdivision (d)(8). The change is reasonably necessary for consistency purposes.

**Subdivision (d)(8)(A)2.**

This subdivision was amended to further clarify “auto body repair shops.” The term “to perform automotive repairs” was deleted, and was replaced with “as an auto body and/or paint shop.” The change is reasonably necessary for consistency purposes to address the manner in which California treats the registration of automotive repair shops. Businesses must apply with the Bureau of Automotive Repair (“BAR”) Licensing Unit in order to register as an automotive repair shop in the State of California, using BAR’s Application for Automotive Repair Dealer Registration. In that form, to apply and to be recognized as an automotive repair shop, the business must register their type of business as an “Auto Body and/or Paint Shop” which is on page 3 of 5 of the form. Thus, the changes are reasonably necessary to clarify to insurers and the public what shops are considered an automotive repair shop, and to be more consistent with the way that BAR and the State of California recognizes the registration of automotive repair shops in California. Additionally, the word “and” was deleted at the very end of the subdivision, since subdivision (d)(8)(A)4. was added to subdivision (d)(8)(A). The deletion is reasonably necessary for consistency purposes.

**Subdivision (d)(8)(A)3.e**

This subdivision was amended to delete the word “and” given that additional types of labor rates were added to subdivision (d)(8)(A)4. The deletion is reasonably necessary for consistency purposes.

**Subdivision (d)(8)(A)3.f**

This subdivision was amended to delete the period at the end of the subdivision given that additional types of labor rates were added to subdivision (d)(8)(A)4. The deletion is reasonably necessary for consistency purposes.

**Subdivision (d)(8)(A)3.g**

This subdivision was added to include an additional type of labor rate, “carbon fiber labor” which is a common type of labor that Autobody Repair Industry requested the addition of during the 45-Day Comment period, as a type of labor rate. The Standardized Labor Rate Survey from the proposed regulations is intended to result in accurate and current labor rate surveys. Apart of accurate and current labor rate surveys is accounting for the most relevant and prevalent types of labor rates commonly used by auto body shops. Since “carbon fiber labor” is a common and prevalent labor rate charged by auto body shops, the Department added this type of labor rate to the Standardized Labor Rate Survey. The addition is reasonably necessary for more accurate and current labor rate surveys.

**Subdivision (d)(8)(A)3.h**

This subdivision was added to include an additional type of labor rate, “fiberglass labor” which is a common type of labor that a Commenter requested the addition of as a type of labor rate. The Standardized Labor Rate Survey from the proposed regulations is intended to result in accurate and current labor rate surveys. Apart of accurate and current labor rate surveys is accounting for the most relevant and prevalent types of labor rates commonly charged by auto body shops. Since “fiberglass labor” is a common and prevalent labor rate charged by auto body shops, the Department added this type of labor rate to the Standardized Labor Rate Survey. The addition is reasonably necessary for more accurate and current labor rate surveys.

**Subdivision (d)(8)(A)4.**

This subdivision was added to redefine Geographic Area, so that all Responding Qualified Auto Body Repair Shops within the shop’s core area and its periphery is now included in a shop’s Geographic Area.

Insurers were concerned during the 45-Day comment period that the prior definition of Geographic Area, which comprised of the six (6) closest shops to the shop in question was too small to account for a Geographic Area. Furthermore, they were concerned that with only 6 shops comprising of a Geographic Area, this opened up to the possibility of collusion and price manipulation. Although the Department disagrees that collusion is likely to occur, even with only 6 shops, the Department did want to address the Commenters’ concerns that more than six shops should comprise of a Geographic Area.

Although six shops was based on the Sac State Study, the Department felt it was necessary to fully consider the possibility that a distance further than the sixth closest shop comprises of the Geographic Area, especially in tight-knit Urban areas where the seventh closest shop is just down the street. Thus, the Department redefined Geographic Area to comprise of a shop's core area and periphery area, later defined in subdivision (d)(8)(C) and (d)(8)(E). Essentially, the Geographic Area now comprises of the sixth closest shop, plus all shops within a one mile periphery of the sixth furthest shop. The addition of the periphery accounts for tight market areas in urban areas. The change is reasonably necessary to address these concerns, and to create Geographic Areas that will result in the most reliable and accurate labor rate surveys for the Standardized Labor Rate Survey.

**Subdivision (d)(8)(B)**

This subdivision was deleted since it outlined the old definition of Geographic Area, which was previously redefined in subdivision (d)(8)(A)4. However, this older concept of Geographic Area, is later used to define the concept of "core area," referenced in subdivision (d)(8)(C). The deletion is reasonably necessary for consistency purposes.

Subdivision (d)(8)(C) was renumbered to (d)(8)(B) to reflect the deletion of the previous subdivision. The renumbering is reasonably necessary for consistency purposes.

Additionally, the reference to ArcGIS software was moved from the end of the subdivision to earlier in the subdivision for easier reading of the language. The change is reasonably necessary for clarity purposes. Additional changes to the language through the deletion of "i.e. the software must report these" was made. This language is vague since the software does not necessarily report its result to anything. Thus, the term was replaced with, "In a Standardized Labor Rate Survey," reflecting that the results of the survey must be reported, rather than the software. The change is reasonably necessary for clarity purposes.

**Subdivision (d)(8)(C)**

This subdivision was added to reflect the previous concept of Geographic Area, and has been renamed "core area." Core area comprises of the six closest Responding Qualified Auto Body Repair Shops in a straight-line distance to the shop in question. The addition of this subdivision was reasonably necessary given that Geographic Area was redefined in subdivision (d)(8)(A)4. to include a shop's core area and periphery area. The addition of this subdivision is reasonably necessary to address the change in definition of Geographic Area, and for consistency purposes.

**Subdivision (d)(8)(D)**

This subdivision was amended to reflect the addition of the concept of "core area" from subdivision (d)(8)(C). All previous references to "geographic areas" has been replaced by "core area," and references to core area properly cite to (d)(8)(C). The changes are reasonably necessary for consistency purposes.

**Subdivision (d)(8)(E)**

This subdivision was added to reflect the new concept of “periphery area.” A geographic area, as referenced in subdivision (d)(8)(A)4., now consists of a core area and periphery area, and the method of calculating the core and periphery areas are first laid out in this subdivision. Subdivision (d)(8)(E) explains that the periphery is to be included in the given shop’s Geographic Area. The addition is reasonably necessary for consistency and clarity purposes so that insurers, auto body shops, and the public will know what the periphery area is, and how to calculate the prevailing rate for each geographic area.

**Subdivision (d)(8)(E)1.**

This subdivision was added to define how core area radius is to be calculated, which is the distance in miles, using three significant digits to the right of the decimal place, from the shop in question and the furthest Responding Qualified Auto Body Shop. Insurers were concerned during the 45-Day comment period that the originally noticed concept of Geographic Area was too small. The calculation of core area radius begins the expansion of the concept of Geographic Area, by pinpointing the sixth furthest shop from the shop in question. The addition is reasonably necessary to address the concern that the originally noticed concept of Geographic Area is too small, and also for consistency purposes.

**Subdivision (d)(8)(E)2.**

This subdivision was added to define how to calculate the periphery, which is calculated by adding one mile to the core area radius. By expanding the core area by one mile out from the sixth furthest shop from the shop in question, this effectively expands the Geographic Area to include all shops within this one mile periphery. The addition is reasonably necessary to address the concern that the originally noticed concept of Geographic Area is too small, and also for consistency purposes.

**Subdivision (d)(8)(E)3.**

This subdivision was added to explain how the calculation of core area radius and periphery work in conjunction to calculate which Responding Qualified Auto Body Repair Shops are to be included in the calculation of Geographic Area of a shop in question. The language is reasonably necessary for consistency and clarity purposes, and to explain to insurers, auto body shops, and the public how the core area radius and periphery work to ascertain shops within a Geographic Area.

The subdivision also specifies that those Responding Qualified Auto Body Repair Shops that lie within the periphery are to be included in the Geographic Area. Since the periphery is one mile out from the furthest Responding Qualified Auto Body Repair Shop in the core area, including all shops within the periphery now expands the number of shops to be included the calculation of prevailing rate. Depending on how many shops are within the periphery, the addition of periphery area effective adds more shops to the calculation of prevailing rate, where there were six shops before. The language is reasonably necessary to explain to insurers, auto body shops, and the public which shops

should be included for clarity purposes. Furthermore, the addition of the language is reasonably necessary to address the concern from Commenters that the Geographic Area with only six shops was too small.

The subdivision further specifies that those Responding Qualified Auto Body Repair Shops lying outside the periphery is to be excluded from the calculation of Geographic Area. The language is reasonably necessary to explain to insurers, auto body shops and the public which shops should be excluded for clarity purposes.

**Subdivision (d)(8)(F)**

This subdivision was added to demonstrate an example of how to calculate Geographic Area from subdivision (d)(8)(A)4., using the concepts of core area and periphery as outlined in subdivisions (d)(8)(C) and (d)(8)(E). The example lays out a hypothetical situation, outlining shops S1 – S24, with corresponding distances from Shop S1, whether or not it is a Responding Qualified Shop, and the status of the shop as a within the core area or periphery. A chart laying out the hypothetical situation is provided in subdivision (d)(8)(F) to assist the reader in their understanding of the example. The addition of the subdivision is reasonably necessary to provide insurers, auto body shops, and members of the public guidance as how to apply the concept of core area and periphery to calculate the prevailing rate in a geographic area.

**Subdivision (d)(8)(F)1.**

This subdivision was added to demonstrate how to calculate the core area, pursuant to subdivision (d)(8)(C). The subdivision continues using the hypothetical laid out under subdivision (d)(8)(F), and demonstrates how to calculate the core area using the provided scenario. The addition of the subdivision is reasonably necessary to provide insurers, auto body shops, and members of the public guidance as to how to calculate the concept of core area radius.

**Subdivision (d)(8)(F)2.**

This subdivision was added to demonstrate how to calculate the periphery area, pursuant to subdivision (d)(8)(E)2. The subdivision continues using the hypothetical laid out under subdivision (d)(8)(F), and demonstrates how to calculate the periphery area using the provided scenario. The addition of the subdivision is reasonably necessary to provide insurers, auto body shops, and members of the public guidance as to how to calculate the concept of periphery area.

**Subdivision (d)(8)(F)3.**

This subdivision was added to demonstrate how to ascertain what Responding Qualified Auto Body Repair Shops are to be included in the periphery and core areas, pursuant to subdivision (d)(8)(E)3. The subdivision continues using the hypothetical laid out under subdivision (d)(8)(F), and demonstrates how to assess the Responding Qualified Auto Body Repair Shops using the provided scenario. The addition of the subdivision is reasonably necessary to provide insurers, auto body shops, and members of the public

guidance as to which Qualified Auto Body Repair Shops should be included in the calculation of a shop's prevailing rate in a Geographic Area.

**Subdivision (d)(8)(F)4.**

This subdivision was added to illustrate what Responding Qualified Auto Body Repair Shops are located in the Geographic Area of hypothetical Shop S1, using the hypothetical laid out under subdivision (d)(8)(F). A graphical illustration is further provided showing the shops that are to be included in the Geographic Area, and which shops are outside the periphery and must be excluded. The addition of the subdivision is reasonably necessary for clarity purposes to provide insurers, auto body shops, and members of the public guidance as to how to calculate which Responding Qualified Auto Body Repair Shops are to be included in the Geographic Area of a shop in question.

**Subdivision (e)(1)(A)**

This subdivision was added to further clarify and account for the use of the Standardized Labor Rate surveys to quantify the labor rate component of estimates, when the claimant has chosen a repair shop. In that case, the prevailing rate is the Geographic Area of that chosen shop. Prior to the addition of this subdivision, the Noticed Text did not specify which prevailing rate should be used for estimates when a claimant has chosen their repair shop. The addition of the language is reasonably necessary for clarity purposes to explain to insurers, auto body shops, and members of the public which prevailing rate is to apply for estimates when a claimant has chosen their auto body shop.

**Subdivision (e)(1)(B)**

This subdivision was added to further clarify and account for the use of the Standardized Labor Rate surveys to quantify the labor rate component of estimates, when the claimant has not yet chosen a repair shop. Prior to the addition of this subdivision, the Noticed Text did not specify which prevailing rate should be used for estimates when a claimant has not chosen their repair shop. The addition of the language is reasonably necessary for clarity purposes to explain to insurers, auto body shops, and members of the public which prevailing rate is to apply for estimates when a claimant has not yet chosen their auto body shop.

**Subdivision (e)(1)(B)1.**

This subdivision was added to account for when an estimate is being prepared at an auto body repair shop that is registered with BAR, the prevailing rate to be used is of that shop. The language is reasonably necessary to account for situations where claimants have not yet chosen a repair shop, and to ascertain which prevailing rate to use when an estimate is being prepared by an auto body repair shop registered with BAR for clarity purposes.

**Subdivision (e)(1)(B)2.**

This subdivision was added to account for when an estimate is being prepared at a location, other than an auto body repair shop registered with BAR, the prevailing rate to be use is of the closest shop in driving distance to where the estimate is being prepared.

The language is reasonably necessary to account for situations where claimants have not yet chosen a repair shop, and to ascertain which prevailing rate to use when an estimate is not being prepared by an auto body repair shop registered with BAR for clarity purposes.

**Subdivision (e)(1)(C)**

This subdivision was added to account for when a claimant does subsequently choose a repair shop. In that case, the insurer is to prepare a new estimate using the prevailing rate in the Geographic Area of the claimant's chosen shop. The language is reasonably necessary to account for the possibility that a claimant will subsequently choose a shop, and clarity is needed for what to do in that instance. However, a new estimate is not required if the claimant subsequently chooses a shop that is in the same Geographic Area of the chosen shop. This language is reasonably necessary to prevent redundancies, and save insurers resources from preparing another estimate when it will be the same Geographic Area.

**Subdivision (e)(2)(A)**

This subdivision was amended to delete "or" from the very end of the subdivision, due to the addition of subdivision (e)(2)(C). The deletion is reasonably necessary given the new addition to the subdivision and for clarity purposes.

**Subdivision (e)(2)(B)**

This subdivision was amended to clarify that there are possibly multiple labor rates that could be posted by a repair shop. The phrase "of that repair shop" was deleted and replaced with "applicable to that type of labor" to account for multiple types of labor rates. The amendment is reasonably necessary given that the Standardized Labor Rate Survey requires that prevailing labor rates are determined for eight (8) separate types of labor rates, pursuant to subdivision (8)(A)3. The change reflects the accounting for these types of rates that may be posted in an auto body shop.

Additionally, the word "or" was added to the very end of the subdivision to account for the addition of subdivision (e)(2)(C). This addition is necessary for consistency and clarity purposes.

**Subdivision (e)(2)(C)**

This subdivision was added to account for situations where a claim from an auto body shop is higher than the labor rate actually charged by that shop for that type of labor in the past sixty (60) days. In that case, insurers are allowed to adjust the labor rate to the prevailing rate or an amount that is lower than the prevailing rate, if the insurer provides proof of three (3) invoices showing a lower rate.

Insurers submitted comments during the 45-Day comment period expressing their concerns that auto body shops would artificially inflate labor rates in the questionnaire, with little recourse left for insurers. The addition of this subdivision was to address this concern by providing a recourse where there is proof that an auto body shop's claim is actually higher than the labor rate they charged in the past 60 days. Thus, this addition is

reasonably necessary to address insurers' concern. Furthermore, requiring that the insurer provide proof of three (3) invoices is reasonably necessary because it serves as an objective means of proof of lowering the prevailing rate. Giving the insurer a choice to adjust the claim in question to either the prevailing rate or a rate that is lower is reasonably necessary because the insurer may choose not to lower their rate or provide invoices.

Additionally, language was added to clarify that if the three (3) invoices are not the same, the insurer may only adjust the labor rate to the highest of the rates in the invoices. This addition is reasonably necessary to provide insurers guidance as to what adjustment amount may be made when there are three different labor rates on the invoices.

Finally, language was added to clarify that only non-direct repair program, or non-discounted rates may be used. This language is reasonably necessary for consistency and clarity purpose, since DRP rates are not allowed in the consideration of the proposed regulations.

### **Section 2695.82**

This section was amended to account for several changes that were made in Section 2695.81 as well as language changes for clarity purposes.

The "Instructions" part of the section added "Please ensure that this questionnaire is" completed. The addition is reasonably necessary for clarity purposes and for better reading of the section.

In "Question 1" of the section, language was amended to further clarify and be consistent with prior amendments of "auto body repair shops" in section 2695.81. The change is reasonably necessary for consistency purposes to address the manner in which California treats the registration of automotive repair shops. Businesses must apply with the Bureau of Automotive Repair ("BAR") Licensing Unit in order to register as an automotive repair shop in the State of California, using BAR's Application for Automotive Repair Dealer Registration. In that form, to apply and to be recognized as an automotive repair shop, the business must register their type of business as an "Auto Body and/or Paint Shop" which is on page 3 of 5 of the form. Thus, the changes are reasonably necessary to clarify to insurers and the public what shops are considered an automotive repair shop, and to be more consistent with the way that BAR and the State of California recognizes the registration of automotive repair shops in California.

Finally, in "Question 3" of the section, "carbon fiber labor rate" and "fiberglass labor rate" were added to account for the additional types of labor rates added in section 2695.81, subdivision (8)(A)3. The change is reasonably necessary for consistency purposes.

## **Section 2698.91**

### **Subdivision (c)**

This subdivision was amended to further clarify “auto body repair shops.” The term “to perform automotive repairs” was deleted, and was replaced with “as an auto body and/or paint shop.” The change is reasonably necessary for consistency purposes to address the manner in which California treats the registration of automotive repair shops. Businesses must apply with the Bureau of Automotive Repair (“BAR”) Licensing Unit in order to register as an automotive repair shop in the State of California, using BAR’s Application for Automotive Repair Dealer Registration. In that form, to apply and to be recognized as an automotive repair shop, the business must register their type of business as an “Auto Body and/or Paint Shop” which is on page 3 of 5 of the form. Thus, the changes are reasonably necessary to clarify to insurers and the public what shops are considered an automotive repair shop, and to be more consistent with the way that BAR and the State of California recognizes the registration of automotive repair shops in California.

### **Subdivision (d)**

This subdivision was amended to clarify and specify the heading “Reporting of survey results” to account for the fact that the subdivision detailed the reporting of survey results. The addition of the language is reasonably necessary for clarity purposes.

### **Subdivision (d)(1)**

This subdivision was amended to clarify and specify the heading “Public information” to account for the fact that the subdivision detailed the reporting of public information. The addition of the language is reasonably necessary for clarity purposes.

### **Subdivisions (d)(1) – (d)(6)**

These subdivisions were renumbered to subdivisions (d)(1)(A) – (d)(1)(F) based on the change to (d)(1). The renumbering is reasonably necessary for clarity and continuity purposes.

### **Subdivision (d)(1)(D)**

This subdivision, which was previously subdivision (d)(4) was amended to account for insurers who specifically conduct a Standardized Labor Rate Survey. As part of the public information that must be submitted under the Standardized Labor Rate Survey, insurers must report the prevailing auto body rate for each type of labor rate for each Geographic Area. Since the Standardized Labor Rate Survey requires the determination of eight (8) different types of labor rates, the addition in language is reasonably necessary to account for these types of labor rates.

### **Subdivision (d)(7) and (d)(8)**

These subdivisions were deleted, and moved and renumbered to (g)(6) and (g)(5) respectively. The deletion is reasonably necessary given that the subdivision (d)(7) and (d)(8) are now considered “non-public information” rather than public. (Please see more

details as to why they are considered non-public information below in subdivision (g)5 and (g)(6.)

**Subdivision (d)(2)**

This subdivision was amended for clarity purposes to add the heading “Removal of nonpublic information” since the section related to removal of nonpublic information. The addition of the language is reasonably necessary for clarity purposes.

**Subdivision (g)(2)**

This subdivision was amended to delete the word “and” at the very end of the subdivision to account for the addition of subdivisions (g)(5) and (g)(6). The deletion is reasonably necessary for consistency purposes.

**Subdivision (g)(3)**

This subdivision was amended to delete the period at the very end of the subdivision to account for the addition of subdivisions (g)(5) and (g)(6). The deletion is reasonably necessary for consistency purposes.

**Subdivision (g)(4)**

This subdivision was amended to clarify situations where insurers conduct a Standardized Labor Rate Survey, and must report the name of any shop excluded from the survey, pursuant to section 2695.81, subdivision (d)(2). Language was added to specify that the reporting of shops excluded only applies to surveys conducted pursuant to a Standardized Labor Rate Survey. Insurers expressed concern during the 45-Day comment period that the language was unclear, and it appeared that that the reporting of this information applied to all surveys. Thus, the changes to the language is reasonably necessary to address this potential clarity issue. Finally, further punctuation changes were made, which is reasonably necessary for clarity and consistency purposes.

**Subdivision (g)(5)**

This subdivision, which was previously subdivision (d)(8), was moved from “public information” to “non-public information” to address the issue that information about an insurers’ Direct Repair Program is considered “non-public” information rather than “public information.” Further the subdivision requires the name, physical address of record, and license number with the BAR be reported to the Department. The Department felt it was necessary to move this from public to non-public information that must be reported given that information as to whether or not a shop is a specific member of an insurer’s Direct Repair Program is non-public information. Thus, the renumbering of the subdivision as non-public is reasonably necessary to account for this fact.

**Subdivision (g)(6)**

This subdivision, which was previously subdivision (d)(7), was moved from “public information” to “non-public information” to address the issue that the labor rates reported by each shop that responded to the survey is considered “non-public” information rather than “public information.” The Department felt it was necessary to move this from public

to non-public information that must be reported to the Department given that the labor rates reported by each shop that responded to the survey is non-public information, rather than public information. Insurers invest time and resources into their labor rate surveys, and the responses they receive from shops regarding labor rates for each shop is non-public. Thus, the renumbering of the subdivision as non-public is reasonably necessary to account for this fact.

**Subdivision (h)**

The subdivision was amended to fix a typo that incorrectly referenced the wrong subdivision. The language “Subdivision (g) of Section 2695.81” was replaced with “Subdivision (f) of Section 2695.81” which made the proper reference. The change is reasonably necessary for consistency purposes.

**Subdivision (i)**

This subdivision was amended to delete the word “specific” for clearer reading of the subdivision. The deletion is reasonably necessary for clarity purposes.

Additionally, the term “that is higher or lower than the prevailing auto body rate” was added. Insurers expressed concerns during the 45-Day comment period that there was a potential consistency and clarity issue between section 2695.81, subdivision (e)(4) and this subdivision. Section 2695.81, subdivision (e)(4) states that subdivision (e) shall not preclude an insurer from adjusting upward the prevailing rate, or to negotiate a higher rate. Thus, the language is reasonably necessary to account for a potential clarity and consistency issue.

**General**

**Additional nonsubstantive changes have been made during review by the Office of Administrative Law.**

**UPDATE OF MATERIAL RELIED UPON (Government Code §§ 11346.9(a)(1) and 11347.1)**

On September 26, 2016, a Notice of Availability of Revised Text and of Addition to Rulemaking File was issued in this matter. The following additional material was relied upon by the Department:

- 1) Excerpts from CDI Complaint File Number: CSB-7074971
- 2) Excerpts from CDI Complaint File Number: CSB-7070924
- 3) Excerpts from CDI Complaint File Number: CSB-7074895
- 4) Excerpts from CDI Complaint File Number: CSB-7069934
- 5) Excerpts from CDI Complaint File Number: CSB-7053408
- 6) Excerpts from CDI Complaint File Number: CSB-7065828
- 7) Excerpts from CDI Complaint File Number: CSB-7066140
- 8) Excerpts from CDI Complaint File Number: CSB-7066157

- 9) Excerpts from CDI Complaint File Number: CSB-7066262
- 10) Excerpts from CDI Complaint File Number: CSB-7066264
- 11) Excerpts from CDI Complaint File Number: CSB-7066340
- 12) Excerpts from CDI Complaint File Number: CSB-7066614
- 13) Excerpts from CDI Complaint File Number: CSB-7066779
- 14) Excerpts from CDI Complaint File Number: CSB-7068305
- 15) Excerpts from CDI Complaint File Number: CSB-7069169
- 16) Excerpts from CDI Complaint File Number: CSB-7070222
- 17) Excerpts from CDI Complaint File Number: CSB-7070223
- 18) Excerpts from CDI Complaint File Number: CSB-7071586
- 19) Excerpts from CDI Complaint File Number: CSB-7077647
- 20) Excerpts from CDI Complaint File Number: CSB-7078176
- 21) Excerpts from CDI Complaint File Number: CSB-7070228
- 22) Excerpts from CDI Complaint File Number: CSB-7067694
- 23) Excerpts from CDI Complaint File Number: CSB-7063425
- 24) Excerpts from CDI Complaint File Number: CSB-7061519
- 25) Excerpts from CDI Complaint File Number: CSB-7060276
- 26) Excerpts from CDI Complaint File Number: CSB-7058697
- 27) Excerpts from CDI Complaint File Number: CSB-7057044
- 28) Excerpts from CDI Complaint File Number: CSB-7056262
- 29) Excerpts from CDI Complaint File Number: CSB-7056014
- 30) Excerpts from CDI Complaint File Number: CSB-7055467
- 31) Excerpts from CDI Complaint File Number: CSB-7055168
- 32) Excerpts from CDI Complaint File Number: CSB-7054517
- 33) Excerpts from CDI Complaint File Number: CSB-7053260
- 34) Excerpts from CDI Complaint File Number: CSB-7053031
- 35) Excerpts from CDI Complaint File Number: CSB-7052803
- 36) Excerpts from CDI Complaint File Number: CSB-7052382
- 37) Excerpts from CDI Complaint File Number: CSB-7052244
- 38) Excerpts from CDI Complaint File Number: CSB-7052021
- 39) Excerpts from CDI Complaint File Number: CSB-7051250
- 40) Excerpts from CDI Complaint File Number: CSB-7050378
- 41) Excerpts from CDI Complaint File Number: CSB-7065363
- 42) Excerpts from CDI Complaint File Number: CSB-7064878
- 43) Excerpts from CDI Complaint File Number: CSB-7064616
- 44) Excerpts from CDI Complaint File Number: CSB-7064507
- 45) Excerpts from CDI Complaint File Number: CSB-7063554
- 46) Labor Rate Survey CSAA 3-7-16
- 47) Labor Rate Survey CNIC-21CCIC-FSIC 2015-2016
- 48) Labor Rate Survey Allstate Final 3-8-10 Rates by Market
- 49) Labor Rate Survey Allstate 2-5-16
- 50) Labor Rate Survey Farmers 3-30-16 Chatsworth, Northridge, Valencia
- 51) Labor Rate Survey Farmers 4-18-16 Carmel Valley – Pacific Grove Area
- 52) Labor Rate Survey Farmers 5-23-16 Escondido, San Marcos, Fallbrook
- 53) Labor Rate Survey Farmers 6-6-16 Cypress, Garden Grove, Seal Beach

- 54) Labor Rate Survey Farmers 6-29-16 Colusa
- 55) Labor Rate Survey Farmers 6-29-16 Red Bluff
- 56) Labor Rate Survey Farmers 6-29-16 Shasta & Siskiyou County
- 57) Labor Rate Survey Farmers 7-12-16 Fremont, Milpitas, Newark, San Jose
- 58) Labor Rate Survey Farmers 7-12-16 Campbell, Los Gatos, Cupertino
- 59) Labor Rate Survey Farmers 7-12-16 CM, Irvine, NP Beach, Laguna Beach
- 60) Labor Rate Survey Farmers 8-2-16 Mendocino County
- 61) Labor Rate Survey Farmers 5-16-16 San Joaquin County
- 62) Labor Rate Survey Farmers 5-16-16 Stanislaus County
- 63) Labor Rate Survey Farmers 5-20-16 Arleta, NH, Pacoima, Sunland, Sylmar
- 64) Labor Rate Survey Farmers 5-20-16 Merced County
- 65) Labor Rate Survey Farmers 5-20-16 Simi Valley
- 66) Labor Rate Survey Safeco 4-18-16
- 67) Labor Rate Survey State Farm 7-06-16
- 68) Department of Consumer Affairs, Bureau of Automotive Repair Licensing Unit  
— Application for Automotive Repair Dealer Registration, revised 05/11
- 69) Draft Autobody Analyzer [Geocoding proof of concept demonstrator], dated  
9/23/16

#### **LOCAL MANDATE DETERMINATION (Government Code § 11346.9(a)(2))**

The Department has determined that the proposed regulations will not impose a mandate upon local agencies or school districts.

#### **ALTERNATIVES DETERMINATION (Government Code § 11346.9(a)(4))**

The Department has determined that no alternative it considered or that was otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

In support of this determination is the fact that the Department has not considered an alternative other than those alternatives proposed and responded to in the summary and response to comments, and at no point during the rulemaking proceeding has an alternative been proposed, which would result in the same benefits as the proposed regulations, or implement the statutory policy, in a more effective, less burdensome or more cost-effective manner than the proposed regulations.

**ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT  
ON SMALL BUSINESS (Government Code § 11346.9(a)(5))**

No alternatives were proposed to the Department that would lessen any adverse economic impact on small business.

**SUMMARY OF AND RESPONSE TO COMMENTS (Government Code §§  
11346.9(a)(3) and 11346.9(a)(5))**

The Department received comments following the public hearing on April 22, 2016, and in response to a notice of revised text issued on September 26, 2016. The public comments and the Department's responses are set forth in the table below.

**SUMMARY AND RESPONSE TO COMMENTS RECEIVED  
DURING THE INITIAL NOTICE PERIOD OF MARCH 4, 2016 THROUGH APRIL 21, 2016**

| Commenter  | Synopsis or Verbatim Text of Comment  | Department's Response  |
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| <p><b>Bill Simpkins, Auto Care Inc.</b></p> <p>March 03, 2016<br/><u>Written Comments 18A:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p>   | <p><b>Comment # 1:</b><br/>As an owner of 33 years now, I believe the dept needs to add standardized labor surveys for each city in the state. Anti steering is fine, but when we are told their so called survey ranges from \$70 to \$87...something is wrong!</p>  | <p><b>Response to Comment # 1:</b><br/>The current draft of the proposed regulations will cover every city in the State that has a licensed auto body shop. The Geocoding currently proposed will provide more precise accurate, and reliable surveys for each shop in each city in the state versus relying on set or gerrymandered geographic boundaries, such as cities, counties, regions, or artificial boundaries, which vary significantly in size and demographics throughout the State.</p> |
| <p><b>California Autobody Association</b></p> <p>April 15, 2016<br/><u>Written Comments 18B:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 2:</b><br/>The California Autobody Association (CAA) is pleased to support the proposed Auto Body Repair Labor Rate Surveys Regulation. The CAA is a non-profit trade association comprised of over 1100 individual and independent repair businesses within the collision repair industry.</p> <p>The CAA has worked with the Department of Insurance and various stakeholders for the past 15 years (including participation in last year's pre-notice discussions) to address issues and concerns with insurer auto body repair labor rate surveys that are inconsistent, inaccurate and unreliable.</p> | <p><b>Response to Comment # 2:</b><br/><b>Thank you</b></p>  |

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|  | <p><b>Comment # 2.1:</b><br/> Insurers that settle or adjust automobile claims must gather information from various sources to determine whether the labor rate charged by a repair facility is reasonable. Some insurers conduct formal written surveys while others may conduct a less formal survey (verbal). Insurers benefit financially from paying lower auto body rates and this creates an incentive for some insurers to manipulate surveys to reflect lower labor rates. This is especially true when no clear standards exist for conducting fair and reasonable labor rate surveys. For example, some insurer surveys contain deficiencies including: failing to contain a representative sample of body shops; not defining a clear geographical area; including discounted or negotiated labor rates; including motorcycle or restoration repair shop rates and failing to include current and updated labor rates. Clearer and more reliable standards are needed to provide consistency in the way insurers conduct and report auto body repair labor rate surveys.</p> <p><b>Comment # 2.2:</b><br/> The CAA believes the proposed labor rate surveys regulations will clarify and address many of the issues and concerns by standardizing the surveys to effectuate fair and equitable claims settlement or adjustments of labor rates.</p> <p><b>Comment # 2.3:</b><br/> We would also like to suggest the following change to Section 2695.82 (Questionnaire), under Question 3: Hourly Rate Charged. The following additional categories should include the question: (g) Carbon Fiber ___per hour; (h) Fiber Glass: ___per hour; (i) Other specialty ___per hour. New lightweight vehicle materials are constantly being introduced because of rapid automotive technology changes. The Questionnaire should provide the ability for the repair shops to include labor rates for such changes in automotive repair technology.</p> | <p><b>Response to Comment # 2.1:</b><br/> The Department thanks the Commenter for the comment in support of the proposed regulations, and for providing examples illustrating the necessity for addressing the issues the proposed regulation seeks to address.</p> <p><b>Response to Comment # 2.2:</b><br/> The Department thanks and agrees with the commenter.</p> <p><b>Response to Comment # 2.3:</b><br/> In response to this comment, the Department added “carbon fiber” and “fiberglass” as additional categories of labor rates in the Final Text. However, the Department declines to add “other specialty” as a separate category.</p> |
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|   | <p>Thank you for your consideration.</p>   | <p>Unlike carbon and fiberglass, which are currently materials used in auto body repairs and for which there are accepted auto body industry labor rates, adding the category of “other specialty” would create an ambiguous term, that would result in significant challenge for stakeholders to understand what is meant and could increase disputes. Also, to the degree new materials are used in auto body repairs and a labor rate is attached to work associated with that new material, the Department would consider future amendments to these regulations.</p> |
| <p><b>Frank Shiro, Schiro’s Collision Repairs</b></p> <p>April 21, 2016</p> <p><u>Written Comments 18C:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> <p><b>Attachments</b> are summarized.</p> | <p><b>Comment # 3.1:</b></p> <p>My name is Frank Schiro, co-owner of Schiro's Collision Repairs located in North Hollywood and Chatsworth, California. My purpose is to convey to the Department of Insurance how unfair the labor rate surveys are manipulated by a major insurance company in our area in the hope of the DOI creating a more fair system. I would also like to convey to the DOI steering practices that are being employed as well. Lastly, I would like the DOI to consider why the DOI has created a system that mostly requires the insurance companies to write a response from Request for Assistance claims filed against the carrier without any accountability to how the insurance companies respond to the RFA complaint.</p> <p><b>Comment # 3.2:</b></p> <p>There is a pattern where either the customer or my company files a Request for Assistance against major insurance companies where they</p> | <p><b>Response to Comment # 3.1:</b></p> <p>The Department thanks the Commenter for the comment in support of the proposed regulations. However, the comment regarding Request for Assistance is outside the scope of the current proposed regulations. The current regulations do not attempt to address the process by which consumers file Requests for Assistance</p> <p><b>Response to Comment # 3.2:</b></p> <p>The comment addresses an issue that is outside the scope of the current</p>   |

exercise unfair labor rate surveys, steering practices or other unfair claim's handling practices and all the carrier is seemingly required to do by the DOI is send a response of any kind to the person or shop that filed the RFA. No matter how strong the evidence proves the unfair claims handling occurred, the outcome is the same- no relief for the body shops.

**Comment # 3.3:**

To make my point, I will focus on Geico Insurance because in my opinion, they are the most abusive in our area of the larger insurance companies with regards to unfair labor rate surveys and steering practices. On October 29, 2013, Geico reported to the DOI labor rates from the survey they conducted which consisted of fifteen shops in the San Fernando Valley. To verify the accuracy and current relevance of their survey, in April of 2015 (one year ago), I contacted the owners of most of the fifteen shops (three did not respond). In my research, I discovered the following inconsistencies:

1. Of the fifteen shops, one was no longer in business.
2. Half of the shop owners that responded were not aware they were taking part in a Geico survey in late 2013.
3. Of the twelve shops I received an e-mail response from, all had posted rates that were significantly higher than the rates that Geico claimed on their survey.
4. Instead of submitting the average rates of their of their fifteen shops which would have been Body Rate: \$48.26; Paint Rate \$48.26; Paint Material Rate \$34.40; Frame Rate\$69.80 and Mechanical Rate \$99.86, they used language, "...a summary of the most commonly occurring rates for each of the labor territories in the state of California." This "summary" resulted in the following labor rates: Body Rate: \$45.00; Paint Rate \$45.00; Paint Material Rate \$34.00; Frame Rate \$65.00 and Mechanical Rate \$95.00.

proposed regulations.

**Response to Comment # 3.3:**

The Department thanks the commenter for providing an example illustrating the necessity for addressing the issues of inaccurate or outdated surveys the proposed regulation seeks to address.

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|  | <p><b>Comment # 3.4:</b><br/>To make matters much worse, the DOI is allowing this unfair Geico labor rate survey to still stand today- nearly two-and-a-half years after it was submitted!</p> <p>I am pleading with the DOI to create a more fair labor rate survey that is fair for all parties and to reform the RFA process so shops have recourse when we are victimized by these unfair claim's handling practices. Attached are a few examples supporting my statements above. As for labor rates, upon request, I can provide dozens of paid Geico claims where they refused to pay our posted rates as well as examples of other major insurance companies enforcing unfair and outdated labor rate surveys.</p> <p><b>Attachment 1: Geico Labor Rates</b><br/>E-mail Exchange between Commenter and Geico regarding auto body parts.</p> <p><b>Attachment 2: Geico Steering 1</b><br/>E-mail from a customer documenting an incident involving Geico.</p> | <p><b>Response to Comment # 3.4:</b><br/>The comment addresses an issue that is outside the scope of the current proposed regulations. However, the Department thanks the commenter for providing an example illustrating the necessity for addressing the issues of inaccurate or outdated surveys the proposed regulation seeks to address.</p> <p>The proposed regulations address this issue by establishing a time limit for the Standardized Labor Rate Survey. Furthermore, the conducting a Standardized Labor Rate Survey in compliance with the proposed regulations will result in a rebuttable presumption that the insurer attempted in good faith to effectuate a fair and equitable settlement. Those labor rate surveys not in compliance with the proposed regulations will not result in the rebuttable presumption.</p> <p><b>Response to Attachment 1:</b> Although the attachment mentions a labor rate, the main content involves a topic that is outside the scope of the current proposed regulations.</p> <p><b>Response to Attachment 2:</b> The</p> |
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|   | <p><b>Attachment 3: Geico Steering 2</b><br/>E-mail from a customer documenting an incident involving Geico.</p>   | <p>attachment’s main content involves a topic that is outside the scope of the current proposed regulations.</p> <p><b>Response to Attachment 3:</b> The attachment’s main content involves a topic that is outside the scope of the current proposed regulations.</p> |
| <p><b>Gerry Connolly, Fender Bender</b><br/>April 21, 2016<br/><u>Written Comments 18D:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 4:</b><br/>Please consider on topic of labor rate survey .<br/><a href="http://www.fenderbender.com/FenderBender/April-2016/State-Farm-Announces-2016-Initiatives-Could-Downsize-Network/">http://www.fenderbender.com/FenderBender/April-2016/State-Farm-Announces-2016-Initiatives-Could-Downsize-Network/</a></p> <p>Sent from my iPhone</p> <p><b>Copied from Link:</b><br/>April 21, 2016—<a href="#">State Farm Insurance</a> discussed its outlook for 2016 in a video posted Tuesday on its business-to-business website, highlighting strategies for repairers in its network and saying that it may downsize the number of repairers in its Select Service program.</p> <p>Gregg McDonald, claim manager for State Farm, addressed a wide range of topics in the eight-minute video, which <i>FenderBender</i> was provided access to by a Select Service shop.</p> <p>As McDonald highlighted company initiatives for 2016 toward the end of the video, he stated that one of State Farm’s goal is to address markets where repair capacity exceeds customer demands.</p> | <p><b>Response to Comment # 4:</b><br/>The comments do not directly address the regulations being considered and involve a topic that is outside the scope of the current proposed regulations.</p>  |

“We will be applying consistent reviews across all network participants, and we will continue to determine which repairers are the best fit for our program,” he said. “There are markets where we will see fewer repairers in our network. We want to work with repairers that are committed to providing our customers with the highest quality and the most competitive repairs possible.”

That doesn’t signal a preference to large MSOs, though, McDonald explained: “Independants, and the two, three location MSOs still handle a majority of our customers’ repairs. They are a vibrant part of our network.”

Instead, determinations will likely be made depending on the company’s “RPM Reports” issued to each Select Service repairer—reports that measure a number of KPIs and issue each business a performance score and ranking within the system.

McDonald first addressed the RPM reports earlier in the video when he discussed opportunities for repairers to work with State Farm in strategic ways to improve efficiency and performance in State Farm’s Select Service program.

“Repairers often ask how they can improve their performance on Select Service,” McDonald said. “Our strong suggestion would be to focus on the top three areas highlighted on the RPM report.”

Focusing on quality, efficiency and competitive price, McDonald said repairers could yield positive results on the RPM. In regard to competitive pricing, he suggested ways repairers could address those issues.

“We’ve seen repairers choose to be more competitive by offering lower labor rates or judgement times. Some have chosen to provide parts discounts,” he said. “Others use a higher percentage of alternative parts.

Some use a combination of approaches. Our data does show that repairers who focus on repairing parts versus replacing them are among our most competitive.”

"Repairers with questions about the program can continue to reach out to their State Farm contact," State Farm spokesperson Justin Tomczak said when reached for comment by *FenderBender*,

**A full transcript of the video is provided below:**

*Hello, and thank you for taking the time to watch this video. And more importantly, thank you for all you do for our mutual customers.*

*We appreciate working with you to ensure they have the best repair experience possible. Today I'll provide some details on the current state of our Select Service program. I'll touch on how you can continue to have success as a participant on the program, and finally, I'll discuss our plans for 2016.*

*In past videos we've talked about the pace of change in our industry. This pace accelerated in 2015. We believe staying informed on changes in our industry is one of the best ways to prepare for the future. Here are a few things in particular that caught our attention.*

*GM kicked off its Dynamic Parts Pricing initiative. We noticed a significant increase in the availability of technology features in new model vehicles. And as we say every year, the pace of consolidation in the repair industry increased. We also couldn't help but notice the continuous drumbeat surrounding autonomous vehicles and "On Demand" transportation services. And connected to this, the recent investment GM made in Lyft.*

*It appears that auto manufacturers may be planning for a future that looks much different than today. There certainly are a lot of indicators of a changing landscape around transportation in general. Each of these developments have implications both for repairers and insurers. Our customers expect us to prepare for the future. And our Select Service program needs to be positioned for the future.*

*As we said in our last video message, “We are looking for opportunities to work together with you in more strategic ways.”*

*Our program administration team will mark its first anniversary in April. Since implementation, we’ve facilitated performance discussions with each of you at least once. With a focus on all aspects of performance we’ve removed some repairers. This has created opportunities for other repairers who were not previously on our program. Our program administrators are using a consistent approach to managing the Select Services program across the country. Their knowledge of your performance has laid a solid foundation for the coming year.*

*As we look at how Select Service compares to the industry, we see many markets where Select Service results are not competitive compared to the industry. This is one area we’ll be focused on this year. Repairers often ask how they can improve their performance on Select Service. Our strong suggestion would be to focus on the top three areas highlighted on the RPM report. This is really the key to improving performance. Repairers who follow specific action plans that directly relate to the three areas for improvement see the most success. We are seeing some repairers who are truly embracing continuous improvement and consistently have scores above 950. A few have achieved 1,000 point scores.*

*Let's begin with quality. As a participant in the program, we consider your ability to conduct quality repairs to be fundamental. This is the most important aspect of our program and is a requirement for every repair. Having a quality control process in place is required by our agreement. Actively utilizing that process in each step of the repair will help ensure that our customers' vehicles will be continues to be repaired properly. Also, your continued engagement in training and certification will help to support our common interest in quality repairs.*

*Next is efficiency. Customers today are demanding faster service in all aspects of their lives. Having complete repair plans and accurate parts orders are the primary drivers to improving cycle time.*

*And finally, competitive price. We recognize repairers can do a number of things to be more competitive. We know this is your business and we won't dictate how you address competitive issues. We've seen repairers choose to be more competitive by offering lower labor rates or judgement times. Some have chosen to provide parts discounts. Others use a higher percentage of alternative parts. Some use a combination of approaches. Our data does show that repairers who focus on repairing parts versus replacing them are among our most competitive.*

*These decisions are yours. Any of them can yield positive results on the RPM. We will continue to provide awareness of competitive issues through our program administrators.*

*Now let's talk about our plans for 2016. Roughly 10 years ago, we made a significant change to the size of our network. Back then we called it Service First. In our effort to better match our network size to customer demand, we created a program that was half the size of*

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|   | <p><i>Service First. Today we see many markets where we have more repair capacity than customer demand. This overcapacity may result in fewer jobs for high-performing repairers. One of our goals for 2016 will be to address these markets. While we don't have a specific target for our network size, we want high performers to have the opportunity to have consistent repair volume. We will be applying consistent reviews across all network participants, and we will continue to determine which repairers are the best fit for our program. There are markets where we will see fewer repairers in our network. We want to work with repairers that are committed to providing our customers with the highest quality and the most competitive repairs possible. We also know our program will continue to have a diverse mix of independently owned repairers in addition to the MSOs. Independants, and the two-three-location MSOs still handle a majority of our customers' repairs. They are a vibrant part of our network. Our customers have a choice, and we know you do to. We encourage you to act on the information shared by your program administrator, and use your RPM to move into the future with us. Please continue to engage your program administrators as you have questions regarding your performance.</i></p> <p><i>Once again, thank you for all that you do for our customers, and have a great 2016.</i></p> |   |
| <p><b>Hillel Shamam, Eli's Collision Repair</b></p> <p>April 21, 2016<br/> <u>Written Comments 18E:</u></p> <p>Verbatim, but with inserted <b>Comment</b></p> | <p><b>Comment # 5:</b></p> <p>Good Afternoon,</p> <p>Eli's Collision Repair is a BAR licensed facility and is established in Los Angeles for almost 40 years.</p>   | <p><b>Response to Comment # 5:</b></p> <p>Thank you</p> |

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| <p><b>Numbers</b> keyed to responses.</p> <p><b>Attachments</b> are summarized.</p> | <p><u>Eli's Collision Repair would like to submit our official comments in regards to the public hearing today discussing labor rates and insurance company surveys.</u></p> <p><b>Comment # 5.1:</b></p> <ol style="list-style-type: none"> <li>1. It should be mandatory for collision repair facilities to post their labor rates in order to reflect the free market.</li> </ol> <p><b>Comment # 5.2:</b></p> <ol style="list-style-type: none"> <li>2. Insurance companies can help keep posted labor rates competitive by submitting labor rate surveys that comply with certain conditions.</li> </ol> <p><b>Comment # 5.3:</b></p> <ol style="list-style-type: none"> <li>3. The most important condition for labor rate surveys is that it cannot include rates from collision repair facilities that they have partnerships with. (aka DRP shops or wholesale rates)</li> </ol> <p><b>Comment # 5.4:</b></p> | <p><b>Response to Comment # 5.1:</b><br/>The Department does not regulated and license auto body repair shops or have the authority to require the posting of labor rates. The comment addresses an issue that is outside the scope of the current proposed regulations.</p> <p><b>Response to Comment # 5.2:</b><br/>General comment with no specific recommendations and is vague in nature as to what “certain conditions” are.</p> <p><b>Response to Comment # 5.3:</b><br/>Under section 2695.81(d)(6) of the proposed regulations, the Standardized Labor Rate Survey prohibits any discounted rate negotiated or contracted for with members of its Direct Repair Program. However, “partnerships” as referenced by the Commenter is vague and overly broad, and could be interpreted as any potential relationship between shops and insurers.</p> <p><b>Response to Comment # 5.4:</b></p> |
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|  | <p>4. The other important condition for labor rate surveys would be that they cannot be deceptive and significant fines can and will be incurred if they are proven to be so.</p> <p><b>Comment # 5.5:</b></p> <p>5. The enclosed document listed as insurance rates shows how insurance companies have been able to skew what they pay collision repair facilities compared to what they pay mechanical repair facilities such as dealerships.</p> <p><b>Comment # 5.6:</b></p> <p>6. The following points and the enclosed documents from Coast National and Safeco show how current surveys are deceptive.</p> <ul style="list-style-type: none"> <li>a. The clarity of 758 (c) is extremely vague and immensely open for interpretation. It dictates no standard procedure methodology or regulation for how an insurance obtains these surveys / rates. Requirements should be succinct.</li> </ul> <p><b>Comment # 5.7:</b></p> <ul style="list-style-type: none"> <li>b. The Safeco survey provides no evidence for their cumulative labor rate results. All listed body shop rates are blank which obviously provides no evidence to support their concluded findings.</li> </ul> | <p>Imposition of fines is outside the scope of the current proposed regulations.</p> <p><b>Response to Comment # 5.5:</b><br/>Although mechanical repair facilities may provide some insight into the rising cost of auto body repairs, the statement is overly broad and does not provide substantiation. Mechanical repair facilities are an issue that is beyond the scope of the current regulations and the statutory authority the Department is relying on.</p> <p><b>Response to Comment # 5.6:</b><br/>The Department does not have the authority to amend statutes. However, the proposed regulations do provide clearly defined methodologies for conducting a Standardized Labor Rate Survey.</p> <p><b>Response to Comment # 5.7:</b><br/>Thank you for this example of why the proposed standardized methodology for an optional labor rate survey is needed to address a current defect with the way some labor rate surveys are conducted. The proposed regulations will require that the labor rate of each geographic</p> |
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|  | <p><b>Comment # 5.8:</b></p> <p>c. The enclosed Coast National survey lists the rates for hundreds of shops but provides no results of what their cumulative findings are and what they are supporting.</p> <p>Please contact us if you have any questions.</p> <p><b>Attachment 1: Coast National Example</b><br/>This is a 2014 Coast National Labor Rate Survey.</p> <p><b>Attachment 2: Safeco Example</b><br/>This is a 2014 Safeco Labor Rate Survey.</p> <p><b>Attachment 3: Insurance Labor Rates List</b><br/>Chart of insurers' labor rates versus labor rates charged by different shops.</p> | <p>area is reported to the Department as part of the information that will be made public upon request, under section 2698.91(d)(1)(D).</p> <p><b>Response to Comment # 5.8:</b><br/>The Department thanks the commenter for providing an example of a labor rate survey that the Commenter believes to be inaccurate or outdated.</p> <p><b>Response to Attachment 1:</b><br/>The Department thanks the Commenter for providing an example of a labor rate survey that the Commenter believes is inaccurate or outdated.</p> <p><b>Response to Attachment 2:</b><br/>The Department thanks the Commenter for providing an example of a labor rate survey that the Commenter believes is inaccurate or outdated.</p> <p><b>Response to Attachment 3:</b><br/>The Department thanks the Commenter for providing an example of the disparity in labor rate surveys and rates charged by auto body shops.</p> |
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| <p><b>Isela Bowles, Formula 1 Collision Center</b></p> <p>April 22, 2016<br/> <u>Written Comments 18F:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 6.1:</b><br/> Respectfully I would like to address the importance of these labor rate surveys.</p> <p>On behalf of many independent Auto Body shops we thanked you that you are addressing such a controversial issue.</p> <p>Our Concerns are the following:</p> <ol style="list-style-type: none"> <li>1) Regulatory</li> <li>2) Fairness</li> <li>3) Accessibility</li> </ol> <p><b>Comment # 6.2:</b><br/> 1) Regulatory:<br/> The surveys appear as a regulatory fashion way to determine what an Automotive shop can charge for the repairs of a automobile. It restricts a business the fairness of being able to charge a fair labor rate. The Beauty about our country is that we have free enterprise which means competition. Business compete for business and it is exactly how it balances what a business can charge otherwise you can you out of business. We must understand how these labor rates impact the right to do business in this state of California. The insures are the one who are doing the labor rates surveys and it is up to their discretion which shops get picked. The last time my shop was surveyed the surveyor told me that my labor rates where to high and that he could not use my shop rates. How was this fair to my business or any other business.</p> | <p><b>Response to Comment # 6.1:</b><br/> The Department thanks the commenter for the comment in support of the proposed regulations.</p> <p><b>Response to Comment # 6.2:</b><br/> The proposed regulations do not impede any body shop from charging any labor rate they choose, or the fair market value of labor rates charged in the open market. In fact, this proposed regulation states in proposed Section 2695.81(e) (5) that “This subdivision (e) shall not be construed to imply that the repair shop must accept the amount offered for payment by the insurer or that the amount charged by the repair shop is excessive or unreasonable, but only that the insurer has taken reasonable steps to quantify its contractual or legal obligation for payment of the claim pursuant to the applicable insurance policy or other laws.”</p> |
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|  | <p><b>Comment # 6.3:</b><br/> The other problem we encounter is that when an insurance adjuster tells us how much they are going to pay per hour, we ask them to show us their survey and they can never provide you with a copy. Furthermore, the two times that I have submitted a public records request for these surveys there was never a response. That leaves us without a way to confirm that these unfair labor rate are true and we are not able to verify that these labor rate surveys even exist.</p> <p><b>Comment # 6.4:</b><br/> 2) Fairness:<br/> Fairness is the second most important issue and to give you a perspective of fairness here are the facts.</p> <ol style="list-style-type: none"> <li>1) In 1990 the labor rate was \$28.00 dollars per hour</li> <li>2) 2016 the labor rate varies from \$42.00 to \$52.00 dollars per hour</li> </ol> | <p><b>Response to Comment # 6.3:</b><br/> The proposed regulations address this transparency issue as the Commenter mentions. The proposed regulations may require that the public survey data submitted to the Department is in electronic format so that it can easily be published on the Department’s website. Labor Rate surveys can still be requested through a Public Records Act request under the proposed regulations. The Department strives to comply with every Public Records Act request, and is unaware of any specific instances where the Department has failed to provide a labor rate survey as requested under a Public Records Act request. However, posting survey results on the web may eliminate some of the need to do a public records request.</p> <p><b>Response to Comment # 6.4:</b><br/> The Department thanks the Commenter for providing an example of the price increases in the past 36 years, however the example is generalized and does not explain where the rates come from or who charged such rates. The Department does not have the authority to regulate the auto body repair industry. Nor, do the proposed</p> |
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|  | <p>Lets analyze this date from 1990 to 2016 there is a span of 26 years, the difference between \$28.00 and \$42.00 is \$14.00 dollars. The difference between \$28.00 and \$52.00 is \$24.00 dollars.</p> <p>If we compare the 26 year span from the lowest labor rate of \$42.00 dollars we can see that the increase was 0.54 cents per year and for the highest 0.92 cents a year. If you compare the two increases per year of .54cents and .92cents a year accordingly, it will not even meet the cost of leaving mean rate increase. Not to mention all the necessary procedures that insurers refuse to pay an automotive repair shop, such as masking time and materials, welding materials, prepping materials and many other non-included operations and materials that become a loss to the business or the consumer gets the charge and are forced to pay out of pocket. Please keep in mind that it appears as our businesses are being regulated as far as a fair labor rate and without representation nor a voice to have due process.</p> <p><b>Comment # 6.5:</b><br/> 3) Accessibility:<br/> This last and most important is the accessibility to the actual so called labor rate surveys. Businesses have a disadvantage and lack of accessibility.</p> <p>a) We are not provided with a copy of surveys.<br/> b) We have to do a public records request for a copy of surveys<br/> I personally have requested these records twice and have never received a response, therefore I was never given the opportunity to see, inspect, nor verify these surveys.</p> | <p>regulations regulate the auto body repair industry. Shops are free to charge whatever rates they choose. The proposed regulations aims to address inaccurate or outdated surveys resulting in a disparity between what auto body repair shops charge, and the results of these surveys. The proposed regulations aim to address the issue of consumers who are forced to pay the price difference when insurers use inaccurate or unreliable surveys to pay or reduce how much they will pay for labor rates on automobile insurance claims.</p> <p><b>Response to Comment # 6.5:</b><br/> The proposed regulations address the accessibility issue that the Commenter mentions. The proposed regulations may require that the public survey data submitted to the Department is in electronic format so that it can easily be published on the Department’s website.</p> <p>Labor Rate surveys can still be requested through a Public Records Act request under the proposed regulations. The Department strives to comply with every Public Records Act request, and is unaware of any specific instances</p> |
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|  | <p><b>Comment # 6.6:</b><br/> c) A lot of the shops surveyed are DRP shops that under contract with many insurers and they are bound by discounted labor rates. How can we verify that the labor rates were unbiased.</p> <p>My suggestion is that some of the language is changed to “SHALL” as any other word is rather loose and meaningless. It gives the insurer a way out of compliance.</p> <p>A VOICE is what our industry needs, please be the voice of every CONSUMER and BUSINESS that is greatly impacted by these unfair labor rate surveys.</p> <p><b>Comment # 6.7:</b><br/> CONCLUSION:<br/> It is my recommendation that if these labor rate surveys must exist, then they must be done by the Department of Insurance and not the insurer, and that all independent shops be included. The cost of these surveys must be passed on to the insurers via their licensing fees so as to not affect tax payers money to incur this expense. A survey can be mailed to all shops and give them 30 days to have the opportunity of having a fair chance to establish what ends up regulating and limiting our business.</p> | <p>where the Department has failed to provide a labor rate survey as requested under a Public Records Act request. However, posting survey results on the web may eliminate some of the need to do a public records request.</p> <p><b>Response to Comment # 6.6:</b><br/> The proposed regulations Standardized Labor Rate surveys prohibits the use of discounted rates negotiated or contracted for with members of its Direct Repair Program.</p> <p>Although the Department appreciates the suggestion of using the language “shall” in the proposed regulations, the comment is nonspecific and general, and it is unclear where the Commenter wants this word used in the proposed regulations.</p> <p><b>Response to Comment # 6.7</b><br/> The Department does not have the authority to conduct labor rate surveys and require insurers to pay claims based upon a survey conducted by the Department. Under Ins. Code § 758(c) insurers are not required to conduct labor rate surveys.<br/> The proposed regulations do not</p> |
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|  | <p>Monopoly does not exist in this Industry, Free Enterprise is designed to protect the cost and best interest of consumers. Mechanics for example are at the present labor rate of \$95.00 to \$165.00 per hour yet we are being oppressed by these labor rate surveys with \$42-\$52.00 per hour, how can these rates be fair and equitable with the industry and the tremendous liability we carry by repairing automobiles.</p> <p>Please make the changes necessary to protect the consumers from this abuse as the insurers premiums reflect the protection they are paying for yet the repairs many times become compromise with the many short pay from insurers.</p>   | <p>address the labor rates of mechanical repair shops, and is beyond the scope of the proposed regulations. The proposed regulations is aimed at protecting consumers in the fair settlement of auto body repair claims that use auto body repair labor rate surveys.</p> |
| <p><b>Jay Flores, Tony's Body Shop</b></p> <p>April 21, 2016</p> <p><u>Written Comments 18G:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 7:</b></p> <p>I am emailing you to voice <u>my support in the legislation</u> that has been proposed to give clarity to Labor rate Surveys.</p> <p>Tony's Body Shop is the largest body shop in Ventura County and I get to see firsthand the manipulation of the rates by carriers.</p> <p>I see labor rates vary from over \$ 100 to \$ 40 dollars all across California, with no connection to the areas cost of living.</p> <p>I see intentional manipulation in the survey's that are on file with the DOI.</p> <p>the re-imburement rates that we in the collision industry have dealt with have not even kept up with inflation.</p> <ul style="list-style-type: none"> <li>● I have may stories to tell, but one simple one:</li> </ul> | <p><b>Response to Comment # 7:</b> The Department thanks the Commenter for the comment in support of the proposed regulations, and for providing examples illustrating the necessity for addressing the issues the proposed regulation seeks to address.</p>              |

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|  | <p>we raised our shop rates beginning January 1<sup>st</sup> 2016 due to the many changes that have occurred in California.</p> <p>I asked the local U.S.A.A. field estimator for the phone number to the “decision maker” in his company that deals with rates, he pretended not to know and gave me 5 names to call and talk to....</p> <p>mind you, they have no survey on file with the DOI.</p> <p>Yet, I pay my bills, I paid my home insurance and car insurance, I looked at the prior year, was 7% higher exactly. What I see in the insurance industry is listed below – Yet we in the collision industry are being taken advantage of and when ask for a rate change , they make it difficult to do without having to bill the customer.....</p> <p>They are able to :</p> <ol style="list-style-type: none"> <li>1. Raise rates when profit margins aren't acceptable</li> <li>2. Raise rates on a market-by-market basis</li> <li>3. Raise rates for an appropriate and acceptable return to investors</li> <li>4. Raise rates even when the inflation rate is 0</li> <li>5. Raise rates quickly when costs increase to recover those costs quickly</li> <li>6. Raise rates as long as necessary and as justified by market and economic factors</li> </ol> |   |
| <p><b>Insurance Industry Coalition</b></p> <p>April 21, 2016</p> | <p><b>Comment # 8:</b><br/> 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</p>  | <p><b>Response to Comment # 8</b><br/> Thank you.</p> |

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| <p><u>Written Comments 18H:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p>Insurance’s (“Department”) proposed regulations on “Labor Rate Surveys.”</p> <p><b>Introduction</b></p> <p><b>Comment # 8.1</b></p> <p>This issue is very familiar to the Department and our organizations. By our count, this is the fourth time the Department has considered how to regulate labor rate surveys of auto repair shops in California.</p> <p><b>Comment # 8.2</b></p> <p>Each time these previous discussions have occurred, insurers have attempted to outline the scope of the Department’s power to regulate and then provide practical solutions consistent with this authority. We respect the important public function of the Department and take seriously the obligations which insurers have to society. We are concerned, however, that this latest proposal exceeds the Department’s power to regulate insurers and represents unnecessary and expensive policy choices which we hope the Department will improve.</p> <p>In these comments, we will, first, outline our view of the scope of the Department’s legislatively-granted power to regulate in these areas. Thereafter, we will offer suggestions and questions which we hope will help the Department to improve the proposals.</p> <p><b>Comment # 8.3</b></p> <p>A core objective of the regulation is inconsistent with the Department’s mission statement. On the Department’s website, it plainly states that “consumer protection continues to be the core of [the Department’s] mission.” In reviewing the Department’s Policy Statement Overview of</p> | <p><b>Response to Comment # 8.1:</b></p> <p>The Department disagrees that it has considered regulations in this area four times. This current rulemaking is only the second time that the Department has Noticed a regulation related to auto body labor rate surveys, except for the current regulations (2698.91) which are extremely narrow in scope. The first time was in 2006.</p> <p><b>Response to Comment # 8.2:</b></p> <p>The Department thanks the insurers for involving itself in the rulemaking process, and for suggesting practical solutions, and for the respect of the Department’s role and public function. The Department disagrees that the proposed regulations exceed the Department’s power to regulate insurers. The Department thanks the Commenter for its comments on scope and suggestions.</p> <p><b>Response to Comment # 8.3:</b></p> <p>The Department disagrees with this comment. The proposed regulations are consistent with the Department’s Mission of “ensuring vibrant markets where insurers keep their promises and</p> |
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the regulation on pages 6 and 8, and the Department’s Initial Statement of Reasons pages 37 and 40 we believe the following statements are inconsistent and inappropriate with the Department’s mission: Conducting fair and equitable Standardized Labor Rate Surveys will benefit auto body shops and policy-holders (households). Currently when the labor rate paid by the insurer doesn’t cover the work performed by the shop, the shop either incurs a financial loss or bills the consumer the unpaid amount. While some shops may pass this cost on to the consumer; others work with the consumer in an attempt to increase the probability of repeat business. ***The Department projects \$1.15 million in benefits will be passed on to the auto body shops and policyholders (households)*** (Emphasis Added.)

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

the health and economic security of individuals, families, and businesses are protected”. Within the Notice of Proposed Rulemaking and Initial Statement of Reasons, the Department has clearly outlined numerous benefits of the proposed regulations to Consumers and the general public, which is consistent with the Department’s Mission and Vision, which is “Insurance Protection for All Californians”.

The Commenter’s *two* quotes from the Initial Statement of Reasons are taken out of context. The Commenter has simply chosen *two* instances within the forty-four paged Initial Statement of Reasons and ten paged Notice of Proposed Rulemaking, in an attempt to illustrate that the proposed regulations is aimed at protecting only auto body repair shops, when the stated purpose of the regulations (as noted in the Initial Statement of Reasons) is to provide insurers with a mechanism to support the use of labor rate surveys when settling automobile insurance repair claims in a fair, equitable and reasonable manner, as required by Ins. Code section 790.03(h), in an effort to

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|  | <p><b>Comment # 8.4</b></p> <p>In our view it is simply not the role of the Department to interfere in the free market system and propose laws that could financially benefit the auto body repair shops.</p> <p>We disagree that auto body repair shops are “consumers,” and we also disagree that the regulations will necessarily benefit consumers as “higher labor rates” could increase insurance premiums.</p> <p>The scenario of financial disagreements between a non-direct repair shop, policyholder, and insurer is not exclusive to the property casualty insurer setting as the same financial disagreement occurs whenever a patient uses an out-of-network provider in the context of health insurance.</p> <p>This issue is often governed by the contract between the policyholder and insurer, and at the policy level legislatures have intervened in such situations even here in California. The point is if one of the goals of the Department is to “prevent auto body repair shops from facing the dilemma of whether to accept a financial loss, or bill the consumer,” then that is a policy question that should be addressed by the legislature as many stakeholders need to be involved in that policy question. The regulatory process is not the appropriate venue to address these changes.</p> | <p>protect all insurance consumers and claimants who may be financially harmed by the use of unreliable labor rate surveys.</p> <p>.</p> <p><b>Response to Comment # 8.4:</b></p> <p>The Department agrees that the Department’s role is not to interfere in the free market system. However, the proposed regulations do not interfere in the free market system. Further, the proposed regulations are not intended to financially benefit auto body repair shops. As noted above, the stated purpose of the regulations (as noted in the Initial Statement of Reasons) is to provide insurers with a voluntary mechanism to support the use of labor rate surveys when settling automobile insurance repair claims in a fair, equitable and reasonable manner, as required by Ins. Code section 790.03(h), in an effort to protect all insurance consumers and claimants who may be financially harmed by the use of unreliable labor rate surveys.</p> <p>Auto body shops are members of the public who may be financially harmed by the use of unreliable labor rate</p> |
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|  |  | <p>surveys. Thus, if insurers choose to conduct and use the reliable Standardized Survey, as proposed in these regulations, more fair equitable and reasonable claims settlements will result, thus benefiting consumers who are now forced to pay the out-of-pocket cost difference between labor rates based upon unreliable surveys reasonable rates charged by auto body repair shops. While auto body repair shops may also be paid a fairer, more equitable and reasonable labor rate in order to repair damaged automobiles to a workmanlike and safe condition, the proposed regulations are not intended to fully compensate those repairs that might still charge rates higher than the fair and equitable labor rate in a particular geographic market area. The proposed regulations do not apply to health insurance, and the Department does not agree with the comparison, which is beyond the scope of the proposed rulemaking.</p> <p>Although policyholders and insurers may be bound by the provisions contracted in their policies, the Department's regulatory role obligates us to protect consumers, especially where inaccurate, unreliable, or</p> |
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|  | <p><b>Comment # 8.5</b><br/> <b>Proposed sections 2695.81 and 2695.82 and the proposed amendments to existing section 2698.91 fail to comply with the standards of authority, reference, consistency, clarity and necessity.</b><br/> <b>Sections 2695.81 and 2695.82</b><br/> Section 2695.81 describes the Standardized Auto Body Repair Labor Rate Survey. Subdivision (d) sets forth the requirements for the survey. Subdivision (e) describes how an insurer may use the survey. Subdivision (c) provides that a survey that complies with the requirements in subdivision (d) and that is used pursuant to subdivision (e) shall result in a rebuttable presumption that the insurer "has attempted in good faith to effectuate a fair and equitable" settlement of the claim.<br/> The quoted language in subdivision (c) is based on Insurance Code section 790.03(h)(5) which defines "Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which</p> | <p>inconsistent labor rate surveys are used to settle consumer claims. Although legislation may be used to address some of these issues, the potential for legislation does not prohibit the Department from using its regulatory and rulemaking power to address the pressing issues created by unreliable or outdated auto body labor rate surveys. In this case, the regulatory process is the appropriate process to address these issues.</p> <p><b>Response to Comment # 8.5:</b><br/> The Department disagrees that the proposed regulations do not comply with the standards of authority, reference, consistency, clarity and necessity, as outlined in our Responses below.<br/> The Department thanks the Commenter for summarizing the regulations. However, the statement by the Commenter that "the Department anticipates that insurers will comply with the proposed regulations, and conduct labor rate surveys that are compliant with the Standardized Labor Rate Surveys" is taken out of context</p> |
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|  | <p>liability has become reasonably clear" as an unfair and deceptive insurance practice.</p> <p>Although the provisions of section 2695.81 do not expressly oblige insurers to conduct and use the survey, the Informative Digest explains that "the Department anticipates that insurers will comply with the proposed regulations, and conduct labor rate surveys that are compliant with the Standardized Labor Rate Surveys."</p> | <p>and mischaracterizes the stated purpose, intent, and result of the proposed regulations. To be clear, these proposed regulations provide insurers with a <u>voluntary</u> mechanism to support the use of labor rate surveys when settling automobile insurance repair claims in a fair, equitable and reasonable manner, as required by Ins. Code section 790.03(h), in an effort to protect all insurance consumers and claimants who may be financially harmed by the use of unreliable labor rate surveys. Insurers may choose to conduct a Standardized survey, may choose to conduct a survey that does <u>not</u> follow the Standardized survey methods and requirements, or may choose to not conduct any auto body labor rate survey. However, no matter what option the insurer chooses, the insurer is still subject to settling automobile insurance repair claims in a fair, equitable and reasonable manner, as required by Ins. Code section 790.03(h). These proposed regulations merely provide one way an insurer may evidence compliance with Ins. Code section 790.03(h), and, by doing so, receive the significant benefit of a rebuttable presumption by the Commissioner that</p> |
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|  | <p><b>Comment # 8.6</b><br/> <b>Authority - The Department has no authority to adopt Sections 2695.81 and 2695.82.</b><br/> 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."<br/> Insurance Code sections 758, 790.03, 790.10, 12921, and 12926 are cited as the authority for sections 2695.81 and 2695.82. However, none of the cited statutes permit the adoption of the two regulatory sections.</p> <p><b>Comment # 8.7</b><br/> <b><i>Absence of Authority in Insurance Code Section 758</i></b><br/> 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</p> | <p>the insurer has attempted in good faith to effectuate a fair and equitable labor rate component of a claim settlement, or adjustment of the labor rate component of a written estimate provided by a claimant pursuant to subdivision (f)(3) of Section 2695.8. Given this significant benefit to insurers, it is hoped and expected that many insurers will avail themselves of this mechanism.</p> <p><b>Response to Comment # 8.6:</b><br/> The Department thanks the Commenter for its summary of "Authority."<br/> The Department disagrees that the Department does not have authority. The Department properly cited to authority in its filing documents.</p> <p><b>Response to Comment # 8.7:</b><br/> The Department thanks the Commenter for the summary of Ins. Code § 758(c).</p> |
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|  | <p>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."</p> <p>The authority granted to the Department by section 758 is limited. The Department is authorized to receive the survey results from insurers, to verify that the survey information includes the names and addresses of the shops surveyed and the total number of shops surveyed, and to make the survey information available upon request.</p> <p>Sections 2695.81 and 2695.82 are beyond the authority granted to the Department by Insurance Code section 758. Section 758 does not permit or obligate the Department to set requirements for labor rate surveys, or to specify how surveys are to be used, or to determine the questions that the surveys must ask. Moreover, section 758 does not give the Department any authority to create a rebuttable presumption regarding an insurer's use of a labor rate survey to effectuate a fair and equitable settlement of a repair claim.</p> <p><b>Comment # 8.8</b><br/> <i>Absence of Authority in Insurance Code Sections 790.03 and 790.10</i><br/> Sections 2695.81 and 2695.82 would create a rebuttable presumption that an insurer that uses the standardized survey has not violated Insurance Code section 790.03(h)(5). This attempt to adopt a regulation that defines conduct which may fall outside the definition in section 790.03(h)(5) is not authorized.</p> | <p>The Department agrees that the Department's authority under Ins. Code § 758 (c) is not unlimited, and thanks the Commenter for the acknowledging the authority the Department does have under this code section.</p> <p>The Commenter incorrectly states that the Department is setting requirements for labor rate surveys under sections 2695.81 and 2695.82, based solely upon Ins. Code § 758 (c) . On the contrary, as stated in the Initial Statement of Reasons (among other documents), the Department proposes to amend and adopt these sections under the authority granted by California Insurance Code ("Ins. Code") sections 758, 790.10, 12921, and 12926.</p> <p><b>Response to Comment # 8.8:</b><br/> The proposed regulations do not fall outside the definition of Ins. Code § 790.03. Further, Ins. Code § 790.03 is enforced under Ins. Code § 790.05. When the Commissioner has reason to believe that a person has engaged in any unfair method of competition, or any unfair or deceptive act or practice under Ins. Code § 790.03, after issuing</p> |
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|  | <p><b>Comment # 8.9</b><br/> <i>In Association of California Insurance Companies v. Jones</i> (2015) 235 Cal.App.4th 1009, the Court of Appeal invalidated a regulation that</p> | <p>an order to show cause and a notice of hearing, an Administrative Law Judge (“ALJ”) conducts a hearing in accordance with the APA. Therefore, the Commissioner has clear authority to promulgate a regulation, under Ins. Code Section 790.10 in order to administer the Unfair Insurance Practices Act (790 et seq.), that informs the ALJ when an insurer conducts a Standardized survey, the insurer shall receive a rebuttable presumption that the insurer has attempted in good faith to effectuate a fair and equitable labor rate component of a claim settlement, and so has not violated Ins. Code section 790.03(h). The Department may rebut this presumption with evidence to the contrary presented to the ALJ in the administrative hearing. Also, this rebuttable presumption would act, in many instances, to inform the Department and the Commissioner such that no enforcement action and hearing would be necessary, as there would be no violation to pursue through administrative hearing .</p> <p><b>Response to Comment # 8.9:</b><br/> The Department thanks the Commenter for the summary of the <i>Association of</i></p> |
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sought to define conduct as violative of one of the unfair and deceptive acts listed in section 790.03. Sections 790.03 and 790.10 are part of the Unfair Insurance Practices Act (UIPA). The court in *Jones* explained, "The language of the UIPA reveals the Legislature's intent to set forth in statute what unfair or deceptive practices are prohibited, and not delegate that function to the Commissioner." (*Jones*, at p.1029.)

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

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

**Comment #8.10**

The Commissioner took the position that his power under section 790.10 to administer the provision in section 790.03 regarding misleading statements gave him the authority to adopt a regulation requiring homeowners insurers to use a standard replacement cost estimate methodology. The court responded that the Commissioner's interpretation of the UIPA would make section 790.06 superfluous. The court explained, "Put differently, under the Commissioner's interpretation of its authority

*California Insurance Companies v. Jones* ("ACIC") case. However, the ACIC case is not a final decision. The case is pending before the California Supreme Court on appeal, and therefore, does not apply in the interpretation of the proposed regulations. The Department believes that ACIC case will be overturned by the Supreme Court, and will not likely impact the proposed regulations. In any case, the proposed regulations are distinguishable from the regulations in the ACIC case, since the proposed regulations outlines only a recommended standardized method of conducting labor rate surveys. Insurers are not obligated to conduct a labor rate survey, nor are they obligated to conduct a Standardized Labor Rate Survey in compliance with the proposed regulations.

**Response to Comment #8.10**

The case cited by commenter is outside the scope of the current proposed regulation. While the Department believes that the ACIC case will be overturned by the Supreme Court, unlike the regulations cited by the commenter, the current proposed regulations are not mandatory and do

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|  | <p>under the UIPA, he would never have to resort to the procedures in section 790.06 regarding practices not 'defined' in section 790.03 because the Commissioner could always argue that conduct not meeting standards in a regulation promulgated under the cover of the Commissioner's power to administer under section 790.10 would be 'misleading.'" (<i>Jones</i>, at p. 1031.)</p> <p><b>Comment #8.11</b><br/> <i>Jones</i> held that neither section 790.03 nor section 790.10 gave the Commissioner the authority to adopt a regulation that used a standardized cost estimate methodology to define an unfair or deceptive practice. Similarly, sections 790.03 and 790.10 do not give the Commissioner the authority to adopt a regulation that uses a standardized labor rate survey to define conduct that presumably falls outside the unfair and deceptive acts set forth in the UIPA.</p> <p><b>Comment #8.12</b><br/> The Commissioner may believe that it is important to determine that certain practices relating to labor rate surveys are unfair and deceptive. However, that determination may not be made through the adoption of a regulation pursuant to section 790.10.</p> | <p>not require any insurer to do anything. The proposed labor rate survey is optional for all insurers.</p> <p><b>Response to Comment #8.11</b><br/> Commenter is incorrect in stating that the Commissioner's proposed regulations would fall outside the unfair or deceptive acts set forth in the Unfair Insurance Practices Act (UIPA), as an insurer's failure to effectuate a fair and equitable settlement of a claim is expressly one of unfair or deceptive acts set forth in the UIPA [Ins Code Section 790.03(h)(5)]. Since these regulations relate directly to the fair and equitable settlement of a claim, the regulations clearly fall within the scope of the UIPA.</p> <p><b>Response to Comment #8.12</b><br/> The Department disagrees with this specific comment for the same reasons described above in the Department's response to Comment 8.11.</p> |
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|  | <p><b>Comment #8.13</b><br/> Instead, section 790.06 provides the Commissioner with procedures to determine that acts not defined in section 790.03 are unfair and deceptive. The court noted in <i>Jones</i>, "We are also not suggesting that the Commissioner could not use the administrative and court processes in section 790.06 to seek a determination that replacement cost estimates not including certain information are unfair and deceptive." (<i>Jones</i>, at p. 1036.) The Commissioner may use the processes available under section 790.06 to determine that an insurer's labor rate survey practices are unfair, but he may not make such a determination by adopting a regulation.</p> <p><b>Comment #8.14</b><br/> The principles established by the Court of Appeal in the <i>Jones</i> decision prevent the Department from relying on sections 790.03 and 790.10 as authority for the adoption of sections 2695.81 and 2695.82.</p> | <p><b>Response to Comment #8.13</b><br/> The Department disagrees that Ins Code 790.06 is the proper administrative process for addressing unfair claims settlement practices. As stated above, one of the unfair or deceptive acts defined in Ins Code Section 790.03, of the UIPA, is an insurer's failure to effectuate a fair and equitable settlement of a claim [Ins Code Section 790.03(h)(5)]. Since these regulations relate directly to the fair and equitable settlement of a claim, the regulations clearly fall within Ins Code Section 790.03. Ins Code Section 790.06 is only permissible if the alleged unfair act or practice is <u>not</u> defined in Ins Code Section 790.03. Since these regulations fall squarely within Ins Code Section 790.03, Ins. Code Section 790.06 is prohibited from being triggered by alleged unfair claims settlements.</p> <p><b>Response to Comment #8.14</b><br/> Notwithstanding that the Department believes that the <i>ACIC</i> case will be overturned by the Supreme Court, the Department disagrees that the Department cannot rely on 790.03 and 790.10 as authority for sections</p> |
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**Comment # 8.15**

**Absence of Authority in Insurance Code Sections 790.10, 12921 and 129261**

It is important to note that the Office of Administrative Law (OAL) rejected a similar Department proposal to standardize insurer auto labor rate survey in 2007. Because nothing in 790.10 discusses auto labor rate survey, the OAL deemed it “improper” for the Department to use it as authority. The OAL further concluded that sections 12921 and 12926 did not authorize the adoption of the regulation as stated in part. "These sections are proper authority citations for the purpose of demonstrating that the Department has general authority under the law to adopt regulations. Neither section, however, grants any authority specific to the issue of auto body repair shop labor rate surveys." We urge the Department to review the OAL Decision of Disapproval of Regulatory Action File # 06-1114-04 S (January 5, 2007) because it has precedential value.

2695.81 and 2695.82 based on the regulations being an optional survey, and this regulation being completely different from the ACIC regulation.

**Response to Comment #8.15**

The Department disagrees with the assertion that it cannot rely on Insurance Code sections 790.03 and 790.10 as authority for sections 2695.81 and 2695.82 of the proposed regulations. Insurance Code section 790.10 contains an express grant of broad, quasi-legislative rulemaking authority to implement Insurance Code section 790.03, which proscribes, among other prohibited acts that are relevant here, failing to attempt in good faith to effectuate prompt, fair and equitable settlements of claims. There is an infinite universe of modalities by which insurers could conceivably commit this prohibited act, and it is absurd to suggest that the Legislature must have foreseen and spelled out every single method by which insurers might possibly fail to attempt to settle claims fairly or equitably, in order for the Department to have rulemaking authority under section 790.10 to address any one particularly common or egregious method of doing so.

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|  |  | <p>Certainly the Department has not asserted in connection with the present rulemaking that, alone, Insurance Code sections 12921 and 12926 grant authority specific to auto body repair shop labor rate surveys. Nor does the Department need to.</p> <p>The commenter ventures to cite the disapproval in 2007 of the Department's Regulatory Action File No. 06-1114-04 S, asserting that this disapproval by OAL has "precedential value." However, the commenter cites no authority for this supposition. Additionally, the commenter fails to acknowledge that, except for the commonality of subject matter (labor rate surveys), the present rulemaking bears little or no resemblance to the rulemaking undertaken a decade ago. Perhaps the most salient dissimilarity involves the approach taken by the two rulemaking actions: The former rulemaking action required all surveys, if they were to be relied on in the settlement of claims, to conform to a set of prescriptive standards, while the presently proposed rule contains no such requirement, but only sets out a recommended method, which if</p> |
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|  |  | <p>insurers adopt affords them a safe harbor from allegations of failing to settle claims fairly with respect to labor rates; there simply is no requirement that insurers conduct the standardized survey and use it as described in the regulations, even if they do use labor rate surveys as a basis for settling claims.</p> <p>Further, subsequent to OAL's disapproval of the cited rulemaking action, OAL has indeed approved regulations adopted by the Department on the basis of rulemaking authority cited for the presently proposed regulations, including the authority conferred by Insurance Code sections 790.03 and 790.10, when there was no mention of the specific subject matter of those regulations in the statutes providing rulemaking authority for those regulations. For instance, the very next year the Department adopted the Sales to Military Personnel regulations (10 CCR 2695.20 et seq.; OAL File No. 2008-0123-02S, approved on February 22, 2008), even though the underlying statutes contained no mention of military personnel, sales on military bases,</p> |
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|  | <p><b>Comment # 8.16</b><br/> <b>Reference - Sections 2695.81 and 2695.82 fail to comply with the reference standard.</b><br/> 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."<br/> Insurance Code sections 758 and 790.03 are cited as reference for sections 2695.81 and 2695.82. However, neither statute is a proper reference for the proposed regulations.</p> <p><b>Comment # 8.17</b><br/> <i>Absence of reference in Insurance Code section 758</i><br/> 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.<br/> The Department may adopt a regulation that interprets or implements the provisions of subdivision (c) of section 758, but the Department's</p> | <p>permission given by military commanders to solicit, or any of the other very specific issues addressed in those regulations.</p> <p>Accordingly the commenter's observations with regard to a decade-old disapproval by OAL are inapposite.</p> <p><b>Response to Comment # 8.16:</b><br/> The Department thanks the Commenter for its summary of reference. The Department disagrees. The Department properly cited to reference in its filing documents.</p> <p><b>Response to Comment # 8.17:</b><br/> The Department disagrees with the Commenter that the reference cited is only limited in scope to Ins. Code § 758. On the contrary, reference under Gov. Code § 11394(e) requires us to list a reference if the proposed regulations "implement, interprets, or makes specific" a provision of law. The proposed regulations, as stated in the Department's filing documents</p> |
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|  | <p>regulation may not go beyond the scope of the three elements of subdivision (c).</p> <p>Proposed sections 2695.81 and 2695.82 create requirements for a standardized labor rate survey, describe how an insurer may use the standardized survey, and establish a rebuttable presumption when the survey is used. The matters addressed by the two regulations go beyond any interpretation or implementation of the three duties delegated to the Department in subdivision (c) of section 758.</p> <p>The citation of section 758 as reference for sections 2695.81 and 2695.82 is improper and unwarranted.</p> <p><b>Comment # 8.18</b></p> <p><b><i>Absence of reference in Insurance Code 790.03</i></b></p> <p>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.</p> <p>By citing section 790.03 as reference for sections 2695.81 and 2695.82, the Department is taking the position that the two proposed regulations are interpreting or implementing section 790.03. The <i>Jones</i> decision rejected the reasoning behind the Department's position.</p> <p>In the <i>Jones</i> 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.</p> <p>The Court of Appeal rejected the Commissioner's argument. The first case on which the Commissioner relied, <i>Ford Dealers Assn. v. Department of Motor Vehicles</i> (1982) 32 Cal.3d 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</p> | <p>does interpret and make specific Ins. Code. § 758, but also interprets and makes specific Ins. Code. § 790.03, as noted above.</p> <p><b>Response to Comment # 8.18:</b></p> <p>The Department disagrees with the Commenter that the reference cited is only limited in scope to Ins. Code §790.03. On the contrary, reference under Gov. Code § 11394(e) requires us to list a reference if the proposed regulations “implement, interpret, or makes specific” a provision of law. As discussed in our Response to Comment # 8.9 <i>The Association of California Insurance Companies v. Jones</i> (“<i>ACIC</i>”) case, as cited by the Commenter is not a final decision. The case is pending before the California Supreme Court on appeal, and therefore, does not apply in the interpretation of the proposed regulations. The Department believes that <i>ACIC</i> case will be overturned by the Supreme Court, and will not likely impact the proposed regulations. In</p> |
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|  | <p>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 <i>Ford Dealers</i>; it did not do so in the UIPA." (<i>Jones</i> at p. 1033)</p> <p>The second case relied on by the Commissioner, <i>Credit Ins. Gen. Agents Assn. v. Payne</i> (1976) 16 Cal.3d 651, upheld the Insurance Commissioner's authority to adopt a regulation interpreting credit insurance statutes. The Court of Appeal concluded that the <i>Payne</i> decision was not applicable to the Commissioner's authority to adopt a regulation which sought to interpret or implement Insurance Code section 790.03. The court observed, "Once again, these statutes governing credit insurance do not contain the same language or fit the same statutory context as section 790.03 does in the UIPA." (<i>Jones</i> at p. 1033)</p> <p>Sections 2695.81 and 2695.82 may not be adopted under the guise of implementing Insurance Code section 790.03. In ruling that the Legislature did not give the Commissioner the authority to adopt a regulation defining an unfair or deceptive practice set forth in section 790.03, the <i>Jones</i> 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." (<i>Jones</i> at p. 1036.)</p> <p>Sections 2695.81 and 2695.82 would define conduct that fall outside the definition of an unfair or deceptive practice in Insurance Code section 790.03(h)(5). This is more than interpreting, implementing or filling in the details of section 790.03. Therefore, citing section 790.03 as reference for sections 2695.81 and 2695.82 is improper and unwarranted.</p> | <p>any case, the proposed regulations are distinguishable from the regulations in the <i>ACIC</i> case, since the proposed regulations outlines a recommended standardized method of conducting labor rate surveys.</p> <p>The proposed regulations does interpret, implement, or make specific Ins. Code § 790.03, which defines what are unfair or deceptive practices. Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear, includes auto claims based on labor rate surveys. Therefore, reference was properly cited in our filing documents.</p> <p>The Commenters cited <i>Ford Dealers</i> case is not germane to the current proposed regulations as there are no other agencies proposed regulations to juxtapose against as in the <i>Ford Dealers</i> matter. Again the citation to the <i>Payne</i> case only supports the Commissioner's authority to promulgate regulations. The commenter's statement regarding the interplay between the <i>Payne</i> case and the <i>ACIC vs. Jones</i> matter is illusory as the <i>Jones</i> case is on appeal to the Supreme Court and thus not a final</p> |
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|  | <p><b>Comment # 8.19</b><br/> <b>Consistency - Sections 2695.81 and 2695.82 fail to comply with the consistency standard.</b><br/> 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."<br/> <b>Comment # 8.20</b><br/> Sections 2695.81 and 2695.82 do not comply with the consistency standard because the regulations are in conflict with a Court of Appeal decision and an Insurance Code statute.<br/> <b><i>Inconsistent with ACIC v. Jones</i></b><br/> The fundamental holding in the Court of Appeal's <i>Jones</i> 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]." (<i>Jones</i> at p. 1029.)<br/> The attempt in sections 2695.81 and 2695.82 to delineate conduct that may fall outside the meaning of section 790.03(h) is at odds with the holding in <i>Jones</i>.</p> | <p>decision which and thus has no weight in consideration of this proposed regulation.</p> <p><b>Response to Comment # 8.19:</b><br/> The Department thanks the Commenter for its summary of the consistency standard. The Department disagrees with the Commenter, the proposed regulations do not fail to comply with the consistency standard.</p> <p><b>Response to Comment # 8.20:</b><br/> The Department disagrees with the Commenter; the proposed regulations do not fail to comply with the consistency standard.<br/> The <i>Association of California Insurance Companies v. Jones</i> ("ACIC") case, as cited by the Commenter is not a final decision. The case is pending before the California Supreme Court on appeal, and therefore, does not apply in the interpretation of the proposed regulations. The Department believes that ACIC case will be overturned by the Supreme Court, and will not likely impact the proposed regulations. In any case, the proposed regulations are distinguishable from the regulations in</p> |
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|  | <p><b>Comment # 8.21</b><br/> <b><i>Inconsistent with Insurance Code section 790.05</i></b><br/> 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.<br/> 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.<br/> An administrative hearing on an insurance enforcement matter may be subject to a rebuttable presumption when so directed by the Legislature. Insurance Code section 1738 requires that a hearing on the revocation of a producer license must be conducted in accordance with the APA. The Legislature has directed in Insurance Code 1623 that there is a rebuttable presumption that a person is acting as an insurance broker if certain conditions exist. An administrative judge is required to follow the Legislature's direction when the judge makes his or her decision.</p> | <p>the <i>ACIC</i> case, since the proposed regulations outline a recommended standardized method of conducting labor rate surveys and interpret a different Ins Code Section, 790.03(h)</p> <p><b>Response to Comment # 8.21:</b><br/> The Department disagrees with the Commenter; there is no inconsistency with Ins. Code § 790.05 or the Administrative Procedure Act (the APA), which is codified in Gov. Code § 11500 et seq., nor does the commenter identify any provision of law — including any provision of the APA — that is or could possibly be at odds with the proposed regulations in any respect. In any hearing in which the proposed regulations might be involved, the APA would require the Administrative Law Judge (the ALJ) to apply the applicable law, including the commissioner's regulations. This is always the case with proceedings under Insurance Code section 790.05, where in order to determine whether there has been a violation of Insurance Code section 790.03 the ALJ is required by the APA to conduct the hearing in such a way as to determine whether the acts in question do or do not comport with</p> |
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|  | <p>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.</p> <p>In the absence of a statute that establishes a presumption, the Department of Insurance may not require an administrative law judge to follow a presumption that is created by regulation.</p> <p>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.</p> | <p>the Fair Claims Settlement Practices Regulations (10 CCR 2695.1 et seq.), to which the proposed regulations will be added. Thus, while it is true that “[t]he APA does not direct the judge to follow a rebuttable presumption of compliance with 790.03 when a decision is developed,” there is no need that the APA should so direct; the ALJ is nonetheless required to apply the commissioner’s regulations, including the proposed regulations setting forth the rebuttable presumption in question. And, again, there is no contrary provision of the APA which would impede the ALJ in doing so.</p> <p>It is also important to note that all such hearings are held before the commissioner; at the hearing, the ALJ represents the commissioner in his role as trier of fact. In the event that, in the commissioner’s judgment, the ALJ in her proposed decision fails to properly apply the facts to the applicable law, including the commissioner’s regulations, the commissioner may either amend the proposed decision or reject it in its entirety and rewrite the ALJ’s decision in order to correct any error on the part of the ALJ. (Gov. Code section 11517.) Certainly the</p> |
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|  | <p><b>Comment # 8.22</b><br/> <b>Clarity - Sections 2695.81 and 2695.82 fail to comply with the clarity standard.</b></p> | <p>commenter cites no provision of the APA, nor could any such provision be cited, that would prohibit an ALJ from observing, and applying to the evidence set forth at any hearing under Insurance Code section 790.05, the rebuttable presumption established by the proposed regulations to, the evidence set forth at any hearing under Insurance Code section 790.05. Accordingly no consistency standard issue has been identified.</p> <p>While we agree that a statute may establish a rebuttable presumption, the commenter provides no evidence, no valid reasoning, and certainly no citation to any applicable law, to support the supposition that a rebuttable presumption may not also be set forth in regulation. In fact there are many rebuttable presumptions set forth in the California Code of Regulations (the CCR) which are not present in the underlying statutes. (See, e.g., 3 CCR 1703.2; 4 CCR 2513; 7 CCR 218 and 219; 10 CCR 260.235.4; 18 CCR 1684; and 22 CCR 80019.1, 82019.1, 86519.1 and 120201.)</p> <p><b>Response to Comment # 8.22:</b><br/> The Department thanks the Commenter on its summary of the clarity standard.</p> |
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|  | <p>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."</p> <p>Sections 2695.81 and 2695.82 fail to comply with the clarity standard because insurers will have difficulty understanding several of the provisions in the regulations.</p> <p><b>Comment # 8.23</b><br/> <i>Section 2698.91 and Subdivisions (c), and (e)(4) of section 2695.81—<br/> Negotiating Rates</i></p> <p>Proposed subdivision (i) of section 2698.91 provides that nothing in the section "shall prohibit an insurer from negotiating and/or contracting with an auto body repair shop for a specific labor rate." The terms of subdivision (i) allow an insurer to negotiate a rate that is lower than the prevailing rate established by the standardized labor rate survey. However, if the insurer wants the benefit of the rebuttable presumption promised in subdivision (c) of section 2695.81, subdivision (c) provides that the insurer must use the standardized survey according to the provisions of subdivision (e) of section 2695.81. 7</p> | <p>The Department disagrees with the Commenter that there is a clarity issue in the proposed regulations. Any potential clarity standard violations have been eliminated in the Amended Text of Regulation, as noted below. As a general matter, however, it is important to note that insurers are very sophisticated business entities that are necessarily conversant in highly technical and complex legal documents; accordingly the proposed regulations can easily be understood by insurers. Certainly the regulations contain no undefined terms that are not generally familiar to insurers, nor have any such terms been identified.</p> <p><b>Response to Comment # 8.23:</b></p> <p>The Department acknowledges that there was a potential clarity issue as the Commenter mentions in the comment. In the Final Text of Regulation, the Department changed section 2698.91(i) to add the language that nothing prohibits "an insurer from negotiating and/or contracting with an auto body repair shop for a labor rate <u>that is higher or lower</u> than the prevailing auto body rate." The text changes address this clarity issue.</p> |
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Subdivision (e)(4) only allows the insurer to negotiate a rate that is higher than the rate determined by the standardized labor rate survey. The various subdivisions create confusion for insurers. On one hand, a subdivision tells an insurer that it is free to negotiate with an auto body repair shop for a specific rate, including a rate lower than the prevailing rate established by the standardized labor rate survey. On the other hand, other subdivisions require an insurer to use the standardized labor rate survey in a manner that only allows the negotiation of a rate that is higher than the rate established by the standardized labor rate survey. The result is an absence of clarity. Also, what if the rates for the same area are different on the surveys conducted by different carriers? How will the Department address that issue?

**Comment # 8.24**

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

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

The two subdivisions put the insurer in a confusing position. The repair shop's responses to the questionnaire that asks the shop whether the shop meets the standards do not provide the insurer with assurance that the shop really meets the standards. Since the insurer may only use the

With regard to the potential that different surveys may derive different labor rates, there is no clarity issue. First, if the Standardized method is followed, any differences among insurer surveys is not projected to be significant. Also, the Department will consider each insurer's claim handling based upon each insurer's labor rate survey. This is no different than how the Department evaluates this issue today, where more than 20 different labor rate surveys are used by insurers to settle claims.

**Response to Comment # 8.24:**

The Department disagrees that there is a clarity issue here. The proposed regulations under section 2695.81(d)(9) requires that insurers utilize the questionnaire set forth in section 2695.82 in order to qualify as a Standardized Labor Rate Survey. The questionnaire under section 2695.82 will allow insurers to ascertain whether or not a specific repair shop is in compliance with equipment requirements under section 2695.81(d)(4). The Department agrees with the Commenter that subdivision

reported rates of shops that meet the standards, the insurer may feel compelled to conduct an inspection, making the advice in subdivision (d)(4)(B) an empty declaration. It is difficult to understand how the two subdivisions are to be reconciled.

**Comment # 8.25**

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

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

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

Insurance Code Section 758(c) states:

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

(d)(4)(B) does not require insurers to inspect a shop to confirm that the shop meets specific standards.

Insurers conducting a Standardized Labor Rate Survey need only rely on the specific repair shop’s answers in the questionnaire, without being compelled to conduct an inspection. Even if the insurer may feel compelled to conduct an inspection, this does not amount to a clarity issue in the proposed regulations.

**Response to Comment # 8.25:**

With regard to the CPI comment, the Department agrees and has changed the text in its Final Text of Regulation for section 2695.81(d)(1)(C)3.b., which states that “[l]abor rates and prevailing rates shall be increased or decreased commensurately with any increase or decrease in the California CPI-U.”

The Department disagrees that there is any confusion regarding whether the insurer is required to conduct a labor rate survey. On the contrary, the first paragraph of section 2695.81 states that the Commissioner is promulgating the proposed regulation to “establish a standardized labor rate survey...*if the*

information shall include the names and addresses of the auto body repair shops and the total number of shops surveyed. (Emphasis added)

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

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

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

The coalition is concerned by the Department’s recent change in their interpretation of the code. Specifically, that Insurance Code Section 758 creates a “defacto” requirement for insurers to conduct a labor rate survey merely because the insurer gathers and collects auto repair labor information necessary for the insurer to properly adjust an automobile insurance claim. This new interpretation of the definition of a “survey” is inconsistent with the Department’s prior and longstanding pronouncement back in 2006, when it amended the Auto Body Repair Labor Rates

*insurer elects to use a survey.*” (Emphasis added).

The Department thanks the Commenter for the summary of Ins. Code § 758(c). As stated, the Standardized Survey is a recommended survey, and conducting a labor rate survey is not mandatory. The first paragraph of section 2695.81 states that the Commissioner is promulgating the proposed regulation to “establish a standardized labor rate survey...*if the insurer elects to use a survey.*” (Emphasis added). The Department disagrees that the proposed regulations creates a mandatory requirement that insurers “shall conduct” labor surveys, as noted by the Commenter. The commenter misconstrues the plain meaning of the subject proposed language. The Commenter alludes to the Department’s alleged interpretation of the code that is not referenced anywhere in the Department’s filing documents. The proposed regulations do not create a “de facto” requirement for insurers to conduct a labor rate survey. In fact, the definition of survey is defined in the currently effective regulations, Section 2698.91(a). The proposed rulemaking merely makes a

Regulations (File # RH05044654, 9/8/2006, *Initial Statement of Reasons – Proposed Amendments to the Auto Body Repair Labor Rate Surveys Regulations*):  
*Proposed section 2698.91(1): (Adopt)*  
*Insurance Code Section 758(c) does not require an insurer to conduct a labor rate survey. The proposed amendment clarifies this legislative intent in stating that nothing in these regulations shall require an insurer to conduct an auto body labor rate survey.*  
Further, the CDI’s recent position on the definition of a “survey” is incompatible with the common parlance understanding of what a “survey” means and entails from a methodology standpoint.

**Comment # 8.26**

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

Government Code 11349.1 requires a regulation to comply with the necessity standard. Government Code 11349(a), which defines the necessity standard, provides that the need for the regulation must be demonstrated in the rulemaking record "by substantial evidence." Title 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.

non-substantive amendment to the definition of “survey” in current Section 2698.91(a). Therefore, the Department disagrees that this proposed rulemaking changes an insurer’s longstanding obligation from the original effective date of this definition. Insurers have never questioned this definition or how the Department applies this definition. Further, the Commenter’s comment regarding definition of survey being incompatible with common parlance understanding is unsubstantiated.

**Response to Comment # 8.26:**

The Department disagrees that the proposed regulations fails to comply with the necessity standard. The filing documents includes a statement of the specific purpose of each subdivision of the in the proposed rulemaking, and information explaining why each provision of the regulation is required to carry out the described purpose. The Commenter fails to mention that CCR title 1 section 10(b) states that when the explanation is based upon “policies, conclusions, speculation, or conjecture, the rulemaking record must include ...supporting facts, studies, expert opinion or other information.” Here,

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|  | <p><b>Comment # 8.27</b><br/> <b><i>Complaints and enforcement actions supporting the need for the regulations</i></b></p> <p>The Informative Digest asserts that that the Department of Insurance has received "hundreds of complaints from consumers and auto body shops" regarding auto body labor rate surveys. The Informative Digest contends that issues related to surveys "culminated in several enforcement actions which the Department filed against several insurers."</p> <p>These generalities fall far short of substantial evidence required to establish the need for the regulations. The Informative Digest fails to compare the number of complaints to the total number of auto body repair claims; fails to specify how many complaints came from body shops versus consumers; fails to explain how many of the complaints were justified; fails to provide the exact number of enforcement actions which were related to surveys; and fails to explain whether any enforcement action resulted in a finding that an insurer violated Insurance Code section 790.03 because of its survey practices.</p> <p>These failures need to be addressed with specific facts in order to satisfy the necessity standard.</p> <p><b>Comment # 8.28</b><br/> <b><i>Sample size</i></b></p> <p>Section 2695.81(d)(2) requires that an insurer must send the survey questionnaire to all licensed auto body shops. Scientific sampling practices produce valid and reliable survey results. The department has</p> | <p>the rulemaking file contains significant supporting facts, studies and other information that support the necessity of this rulemaking.</p> <p><b>Response to Comment # 8.27:</b><br/> The Department explained with substantial evidence in the filing documents the necessity for the proposed rulemaking. The Department states in detail that hundreds complaints were filed in the Informative Digest, and detailing a main summary of the complaints. Furthermore, the public rulemaking file contains all of the complaints that were filed with the documents detailing each individualized complaint.</p> <p>The Commenter misinterpreted the necessity standard, which does not extraneously require the Department to tally the number of complaints or shops, or any of the other demands the Commenter makes. There is substantial evidence showing necessity for the proposed regulations.</p> <p><b>Response to Comment # 8.28:</b><br/> The Department explained with substantial evidence in the Initial Statement of Reasons the necessity for Subdivision (d)(2). Sample size is not homogenous in the State of California,</p> |
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|  | <p>failed to provide any facts or studies that justify the rejection of proven sampling methodologies.</p> <p><b>Comment # 8.29</b><br/> <b><i>Direct Repair Program Rates</i></b><br/> Section 2695.81(d)(6) excludes contracted rates under direct repair programs from the standardized labor rate survey. A significant portion of auto body repair claimants use insurer direct repair programs to repair their vehicles. The Department has failed to provide any studies or other substantial evidence proving that direct repair program rates do not reflect prevailing market rates.</p> | <p>and therefore, all shops must be surveyed. Under the necessity standard, the Department is not required to use a “study or expert opinion” to show necessity of each subdivision in the proposed rulemaking. However, the Department took considerable care in consulting experts at Sacramento State on this issue. Differing markets for urban, suburban and urban areas also were carefully considered by the Sacramento State statistics professors and the Department’s actuarial and economic staff.</p> <p><b>Response to Comment # 8.29:</b><br/> The Department explained with substantial evidence in the Initial Statement of Reasons the necessity for Subdivision (d)(6). Furthermore, Direct Repair Program Rates do not accurately reflect market rates. Under the necessity standard, the Department is not required to use a “study or expert opinion” to show necessity of each subdivision in the proposed rulemaking.</p> <p>Further, as stated in the Initial Statement of Reasons, the proposed subdivision prohibits insurers from using a discounted rate negotiated or</p> |
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|  |  | <p>contracted with members of its Direct Repair Program. Discounted rates or rates from insurers' Direct Repair Program, tend to be lower than the actual market rate since insurers are able to negotiate a lower labor rate in return for promising the shop an increased volume of work will be referred to that DRP shop. The purpose of the Standardized Labor Rate Survey is intended to settle claims for repairs in the <u>non-discounted or open market</u>. Also, since Ins. Code section 758.5 confers upon a claimant the right to select the automotive repair dealer (repair shop), using discounted or negotiated rates from DRP hinders that right, misrepresents the actual market labor rates in a given geographic area and results in unreasonably low insurance settlements. The proposed language is reasonably necessary to address the skewed data that may result by including discounted or DRP labor rates. The proposed language does not prohibit the use of non-discounted rates of a DRP shop, which will equitably be included in the Standardized Labor Rate Survey. However insurers must report their use of DRP shops in its survey under proposed CCR section 2698.91(d) for transparency purposes.</p> |
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|  | <p><b>Comment # 8.30</b><br/> <b><i>Limitation to direct responses from repair shops</i></b><br/> Section 2695.81(d)(5) explains that the standardized labor rate survey's prevailing rate is calculated on the basis of the rates "charged" by repair shops. In establishing the rates charged, section 2695.81(d)(7) imposes the limit of "[o]nly direct responses" from repair shops and excludes "[a]ny source other than direct responses provided by an auto repair shop on a survey questionnaire."<br/> A shop is required to declare that its responses are true and correct; but the declaration is not made under oath and the Department of Insurance has no authority to confirm that a shop's answers to questions about the rates it charges are accurate.<br/> The Department has failed to provide any substantial evidence that direct responses from repair shops are the best method for determining the rates that shops really charge. There are no facts or studies put forward to justify subdivision (d)(7)'s exclusion of other sources of information to determine the rates which are being charged by repair shops.</p> <p><b>Comment # 8.31</b><br/> <b>Amendments to Section 2698.91</b><br/> Insurance Code section 758 is cited as the authority for the proposed amendments to section 2698.91. As explained in the discussion of sections 2695.81 and 2695.82, subdivision (c) of section 758 grants the Department of insurance limited authority. The Department is required to 1) receive the labor rate survey results from insurers, 2) make the survey information available upon request, and 3) verify that the survey</p> | <p><b>Response to Comment # 8.30:</b><br/> The Department agrees that the Department does not have the authority to require that a shop declare under oath the shop's answers are accurate, nor does the Department feel that an oath is necessary.<br/> The Department explained with substantial evidence in the Initial Statement of Reasons the necessity for Subdivision (d)(5). Under the necessity standard, the Department is not required to use a "study or expert opinion" to show necessity of each subdivision in the proposed rulemaking. The Department's filing documents contains substantial evidence and information explaining why direct responses are required to carry out the purpose.</p> <p><b>Response to Comment # 8.31:</b><br/> Ins. Code § 758 is limited in its scope<br/> However, the Commenter incorrectly states that the Department is setting requirements for labor rate surveys under sections 2695.81 and 2695.82, based solely upon Ins. Code § 758 (c) . On the contrary, as stated in the Initial Statement of Reasons (among other</p> |
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information includes the names and addresses of the auto body repair shops and the total number of shops surveyed. The Informative Digest acknowledges the Department's limited role by explaining "that the Department is acting as a 'clearing house' for surveys submitted to the Department pursuant to Ins. Code section 758(c)."

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

**Comment # 8.32**

***Subdivision (d)(5)***

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

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

**Comment # 8.33**

***Subdivision (d)(7)***

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

documents), the Department proposes to amend and adopt these sections under the authority granted by California Insurance Code ("Ins. Code") sections 758, 790.10, 12921, and 12926.

The Department disagrees with the Commenter. The proposed regulations under section 2698.91 has sufficient authority and necessity.

**Response to Comment # 8.32:**

The Department disagrees with the Commenter. As previously explained above, the Department does have authority to adopt section 2695.81. The Final Text of Regulations was renumbered so that subdivision (d)(5) is now subdivision (d)(1)(E). The reference to section 2695.81 only requires and reminds those who conduct a Standardized Labor Rate Survey to report specific information, which was outlined in section 2695.81(e).

**Response to Comment # 8.33:**

The Commenter's interpretation of Ins. Code § 758(c) is incorrect. Although the 758(c) does require that insurers report the "results" of the survey to the Department, the Commenter's interpretation is too narrow. Results of

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|  | <p>not authorize the Department to mandate an insurer to submit the survey responses.</p> <p><b>Comment # 8.34</b><br/><i>Subdivision (d)(8)</i><br/>Subdivision (d)(8) would require an insurer to submit to the Department the license number for each auto body repair shop that responded to the insurer's survey. This requirement is not authorized by section 758(c). Section 758(c) only requires the survey information submitted by the insurer to include "the names and addresses of the auto body repair shops."</p> <p>Subdivision (d)(8) also would require an insurer to indicate whether a shop is a member of the insurer's direct repair program. There is no authority for this requirement. Section 758(c) makes no mention of direct repair programs.</p> <p><b>Comment # 8.35</b><br/><i>Subdivision (e)</i><br/>Subdivision (e) would require an insurer to submit the results of its labor rate survey within 30 days of completing the survey. This requirement does not comply with the necessity standard. The Department has failed to provide substantial evidence that there is a need for compliance with the 30-day mandate in order to effectuate the purposes of section 758(c).</p> <p><b>Comment # 8.36</b><br/><i>Subdivision (g)</i><br/>Subdivision (g) would require an insurer to submit information that is not required to be submitted by section 758(c). There is no requirement in the</p> | <p>the survey includes the survey responses. When a questionnaire is sent, an auto shop is asked to respond to it. Thus the responses are the result of the survey.</p> <p><b>Response to Comment # 8.34:</b><br/>The Department disagrees with the Commenter. As previously explained above, the Department does have authority to adopt section 2695.81. The Final Text of Regulations was renumbered so that subdivision (d)(5) is now subdivision (d)(1)(E). The reference to section 2695.81 only requires and reminds those who conduct a Standardized Labor Rate Survey to report specific information, which was outlined in section 2695.81(e).</p> <p><b>Response to Comment # 8.35:</b><br/>The Department explained with substantial evidence in the Initial Statement of Reasons the necessity for Subdivision (e).</p> <p><b>Response to Comment # 8.36:</b><br/>Under 758(c) insurers are required to report the "results" of their labor rate surveys to the Department. Results of</p> |
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|  | <p>statute that an insurer must submit any of the information listed in subdivision's four subparagraphs.</p> <p><b>Comment # 8.37</b><br/> <b>Subdivision (h)</b><br/> Subdivision (h) provides for a confidentiality provision. There is a need for a confidentiality provision but the provision should be achieved without the subdivision's reference to subdivision (g) of section 2695.81. First, there is no subdivision (g); the reference probably was meant to be to subdivision (f). Second any reference to section 2695.81 is improper because the Department does not have authority to adopt the section.</p> <p><b>Comment # 8.38</b><br/> <i>Industry Proposed Changes to the Auto Body Repair Labor Rate Surveys</i><br/> The coalition offers the following changes to the proposed regulations: In the section, Adopt Section 2695.81. The Standardized Auto Body Repair Labor Rate Survey;<br/> The coalition is concerned that the proposed regulations create confusion as to whether or not an insurer is required to conduct a labor rate survey in order to comply with its regulatory duty to make sure that there is a reasonable and appropriate basis for the insurer's position on a particular labor rate asserted by an auto repair shop in an insurance claim.<br/> Add "Nothing in this section shall be construed to require an insurer to conduct an auto body labor rate survey."</p> <p><b>Comment # 8.39</b><br/> In Section 2695.81 (d) The Standardized Labor Rate Survey, (1) Currentness, (A) Time since submittal of survey to the Department, (1) and (2);</p> | <p>the survey includes the requirements under subdivision (g)(1) – (g)(5).</p> <p><b>Response to Comment # 8.37:</b><br/> Subdivision (h) was changed in the Final Text of Regulation to now correctly reference section 2695.81(f). As previously explained above, the Department has proper authority for 2695.81.</p> <p><b>Response to Comment # 8.38:</b><br/> The Department thanks the Commenter on the suggested changes to the proposed regulations.<br/> The Department disagrees that there is any clarity issue as to whether a recommended survey by the Commissioner is mandatory. The first paragraph of section 2695.81 states that the "Commissioner has promulgated Section 2695.81...to establish a standardized labor rate survey that the Commissioner recommends...if the insurer elects to use a survey." Thus adding the proposed language is unnecessary.</p> <p><b>Response to Comment # 8.39:</b><br/> The Commenter's comments regarding the cost, substantial investment, and length of time is general and unsupported by specific facts.</p> |
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This section states that labor rate surveys are only valid for one year, requiring insurers to conduct a survey every year. The surveys are lengthy and conducting them on an annual basis will require a substantial investment of employee labor and expense. Our concern is that the auto body shops could ask for substantial rate increases each year. The survey should be valid for 24 months.

In Section (d)(1)(A)(1) and (d)(1)(A)(2): change “calendar year” to “twenty-four (24) months”

Change any requirement that the survey be completed at the end/beginning of a calendar year so that not all surveys are occurring simultaneously

**Comment # 8.40**

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

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

In Section (d)(2): “...at least twenty-five (25) percent of all auto body repair shops registered with, or licensed by, the Bureau of Automotive Repair...”

However, the Department does allow for the survey to be valid for 2 years if the CPI under section 2695.81(d)(1)(C) is applied. Thus the survey can be valid up to 24 months when the proposed subdivision is applied.

The Department rejects this proposed change based on the reasoning above. The Final Text of Regulations removed “calendar” from “calendar year” to fix this clarity issue in subdivision (d)(1)(C)1. It was not the Department’s intention for the surveys to occur simultaneously at the beginning of the year.

**Response to Comment # 8.40:**

The Department rejects the Commenter’s suggested change of subdivision (d)(2) to 25%. The Commenter’s suggestion that 25% is a statistically supportable number is unsubstantiated. With a 90% confidence level, 25% sampling is not statistically significant. This is especially true given the Department’s reasoning for 100% of the shops to be surveyed, the necessity of which is substantiated in the Initial Statement of Reasons. Furthermore, requiring 100% of BAR shops to be surveyed prevents

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|  | <p><b>Comment # 8.41</b><br/> In Section 2695.81 (d) The Standardized Labor Rate Survey, (4) Standards;<br/> The regulations require auto body shops to meet certain standards established by the California Bureau of Automotive Repair (“BAR”) to participate in the survey. Insurers are not required to physically inspect the shop to confirm the repairs, but the insurer must check the body shop’s submitted labor rate form to ensure the shop qualifies to participate in the survey. This is burdensome and costly on insurers to check the accuracy and validity of the auto body shop’s submission. We suggest that the regulations either allow the unequipped shops to participate in the survey, or to pay those unequipped shops a lower rate than the participating “properly equipped” shops.<br/> In Section (d)(4): Add that if a shop does not meet the specific standards set forth in (d)(4)(A), then the shop does not receive the benefit of the established survey rate</p> <p><b>Comment # 8.42</b><br/> In Section 2695.81 (d) The Standardized Labor Rate Survey, (5) Prevailing Auto Body Rate;</p> | <p>potential discretionary selection of shops and is fair and equitable.<br/> <b>Response to Comment # 8.41:</b><br/> The Department disagrees with the Commenter. Subdivision (4)(B) states specifically, that the insurer is not required to survey shops in order to confirm the specific standards of the proposed regulations. Thus there is no need for the insurer to check to the body shop’s submitted labor form to ensure the shop qualifies. Therefore, there is no cost associated with the proposed regulations requiring insurers to check the accuracy of a shop’s admission. The Department rejects that unequipped shops are allowed to participate, which would depress the prevailing rate. The Department further rejects that the unequipped shop is paid a lower rate, given that some of these shops actually do lease the proper equipment, or contract the work to another shop with the equipment, and paying them less than the prevailing rate would be unfair and inequitable.</p> <p><b>Response to Comment # 8.42:</b><br/> The Department thanks the Commenter for this suggestion. In response to this and other comments, the Department</p> |
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The regulations propose that insurers use the greater of the arithmetic mean or average, or a rate of the simple majority of shops, whichever is greater. This method has the effect of skewing labor rates in favor of the auto body shops. This could lead to inconsistent methods being used by insurers to survey auto body shops. There should be one consistent method for all auto body shops - make the calculation based upon one or the other, but not both. And if no other protection against outliers is added, the calculation should be based upon the simple majority, since this will inherently minimize distortion from outliers.

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

In Section (d)(5): Rather than the clearly biased “greater of” language, either use the simple majority standard or use the arithmetic mean but with some protections against outliers (e.g., removal of the lowest and highest rate).

Add: “A Standardized Labor Rate Survey may, at the insurer’s option, account for the relative volume of each responding shop’s repair capacity in calculating the prevailing rate.”

eliminated the greater of the arithmetic mean or average in its Final Text of Regulation. The prevailing rate is now calculated as the simple majority of surveyed shops, and all reference to arithmetic mean or average was eliminated.

The Department rejects a weighted survey response based on shop capacity for the Standardized Labor Rate Survey. First, the Commenter did not suggest an accurate means for the Department to measure shop capacity. Counting the number of vehicle bays, for example does not necessarily mean that a shop with less bays will have less capacity. Furthermore, there is no accurate way for the Department to count number of bays, nor is the Department aware of an accurate measurement of shop capacity.

Additionally, when consumers are making a choice regarding auto body repair, “shop capacity” is not a consideration for cost or market value. Therefore, the Department rejects this suggestion. However, since the Standardized Labor Rate Survey is not mandatory, insurers are free to consider volume in their methodology, or any methodology for their labor rate

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|  | <p><b>Comment # 8.43</b><br/> In Section 2695.81 (d) The Standardized Labor Rate Survey, (6) Use of Direct Repair Rate;<br/> The regulations propose that insurers use the posted labor rates of direct repair shops and not its negotiated rate. This is unfair because our experience is that most auto body shops do not charge the posted labor rates. Further, a body shop can change its posted labor rate as often as it wants, for as much as it wants. The posted labor rate does not reflect what the market is willing to pay (e.g. posted rate on the back of the hotel door).<br/> In Section (d)(6): Strike this section banning the inclusion of discounted direct repair shop rates</p> | <p>surveys, to the degree insurers can support than this practice results in fair and equitable labor rates in each geographic area surveyed.<br/> As stated above, the Department eliminated arithmetic mean or average from the Final Text of Regulation<br/> As Stated above, the Department rejects relative volume or capacity into the calculation of prevailing rate.<br/> <b>Response to Comment # 8.43:</b><br/> As noted in the Department’s Statement of Reasons, the proposed regulations prohibit the use of Direct Repair Program rates because DRP rates tend to be a contractual lower rate based on increased work volume from the insurer and do not accurately reflect market prices. However, shops participating in a DRP program are free to participate in the survey using non-discounted rates, in order to avoid unfairly excluding those shops. The posted rate on the back of a hotel door is a flawed analogy to the posted rate in an auto body shop. California Civ. Code § 1863 requires all hotels to post the nightly rate in every room, and it prohibits hotels from charging more than the posted price. Thus, hotels have an incentive to post the highest</p> |
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|  | <p><b>Comment # 8.44</b><br/> In Section 2695.81 (d) The Standardized Labor Rate Survey, (7) Use of Survey Data Only;</p> | <p>possible “walk-in price” that they could charge given when demand for the rooms in the area is the highest because they are prohibited from charging anything more. The Commenter may benefit from reviewing California Civ. Code § 1863, or this article: <a href="http://mentalfloss.com/article/74828/why-are-hotel-rack-rates-so-exorbitantly-high">http://mentalfloss.com/article/74828/why-are-hotel-rack-rates-so-exorbitantly-high</a> that explains posted rates for hotels in California.</p> <p>Auto body repair shops, on the other hand, have every incentive to post the market rate, as noted by auto body shops during the public hearing. California Civ. Code § 1863 does not apply to auto body repair shops, nor does a comparable rule apply.</p> <p>Consumers, concerned about the price of repairs will look at the posted rate and will be deterred by a posted rate that is too high above the market price, and go to another shop. In fact, the posted rate does often reflect the market price, for fear of a lost consumer to a competitor.</p> <p>The Department rejects this proposed change based on the above reasoning.</p> <p><b>Response to Comment # 8.44:</b></p> |
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|  | <p>The regulations do not allow insurers to conduct a labor rate survey via any other method than the proposed survey. Insurers should be allowed to perform a labor rate survey from estimating data, subrogation demands or other means.</p> <p>In Section (d)(7): Delete the word “shall not be used” and instead insert: Labor rates from the following sources shall be allowed in a Standardized Labor Rate Survey. Any other methodologies, other than a labor rate survey, previously approved by the Department shall also be permitted.</p> <p>12</p> <p><b>Comment # 8.45</b><br/> In Section 2695.81 (d) The Standardized Labor Rate Survey, (8)(B)(C)(D) Geographic Area;<br/> The regulations would require insurers to establish individual body shop markets based upon geocoding. The proposal provides that “the geographic area for an auto body repair shop shall comprise six (6)</p> | <p>The Commenter fails to explain why any other rate other than direct responses to the survey be included, including estimating data, subrogation demands or other demands, whereas the Department explained the necessity to exclude these other methods in the Department’s Initial Statement of Reasons.</p> <p>Further, these regulations do not prevent an insurer from using other sources in a labor rate survey, to the degree insurers can support than this practice results in fair and equitable labor rates in each geographic area surveyed. However, such a survey would not be considered a Standardized labor rate survey and would not confer upon the insurer the rebuttable presumption described in these proposed regulations.</p> <p>The Department rejects this proposed change based on the above reasoning.</p> <p><b>Response to Comment # 8.45:</b><br/> In response to this and other comments, the Final Text of Regulations reflects a change to Geographic Area under</p> |
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|  | <p>Responding Qualified Auto Body Repair shops,” based on the nearest 5 such shops (or 6, if the shop in question isn’t one). In other words, by its own terms, the regulation requires that every shop – even those not licensed by BAR or otherwise qualified to respond to the survey – be assigned its own, individual “prevailing” labor rate.</p> <p>With over 7000 shops licensed by BAR, and an indeterminate number of additional unlicensed shops, this amounts to THOUSANDS of individual “geographic areas” that must be surveyed and THOUSANDS of individual “prevailing” labor rates that must be calculated.</p> <p>This runs fundamentally counter to the concept of a true “prevailing” labor rate based on market areas, such as might be used in Los Angeles and the San Fernando Valley, for example, which are generally considered to be in the same market and to have consistent labor costs. It could also lead to some illogical results, such as where one remote shop is included in a labor rate calculation with five shops a great distance away which are nevertheless the ‘nearest’ to that shop. The labor rate for the remote shop may be higher or lower than the remote market dictates. Furthermore, such a proposal allows, and even encourages, labor rate manipulation and collusion by body shops. If just one or two shops choose to respond to the survey in self-interested bad faith (and there’s nothing in the regulations that would seem to dissuade such activity), it could have a significant effect on the rates an insurer would have to pay to those same shops and surrounding shops. Such a name-your-price mechanism will only lead to higher labor rates than the market would naturally yield, to the detriment of consumers.</p> <p>Finally, the proposal does not indicate who will apply the geocoding or who will pay for it. Geocoding would be extremely burdensome to the insurer in terms of labor and expense. This is well illustrated by the 23 lines of intricate detail in the regulations describing how to determine which qualifying shops are the closest, using sophisticated latitude and</p> | <p>subdivision (8)(D). A periphery was added, so that a geographic area may be expanded in most instances to include more than six shops, given that one more mile is added to the sixth closest shop, and all shops within that mile are also included in the geographic area. Under this amendment to the proposed regulations, the average number of potential shops in each geographic area increases from 6 shops to about 20 shops, with many shops in urban areas having 30 or more shops and some even having up to 80 or more shops in their geographic area. The Department believes this resolves the concern expressed by the comment.</p> <p>As noted in the Department’s Initial Statement of Reasons for subdivision (d)(2), according to the Bureau of Automotive Repair, there are approximately 5000 auto shops registered to perform collision repair services in California. Of those shops, the Department estimates there are 4,000 repair dealers that meet the minimum standards to be surveyed. The Commenter’s estimate of 7000 shops is over-inflated and unsubstantiated. Furthermore, the</p> |
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|  | <p>longitude tools and software requiring precision down to the nearest thousandth of a mile, with tie-breaker provisions.</p> <p>In Section 2695.81 (d)(8)(B)(C)(D): Eliminate the geo coding requirement and use the language from the previous (Public Discussion Draft of 3/30/15) labor rate survey geographic area: <i>“(k) Any geographic area used by an insurer in a labor rate survey shall enable the labor rate survey to consistently yield prevailing labor rates that, when used in paying or adjusting an automobile insurance claim, ensure that the labor rate component of the claim settlement is fair and equitable.”</i></p> | <p>Department is not expecting insurers to pay <i>unlicensed</i> shops, and this is beyond the scope of the rulemaking. The Department disagrees that Los Angeles and the San Fernando Valley are considered to be in the same market and to have consistent labor costs. For example, in Los Angeles alone, the area of Westwood will have a much different labor rate than the area of South Central Los Angeles. Combining such diverse markets of Los Angeles <i>and</i> the San Fernando Valley into the “same market” is the type of unreliable geographic area that the proposed regulations intends to address.</p> <p>The Department disagrees that a remote shop with the five closest shops would lead to illogical survey results. If a shop offers a special aluminum repair in Barstow, a consumer will consider the closest shops to that shop that offers the same type of repair. It would not be illogical for that person to consider driving to another shop that is further away in their consideration of the market area for a specialty repair rate. The Department disagrees with the Commenter, and believes that collusion is highly unlikely. As previously</p> |
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|  |  | <p>explained, a periphery was added, so that a geographic area may include significantly more than six shops. This means that in order to manipulate the market, a shop must collude with the five or six closest shops, add one mile and include all of those shops. In turn every single one of those shops must collude with every other shop in its geographic area. Collusion must be done on the exponential scale, a level of conspiracy that is highly unlikely and the chances miniscule.</p> <p>Additionally, in the case where any autobody shop colludes and manipulates prices in an insurance claim, the Commissioner has the authority to investigate and work with District Attorney's Offices throughout the State to prosecute for insurance fraud. In fact, the Department has prosecuted claims against autobody shops for insurance fraud in the past. Furthermore, existing anti-trust laws act as a deterrent, and prohibit auto body shops from manipulating the market and engaging in monopolistic activities.</p> <p>The Department submitted a proof of concept in its Notice of Amendment to Text, demonstrating the benefits of the</p> |
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|  | <p><b>Comment # 8.46</b><br/> <i>Reasonable Alternatives</i><br/> On November 18, 2015, we submitted an alternative that the Department has yet to acknowledge as we do not see it under the “Reasonable Alternatives and Performance Standard.” We reiterate the following alternative: Given the many unresolved questions and issues with the</p> | <p>geocoding concept in its proposed regulations. The Commenter does not provide anything other than a generality the cost would be extremely burdensome to the insurer. This assertion is especially confounding, given that the Department’s proof of concept was done without being “extremely burdensome” to the Department. Furthermore, the Department’s Economic Impact Analysis estimates the costs to be minimal for insurers.</p> <p>The Department considered and rejected this alternative for its Standardized Labor Rate Survey. However, as noted, the Standardized Labor Rate Survey is a recommended survey. Insurers are free to use a different form of survey methodology, but will not receive the rebuttable presumption that is presumed with the Standardized Labor Rate Survey.</p> <p><b>Response to Comment # 8.46:</b><br/> The Department thanks the Commenter for the comment. However, a task force was used in the past, and did not lead to a fruitful result. At this point, the Department is proceeding with the</p> |
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Department's proposed regulations on auto labor rate surveys, we would like to work with the Department to convene a task force involving all the stakeholders to discuss a more comprehensive approach to these issues rather than moving forward with an incomplete regulation.

**Comment # 8.47**

***Conclusions***

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

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

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

proposed rulemaking given the number of years that was invested into the rulemaking and the reason that the task force failed to work in the past.

**Response to Comment # 8.47:**

The Commenter states that the proposed regulations is burdensome and expensive, that it will lead to inflated rates, or that they will lead without any substantiation or specific explanation. The Department disagrees that the standardized survey is any more susceptible to inflated rates than surveys currently conducted by insurers; current insurer surveys take rate responses at face value without independent verification and are equally susceptible to rate inflation. The CPI method of calculating inflationary cost was adopted to address insurers' concerns and is actually aimed at reducing the potential cost for insurers without conducting a survey every twelve months. The CPI is a standard methodology and measure of inflation that can accurately account for inflation for the auto body repair industry. As stated in the Department Economic Impact Analysis, the Department estimates minimal costs to the Insurer.

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|  | <p>Further, the Department has not provided any evidence demonstrating the necessity for these proposed regulations, other than its own Informative Digest that asserts it has received “hundreds of complaints from consumers and auto body shops” regarding auto body labor rate surveys and these generalities fall far short of the substantial evidence required to establish the need for the regulations.</p> <p>We look forward to continued dialogue with the Department on these this proposal and respectfully urge the Department to consider significant revisions based upon the above.</p> <p>Should you have any questions or concerns, please feel free to contact any of the following: Michael Gunning, PIFC Vice President (916-442-6646/<a href="mailto:mgunning@pifc.org">mgunning@pifc.org</a>), Armand Feliciano, ACIC Vice President (916-205-2519/<a href="mailto:armand.feliciano@acicnet.org">armand.feliciano@acicnet.org</a>), Shari McHugh, on behalf of PADIC, (916-769-4872/<a href="mailto:smchugh@mchughgr.com">smchugh@mchughgr.com</a>), Christian Rataj, NAMIC Senior Director (303-907-0587/<a href="mailto:crataj@namic.org">crataj@namic.org</a>), or Steve Suchil, AIA Assistance Vice President (916-718-9568/<a href="mailto:ssuchil@aiadc.org">ssuchil@aiadc.org</a>), or Marti Fisher, California Chamber of Commerce, (916-930-1265/<a href="mailto:marti.fisher@calchamber.com">marti.fisher@calchamber.com</a>)</p> | <p>The Department thanks the Commenter for this comment, and continues to strive to work cooperative with all stakeholders to prevent further disagreement. However, the Department’s ultimate goal with these proposed regulation is to the protect consumers and the public.</p> <p>The Department continues to consider and strive to reduce undue costs or unfair results for insurers for these proposed regulations. The Department disagrees that there is an overreach of business activities to insurers given the Department’s regulatory authority to protect the public and regulate the insurance industry in the State of California.</p> <p>The Department demonstrated sufficient necessity and with substantial evidence in its filing documents the need for the proposed rulemaking. Additionally, there is ample evidence in the public rulemaking file. Our records reflect that the Commenter has requested a copy of our public file, and now has a copy of the hundreds of complaints mentioned in our filing documents.</p> <p>Thank you for your comments.</p> |
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| <p><b>Karen Chadd, Phil's Auto Body</b></p> <p>April 21, 2016<br/> <u>Written Comments 18I:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 9.1</b><br/> We are writing in support of the proposed rulemaking regarding the Standardization of Auto Body Repair Labor Rate Surveys. Currently the Labor Rate Surveys conducted by the insurance companies are inconsistent, unreliable, and inaccurate. They do not reflect standardized criteria to make fair and equitable claims settlements.</p> <p><b>Comment # 9.2</b><br/> If there are to be any Labor Rate Surveys that control what our industry can charge for services, they must be standardized and conducted on an annual basis to remain current with the market.</p> <p><b>Comment # 9.3</b><br/> It has been our experience that a lot of insurers are not conducting real labor rate surveys on a consistent basis. Insurers include our shop in their survey when they do not actually conduct a survey of our shop. They include shops that are not in Santa Cruz County which is one of the top ten most expensive areas to live in the nation. Insurers include shops that do not have the proper equipment to repair vehicles. If an insurance company is going to conduct a survey it has to be fair and reasonable.</p> <p><b>Comment # 9.4</b><br/> It must take into account the special equipment and training for Frame repair, Mechanical repair, and Aluminum repair, for which many do not currently pay a different hourly rate.</p> | <p><b>Response to Comment # 9.1:</b><br/> Thank you.</p> <p><b>Response to Comment # 9.2:</b><br/> The Department does not have the statutory authority to make the labor rate surveys a mandatory, annual event. The proposed regulations do attempt to resolve the issue specified because it does provide for a standardized methodology and a standardized time frame for validity for a labor rate survey conducted according to the proposed regulations.</p> <p><b>Response to Comment #9.3:</b><br/> The proposed regulations will seek to address this issue by providing a methodology for creating a higher quality labor rate survey that should address the issues regarding scope and sampling methodology.</p> <p><b>Comment #9.4:</b><br/> The proposed regulations addresses this issue by including opportunities to survey different rates for a variety of specialty repairs, such as different metals.</p> |
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|   | <p><b>Comment #9.5:</b><br/>They cannot include the rate of shops on their Direct Repair Programs as they are contracted with these shops to “refer” customers to them in exchange for a lower shop rate, discounted parts, etc. These rates do not reflect the true market rate.</p> <p>There are currently existing laws in place but there are few Insurance companies that comply with them. We support the strengthening of these laws and the enforcement by the Department of Insurance in their compliance. Our shop is not on any Direct Repair Programs because we choose not to be. We do not believe it is in our customer’s best interest because we work for them not the insurance company and view these programs as a direct conflict of interest.</p> <p>Thank you</p> | <p><b>Comment #9.5:</b><br/>The proposed regulations contain provisions that would exclude Direct Repair Program rates from the Labor Rate Survey.</p> <p>Thank you.</p> |
| <p><b>Mark Holland, Phil’s Auto Body</b></p> <p>April 21, 2016<br/><u>Written Comments 18J:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 10</b><br/>In regards to the proposed regulations covering auto body repair labor rate surveys and anti-steering in auto body repairs, we request that you oppose any legislative effort that would stop these regulations from moving forward.</p>  | <p><b>Response to Comment # 10:</b><br/>Thank you, however, legislative matters are beyond the scope of the current proposed regulations.</p>                            |
| <p><b>Moica Baumann, California New Car Dealers Association</b></p> <p>April 21, 2016<br/><u>Written Comments 18K:</u></p>  | <p><b>Comment # 11</b><br/>The California New Car Dealers Association (CNCDA) is a statewide trade association that represents the interests of over 1,100 franchised new car and truck dealer members. CNCDA members are primarily engaged in the retail sale and leasing of new and used motor vehicles, but also engage in automotive service, repair and part sales, often including auto body repair services.</p>  | <p><b>Response to Comment # 11:</b><br/>Thank you for this enlightening background on the CNCDA</p>  |

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| <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 11.1</b><br/>CNCDA writes to address recent changes in California law that took place after the publication of the Initial Statement of Reasons that will have an important impact on the proposed regulation. Specifically, Governor Brown signed Senate Bill 3 on April 4, 2016. This legislation will gradually increase the State’s minimum wage to \$15 an hour by 2022, and then increase each year after to account for inflation.</p> <p><b>Comment # 11.2</b><br/>This legislation is relevant to new proposed Section 2695.81, subsection (d)(1), which addresses the currentness of submitted Standardized Labor Rate Surveys. Barring the use of the so-called off ramp provisions that allows the Governor to pause a scheduled increase in the minimum wage, the minimum wage will increase significantly each year every year for the next six years. Furthermore, after 2022, the minimum wage may increase an additional, unknown amount each subsequent year to reflect inflation.</p> <p><b>Comment # 11.3</b><br/>While the vast majority of the skilled auto body technicians employed by CNCDA's members make much more than the minimum wage, the minimum wage is nonetheless a crucial guidepost for setting hourly rates for these technicians. CNCDA's members expect that wages for auto body technicians will increase proportionally to the minimum wage increases through 2022 and beyond.</p> <p><b>Comment # 11.4</b><br/>The Department of Insurance published the proposed regulation prior to enactment of SB 3. CNCDA encourages the Department to review this change in the law for its impact on the currentness of the proposed Standardized Labor Rate Surveys.</p> <p><b>Comment # 11.5</b><br/>Thank you for the opportunity to offer comments on the proposed regulation. Should you have any questions about this comment, please feel free to contact me.</p> | <p><b>Response to Comment # 11.1</b><br/>This request is outside the scope of the currently proposed regulations. This request also proposed an issue that is outside of the statutory authority being relied upon to promulgate these regulations.</p> <p><b>Response to Comment # 11.2</b><br/>The Economic Impact Assessment (EIA) already takes account for the first 2 years the regulations take into effect. The minimum wage in CA will increase to \$15 in 2022 which is accounted for in the CPI-U.</p> <p><b>Response to Comment # 11.3</b><br/>EIA already takes account for the first 2 years the regulations take into effect. The minimum wage in CA will increase to \$15 in 2022 which is accounted for in the CPI-U.</p> <p><b>Response to Comment # 11.4</b><br/>The Department is cognizant of SB 3 and thus the EIA has already taken into account the increase in the minimum wage.</p> <p><b>Response to Comment # 11.5</b><br/>You’re welcome.</p> |
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| <p><b>Monte Etherton,<br/>Fender Mender</b></p> <p>April 21, 2016<br/><u>Written Comments 18L:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 12.1</b></p> <p>I and fellow shop owners appreciate and support the refined and detailed language the Department is proposing. These new regulations, once approved, will help alleviate unfair claims settlement practices that many insurers carry out when relying on their stale or bogus labor rate surveys. From a shop owner and employer’s perspective, this problem must be fixed. At the beginning of the 2016, our technicians were required to take a pay cut because of several new laws that went into place such as piecework break pay, sick pay, and increases in minimum wage. Coupled with substantial health insurance cost increases, our direct labor and related labor costs increased substantially.</p> <p>Normally, any business that incurs cost increases such as these must increase their selling price to cover those costs. In our industry, this is not possible because of “Labor Rate Surveys”. Since we couldn’t realistically raise our prices, our only option was to reduce the pay of our technicians. And although they understand, they are not happy about it, and neither are we.</p> <p>We have been threatened by insurers that if we charge any of their customers more than what that insurer has allowed (i.e. rate differences) , they will use that information to steer future customers from us by telling those future customers they will have to pay out-of-pocket. As you have stated, this option is not fair to consumers or fair to shops, so it is not an option.</p> <p>Insurers such as GIECO, State Farm, Farmers, 21st Century, Safeco, Progressive, Mercury, and Liberty Mutual all practice the same methodology of either relying on an outdated survey, or “fix” the survey so it comes out lower than actual market rates. As you are well aware, some of these companies are using rates from 3, 4, and 5 years ago, or using geographic areas the size of San Diego County. They simply cheat because they can.</p> | <p><b>Response to Comment # 12.1:</b></p> <p>Thank you. The issues presented by the commenter is one of the reasons why the proposed regulations are being promulgated and is attempting to address.</p> |
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The question that keeps coming to mind is this: Why is any rate that is higher than a calculated mean or average rate considered unreasonable? In the past, the department has received labor rate surveys from at least one insurer that arrived at a RANGE of prevailing rates. This survey is from Progressive, and is in your database. I believe it was from 2010:

| 45 - North<br>San Diego<br>County Zone | Name of Shop                   | Address                  | City      | Zip   | Sheet<br>Metal<br>Labor          | Paint<br>Labor             |
|--|--------------------------------|--------------------------|-----------|-------|----------------------------------|----------------------------|
|  | 1st Class Collision Inc        | 505 Corporate Dr.        | Escondido | 92029 |                                  |                            |
|  | BMW of Encinitas               | 1302 Encinitas Blvd      | Encinitas | 92024 |                                  |                            |
|  | Bob Baker VW                   | Paseo Del Norte          | Carlsbad  | 92008 |                                  |                            |
|  | Bradley Allen Auto Body        | 204 N. Coast Hwy 101     | Encinitas | 92024 |                                  |                            |
|  | Brecht BMW                     | 1555 Auto Park Way North | Escondido | 92029 |                                  |                            |
|  | Caliber Collision Center       | 4156 Avenida De La Plata | Oceanside | 92056 |                                  |                            |
|  | California Auto Body           | 320 N. El Camino Real #F | Encinitas | 92024 |                                  |                            |
|  | Coast Collision Center         | 6030 Avenida Encinas #C  | Carlsbad  | 92009 |                                  |                            |
|  | Escondido Paint and Body       | 1416 Mission Rd          | Escondido | 92029 |                                  |                            |
|  | Euro Pacific Auto Body         | 1408 Mission             | Oceanside | 92054 |                                  |                            |
|  | European Auto Body - Escondido | 2129 Vineyard Ave.       | Escondido | 92029 |                                  |                            |
|  | Fallbrook Auto Body and Paint  | 1127 East Mission Road   | Fallbrook | 92028 |                                  |                            |
|  | Leucadia Auto Body             | 1508 N. Coast Hwy 101    | Encinitas | 92024 |                                  |                            |
|  | Mossy Nissan of Oceanside      | 3535 College Blvd        | Oceanside | 92056 |                                  |                            |
|  | Neimans Collision Center       | 309 Industrial Way       | Fallbrook | 92028 |                                  |                            |
|  | Stroyer Brothers - Escondido   | 360 N. Hale Street       | Escondido | 92029 |                                  |                            |
|  | Toyota of Carlsbad             | 6030 Avenida Encinas     | Carlsbad  | 92011 |                                  |                            |
|  | Weseloh Chevrolet              | 5335 Paseo Del Norte     | Carlsbad  | 92008 |                                  |                            |
|  | <b>Number Surveyed</b>         | <b>20</b>                |           |       | <b>Prevailing<br/>Rate Range</b> | <b>\$50-\$54 \$50-\$54</b> |
|  | <b>Number Responded</b>        | <b>20</b>                |           |       |                                  |                            |

The idea of a range of rates has been suggested many times to CDI, but will not stick. However, since this document was unknown (at least to me) until just recently, I believe it may make a difference in how you proceed:

**Comment # 12.2**

1. Please consider amending the regulations in a manner that will allow insurers to submit either a “Prevailing Rate” or a “Prevailing

**Response to Comment # 12.2:**

A rate range was considered by the Department, but was rejected. Use of a

Rate Range” as Progressive did here. There is no question that a range is a more fair and more realistic picture of the actual market.

**Comment # 12.3**

2. With Minimum Wage (MW) increases coming, it is unfair to allow any insurer to skip a year by simply increasing the rates by CPI. CPI will not reflect the additional cost to shops from the increase in MW the coming year. Since most automotive techs in our industry supply their own tools, we must pay them twice MW, so if MW increase \$1.00, their pay must be increased by \$2.00. Labor cost to selling price ratio is at least 2.5, so a \$1.00 MW increase could result in a labor rate increase of \$5.00 per hour. Shops must be able to adjust for these cost increases annually.

If either of these are of interest to you, I would be glad to take work up some rough draft language.

range would lead to inconsistencies in results. The insurers would cite the low end as the best answer, but the shops would prefer the high end. Thus the issue as to the prevailing rate would be unresolved. It would add inconsistency to the methodology and add variability and complexity when determining the rate to be paid.

**Response to Comment # 12.3:**

The Department is aware of the pending increase to the California minimum wage and the possibility of upward pressure on wages earned by those making more than the minimum and thanks the commenter for the quantification of the effects. The proposed regulations attempt to account for increasing costs on an annual basis by requiring either a new survey be conducted, or applying a CPI adjustment as described in section 2695.81(d)(1)(C). This CPI adjustment utilizes the Monthly (All Items) Consumer Price Index for All Urban Consumers for California. Using annualized monthly data based on when the survey was conducted should minimize any lag of minimum wage increases in the CPI data and lead to a fair result while also minimizing costs

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|   |  | to insurers. Additionally, this adjustment is only allowed once, after which a new survey needs to be conducted to retain the rebuttable presumption.  |
| <p><b>Randy Stabler, Pride Collision Center</b></p> <p>April 05, 2016<br/> <u>Written Comments 18M:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 13.1</b></p> <p>I applaud your office and David Jones for taking action on the much needed regulation of Auto Body labor rate surveys in California. I am interested to support your effort and would also like to offer you some input and suggestion for your consideration.</p> <p>In advance of my suggestions, allow me to provide you a little background on me and my company. After graduating from UCLA with a B.A. in political science in 1981, I started a collision repair business with a lifelong friend. We have owned and operated an auto body collision repair center since 1983 and now have 7 locations and approximately 200 employees. In addition, I have been very active in many industry associations both on the state level and nationally through the years. As a matter of fact, I am currently serving as the Chairman of the Collision Industry Conference which is the nationally recognized forum that produced the minimum shop criteria that your department referenced in the newly proposed labor rate survey legislation.</p> <p>Allow me to preface my comments by reiterating that your department's efforts to regulate the Auto Body labor rate survey process is a benefit to our entire industry and I support you in this effort. With that said, I would like to offer some suggestions to make the regulations even better.</p> | <p><b>Response to Comment # 13.1:</b></p> <p>Thank you. While we recognize the issue brought forth by this commenter regarding the minimum requirements in the California Insurance Code, this issue is outside the scope of the current regulation and beyond the statutory authority being relied upon to promulgate the currently proposed regulations.</p> |

**Comment # 13.2**

First, the current labor rate survey regulations create an atmosphere where insurers will pay a standard surveyed amount. Secondly, all repair facilities do not have the same qualifications and hence they do not have the same cost structure. More specifically, repair facilities which have accomplished the necessary steps to be accepted and recognized by vehicle manufacturer certification programs, have a much higher cost structure when it comes to employee training and equipment investment. Further each of these programs levies an annual fee upon the certified collision center in order to fund the testing and labor involved to verify the shops qualifications and capabilities. The investment required to be a part of some of the OEM certification programs can easily top \$250,000 for one location. The departments currently proposed regulations will disadvantage the most qualified segment of the industry and policy holders who drive vehicle brands with certified collision center programs. Insurers will enforce the median labor rate with shops that have a much higher cost structure and are the only ones really qualified to restore customers' vehicles to the factory specifications. Because if this, I would propose your department consider a two tiered rate survey system, which prevents insurers from disadvantaging their policy holder by limiting their payouts to just the "average" repair facility. There is much precedence for this in other industries. In the automotive mechanical repair world, luxury vehicles command a higher labor rate than other brands. This is a natural function of the higher cost sustained by the business and the general competitive market forces.

**Response to Comment # 13.2**

The proposed regulations will not prohibit or inhibit auto body shops that have greater specialization and greater market value for their services from negotiating higher rates directly with any given insurer. The proposed regulations are purely optional and the use of labor rate surveys at all is purely optional. Any labor rate survey, including one conducted using the methodology laid-out in the proposed regulations do not prevent or stop insurers from paying more for specialized repair services or more than the labor rate survey price to any auto body shop. Additionally, the proposed regulations do have sub categories for specialized repairs; such as costlier repairs conducted on different auto body materials. The proposed regulations are fully cognizant of true fair market forces, and thus there is no constraint on these forces contained the proposed regulations. All willing parties, including auto body shops and insurers are more than free to negotiate directly for high auto body labor rates.

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|  | <p><b>Comment # 13.3</b><br/> Secondly, Your proposed regulation refers to a minimum shop training and equipment standard that was created by the Collision Industry Conference (CIC) approximately 20 years ago. This minimum standard or definition for a Class A repair facility is woefully outdated and is currently in the process of being update to the current needs of our industry through the work of the CIC body. The CIC definitions committee has the new definition in a draft form and the details of the content have been vigorously debated over the last year. We expect the CIC body to vote on the language and adopt its updated form at the</p> | <p>Further, proposed Section 2695.81(e)(4) provides that the survey shall <u>not preclude an insurer from adjusting upward the prevailing rate determined by the Standardized Labor Rate Survey in cases where the labor rate charged or quoted by the repair shop on a particular claim is greater than the prevailing rate determined by the Standardized Labor Rate Survey and the insurer negotiates a higher labor rate with the repair shop that is reasonable for the particular repair, geographic area, or other factors. This would include situations where only certain repair shops are certified to perform repairs on certain vehicles types or certain types of materials.</u></p> <p><b>Response to Comment # 13.3</b><br/> While the Collision Industry Conference standard does not contain the most cutting edge or most technologically advanced auto body repairs methods and standards, the CIC standards are still to this day the most widely accepted, and most widely recognized standards in the industry and the standard that was created and accepted by an industry wide association, versus methods and</p> |
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|  | <p>upcoming April meeting in Seattle Wa. I will enclose a draft copy for your review.</p> <p>Thirdly, paint material rates are a significant portion of the cost to repair a collision damaged vehicle. This component must be added to the survey process in order to protect the consumer.</p> <p><b>Comment # 13.4</b><br/> Finally, I would like to suggest that the department’s obligation is to create regulations that protect the consumer. Many insurance companies have preferred provider networks which are a reasonable option for insurers, policy holders, claimant customers and repairers. With that said, I believe that the department of insurance should require full trans parity for consumers. To that end, I believe that insurers should be required to disclose the exact terms of the agreements that they have with their preferred providers. Consumers have a right to know or if a preferred provider has made a separate agreement with an insurer which could compromise the quality and safety of their vehicle during the repair process. Secondly, if a repair facility has agreed to certain terms with an insurer in exchange for the expectation of increased referral volume, it would benefit the consumer to know the exact nature of the insurer and repairer relationship so that the consumer has full disclosure.</p> | <p>processes that may be common in only small niche type repair services.</p> <p>Paint material rates were considered but rejected as an individual repair component because of industry wide standard practices relating to payment for paint services. <u>Also, “paint and materials” rates are not labor rates and so are not included in these proposed regulations designed to deal only with labor rates.</u></p> <p><b>Response to Comment # 13.4</b><br/> Thank you for the recommendation and comment. The Department’s primary goal is indeed consumer protection. However, the commenters suggestion that the Department force an individual commercial party to disclose the details of a contract with a third party vendor is well beyond the scope of the currently proposed labor rate survey regulations and is also well beyond the statutory authority which is being relied on to promulgate the regulations. The Department is cognizant of the potential importance of direct repair shop programs and thus the proposed regulations do in fact take into account</p> |
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|  | <p><b>Comment # 13.5</b><br/> Please don't misunderstand, I am not opposed to preferred provider agreements and our shops participate in several of them. With that said, I believe that both repairers and insurers have an obligation to be fully transparent with our customers. If the department of insurance would require that insurers provide their policy holders and claimants with the full details of the terms of their preferred provider agreements, the consumer would be fully informed and would make more informed choices in the process.</p> <p>I thank you for allowing me to share this perspective with you and am more than willing to speak with you further on these topics and even participate in the development of your regulations.</p> <p>Should you desire to contact me, please use my information below.</p> | <p>special relationships between insurers and direct auto body shop repair shops that go beyond or outside of regular fair market forces, and thus the proposed regulations have provisions in it that prohibit the inclusion of a direct repair auto body shop's discounted rates in the proposed labor rate survey methodology.</p> <p><b>Response to Comment # 13.5</b><br/> The commenter's suggestions are beyond our authority being relied upon to promulgate these proposed regulations, and to do so could violate potential confidential information. Additionally, the department may not have this information.</p> |
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| <p><b>Richard Valenzuela,<br/>National Autobody<br/>Research</b></p> <p>April 21, 2016<br/><u>Written Comments 18:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 14</b></p> <p>Article</p> <p><b>Is There A Double Standard for Setting and Raising Rates Among Insurers and California Collision Repairers?</b></p> <p><b>Why are insurance premiums rising, while collision repair rates remain relatively stagnant (and in some cases even drop)?</b></p> <p>With insurance companies routinely charging higher premiums, why do they continually fight against collision repairers raising their rates? We suggest it is because there exists a double standard for raising rates that is followed by many insurance companies.</p> <p>When we say “double standard,” we mean a rule or principle that is applied differently to different groups of people when it should be applied the same.</p> <p>I’ll illustrate this with an example involving Allstate Insurance. From a recent article in the collision industry press, we’ve synthesized Allstate’s standards for raising insurance rates:</p> <ol style="list-style-type: none"> <li>1. Raise rates when profit margins aren’t acceptable</li> <li>2. Raise rates on a market-by-market basis</li> <li>3. Raise rates for an appropriate and acceptable return to investors</li> <li>4. Raise rates even when the inflation rate is 0</li> </ol> | <p><b>Response to Comment # 14:</b></p> <p>The issue being raised by this commenter is outside of the scope of the currently proposed regulations and beyond the statutory authority being relied upon to promulgate the currently proposed regulations can be used to address.</p> |
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|   | <p>5. Raise rates quickly when costs increase to recover those costs quickly</p> <p>6. Raise rates as long as necessary and as justified by market and economic factors</p> <p>Overall, we find these principles to be very logical, acceptable, and consistent with many for-profit corporations. However, the analysis of these six standards begs a question: Why are collision repairers not provided the same prerogative to raise their labor rates by applying the same standards? Here is a clear case that a double standard exists. (Read the entire article <a href="#">“A Double Standard for Setting and Raising Rates” in Autobody News</a>.)</p>  |   |
| <p><b>Robert Peterson, Santa Clara University School of Law</b></p> <p>April 21, 2016</p> <p><u>Written Comments 18O:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p>Thank you for the opportunity to attend today’s hearing on labor rate surveys.</p> <p><b>Comment # 15.1</b></p> <p>I have a suggestion. Generally speaking, would it be possible to extend the comment time for a few days after hearings? Otherwise, it is almost impossible to digest the comments made by others at the hearing into one’s own comments.</p> <p><b>Comment # 15.2</b></p> <p>Once California decided to allow consumers to choose their own repair shops (a P.P.O. rather than an HMO system), it is obviously necessary to have some kind of cost control. Otherwise shops could quote any rate, and insurers would be obliged to pay it. The labor rate survey has been the tool of choice to discover the fair market rate for auto repair.</p> | <p><b>Response to Comment # 15.1:</b></p> <p>The comments do not address the regulations directly but instead address the regulation process. The Department will in the future consider extending the comment period on a case-by-case basis.</p> <p><b>Response to Comment # 15.2:</b></p> <p>The issue and industry that the commenter raises are completely outside the scope of the proposed regulations and in fact the comparison of health insurance delivery to auto body shop repairs is wholly</p> |

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|  | <p>The use of outdated surveys or improperly skewed surveys is a legitimate concern for consumers and regulators. Likewise, the high cost of collision insurance, which is a pass-through of auto repair rates, is a serious concern for consumers. Speaking personally, my collision rate is higher than the rate I pay for my 300/500/100 liability coverage. And my car is a modest one.</p> <p>The DOI’s current attempt to bring certainty and fairness to this difficult issue is, in my opinion, seriously flawed in a number of respects.</p> <p><b>Comment # 15.3</b><br/> <u>The Rebuttable Presumption</u></p> <p>The survey is now voluntary, and if done in the prescribed way, the insurer receives a “rebuttable presumption” that the rate is fair and equitable. Just which kind of rebuttable presumption is left an open question. More to the point, if the presumption is a carrot to encourage insurer’s to do surveys in accordance with these regulations, it is thin sustenance. This is because of the way presumptions work in California. Does it shift the burden of going forward with evidence, or does it shift the burden of proof to the DOI? Probably neither.</p> <p>In California, presumptions are not evidence. Ev. Code sec. 600. Thus, they may not be “weighed.”</p> <p>There are three kinds of presumptions.</p> <p>Conclusive—Ev. Code sec. 620. It is not one of those.</p> | <p>inappropriate and incompatible with the purpose of the proposed regulations.</p> <p>Consumers already can choose their own repair shops. This regulation does nothing to give them more freedom of choice. The labor rate survey has been a tool widely misused by insurers to avoid paying the fair market rate for repairs, as evidenced by numerous complaints by auto body shop.</p> <p><b>Response to Comment # 15.3:</b></p> <p>The commenter correctly recites the only possible meaning of the language in question: “The survey is now voluntary, and if done in the prescribed way, the insurer receives a ‘rebuttable presumption’ that the rate is fair and equitable.” Though the commenter insinuates that the term “rebuttable presumption” contains some inherent ambiguity, there is in fact no meaningful uncertainty about the meaning of this term, in the context of its use in this regulation. It means a presumption which may be rebutted by evidence. Although the commenter fails to identify any potential alternate meaning of the term “rebuttable presumption” to which the actual</p> |
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|  | <p>There are two kinds of rebuttable presumptions. Those that shift the burden of producing evidence (Ev. Code sec. 630) and those that shift the burden of proof (Ev. Code sec. 660).</p> <p>The regulation does not tell which kind of rebuttable presumption this one would be. If, however, the burden of proof or burden of producing evidence is on the Commissioner, then the presumption does nothing. You can't shift either burden to the party that already has the burden.</p> <p>If the Commissioner would have the burden of production and proof in a market conduct action, then this presumption is illusory. At most, it bespeaks a favorable attitude towards the insurer who surveys in accordance with the regulation.</p> <p>I think, too, that it has no effect outside an enforcement action. It only applies to the Commissioner. So it would have no impact on a suit by the insured or, if under an assignment from the insured, the auto repair shop.</p> | <p>language of the regulation could be susceptible, he does venture to point out that under the Evidence Code there are two varieties of rebuttable presumptions: those affecting the burden of proof and those affecting the burden of production. However, for purposes of the proposed regulations, this is a distinction without a difference, as is confirmed by the commenter's own analysis; according to the comment, the result is the same, regardless of whether the rebuttable presumption set forth in the proposed regulations is characterized as affecting the burden of proof or the burden of production.</p> <p>Although the commenter's conclusion — that the presumption is "illusory" — is erroneous, the analysis is correct to the extent that it demonstrates that, for purposes of the proposed regulations, the question of which variety of rebuttable presumption as defined in the Evidence Code is intended here is of no significance to the operation of the language in question. Accordingly, it is unnecessary to specify in the proposed regulations which kind of rebuttable presumption is intended; the</p> |
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|  |  | <p>intent, and the unambiguous effect, of the language is to signify a rebuttable presumption generally, without regard to any distinction between such presumptions as set forth in the Evidence Code, which in any case is irrelevant here.</p> <p>To begin, any administrative hearing where the presumption set forth in the regulations would be involved would be conducted pursuant to the Administrative Procedure Act, which specifies in relevant part, “[t]he hearing need not be conducted according to technical rules relating to evidence.” (Gov. Code § 11513(c).) Further, in any proceeding in which the Department is seeking to impose a penalty upon an insurer, revoke a license or certificate of authority, or otherwise deprive one of its regulated entities of a property interest, the Department must bear the ultimate burden of proof; this fact is self-evident to all concerned, and insurers (who are the party that is directly affected by the regulations) above all are fully cognizant of it. Certainly in all of their voluminous comments on the proposed regulations no concern that the</p> |
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|  |  | <p>regulations might somehow impose upon insurers the ultimate burden of proof in an administrative hearing has been expressed by the insurance industry. Even in some hypothetical alternate universe where the Department's regulations could magically supersede the guarantees of due process set forth in the United States and the California Constitutions, it would still be inconceivable that an admitted insurer could ever be required to bear the ultimate burden of proof in a proceeding instituted by the Department against the insurer. The commenter intimates that he too is aware of this fact, by twice in the same comment framing hypothetical examples where the burden of proof and/or production is with the commissioner, as follows: (1) "If, however, the burden of proof or burden of producing evidence is on the Commissioner...", and (2) "If the Commissioner would have the burden of production and proof in a market conduct action..." Significantly, nowhere does the commenter even suggest that either kind of burden could lie with an accused insurer.</p> |
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|  |  | <p>In fact, there are many regulations in the CCR which set forth a rebuttable presumption but that, like the proposed regulations, do not distinguish between rebuttable presumptions affecting the burden of proof and those affecting the burden of production. (See, e.g., 3 CCR 1703.2; 4 CCR 2513; 7 CCR 218 and 219; 10 CCR 260.235.4; 18 CCR 1684; and 22 CCR 80019.1, 82019.1, 86519.1 and 120201.) Another example is OAL's own regulation, at 1 CCR 16, which also creates a presumption. Like the presumption set forth in the proposed regulations, 1 CCR 16 does not specify whether the presumption is a rebuttable presumption affecting the burden of proof or one affecting the burden of production; indeed, 1 CCR 16 does not even specify whether the presumption it creates is rebuttable or irrebuttable. It is likewise unnecessary in the proposed regulations to spell out a distinction that has no bearing on the regulation's meaning or application.</p> <p>Finally, with respect to the commenter's conclusion that the presumption set forth in the proposed regulations is illusory, the Department and the several commenters who</p> |
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|  |  | <p>expressed support for the regulations strongly disagree. The regulations set forth a safe harbor for insurers, which they can avail themselves of only by conducting the Standardized Survey, and using it according to the methods, set forth in the proposed regulations. In this way, the regulations incentivize but do not require insurers to do so.</p> <p>As a practical matter, the Department is highly unlikely ever to commence an enforcement action (alleging that the labor rate component of a claim settlement or adjustment violates Insurance Code section 790.03) against an insurer that surveys in the described way. The Insurance Code requires all such surveys, standardized or otherwise, to be filed with the Department (Ins. Code § 758), and the proposed regulations require the insurer to state in such filings whether or not the survey being filed is intended to be a Standardized Survey (Section 2698.91(d)(1)(E)). If the Department determines that the filed survey is indeed a Standardized Survey and the facts indicate that it is being used as provided in the regulations, the commissioner will presume that the</p> |
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|  |  | <p>labor rate component of the claim settlement or adjustment is fair and equitable, pursuant to the proposed regulations; accordingly, he will not bring an enforcement action on that basis, unless there is sufficient evidence militating against the presumption to rebut it. Because, in the commissioner's judgment, the Standardized Survey, when used as prescribed, embodies the fairest practicable method of conducting a labor rate survey that is to be used for purposes of determining a prevailing auto body rate in a specific geographic area, rebutting the presumption of fairness set forth in the proposed regulations would necessary be quite onerous. Accordingly, it is highly unlikely that the commissioner would bring such an enforcement action in the first place. As a result, a tangible benefit is conferred on insurers that conduct and use a Standardized Survey as prescribed: the near certainty that the commissioner will not bring an enforcement action against them on the basis of their labor rate survey.</p> <p>In the unlikely event that the commissioner ever did commence an</p> |
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|  | <p><b>Comment # 15.4</b></p> <p><u>The Survey Design</u></p> <p>The survey design is calculated to get the wrong result (inflated rates) for all of the reasons I outlined in my earlier comments. They also do not define “charge,” nor do they define “non-discounted.” Without these defined, shops may interpret them as they please.</p> | <p>enforcement action under these circumstances, the benefit conferred on the insurer in question would be that the insurer could rely on its use of the Standardized Survey as prescribed, in lieu of having to marshal the statistical analyses, expert witnesses and other costly technical evidence that would otherwise be necessary in order to refute the accusation that the labor rate component of the claim settlement or adjustment was violative of Insurance Code section 790.03.</p> <p>Accordingly, the presumption set forth in the proposed regulations is not illusory. Rather, it provides a valuable benefit to insurers who use a Standardized Survey as prescribed.</p> <p><b>Response to Comment # 15.4:</b><br/>Common canons of construction allow for common interpretations of words. “Charge” and “non-discounted” are common words in the English language that do not have specialized meaning that would require a section giving a special definition as part of the proposed regulations.</p> <p>The Department disagrees that the</p> |
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The proposed regulations require that a geographic area yield rates that are “fair and equitable.” They then define geographic area. “The geographic area for an auto body repair shop shall comprise six (6) Responding Qualified Auto Body Repair shops” closest to the shop in question. Since it says “shall,” it does not appear to permit a geographic area larger than the six nearest responding body shops. We heard testimony today from both sides suggesting that this arbitrary limitation will result in unintended consequences. Any survey so narrowly drawn will seldom yield fair and equitable labor rates, as required.

standardized survey is any more susceptible to inflated rates than surveys currently conducted by insurers; current insurer surveys take rate responses at face value without independent verification and are equally susceptible to rate inflation. The Department is not proposing a survey mechanism for inflated rates, only market rates that are not negotiated down by agreement between a body shop and insurer. Negotiated rates are discounted and not market rates. The responding shop should reply to the survey with its regular, non-discounted, non-negotiated rates, so that shops that are not among the insurers’ preferred shops or part of the insurers’ DRP (Direct Repair Program) do not set the prevailing rate for a given geography with discounted or negotiated rates. Many repair shops fall outside of the various DRP programs in place by the largest, nationwide insurers. The Department has expanded the geographic area in its voluntary Standardized Survey to address industry and the commenter’s concern as discussed at length in the following response (15.5).

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| <p><b>Robert Peterson</b><br/> <b>Santa Clara University</b></p> <p>April 24, 2015 Labor Rate Comments*</p> <p><i>*These comments were originally submitted in response to a different CDI rulemaking. Commenter attached them to his 4/21/16 letter regarding the currently proposed anti-steering regulations.</i></p> | <p><b>Comment # 15.5</b></p> <p>There is an area close to my university that looks like auto body row. Just click on this Google Map link:<br/> <a href="https://www.google.com/maps/search/Auto+Body+Repair+Shops+Near+Santa+Clara+University/@37.3643458,-121.9435833,14.53z">https://www.google.com/maps/search/Auto+Body+Repair+Shops+Near+Santa+Clara+University/@37.3643458,-121.9435833,14.53z</a></p> <p>Note that one of them is called German Auto Body. If they specialize in Mercedes repair and charge \$100/hour, does that mean that Economy Auto Body and Paint can raise its rates to \$100/hour simply because it is located near German Auto Body? If a number of dealerships, with high auto body repair rates, are within a few blocks of Economy Auto Body and Paint, does that mean that Economy can raise its rates to insurers to the dealer rate, even though Economy is not a dealer?</p> <p>You could get six shops within a block or two. Any outside that area simply do not count, even if they are within a 5 minute walk. This is particularly odd because the distances that are considered “unreasonable” in the proposed steering regulations are more than 10 or more than 25 miles, depending on the area. This would suggest that the relevant market is more congruent with these distances.</p> <p>The regulation requires that the survey results by submitted to the DOI. Again, if I am reading this correctly, the survey for each shop consists of the rates of that shop and the nearest 5 other responding shops. This means that there are as many geographic areas as there are shops. 5,000 shops, 5,000 different geographic areas, and 5,000 surveys to be submitted. Perhaps I am reading this incorrectly.</p> | <p><b>Response to Comment # 15.5:</b></p> <p>The German Auto Body Shop would likely be the highest paying shop in its geographic area. If so, then under the proposed regulations, German Auto Body Shop’s rate would, in effect, not be included in the prevailing rate calculation, which states that the prevailing rate would be that of the shop that represents a simple majority (e.g. the rate charged by the fourth shop out of six). The commenter’s example mischaracterizes the impact that one shop’s rate would have on the prevailing rate calculation and the auto body repair market. Because of the simple majority approach, the rates of the highest- and lowest-charging shops in any geographic area are effectively thrown out. Additionally, if a shop tried to artificially charge a higher rate that is not cost-based and competitive with other nearby shops, then they will likely lose business.</p> <p>The Commenters’ comparison of the Anti-Steering Regulation’s definition of “unreasonable distance” as a market area is flawed. In the Anti-Steering Regulations, the Department is defining what is an unreasonable distance for an insurer to require a claimant to drive</p> |
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|  |  | <p>for a vehicle inspection. This is completely different from the proposed regulations which is determining a market area for a specific Geographic Area for labor rate surveys. The issues that each regulation intends to address are completely different, and therefore not relevant to these regulations.</p> <p>The example of German Auto Body is flawed. The rate is set by each repair shop with an eye toward competition consistent with cost recovery and adequate margins. Shops raise their rates in accordance with their costs and try to maintain some competitive advantage with price, quality (e.g. numerous special certifications), or superior service.</p> <p>In response to this and other comments, the Final Text of Regulations reflects a change to Geographic Area under subdivision (8)(D). A periphery was added, so that a geographic area may be expanded in most instances to include more than six shops, given that one more mile is added to the sixth closest shop, and all shops within that mile are also included in the geographic area. Under this</p> |
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|  |  | <p>amendment to the proposed regulations, the average number of potential shops in each geographic area increases from 6 shops to an average of about 21 shops, with many shops in urban areas having 30 or more shops and some even having up to 80 or more shops in their geographic area. The Department believes this resolves the concern expressed by the comment. The rate in the Final Text of Regulations is now specified to be the rate charged by the majority of shops in a given area. There are 21 shops on average in each geography and as many as 50 or more in some urban areas. In rural or more isolated areas, the averages are the smallest and the geography is more likely to be just six shops. The 10-25 mile range in the Steering regulations (which has been amended to 15-25 miles in the revised text) is inapposite to the proposed labor rate survey regulation. The Anti-Steering regulations set an outer limit for the distance an insurer can require a consumer to travel for a vehicle inspection, whereas the labor rate regulation is concerned with setting a market price for shops within a radius that a consumer might travel to find a</p> |
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|  |  | <p>price quote. By conflating the anti-steering distance rule with the geographic area radius, Commenter fails to acknowledge the different goals of the two different regulations.</p> <p>The Department believes that shops compete on many different levels, including cost, quality of repairs, and the length of time it takes to complete the repairs. Shops that provide higher quality repairs will inherently possess an advantage when trying to attract customers over shops that do not. An economy shop that raises its rates to equal its neighbors is not more attractive to potential customers. Under the current environment, without the proposed regulations, there is nothing that would stop Economy Auto Body from raising its rates if it wanted to. So clearly there are other market forces checking this behavior.</p> <p>In light of this and other comments the Department has expanded the geographic area one mile out from the sixth shop to create a more realistic market.</p> |
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|  | <p><b>Comment # 15.6</b><br/> Much turns on the shop’s “posted rate.” The insurer may lower a rate to the posted rate, so shops, unless there is some good reason to the contrary, will simply post higher rates, then “discount” them. The discounted rates</p> | <p>DRP rates include the trade-off of increased business for lower hourly rates and as such are not an accurate representation of a market-wide prevailing rate.</p> <p>Finally, while it is correct that each shop will be the center of its own geographic area, there is no language in the proposed regulations that is susceptible to being misread to indicate that the insurer must submit multiple surveys, nor does the commenter identify any such language. Rather, in the Amended Text of Regulation, at Section 2698.91(d)(1)(D) it is expressly stated that the (singular) Standardized Survey that is submitted to the Department shall contain the prevailing rate for each of the Geographic Area[s] (plural) surveyed, as defined.</p> <p><b>Response to Comment # 15.6</b><br/> Auto body repair shops have every incentive to post a competitive market rate, as noted by auto body shops during the public hearing. Consumers, concerned about the price of repairs will look at the posted rate and will be deterred by a posted rate that is too high above the market price, and go to</p> |
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are not, then, to be included in the survey. The market rate then becomes the posted rate regardless of what repair shops actually charge. Who pays the MSRP on a new car? Likewise, while one may not use a DRP rate in the survey, they may use a “non-discounted posted labor rate” in the survey. Again, a reason to post an inflated rate. In California, shops need not post their rates, and when they do, they need not charge the posted rate.

While one witness said he would lose business if he posted a higher rate, that seems doubtful. Pushing the posted rate by \$15 or \$20 is not likely to make a potential customer turn on his or her heels. Once engaged, the manager can present the lower, discounted, rate. After reviling the insurance company, the shop can then also ask the customer to sign a complaint that they will obligingly send to the DOI.

Although this seems to be an almost intractable issue that has been churning for over 15 years, I would respectfully suggest that these proposed regulations need further work.

another shop. In fact, the posted rate does often reflect the market price, for fear of losing a consumer to a competitor.

Additionally, see Comment #27.2 which reflects real world auto body shop practices, demonstrates that posted labor rates at auto body shops are valid and excellent indicators of the actual market rate and that there is no incentive to post inflated posted rates. Additionally, existing anti-trust laws act as a deterrent, and prohibit auto body shops from manipulating the market and engaging in monopolistic activities.

Further, based upon this and other comments, in the amended text, a shop’s posted rates can be challenged by the insurer if invoices from non-discounted work from the last 60 days can be produced by the insurer. In this instance the insurer may adjust the labor rate in the estimate to the lower of: (1) the labor rate charged by that shop for repairs that were completed by that shop during the immediately preceding 60 calendar days, or (2) the prevailing auto body rate as determined

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|  | <p><b>Comment # 15.7</b></p> <p><u>Rate Repair Survey</u></p> <p>Auto repair policies are by default P.P.O. policies. By contrast, when it comes to repairing one’s body, health care policies vary from bronze to platinum (or, “Cadillac”). This may seem an odd public policy choice, but the legislature made this choice and we must live with.</p> <p>Allowing claimants to pick the out-of-network shop of their choice is a clear benefit to out-of-network body shops. While the DOI strives to bring policies to market at the lowest premium at which an insurer is willing to do so, the P.P.O. approach to auto repair is bound to drive up repair costs which are ultimately born by insureds. Keep in mind, too, that the collision coverage is one of the most expensive coverages in the standard policy. For example, the 6 month premium for \$300/500/100 coverage on my 2013 Honda Fit (with a 21 year old driver with a clean record) totals \$294. Collision and comprehensive for the same car totals \$399. Thus, consistent with the DOI’s commitment to reducing the cost of insurance, the DOI should do nothing that would inflate rates in the related, but (in this regard) unregulated area of auto repair.</p> | <p>by the survey. See proposed Section 2695.81(e)(2)(C).</p> <p><b>Response to Comment # 15.7</b></p> <p>These comments, which were appended to Commenter’s comment letter addressing the Department’s Anti-Steering regulation, are inapposite, as they relate to a previous rulemaking proceeding.</p> <p>The Department disagrees that auto repair policies are PPO policies by “default.” Health insurance and auto insurance are entirely different industries with significantly different regulatory environments; any analogy between the two has little probative value. Furthermore, the significant cost expansion in the healthcare system has prompted many commenters to suggest that our healthcare system is “broken”; it is of questionable value for Commenter to hold up the healthcare system as a model of an efficient market. Commenter’s comment has no bearing on the proposed regulation, which does not purport to change the auto repair claims system, or the means</p> |
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|  | <p>At first blush, the proposed auto rate survey regulation is an attempt to keep within reasonable bounds the cost of auto repairs in the context of the P.P.O. system. If surveys are to be used, then some of the shops' complaints that they were outdated or not followed has some resonance. Sadly, the proposed labor rate survey methodology is flawed in many respects that will artificially inflate rates.</p> | <p>by which insurers administer benefits. The Department disputes that the proposed regulation will raise insurance premiums; Commenter has cited no factual basis for his allegation.</p> <p>The Department thanks Commenter for his acknowledgement that labor rate surveys are intended to control costs in the auto claims system. The Department also thanks Commenter for acknowledging the validity of complaints received by the Department regarding use of outdated or inaccurate surveys. The Department strongly disputes that the proposed labor rate regulations will inflate labor rates. The Department disagrees that the standardized survey is any more susceptible to inflated rates than surveys currently conducted by insurers; current insurer surveys take rate responses at face value without independent verification and are equally susceptible to rate inflation. Commenter's comment relates to a prior rulemaking proceeding and has no probative value with respect to the proposed regulation. Moreover, Commenter neither identifies the mechanism by which the proposed</p> |
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|  | <p>Let me suggest a well-known analogy. Ask any hospital to tell you what they “charge” for a gauze pad or an aspirin. Admonish them to exclude any discounts, whether by prior agreement or otherwise. The hospital will quote the notoriously inflated “chargemaster” rate. This is what they officially “charge” or bill if you walk in off the street and have no insurance. Yet, this rate is actually paid by practically no one – even those who walk in off the street with no insurance.</p> <p>The Court of Appeal recognized this reality in <i>Children's Hospital Central California v. Blue Cross of California</i>, 226 Cal. App. 4th 1260, 1275, 172 Cal. Rptr. 3d 861, 864, 2014 Cal. App. (Cal. App. 5th Dist. 2014). The reasonable value of medical services is not the amount billed, but rather the price that a willing buyer will pay and a willing seller will accept in an arm's length transaction. As the court pointed out, the full billed charges reflect what the provider unilaterally says its services are worth. This may or may not be accurate. Merely averaging the billing rates among hospitals would be a no more accurate estimation of economic reality than the billing rate itself.</p> <p>The auto repair survey suffers from a similar defect. Imagine the anti-trust implications if repair shops implemented a survey of their “chargemaster” rates in order to bind insurers to pay these high rates. Imagine if hospitals could average their “chargemaster” rate and force health insurers to pay those rates. The proposed regulation does this anti-competitive work for the auto shops.</p> | <p>regulation is supposed to inflate labor rates, nor provides any factual support for his bald assertion.</p> <p>Commenter’s comment is not relevant to consideration of the proposed regulation, as he is discussing an entirely different issue relating to the flawed healthcare system.</p> <p>The case cited by Commenter has no probative value with respect to the proposed regulation, as the case concerns the healthcare system, whereas the proposed regulation concerns the auto claims system.</p> <p>Commenter’s comment is nonsensical, as auto repairers do not have “chargemaster” rates. Commenter overlooks the history of labor rate surveys, which were originally created by insurers to control costs, not imposed by the Department. Moreover, the comment has no bearing</p> |
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The survey rules not only invite, but counsel, adverse selection. There is no good reason for a shop charging middling or lower rates to respond to the survey. This would simply lower the average rate and make it harder to deal with insurers. In fact, the proposed regulation counsels as much. **“FAILURE TO COMPLETE THIS QUESTIONNAIRE IN FULL MAY RESULT IN ITS EXCLUSION FROM THE AUTO BODY LABOR RATE SURVEY FILED WITH THE CALIFORNIA DEPARTMENT OF INSURANCE.”** This “warning” also counsels higher priced shops to return the survey. Also, since nothing is under oath, and there is no requirement (if I heard correctly at the hearing) for shops to post their rates, and (unlike insurance companies) certainly no requirement that they charge their posted rates, the survey invites inflated rates.

on the proposed regulation, as the proposed regulation does not create a requirement for labor rate surveys, but only enables an insurer to obtain a rebuttable presumption that their survey obtains a fair result if they properly complete a survey as defined by the regulations.

Commenter’s comment is inapposite, as it pertains to survey rules promulgated during a now-obsolete rulemaking proceeding. Commenter proceeds from the flawed assumption that an auto repairer knows whether her/his rates are higher or lower than the prevailing rate. There is no incentive for shops not to complete a survey because, even if their rates are lower than the prevailing rate, they are not entitled to the higher prevailing rates, but only their lower rate. Shops have no incentive to inflate their labor rates because it having a high rate drives away consumers. The Department disagrees that the standardized survey is any more susceptible to inflated rates than surveys currently conducted by insurers; current insurer surveys take rate responses at face value without

Indeed, Fred's Discount Auto Body Repair's survey would be rejected because Fred's discounts all of its rates. Or, at least, that is what they represent.

Imagine the following dialogue:

Nigel: Hey, Manny. We just got another survey form. That's thirty this month. Should I toss it in the dustbin?

Manny: We are one of the lower priced shops in the tri-county area. There is no good reason to fill this out. In fact, there are good reasons not to. It will just lower the rates insurers will be willing to pay. In addition, anything we submit puts a cap on what we can charge because insurers can lower our estimate to our response to the survey. Of course, if we failed to respond and they entered our rates in the survey as "\$0", that would be different. Toss it in the trash.

Nigel: Just a second. All it says is that we declare that the information provided is true and correct. What happens if we just put down \$100 per hour for all of the different rates?

Manny: Nothing that I am aware of. Nothing says we must actually make people pay whatever rate we say we charge.

Remember when I had that accident and had no health insurance? The hospital sent me a charge for \$5,000. I was only there for one hour. I objected and went through the bill with them. I pointed out that they were charging \$25 for a gauze pad. I offered to get them

independent verification and are equally susceptible to rate inflation. Moreover, the proposed regulation allows insurers to pay a lower rate than a shop's quoted rate if the insurer can produce invoices showing that a shop charges a lower rate.

Commenter's dialogue is counterfactual and does not address the proposed regulation.

a whole box of gauze pads instead of paying \$25 for one pad. You know what? They settled the whole bill for \$1,000. If hospitals can charge one rate and actually charge a lower rate, so can we. So, maybe we should fill out that survey after all, if you know what I mean. Heh, heh, heh (conspiratorial laughter).

At the hearing Mr. Cignarale defended the 110% enhancement for more expensive shops on the basis that, despite the mean or median results of the survey, there is a range surrounding the result that is reasonable. Oddly, the DOI has less concern when picking the “most actuarially” sound rate (rather than a range) that its insurers may charge for coverage.

Thus, a repair shop that charges more than the survey results support over the last 90 calendar days may bump its rates by 10% above the “prevailing auto body rate.” But, given that there is a range around the mean or median, clearly a shop that charges less over the prior 90 days should be content to have its rates reduced 10% below the indications of the survey. This, however, will never happen for at least two reasons. First, the DOI’s regulation ignores the lower range surrounding the mean and median. Second, the adjustment only occurs if the repair shop “voluntarily” presents the last 90 day’s invoices to the insurer. No repair shop will “voluntarily” shoot itself in the foot. Once again, the survey regulation biases the results towards higher rates. I expect, too, that the lower repair shop’s rates would be considered “discounted” rates, thus not qualifying. As with the survey itself, only inflated rates would aid repair shops under this regulation.

The hearing referenced by Commenter was for a now-obsolete rulemaking proceeding and has no probative value with respect to the proposed regulation. The Commenter is referencing a Pre-Notice Hearing.

Commenter’s comment pertains to a survey methodology promulgated during a now-obsolete Department rulemaking, and has no probative value with respect to the proposed regulation. The Commenter is referencing Text from a Pre-Notice Hearing.

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|  | <p>The proposed methodology also inflates costs in another way. Put the range of repair rates on a graph – it will be a curve, with lower rates on the left and higher rates on the right. The “prevailing auto body rate” will be near the peak of the curve. Once this rate is known, repair shops charging less than the prevailing rate will raise their rates for next year’s survey to match the prevailing rate. There is simply every reason to do so, since that is the rate insurers must pay, and with respect to owners of insured vehicles, there is no price competition when choosing shops charging that prevailing rate. As far as uninsured owners are concerned, the shop may charge lower rates if they choose and likely could even excluded these “discounted” rates from any future surveys. Consequently, the next year’s survey will include few or no auto repair shops that “charge” less than the prevailing rate. With few or no shops on the low side of the curve, the peak of the curve will move to the right (up). This pattern will, then, be repeated with the next survey, and so on. Because of this adverse selection, the mean or median will be artificially pushed up every year.</p> <p>Let’s apply this to the examples in subsections (g). In example (1), the prevailing rate is \$67.50. Holding inflation constant, in the following year the four shops with rates of \$64, \$65, \$66, and \$66 will all move their rates to \$67.50. The new prevailing rate will be \$69. The next year the four will raise their rates to \$69. Assuming the other two more expensive shops do not raise their rates (although the methodology invites them to do so), the prevailing rate will move to 70. The next year the prevailing rate will be \$70.67. This process will stop only when the new prevailing rate equals the highest rate charged by the most expensive shop (\$73 in this case).</p> | <p>Commenter’s comment pertains to a survey methodology promulgated during a now-obsolete Department rulemaking, and has no probative value with respect to the proposed regulation. The Commenter is referencing Text from a Pre-Notice Hearing. Moreover, shops charging less than the prevailing rate are not entitled to be paid at the higher prevailing rate.</p> <p>Commenter’s comment pertains to a survey methodology promulgated during a now-obsolete Department rulemaking, and has no probative value with respect to the proposed regulation. The Commenter is referencing Text from a Pre-Notice Hearing.</p> |
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|  | <p>In example (2), the three shops charging less than \$67 would move their rates to \$67. The new rate would be \$67.67 (the greater of the mean or the median). Again, this upward climb would repeat itself each year until the prevailing rate equals the highest rate (\$70 in this case)</p> <p>Let me put the point another way. Assume for a moment that regulations allowed insurers to charge rates base on the average rate charged by other insurers in the relevant territory. If they submitted a survey conducted under the above parameters, the DOI would reject it as false and misleading.</p> <p>The mischief of this kind of labor rate survey may fade with the adoption of self-driving cars. It is hard to imagine that OEMs, who will likely be responsible for injuries caused by cars in self-driving mode, will allow them to be repaired at shops other than the ones the OEMs authorize. If repaired at other than an authorized shop, the OEM may void the warranty or cause the OEM to disable the self-driving feature. Repair shops may oppose this. But no matter how loudly they cracked their whips, buggy whip manufacturers are only curiosities today.</p> <p><b><u>Some Suggested Improvements</u></b></p> <p>The current protocols for the labor rate surveys are so flawed that they should not go forward. Arriving at truly accurate estimates for what shops charge may be an intractable problem, but there are some changes that may bring the results closer to reality.</p> | <p>Commenter’s comment pertains to a survey methodology promulgated during a now-obsolete Department rulemaking, and has no probative value with respect to the proposed regulation. The Commenter is referencing Text from a Pre-Notice Hearing.</p> <p>Commenter’s comment is counterfactual, as it requires an assumption contrary to the effect of the proposed regulation.</p> <p>Commenter’s comment regarding autonomous vehicles is irrelevant to the proposed regulation.</p> <p>Commenter’s comment pertains to a survey methodology promulgated during a now-obsolete Department rulemaking, and has no probative value with respect to the proposed regulation. The Commenter is referencing Text from a Pre-Notice Hearing.</p> |
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|  | <p>Part of the difficulty lies in the current two-headed regulatory scheme. The DOI cannot regulate body shops, nor can the BAR regulate insurance, yet the two regimes act as one economic unit with respect to auto repair. The DOI can, however, regulate to some extent the obligation of its insurers. Some of the changes to improve the repair labor rate survey might include the following.</p> <p>--Provide that insurers need not accept estimates from shops that do not complete the survey. At present there are disincentives for lower charging body shops to respond, and there are incentives for more expensive shops to respond. This provision would incentivize all surveyed shops to respond.</p> <p>--Provide that insurers need not accept estimates from shops that do not declare under penalty of perjury that their answers are true and correct. At present there are no real consequences for inflating rates on the survey. Indeed, there is every reason to do so since insurers may reduce the hourly rate to that included in the shops answers to the survey. See (m)(2). An under perjury declaration gives a nudge towards accuracy.</p> | <p>The Department agrees that it regulates insurance and BAR regulates auto repairers. The remainder of Commenter’s remark about “one economic unit” is entirely speculative and Commenter provides no basis for his assertion.</p> <p>Commenter’s suggested “fix” is contrary to statute, which provides that California consumers have the right to select the auto repairer of their choice.</p> <p>Commenter’s suggested “fix” is contrary to statute, which provides that California consumers have the right to select the auto repairer of their choice. Moreover, requiring surveys to be signed under penalty of perjury provides a disincentive for repairers to complete the survey; the proposed regulation requires strong auto repairer participation in order for the survey system to work.</p> |
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|  | <p>--I am not certain whether all licensed repair shops must post their rates. I thought I heard at the hearing that they did not, but I may have misheard. If not, provide that insurers need not accept an estimate from a shop that does not have prominently posted rates. This, at least, gives some meaning to sec. (m)(3) which allows insurers to lower the rate to the posted rate.</p> <p>--Include a question in the survey requiring the shop to declare how long its warrant for materials and workmanship lasts. Provide that insurers may disclose this information when discussing the information they may provide under sec. 758.5 (b)(2). While these regulations are designed to fix the minimum price insurers must approve, they are not (I should hope) designed to stifle competition on quality of work. The warranty is a major protection for consumers. It is part of what they are purchasing. A question like this on the survey may also encourage both shops and insurers to improve their warranties – again, a benefit for consumers.</p> <p>--Provide that an insurer need not accept an estimate from a shop if the insurer has reasonable cause to believe that any of the answers to the survey are false or misleading. Although the perjury declaration may help dampen the numerous invitations in the current regulations to inflate rates, this provision adds a valuable check on overly enthusiastic rate estimates. As with housing discrimination, there is always the background risk that insurers may send a checker with a wrecked car to see if the survey declarations actually match what the shop does in practice.</p> | <p>Commenter’s suggested “fix” is contrary to statute, which provides that California consumers have the right to select the auto repairer of their choice.</p> <p>Commenter’s suggested “fix” is outside the scope of the proposed regulation. Warranties are not a labor rate. Moreover, Commenter is incorrect in his assertion that the labor rate is intended to fix the minimum price an insurer can charge; there is no requirement that any insurer conduct a labor rate survey.</p> <p>Commenter’s suggested “fix” is contrary to statute, which provides that California consumers have the right to select the auto repairer of their choice.</p> |
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|  | <p>--OK, the most controversial. Include DRP or other “discounted” rates in the survey. If these are not included, than the results are as skewed as they would be if you asked hospitals what they “charge” without including what they really charge to HMOs, PPOs, etc.</p>  | <p>As noted in the Department’s Statement of Reasons, the proposed regulations prohibit the use of Direct Repair Rates, given that DRP rates do not accurately reflect the market rate, because they tend to be a contracted lower rate based on an increased volume from the insurer. The proposed regulations allow the posted rate of an insurer’s DRP shop which will include their posted (rather than discounted rate) in the survey.</p>  |
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| <p>Tommy Sarac, North Ranch Body Craft</p> <p>April 21, 2016</p> <p><u>Written Comments 18P:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 16.1</b></p> <ul style="list-style-type: none"> <li>● <i>Standardization:</i> Standardize auto body labor rate surveys to effectuate fair and equitable claim settlements or adjustments of labor rates.</li> <li>● <i>Up-to-Date:</i> Surveys conducted shall contain current labor rates</li> <li>● <i>Sample Size:</i> Insurers shall be required to send a survey questionnaire to all Bureau of Automotive (BAR) licensed auto body repair shops in the specified geographical area.</li> <li>● <i>Auto Body Repair Facilities:</i> Labor Rate Surveys shall use only labor rates of auto body shops licensed with BAR.</li> <li>● <i>Equipment &amp; Insurance:</i> Only labor rates reported by auto body</li> </ul> | <p><b>Response to Comment # 16.1</b></p> <p>The proposed regulations provide a standard methodology, that is optional and voluntary for insurers, for conducting labor rate surveys which would provide a fair and equitable labor rate survey result.</p> <p>The proposed labor rate survey methodology also addresses the issue of conducting up-to-date labor rate surveys by designating that only surveys filed less than a year will qualify as a Standardized Labor Rate Survey, with a mechanism for a</p> |

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|  | <p>shops that meet specified equipment, insurance and other specified requirements may be used in the Labor Rate Survey.</p> <ul style="list-style-type: none"> <li>● <i>No DRP's Rates:</i> Labor Rate Surveys shall not use any discounted rate or DRP rates in survey to determine prevailing auto body rate.</li> <li>● <i>Geographical Areas:</i> Labor Rate Surveys must follow specified geographical areas as outlined in the regulations.</li> <li>● <i>Standardized Questionnaire:</i> Insurers must use a specified Standardized Labor Rate Survey Questionnaire as outlined in the regulations.</li> <li>● <i>Direct Responses from Shops:</i> Only direct responses from the shop based on the Standard Questionnaire will be acceptable. Labor rate surveys cannot rely on estimates, third-party estimating software systems or subrogation reimbursements.</li> <li>● <i>Surveys Public Information:</i> The Labor Rate Survey shall be submitted by insurers and reported to the Dept of Insurance. Results made public.</li> </ul> <p>Please oppose any legislative to stop regulations from moving forward.</p> | <p>possible extension to a maximum of two years.</p> <p>Further, the proposed regulations address all of the other issues raised by the commenter. The proposed regulations address sample size, using licensed repair facilities, the shop must meet certain equipment and insurance requirements, discounted DRP rates are not permissible, specific geographic areas are required, the proposed regulations do require that a survey be mailed to all BAR licensed shops, and most of the survey results would be made public.</p> |
| <p>Terry Lambert, Collision Center</p> <p>April 21, 2016</p> <p><u>Testimony at Hearing:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 17.1</b></p> <p>Terry Lambert from Collision Center.</p> <p>The statement you just made said that it's not mandatory for them to do survey rates. Is that correct</p> <p>Okay. I just have a question with the insurance companies routinely charging higher premiums. Why do they continually fight against collision repair centers for raising their rates?</p> <p>We suggest it's because there's a double standard for raising rates as followed by insurance companies.</p> <p>I'll illustrate this with an example from Allstate Insurance from a recent article in the Collision Industry Press in the All State standards for raising insurance rates.</p>  | <p><b>Response to Comment # 17.1</b></p> <p>The proposed regulation does not mandate the proposed labor rate survey be used by insurers.</p>  |

**Comment # 17.2**

# 1, raise the rates when profit margins aren't acceptable.  
# 2, raise rates on a market-by-market basis.  
# 3, raise rates for an appropriate and acceptable return for investors.  
# 4, raise rates even when the inflation rates are even.  
# 5, raise rates when costs to recover these costs quickly and raise rates as long as it's justified by market and economic standards.  
Overall we find these to be very logical, acceptable and consistent with any for-profit corporation. However, the analysis of these six standards bades the question: Why are collision repairers not provided the same right to raise their labor rates by applying the same standards? It's because there's a double standard rate.

**Comment # 17.3**

Our employees in the Collision Repair Center would love to have a raise as well. Some of these insurance companies haven't raised rates in over eight years. I know they've raised their rates on their premiums but they haven't raised rates for the body shops.  
All of our collision techs would like to have a raise. If we don't have any collision techs left -- it's getting harder and harder to find collision techs because the raises and the wages aren't there. With the minimum wages coming up and being raised, if we don't get raises in the body shops and the insurance industry doesn't start raising the rates for the body shops, there won't be anybody left to repair the cars.  
Thank you.

**Response to Comment # 17.2**

The Department believes it has put forth a proposal that mitigates these concerns and provides fair and equitable claim settlements for all parties involved.  
In addition, auto body shops are free to raise their labor rates. Nothing in the proposed regulations would in any way impinge upon a free enterprise's right to raise their prices.

**Response to Comment # 17.3**

The proposed regulations attempt to account for increasing auto body repair costs on an annual basis by requiring either a new survey be conducted, or applying a CPI adjustment as described in section 2695.81(d)(1)(C). This CPI adjustment utilizes the Monthly (All Items) Consumer Price Index for All Urban Consumers for California. Using annualized monthly data based on when the survey was conducted should minimize any lag of minimum wage increases in the CPI data and lead to a fair result while also minimizing costs to insurers. Additionally this adjustment is only allowed once, after which a new survey needs to be

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|   |  | <p>conducted to retain the rebuttable presumption.</p> <p>Auto body shops are free to raise their labor rates. Nothing in the proposed regulations would in any way impinge upon a free enterprise's right to raise their prices.</p>  |
| <p>Armand Feliciano, ACIC</p> <p>April 21, 2016</p> <p><u>Testimony at Hearing:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 18</b></p> <p>Good morning. Armand Feliciano with ACIC. ACIC is the Property Casualty Insurers Association of America. We represent about 1,000 insurance companies nationwide in national trade. We do plan to submit comments. So folks, my comments on a couple highlights here.</p> <p>I want to thank the Department for holding a hearing. We have significant concerns. Based on our past comments, I think you folks know that, but I was going to highlight some of these.</p> <p><b>Comment # 18.1</b></p> <p>Let me start with authority. We've taken a look on the Insurance Code section 758, 790.10, 12921, 12926. It's still our opinion that there's no authority there for a prescriptive Labor Rate Surveys.</p> <p>758 talks about, you know, If you do them, go ahead and submit it to the Department. You identify the names and the addresses of the body shop surveyed.</p> <p>790.10 is about a general stat sheet. It doesn't even talk about that.</p> | <p><b>Response to Comment # 18</b></p> <p>Thank you for the back ground information.</p> <p>You're welcome. The Department is happy to hold this hearing.</p> <p><b>Response to Comment # 18.1:</b></p> <p>The Department disagrees with the Commenter. There is sufficient authority in the proposed rulemaking. The cited statutes clearly speak to Labor Rate Surveys and the Department's position is strongly supported by the statutory language cited in the proposed regulations. In addition, the commenter incorrectly states that the Labor Rate Survey described in the proposed regulations are prescriptive – they are not – the proposed regulations are purely, 100%</p> |

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|  | <p><b>Comment # 18.2</b></p> <p>We're not alone in that interpretation. I think the Department knows that in 2006 there was a similar proposal on the table for Labor Rate Survey. And I believe the OAL, the Office of Administrative Law, took a look at those sections and said, Yes, there's no authority for this and I think they rejected the rates. We'll submit those in the comments.</p> <p>I just wanted to go on the record to let you know that it's still our position to this day that there's no authority for the regs. That's where we were on the authority issues.</p> | <p>optional for all insurers and in fact all Labor Rate Surveys are purely, 100% optional for all insurers.</p> <p>The commenter is misstating the text of 790.10. 790.10 actually is an extremely broad and explicitly clear statute that supports the Commissioners authority to promulgate these propose regulations. 790.10 states in part “...The commissioner shall...promulgate reasonable rules and regulations...”</p> <p><b>Response to Comment # 18.2:</b></p> <p>The Department disagrees since the proposed regulations are substantially different from the Regulations from 2006. The 2006 Regulations required insurers to conduct a specific, prescribed, methodology, whereas the proposed regulations are a purely, 100% optional labor rate survey methodology that would result in but a rebuttable presumption of validity. Therefore on the most basic level the proposed regulations are completely different and distinguishable from the 2006 Regulations, and will be approved by the OAL.</p> |
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|  | <p><b>Comment # 18.3</b><br/> I didn't know if you had a question, so. Sorry. I have a couple pages here, so. If you can give me some time and patience. Necessity. So again, we also don't believe the Department has demonstrated in the rulemaking record substantial evidence at this point. We saw the line that says, quote, "Hundreds of complaints from consumers and auto body repair shops alleging specific instances where consumers were forced to pay out-of-pocket costs or shops were deprived of their reasonable charged rates."<br/> All right. Well, that's a general statement. You know, we've been asking for a while if there's any specificity to this. So as far as out-of-pocket costs, is it conceivable that maybe the consumer didn't know that they went the labor cost and it wasn't covered, whatever the services are. Maybe they were told it was covered and then found out later it wasn't covered. So I guess what we're looking for is: We have not seen that part of those complaints. It's just presumed that it's all against insurance companies and we don't know what the other side of those complaints look like.</p> <p><b>Comment # 18.4</b><br/> Second, more fundamentally, we don't agree that the body shops are consumers. Okay? In our view, they are a business with a financial stake of this process. We may disagree on that but that's where we are as far as necessity.</p> | <p><b>Response to Comment # 18.3:</b><br/> The Department supported with substantial evidence in the filing documents the necessity for the proposed rulemaking. The Department states in detail that hundreds complaints were filed in the Informative Digest, and detailing a main summary of the complaints. Furthermore, the public rulemaking file contains all of the complaints that were filed with the documents detailing each individualized complaint. The Commenter had not "seen" the complaints because at that point in time, had not yet requested to see the complaints which were added to the public rulemaking file. The Commenter has since requested to view the complaints.</p> <p><b>Response to Comment # 18.4:</b><br/> The issue of whether body shops are consumers is not a substantive issue in the proposed regulations. However, auto body shops are members of the public who may be financially harmed by the use of unreliable labor rate surveys and, in many cases, pass this financial harm caused by insurers on to their customers, who are forced to pay</p> |
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|  | <p><b>Comment # 18.5</b></p> <p>Moving on to the role of the Department. We believe one of the core objectives of this regulation is inconsistent with a mission of the Department. If you look at the Department's website, it's pretty clear. It's about consumer protection, is one of the core values of the Department. And we get that part. But if you look at some of the statements made on this regulation -- I'll just read off to you exactly what we're talking about here. We reviewed the Department's policy statement overview for the regulation on pages 6 and 8. The Department's initial statements of reasons on pages 37 and 40. And there are some statements made there by the Department that we think is inconsistent with the mission of the Department.</p> <p>Let me quote: "The Department projects 1.15 million in benefits will be passed on to the auto body repair shops and policyholders," end quote. Another statement: "They will also prevent auto body repair shops from facing the dilemma of whether to accept a financial loss or bill the consumer for the shortfall between the insurance payment and the estimated cost of repair," end quote.</p> <p>So a couple points on the statements. First, in our view, it is simply not the role of the Department to interfere in the free market system and propose laws that could benefit -- financially benefit the auto body repair</p> | <p>the out-of-pocket cost difference between labor rates based upon unreliable surveys reasonable rates charged by auto body repair shops. Also, in some cases, shops may not receive sufficient labor rate to cover costs necessary to ensure that repair be made in a workmanlike and safe manner subjecting the customer to the risk of future harm.</p> <p><b>Response to Comment # 18.5:</b></p> <p>The proposed regulations is consistent with the Department's mission of protecting the public and consumer protection.</p> <p>The Commenter's quotes from the Initial Statement of Reasons is taken out of context. The Commenter has simply chosen <i>two</i> instances within the forty-four paged Initial Statement of Reasons and ten paged Notice of Proposed Rulemaking, in an attempt to illustrate that the proposed regulations is aimed at protecting only auto body repair shops, when the stated purpose of the regulations (as noted in the Initial Statement of Reasons) is to provide insurers with a mechanism to support the use of labor rate surveys when settling automobile insurance repair claims in a fair, equitable and</p> |
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|  | <p>shops. We disagree that the regulation will necessarily benefit consumers as higher labor rates for the increasing insurance premiums.</p> <p><b>Comment # 18.6</b><br/> And third -- and this is more general. So we get what we're talking about here. There's financial disagreements between parties: Policyholder, repair shop, insurance company. That financial disagreement is not exclusive in the property casualty world. I have health care.</p> | <p>reasonable manner, as required by Ins. Code section 790.03(h), in an effort to protect all insurance consumers and claimants who may be financially harmed by the use of unreliable labor rate surveys.</p> <p>Within the Notice of Proposed Rulemaking and Initial Statement of Reasons, the Department has clearly outlined numerous benefits of the proposed regulations to Consumers and the general public, which is consistent with the Department's mission. The proposed regulations do not interfere in the free market system, nor are they intended to financially benefit auto body repair shops. One of the problems the proposed regulations addresses are unfair or inequitable settlements based on unreliable or outdated auto body labor rate surveys. Consumers are then forced to pay the out-of-pocket cost difference, and therefore, is aimed at consumer protection.</p> <p><b>Response to Comment # 18.6:</b><br/> Just because there is a potential disagreement between parties does not mean that consumers should pay the out-of-pocket cost difference where an</p> |
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If I went out, out of network, to a doc, yeah, I'll pay extra because, you know, the insurance company might only pick up 80 percent of that because it's out of network. So that is also happening in a big picture world. And our point really is: If that's the goal, one of the objectives of this regulation, that's a lot bigger policy question we're talking about. Right? That's not something that should just be dealt here in a regulatory process. I mean, quite frankly, the proper venue for that is the legislature. I mean, you got policymakers deciding on non-contracted doctors and providers today. They have bills on this. It's a big issue. I guess that's our point. If that's the goal, then we got to make it an issue to deal with.

**Comment # 18.7**

Reasonable alternatives. So we believe that the proposed regulation is one-sided. I think we're pretty clear that we've said that all along. There are other parties that need to weigh in here. Look, we hear the Department's argument. There's some complaints about auto body repair shops, believe they're underpaid. But there is a flip side to that. What about overpaying via high labor rates? We think that's equally important for policyholders. We think it is. You know, there was a discussion by the previous witness about rates. Let's talk about rates. Insurance rates are highly regulated in California, highly scrutinized. We can't even just lower our rates. We got to file something to lower our rates if we wanted to.

unreliable or outdated survey is used to justify a claim. This would be unfair unequitable to the consumer. The Commenter's health care analogy does not shed light and is dissimilar to the auto repair industry because auto body repair claims are not "out of network."

Although legislation may be used to address some of these issues, the existence of legislation does not prohibit the Department from using its regulatory and rulemaking power to address the pressing issues created by unreliable or outdated auto body labor rate surveys. In this case, the regulatory process is the appropriate process to address these issues.

**Response to Comment # 18.7:**

Insurance rates is beyond the scope of the proposed rulemaking. Subdivision (4)(B) states specifically, that the insurer is not required to survey shops in order to confirm the specific standards of the proposed regulations. Thus there is no need for the insurer to check to the body shop's submitted labor form to ensure the shop qualifies. Therefore, there is no cost associated with the proposed regulations requiring

As we understand the labor rates on their side, they're not even required to post labor rates. We don't even know. So one of the questions I could ask, Well, how do we verify this? How do we even know what the rates are? And I don't know the answer to that. I'm just -- it's a rhetorical kind of question at this point because obviously our folks have to survey them under these regs and, you know, that's their big concern. There's sort of this, Yeah, our rates are regulated. We can't raise them unless you guys approve it.

**Comment # 18.8**

But on the other side of that, we don't even know what we're dealing over there.

So here's the point and I'll close up real quick, Geoff. We said all long in our proposal that we really need a task force on this at this point. We feel like, Yes, you guys got complaints. And Yes, you're going to put it on insurance companies. Well, what about the other side? That's the question we don't have. Right? I know you said you reached out to the Bureau of Auto Body Repair. We did too. And they need to be on the table. I mean, if we're going to -- we're going to be hold to this standard, what about the standard on the other side? And that's what's missing quite frankly. That's the point we're looking at.

**Comment # 18.9**

And if you folks want to do a task force, we'll be happy to invite all the stakeholders that need to be at the table: The BAR, policymakers. So I'll stop there and thank you for the opportunity to comment. As I said, we are going to be submitting these comments later, so. Thank you.

insurers to check the accuracy of a shop's admission.

**Response to Comment # 18.8:**

The Department thanks the Commenter for the comment. However, a task force was used in the past, and did not lead to a fruitful result. At this point, the Department is proceeding with the proposed rulemaking given the number of years that was invested into the rulemaking and the reason that the task for failed to work in the past. The Department has reached out to the Bureau of Automotive Repair, who were invited to participate, but chose not to. Only the Bureau of Automotive Repair has the authority to regulate auto body repair shops.

**Response to Comment # 18.9:**

The Department thanks the Commenter for the comment. However, a task force was used in the past, and did not lead to a fruitful result. At this point, the Department is proceeding with the

**Comment # 18.10**

MR. CIGNARALE: Armand, two quick questions. You mentioned under Authority this prescriptive nature of regulations given that they move from a mandatory one-sided survey to a recommended survey the insurer may or may not choose to do. How does that play into your use of the term "prescriptive?"

MR. FELICIANO: Right. So that's a good question, Tony. So I guess what's happening here in practical terms, the regs does say "recommended," but it's very silent on what happens if you don't do it. And we know today from our companies, they are submitting other methodologies and that's very silent. Right? There's nothing in the regs about other methodologies that are going to be accepted. So by silence, our policy -- because it's silent, you're forced to feel like it speaks volumes that, This is the way you got to do it. Otherwise, what are we looking at over here?

I mean, I've gotten the question, You know, we're using this methodology today, X, Y, Z, and the Department's okay with it. How is that going to be dealt with? Heck if I don't have an answer.

We've had other conversations where we've asked: Other than a labor rate survey, what's going to satisfy the Department to show that the insurers have done their due diligence in trying to come up with labor rates? And I think, you know, that's the backside of it, Tony, and folks are really struggling with that. You know, if they're silent over here and it's in the books, how does that affect us?

MR. CIGNARALE: Thank you.

Last question: With regards to necessity, you raised the issue of complaints. Have you reviewed the public rulemaking file?

proposed rulemaking given the number of years that was invested into the rulemaking and the reason that the task force failed to work in the past.

**Response to Comment # 18.10:**

The Department feels that there is no clarity issue as to what happens when an insurer does not conduct the recommended Standardized Labor Rate Survey. Conducting a Standardized Labor Rate survey in compliance with the proposed rulemaking will result in a rebuttable presumption. However, as referenced in the Department's Initial Statement of Reasons, not conducting a labor rate survey or a survey not in compliance with the proposed rulemaking will result in *no* rebuttable presumption.

Subdivision (4)(B) states specifically, that the insurer is not required to survey shops in order to confirm the specific standards of the proposed regulations. Thus there is no need for the insurer to check to the body shop's submitted labor form to ensure the shop qualifies. Therefore, there is no cost associated with the proposed regulations requiring insurers to check the accuracy of a shop's admission.

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|   | <p><b>Comment # 18.11</b><br/>MR. FELICIANO: We've not had a chance to see it. I mean, is that available in the Department? Where exactly is that available at this point?</p>   | <p><b>Response to Comment # 18.11:</b><br/>The Commenter has since been provided a copy of the public rulemaking file.</p>   |
| <p><b>Michael Gunning, Personal Insurance Federation of California</b><br/><br/>April 21, 2016<br/><u>Testimony at Hearing:</u><br/><br/>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p>Michael Gunning, Personal Insurance Federation of California representing seven members here in California who are auto body – auto and home insurance companies.</p> <p><b>Comment # 19.1</b><br/>I would like to talk a little bit about some changes we would like to see in the regs today. There will be a coalition letter of all the associations and we will submit those later, but I just want to go through some of the things that we think if changed could make these palatable. And it's actually good because on the very topic you were talking about, Tony, we do think it's unclear if you have to do a survey or not.<br/>As Armand pointed out, because it is specified but there is no comment, What is acceptable if you don't do the standardized survey? We think you should add a section in the front that says – in the beginning of the regs – excuse me – nothing in this section shall be construed to require an insurer to conduct an Auto Body Labor Rate Survey. I think that just makes it clear right now.</p> | <p><b>Response to Comment # 19.1:</b><br/>The Department disagrees that the proposed regulations creates a clarity issue as to whether insurers are required to conduct a survey. On the contrary, conducting a Standardize labor rate survey is completely voluntary on the part of the insurer. The first paragraph of section 2695.81 states that the Commissioner are promulgating the proposed regulation to “establish a standardized labor rate survey...<i>if the insurer elects to use a survey.</i>” (Emphasis added).<br/>The Department believes there is no clarity issue as to what happens when an insurer does not conduct the recommended Standardized Labor Rate Survey. Conducting a Standardized Labor Rate survey in compliance with the proposed rulemaking will result in a</p> |

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|  | <p><b>Comment # 19.2</b><br/>Getting into section D, the Standardized Labor Rate Survey under Currentness, one of the things we think is actually very expensive and unfair is doing the survey every year. And so, we probably want to switch that to every two years or 24 months. These surveys are lengthy and conducting them on an annual basis require a substantial amount of investment in employee labor and expense, and we think that it actually could lead to collusion and the shops asking for substantial rate increases every year since we're doing a survey every year.</p> | <p>rebuttable presumption. However, as referenced in the Department's Initial Statement of Reasons, not conducting a labor rate survey or a survey not in compliance with the proposed rulemaking will result in <i>no</i> rebuttable presumption.</p> <p><b>Response to Comment # 19.2:</b><br/>The Commenter's statement that the cost is very expensive and unfair is unsubstantiated and overly generalized. In fact, the proposed regulations already provide that the survey may be conducted every two years as requested by the commenter. The survey is valid for 2 years if the CPI under section 2695.81(d)(1)(C) is applied. Thus the survey can be valid up to 24 months when the proposed subdivision is applied.</p> <p>The Department disagrees with the Commenter, and believes that collusion is highly unlikely. As previously explained, a periphery was added, so that a geographic area may include many more than six shops, with the average number of shops per geographic area of about 20 shops. This means that in order to manipulate the market, a shop must collude with the five or six closest shops, add one</p> |
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|  | <p><b>Comment # 19.3</b><br/> Secondly, the regulations say we should survey every licensed auto body shop in California. And by one of our member's counts, we think that's 7,000 shops. That's a lot of shops. And so, we think you should consider a more statistically appropriate number. 25 percent. 35 percent. I mean, a survey isn't exactly that. There's a statistical sample size that we should use, but every shop we think is unreasonable and again expensive.</p> | <p>mile and include all of those shops. In turn every single one of those shops must collude with every other shop in its geographic area. Collusion must be done on the exponential scale, a level of conspiracy that is highly unlikely and the chances miniscule. Additionally, in the case where any autobody shop colludes and manipulates prices in an insurance claim, the Commissioner has the authority to investigate and work with District Attorney's Offices throughout the State to prosecute for insurance fraud. In fact, the Department has prosecuted claims against autobody shops for insurance fraud in the past. Furthermore, existing anti-trust laws act as a deterrent, and prohibit auto body shops from manipulating the market and engaging in monopolistic activities.</p> <p><b>Response to Comment # 19.3:</b><br/> However, as noted in the Department's Initial Statement of Reasons for subdivision (d)(2), according to the Bureau of Automotive Repair, there are approximately 5000 auto shops registered to perform collision repair services in California. Of those shops,</p> |
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|  | <p><b>Comment # 19.4</b><br/> And section D, again, under (4), under Standards, the regulations require that shops need certain standards created by BAR to participate in the survey. Although, we're not required to physically inspect the shops to confirm the repairs but we must check if the body shop's submitted a Labor Rate form to ensure that the shop qualifies to participate in the survey, we think this is, again, burdensome and costly on us to check the accuracy of every submission. We suggest that the regulations either</p> | <p>the Department estimates there are 4,000 repair dealers that meet the minimum standards to be surveyed. The Commenter's estimate of 7000 shops is over-inflated and unsubstantiated.<br/> The Department rejects the Commenter's suggested change of subdivision (d)(2) to 25% - 35%. The Commenter's suggestion that 25%-25% is a statistically supportable number is unsubstantiated. With a 90% confidence level, 25%-35% sampling is not statistically significant. This is especially true given the Department's reasoning for 100% of the shops to be surveyed, the necessity of which is substantiated in the Initial Statement of Reasons. Furthermore, requiring 100% of BAR shops to be surveyed prevents potential discretionary picking of shops and is fair and equitable.</p> <p><b>Response to Comment # 19.4:</b><br/> Subdivision (4)(B) states specifically, that the insurer is not required to survey shops in order to confirm the specific standards of the proposed regulations. Thus there is no need for the insurer to check the responses to the body shop's submitted labor form to ensure the shop</p> |
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allow unequipped shops to participate in the survey or to pay those unequipped shops a lower rate than the properly equipped shops.

**Comment # 19.5**

In the prevailing auto body rate – and this is the hard one. The regulations propose that insurers use a greater of arithmetic mean or average or a rate of the simple majority of shops, whichever is greater. We think this method has the effect of skewing labor rates in favor of the shops. And this could lead to inconsistent methods being used by insurers of all the shops. There should be one consistent method for all auto body shops and the calculations should be based on one or the other, but not both. If you don't add an addition to that, a protection for outliers, you know, bigger shops, larger shops, more equipped shops, we think this will inherently minimize or distort these outliers.

qualifies. Therefore, there is no cost associated with the proposed regulations requiring insurers to check the accuracy of a shop's admission. The Department rejects that unequipped shops are allowed to participate, which would depress the prevailing rate. The Department further rejects that the unequipped shop is paid a lower rate, given that some of these shops actually do lease the proper equipment, or contract the work to another shop with the equipment, and paying them less than the prevailing rate would be unfair and inequitable.

**Response to Comment # 19.5:**

The Department thanks the Commenter for this suggestion. In an effort to address this concern and in response to this comment and other comments, the Department eliminated the greater of the arithmetic mean or average in its Final Text of Regulation. The prevailing rate is now calculated as the simple majority of surveyed shops, and all reference to arithmetic mean or average was eliminated. The Department believes this amendment completely addresses the concern raised by the commenter.

**Comment # 19.6**

In addition, we think we should have other ways to do surveys besides the standardized survey. You know, with shops with larger – larger shops with greater volume, you know, more bays, more employees, they can repair more vehicles proportionately. For instance, if a city had five stops with one bay each and one shop with five bays, as many as half of all the vehicle repairs might be completed by the latter. On a per vehicle basis, the larger shops will mathematically play a larger role in the prevailing labor rate in that market than the other shops.

But the proposed regulations precludes a standardized survey from considering that reality, the difference between shops, and instead requires a one shop, one vote approach which makes no allowance for the practical effect if a shop has greater capacity than another.

**Response to Comment # 19.6:**

The Standardized Labor Rate Survey is a recommended survey that is not mandatory. Insurers are free to use any methodology they feel fit, in conducting their own labor rate surveys, including the consideration of greater volume, to the degree insurers can support than this practice results in fair and equitable labor rates in each geographic area surveyed.

However, the Department rejects the consideration of volume and bay capacity for the Standardized Labor Rate Survey.

The Department rejects a weighted survey response based on shop capacity for the Standardized Labor Rate Survey. First, the Commenter did not suggest an accurate means for the Department to measure shop capacity. Counting the number of vehicle bays, for example does not necessarily mean that a shop with less bays will have less capacity. Furthermore, there is no accurate way for the Department to count number of bays, nor is the Department aware of an accurate measurement of shop capacity. Additionally, when consumers are

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|  | <p><b>Comment # 19.7</b><br/> In same section D, # 6, use of the direct repair rates, the regulations propose that insurers use the posted labor rates of direct repair shops and not its negotiated rate. This is always one of our favorite ones here. This is unfair because our experience is that most auto body shops do not charge their posted labor rate when it's posted. And further, a body shop can change its posted labor rate as often as it wants for as much as it wants. The posted labor rate does not reflect what the market is willing to pay. The best analogy of course is that number on the back of the door on the hotel that no one ever pays but it's posted there. So we think we should be allowed to use the direct repair rate, but we would be willing to talk to you about maybe it's a percentage of those rates. 50 percent of DRP rates should be allowed or something like that.</p> | <p>making a choice regarding auto body repair, "shop capacity" is generally not known or a consideration for cost or market value.</p> <p><b>Response to Comment # 19.7:</b><br/> As noted in the Department's Statement of Reasons, the proposed regulations prohibit the use of Direct Repair Program rates because DRP rates tend to be a contractual lower rate based on increased work volume from the insurer and do not accurately reflect market prices. However, shops participating in a DRP program are free to participate in the survey using non-discounted rates, in order to avoid unfairly excluding those shops. The posted rate on the back of a hotel door is a flawed analogy to the posted rate in an auto body shop. California Civ. Code § 1863 requires all hotels to post the nightly rate in every room, and it prohibits hotels from charging more than the posted price. Thus, hotels have an incentive to post the highest possible "walk-in price" that they could charge given when demand for the rooms in the area is the highest, because they are prohibited from charging anything more. The</p> |
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|  |  | <p>Commenter may benefit from reviewing California Civ. Code § 1863, or this article: {<a href="http://mentalfloss.com/article/74828/why-are-hotel-rack-rates-so-exorbitantly-high">http://mentalfloss.com/article/74828/why-are-hotel-rack-rates-so-exorbitantly-high</a>} that explains posted rates for hotels in California. Auto body repair shops, on the other hand, have every incentive to post the market rate, as noted by auto body shops during the public hearing. California Civ. Code § 1863 does not apply to auto body repair shops, nor does a comparable rule applies. Consumers, concerned about the price of repairs will look at the posted rate and will be deterred by a posted rate that is too high above the market price, and go to another shop. In fact, the posted rate does often reflect the market price, for fear of a lost consumer to a competitor.</p> <p>Further, as stated in the Initial Statement of Reasons, the proposed subdivision prohibits insurers from using a discounted rate negotiated or contracted with members of its Direct Repair Program. Discounted rates or rates from insurers' Direct Repair Program, tend to be lower than the</p> |
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|  |  | <p>actual market rate since insurers are able to negotiate a lower labor rate in return for promising the shop an increased volume of work will be referred to that DRP shop. The purpose of the Standardized Labor Rate Survey is intended to settle claims for repairs in the <u>non-discounted or open market</u>. Also, since Ins. Code section 758.5 confers upon a claimant the right to select the automotive repair dealer (repair shop), using discounted or negotiated rates from DRP hinders that right, misrepresents the actual market labor rates in a given geographic area and results in unreasonably low insurance settlements. The proposed language is reasonably necessary to address the skewed data that may result by including discounted or DRP labor rates. The proposed language does not prohibit the use of non-discounted rates of a DRP shop, which will equitably be included in the Standardized Labor Rate Survey. However insurers must report their use of DRP shops in its survey under proposed CCR section 2698.91(d) for transparency purposes.</p> |
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**Comment # 19.8**

Section D again, # 7, the use of the survey data only, the regulations do not allow insurers to conduct to a Labor Rate Survey via any other method in the proposed survey. We should be allowed to use estimating data, subrogation demands, for example, or even other means like CCC. Literally all those things. We think those should be allowed in the mix.

**Comment # 19.9**

The favorite one, geographic areas. The regulations requiring insurers to establish individual body shop's markets based on geocoding. Tony, we had a chance to talk about this a little earlier. But, this small shop, six area responding qualified auto body repair shops, it's – it's difficult. The way we look at it, that with using the six shops in the geocoded area, what you're actually creating is an individual prevailing rate for each shop. And so, one, we question why the government can use SMSA. We can use census data. We can use zip codes. I think one of my members – and I never forget the name of it – has just shifted to a new

**Response to Comment # 19.8:**

The Commenter fails to explain why any other rate other than direct responses to the survey be included, including estimating data, subrogation demands or other demands, whereas the Department explained the necessity to exclude these other methods in the Department's Initial Statement of Reasons. Further, an insurer is not prohibited from using other sources of labor rate data in a survey, to the degree insurers can support that this practice results in fair and equitable labor rates in each geographic area surveyed. However, in doing so the survey would not be a Standardized Survey and so the insurer would not receive the benefit of the rebuttable presumption.

**Response to Comment # 19.9:**

While each shop is considered the center of its own geographic area, and there are potentially thousands of geographic areas. The Department considered and rejected SMSA, census data, or zip codes as explained in the Department's Initial Statement of Reasons. The Department has made a determination that no reasonable

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|   | <p>government forum of areas, but we think that if the government can use these areas, certainly we should be able to use these areas to determine our labor rate surveys in the geographic rate areas for our surveys. But going by the geocoding, we think it just creates thousands of geographic areas. Particularly areas in LA where you have concentrations and you're going to have multiple shops. And even if they're there, it's going to distort, we think, the outcomes of the surveys.</p> <p><b>Comment # 19.10</b><br/>I think the final thing that hasn't been touched upon and I think it's glossed over in the Department's notice is the cost. We have been doing some rough estimation of these costs and three of our member companies have estimated them in the tens of millions of dollars. Unlike the – I think 546 thousand the Department's cited in its notice. We think between staffing, the frequency of the surveys, how cars are inspected, of course, tossing in the other side of this, the steering side, it's a dramatic increase, and the Department has underestimated how expensive this process will be for us. That's it.</p> | <p>alternative to geocoding that would be more effective in carrying out the purpose of the proposed regulation, or would be more cost effective.</p> <p><b>Response to Comment # 19.10:</b><br/>The Commenter's estimate of cost in the tens of millions of dollars is unsubstantiated with any actual numbers or facts. On the contrary, the Department Economic Impact Analysis clearly outlines with specificity the estimate of costs to the insurer and consumers, with a net loss of about \$560,000. Additionally, the Department submitted a proof of concept in its Notice of Amendment to Text, demonstrating the low cost of the geocoding concept in its proposed regulations. The Department disagrees implementing the proposed regulations, regulating an <i>optional</i> survey would cost tens of millions of dollars.</p> |
| <p><b>Richard Valenzuela,<br/>National Auto Body<br/>Research</b></p> | <p><b>Comment # 20.1</b><br/>My name is Richard Valenzuela. I'm with National Auto Body Research. We will be submitting some written material as well. I want to thank you for the opportunity for allowing us to be here today.</p>   | <p><b>Response to Comment # 20.1:</b><br/>Thank you for the general background information. This comment does not directly address the regulations in</p>  |

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| <p>April 21, 2016<br/> <u>Testimony at Hearing:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p>Our comments -- first a quick word about our company that can summarize where we're coming from is that we believe that labor rates are the life blood of auto body shops. Without healthy labor rates, collision repairs are not able to generate the sufficient profits. Not just profits but sufficient profits, and that's a key word, to reinvest in training and in certifications and in equipment.</p> <p>Limited resources, which is what happens when anyone, any business, is not paid sufficient rates, the resources become limited. And limited resources can adversely impact their skill and ability to repair today's vehicles and especially now with the increasing new technologies and the increasing exotic metals that the OEM manufacturers are now coming out with and placing demands on the body shops.</p> <p>Now, what's important for everyone that's listening to me to understand is that National Auto Body Research is not anti-insurance; we're not pro shop. We're vice versa. We're pro customer. We're pro consumer. In our eyes, the consumer is the crash vehicle person who got in an accident. Our concern as a company is the care, the welfare and the safety of that crash vehicle consumer.</p> <p>And from our observation as researchers, what we're seeing is a contentious translational battle between the insurers who have one set of agenda and the body shops who have another set of agenda. What is not being accomplished is the free market system. There are constraints placed on the body shops that limit their ability to operate freely, price freely and offer their services freely.</p> <p>In our position, this is the United States of America. It's a free market system. And the collision repair industry in conjunction with the insurance companies, in our opinion -- and I say this humbly and respectfully -- do not operate in a free market environment.</p> <p>Having said that about our company, we have one thing that we would like to comment on. And as I said before, we'll be submitting written -- much more information in written form.</p> | <p>question. Nothing in the proposed regulations will inhibit the vibrant free market system. Auto body shops and insurers will be free to continue to contract for higher labor rates for auto body repairs.</p> |
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**Comment # 20.2**

I would like to address the issue of a singular prevailing rate. We believe that this sometimes contentious differential that exists between shop door rates or shop retail rates and the typical insurance prevailing rate is problematic. So NABR has developed a system that reports labor rates on the basis of range. Not just one singular rate that fits all shops.

In any form of business, there are a range of rates. There are a range of rates for your shirts. There are a range of rates for your cars. There are a range of rates for the purchase of gas. And we don't believe that one rate fits all is appropriate in any business much less in the collision repair business, because once again, we're concerned about the families that are going to get in those crash vehicles and are going to drive off. We want those cars fixed properly. We want them fixed according to OEM standards and put the car back in the original condition before it got in the accident. I don't think that's asking too much as a consumer.

And so we're, again, advocating on behalf of the consumer, Let's get that job done. In order to get that job done, then the insurance companies have to pay a fair rate. The body shops have to claim a fair rate sufficient to keep them in business over an extended period of time and ensure their future growth and prosperity.

So we don't believe that one rate fits all. We'll work and we would like to see the Department of Insurance consider a range of rates. Our company when we survey, we survey a range of rates. Not just one single rate.

That range of rates leads me to segue -- and bridges me to the second point and that's differentiation of shops.

A range of rates per one shop that has limited capacity, and limited equipment, and limited skill sets is going to be a different range of rates.

It could be somewhere in the 40s. We're in favor of that. Pay the shop what he's worth.

Another range of rates where the shops have invested in equipment, technology, training, have paid tens and thousands of dollars to meet

**Response to Comment # 20.2:**

A labor rate survey which results in a range of rates is not in practice useful for application toward efficient and fair claims handling. It is presumed and proven in real life, that when there is a range, the auto body shop will advocate for the lower rate and the insurer will advocate for a higher rate – thus effectively cancelling out the benefits of a labor rate survey. A fair, efficient and effective labor rate survey that takes into account a broad data set, such as the methodology for a labor rate survey provided in the proposed regulations, would provide fair and efficient way of arriving at a labor rate that would most effectively effectuate fair claims handling.

The proposed labor rate surveys already take into account different rate for different repairs. It is likely that some auto body shops will not have the equipment or expertise to perform all of the different labor rate categories that are listed in the standardized methodology. Thus providing differentiation in the labor rates between different shops.

A rate range was considered by the Department, but was rejected. A range

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|   | <p>OEM certification criteria, those rates are going to be higher rates. They've invested more money. They have to recover the return on their investment and part of that return on investment equation involves higher labor rates.</p> <p>So we would like to see within the DOI regulations a survey system that allows for differentiation among shops, which we do. Our system differentiates shops on the basis of training certifications and equipment.</p> <p><b>Comment # 20.3</b></p> <p>The third and last thing I would like to bring out is this idea of -- and somebody mentioned earlier -- What if an insurance company doesn't survey? We see that as somewhat problematic as well. If somebody doesn't take a survey -- an insurance company doesn't take a survey, then what's left?</p> <p>From my way of looking at it, our observation is what's left is negotiation. The insurer goes to a shop and negotiates a rate. When they negotiate that rate and settle it, they go to a second shop and negotiate that rate by telling the second shop the rate they negotiated with the first shop. And then, they go to a third shop and negotiate a rate with the third shop and quote the rates that they settled with the first and second shop. You keep taking that to its natural conclusion, what you have is a survey. Albeit invalid. Albeit unsubstantiated. Albeit not a survey. It's a survey. So what we're saying is: Not giving -- giving the insurers an option to not survey is leading them to negotiate. Negotiation is going to require surveying and surveying is done in a very unstable way. And that's all the comments that I have for now.</p> | <p>would add inconsistency to the methodology and add variability and complexity when determining the rate to be paid.</p> <p><b>Response to Comment # 20.3:</b></p> <p>The Department lacks the statutory authority needed to require that insurers conduct any type of labor rate survey. Under the current statutory authority, labor rate surveys are voluntary. Auto body shops retain the prerogative to directly negotiate all prices, and labor rates directly with any insurer. Only when the insurer optionally chooses to conduct a labor rate survey, and then chooses to optionally use the method laid-out in the proposed regulations does the methodology in the proposed regulations then apply.</p> |
| <p><b>Sam Valenzuela,<br/>National Auto Body<br/>Research</b></p> <p>April 21, 2016</p> | <p>Good morning, panel. Thank you for having us here. My name is Sam – Sam Valenzuela, also with National Auto Body Research.</p> <p>Based on the comments so far, I'm going to make some adjustments to my comments. We are submitting written materials, so I'll give you a few highlights as well. I think I'll pick up on a topic where Richard left off on</p>  |   |

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| <p><u>Testimony at Hearing:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p>this idea of surveys, whether they're required or not, so just we're clear on that.</p> <p><b>Comment # 21.1</b><br/>From our opinion, we like the optionality that you have. So recommending the survey, not requiring that, we like that. So that the government is not telling people what to do; mandating that they do a survey.</p> <p><b>Comment # 21.2</b><br/>Where I think we would provide feedback there to potentially strengthen the proposal, those regulations, is to enable auto body shops to provide their own, perhaps an independent third party survey, that they could bring forward to put on the table in the absence of an insurer survey. So if I'm working with California Insurance – I just made that name up just as an example – and they don't survey at all, to what do I point as a body shop to say that the \$48 prevailing rate that they want to pay me is fair or not – equitable or not. The introduction of the acceptance and recognition by the Department of an independent third party survey that an auto body shop could bring forward could be something then that they could point to. And in the context of negotiation, that's fine. If both parties can agree on something independent, then great.<br/>So we don't see the need for requiring the survey. I think the optionality is fine. But I think it would be strengthened if it were also allowable to introduce a third party survey the shop could bring forward.</p> | <p><b>Response to Comment # 21.1:</b><br/>Thank you.</p> <p><b>Response to Comment # 21.2:</b><br/>This comment goes beyond the scope of the currently proposed regulations regarding labor rate surveys conducted by insurers. The commenter's proposals likely go beyond the statutory authority the Department is relying upon to promulgate the currently proposed regulations. The proposed labor rate survey methodology is purely optional and the use of labor rate survey is also completely optional. Thus if an auto body shop and an insurer can agree upon the designation of a third party to conduct a labor rate survey for their use, nothing in these regulations would prohibit that. However, nothing in these proposed regulations prohibit an insurer from entering into a contract with a third party to conduct the Standardized survey on behalf of the insurer or several insurers. In that case, the use of a third party to conduct a</p> |
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|  | <p><b>Comment # 21.3</b><br/>The next comment would be a potential change. I think we would echo a comment earlier about the – maybe the complication or sophistication – maybe complication and cost around the specific use of the this geolocating and the TIGER software and being very specific about, It must be six shops that comprise what is defined as a market. I think we would respectfully suggest that that’s one of those areas that might have some unintended consequences.</p> <p><b>Comment # 21.4</b><br/>A market is a market is a market. I’m not sure I could – I could give you a specific number, but to merely say that, It is the shop, the target shop, and its six nearest shops down to 5.28 feet. You know, we’re getting very, very specific. That doesn’t mean that that’s really a market. That’s kind of an artificial definition that’s put on that and that’s potentially where we think there could be issues. When we’re trying to tinker with markets and tinker with the free market system to try to get it to behave the way we want, there could be some unintended consequences.</p> <p><b>Comment # 21.5</b><br/>So I think the point here is that what we’re looking for here is a shop and comparable shops in their area and what are their prices. That’s really the</p> | <p>labor rate survey for contracting parties would be an agreement that must be reached by the parties themselves, thus negating the need for the designation of a “recognized” third party.</p> <p><b>Response to Comment # 21.3:</b><br/>Geocoding the location of body shops has been proven and demonstrated to be a cost effective method of determining physical location.</p> <p><b>Response to Comment # 21.4:</b><br/>To address concerns that limiting the geographic area to only six shop in urban areas is not reflective of the urban market, the final text of the regulations was amended to allow for 1 more mile beyond the 6th shop that is furthest away. The Department believes that this amendment addresses the concern raised by the commenter. Also, the Department believes that the fact that the geocoding software is precise is a benefit, not a negative, since the software computes distances automatically at no additional cost.</p> <p><b>Response to Comment 21.5</b></p> |
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objective that we're after. So an alternate method could be, If I'm a shop and I start looking at distances, let's just say a mile just for example. A mile from my shop in every direction, if I could produce a list of six shops within a mile, is that acceptable? Does it really have to be down to the 5.28 feet, 1,000<sup>th</sup> of a mile. Even taxi cabs don't charge to the 1,000<sup>th</sup> a mile. Right? And their business is based on distance. Totally distance driven. The cost of this fare is how long they drive you and they only charge a 10<sup>th</sup> of a mile, not like a 1,000<sup>th</sup>.

So we think, Department – my people were engineering the solution there. We think maybe backing off from that a little bit.

But we totally recognize that how it is today is wide open. We've seen the surveys with our own eyes. The markets are huge. The geographies are huge. And so we appreciate the Department's efforts to try to put some clarity around it and give it definition so there's no wiggle room. This is how you define market. This is how you compute the prevailing rate. So that's goodness. That's all good for taking a labor rate survey, but it doesn't necessarily mean that that is what a market is.

**Comment # 21.6**

I would contend that a market is more driven by the consumer. How far is a consumer willing to drive to get their car fixed? If you're in downtown San Francisco, you probably won't even cross a bridge to go somewhere. You'll probably be in the city. If you're in Modesto, those shops are getting customers from 35 or 40 miles away. And so, if a shop has an ability and an insurer has an ability to take a target shop and start from there to kind of get out to perhaps some minimum number that you want to see, maybe that would be acceptable and it doesn't necessarily have to

The purpose of the one-thousandth of a mile language in proposed Subdivision 2695.81(d)(8)(D) is necessary in order to limit tie-breakers. However, by adding the periphery to the 6-shop core area, as described in the Final Text, the effect of the tie-breaker is of no consequence.

**Response to Comment # 21.6**

The Department recognizes that any consumer market is driven by consumers. Commenter is not providing any actual alternative solutions or methodologies to be considered. Commenter is making general and obvious observations regarding geography and pure conjecture regarding what he believes

be all of the latitude and longitude down to the 1,000<sup>th</sup> of a mile sixth closest shops. That may or may not be the market. And having some freedom, some flexibility to have that market size grow or shrink according to the geography, as long as they're producing a certain number that you're looking for in sample size, could be okay.

**Comment # 21.7**

I would also recommend also not capping it. Why only have six if I could produce 15? You know, 15 data points would be better than six pretty much in any survey to get a more accurate result. So I wouldn't recommend capping it, but you might look for a minimum perhaps. Any questions so far from the panel? Okay.

to be consumer behavior without any substantiation.

**Response to Comment # 21.7:**

The choice of six auto body shops for the proposed standardized labor rate survey methodology is based upon an independent, scientifically conducted study by the California State University, Sacramento, which found that 6 is a reliable number that provides a degree of certainty and efficiency without compromising on the numbers representative capabilities.

However, based upon this comment and others, the Department amended the proposed regulations (as added in the Final Text of Regulations) which reflects a change to Geographic Area under subdivision (8)(D). A periphery was added, so that a geographic area may be expanded in most instances to include more than six shops, given that one more mile is added to the sixth closest shop, and all shops within that concentric mile are also included in the geographic area. Under this amendment to the proposed regulations, the average number of

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|  | <p><b>Comment # 21.8</b></p> <p>I think last comment on the market piece and the six closest shops, I would – I would propose and suggest to you to consider comparability and capability. If there’s anyone in the room that, say, drives a Mercedes as an example? That’s a very expensive certification to get from the factory from Mercedes Benz. It’s expensive. It’s rare. So if you’re taking a survey for that target shop and there’s a Mercedes Elite, they call it. It’s an aluminum structural certification. Not everybody has that. So to compare that shop’s prices, which might be different because their economics are different as an organization, with the six closest shops, it might be comparing apples and oranges. And so you’re taking a survey of oranges and saying the prevailing rate of an orange is the price of an apple. It might not be that way. So we’re suggesting comparability is an important component. It’s not merely a number, six. It’s not merely a geography, the six closest. Those are two valid components, quantity and geography, but also comparability is very important.</p> <p>That really connects the dot with an earlier comment about price ranges. And we see that in our research, in our data. I can show you the data that Mercedes tier II aluminum certified shops around the country have higher rates than shops that have no certifications at all. But if they’re all in the</p> | <p>potential shops in each geographic area increases from 6 shops to about 20 shops, with many shops in urban areas having 30 or more shops and some even having up to 80 or more shops in their geographic area. The Department believes this resolves the concern expressed by the comment.</p> <p><b>Response to Comment # 21.8</b></p> <p>The proposed standardized labor rate survey methodology does take into account different labor rates for work done on different, objectively identifiable materials. The commenter’s example regarding certification from a specific automobile manufacturer is in regards to an obviously subjective placement of value on a name brand. The commenter’s comments clearly indicate that ultimately the only objectively identifiable difference in the work conjectured upon is a different metal; this type of work on an objectively identifiable different metal is allowed for in the proposed methodology. Ultimately a labor rate survey is for the purpose of defining labor rates based upon averages and for a broader slice of the market than the manufacturer</p> |
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|  | <p>same bucket and all of their pricing is getting compared, it starts to blur what we think is a fair market price for that shop if that makes sense.</p> | <p>specific certification being hypothetically proffered in the comment.</p> <p>And again, nothing the proposed regulations would prohibit or inhibit any auto body shop from directly negotiating with any insurer for a labor rate for truly niche, exotic auto body repairs.</p> <p>Further, proposed Section 2695.81(e)(4) provides that the survey shall <u>not preclude an insurer from adjusting upward the prevailing rate determined by the Standardized Labor Rate Survey in cases where the labor rate charged or quoted by the repair shop on a particular claim is greater than the prevailing rate determined by the Standardized Labor Rate Survey and the insurer negotiates a higher labor rate with the repair shop that is reasonable for the particular repair, geographic area, or other factors. This would include situations where only certain repair shops are certified to perform repairs on certain vehicles types or certain types of materials.</u></p> |
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**Comment # 21.9**

I think the last comment I think I would just echo. I think we see a potential execution on it. A challenge – a minimum at a challenge, perhaps problems. The last market share report that I saw from 2014 had about 170 insurers listed. And the Department notes in their initial reasons document, I think, listed about 5,000 shops that were BAR. They had a BAR license but you estimated maybe 4,000 of those would actually meet your qualification’s list.

Either way, four or 5,000 times 170, if all insurers were to comply, and if they all – let’s say they use mail instead of electronic means, you know, they’re sending out a million pieces of papers to shops who are receiving about 170 surveys from 170 different insurers, it becomes quite burdensome we think on – even on a small business of a shop. Perhaps there’s another way to enable a shop to take one survey.

Presumably if there are answers for 170 surveys, do 170 insurers do the same? Because they’re just reporting price on the wall, their posted price. So it’s 100 percent redundant as many surveys as they get. If there was a way for them to do one survey and allow everybody to access that, then that could potentially create quite a few efficiencies, I think, for the Department, for insurers and for body shops.

We recommend at least the option, again, for an independent third party to provide a solution, because there you have not the insurers putting their own coalition together and not the shops putting their own coalition together, and the Department certainly not taking on the challenge of conducting all these surveys upon their own, but an independent third party that can do it. And might – well, # It would drive tremendous efficiency so the shop doesn’t have to answer hundreds of surveys. That’s all I have for now. We’ll submit the rest via written comments.

**Response to Comment # 21.9:**

Responding to labor rate surveys by body shops is purely voluntary. Body shops would not be required to respond to all or any labor rate survey they are asked to complete. If completing labor rate surveys is overly burdensome, body shops can choose to not respond to labor rate surveys. In addition, it is unlikely that any one body shop would receive labor rate surveys from 170 insurers since, not all insurers conduct labor rate surveys and not all insurers are active in all regions in the State. Further, while there may be about 170 insurers licensed to sell automobile insurance in this state, many do not. Also, many of the insurers are part of an insurance group made up of several insurers. A group insurer may conduct a survey for all insurers in its group so as to reduce the cost to the insurers and the potential burden on the shop in responding to surveys.

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| <p><b>David McClune,<br/>California Auto Body<br/>Association</b></p> <p>April 21, 2016<br/><u>Testimony at Hearing:</u></p> <p>Verbatim, but with<br/>inserted <b>Comment<br/>Numbers</b> keyed to<br/>responses.</p> | <p><b>Comment # 22.1</b><br/>Good morning. My name is David McClune. I represent the California Auto Body Association and I want to thank the Department for putting these hearings on.<br/>The California Auto Body Association is pleased to support the proposed Auto Body Repair Labor Rate Survey regulations. The CAA has worked with the Department of Insurance and various stakeholders for the past 15 years including participation in the last year's pre-notice discussions to address issues and concerns with the insurer, Auto Body Repair Labor Rate Surveys that are inconsistent, inaccurate and unreliable.<br/>The CAA believes the proposed Labor Rate Survey regulations will clarify and address many of the issues and concerns by standardizing the surveys to effectuate fair and equitable claims settlement or adjustments of labor rates.</p> <p><b>Comment # 22.2</b><br/>We would also like to suggest the following change to section 2695.82, the questionnaire, under question 3, Hourly Rate Charges. The following additional categories should be – should include the question: Carbon fiber per hour, fiberglass per hour, and other specialties per hour. New lightweight vehicle materials are constantly being introduced because of rapid automotive technology changes. The questionnaire should provide the ability for repair shops to include labor rates for such changes and auto body – automotive repair technology. I have written comments and I would like to thank you for your consideration.</p> | <p><b>Response to Comment # 22.1:</b><br/>The Department thanks the Commenter for the comment in support of the proposed regulations.</p> <p><b>Response to Comment # 22.2:</b><br/>Based upon this comment and others, the Department added “carbon fiber” and “fiberglass” as additional categories of labor rates in the Final Text. However, the Department declines to add “other specialty” as a separate category.<br/>Unlike carbon and fiberglass, which are currently materials used in auto body repairs and for which there are accepted auto body industry labor rates, adding the category of “other specialty” would create an ambiguous term, that</p> |

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|  |  | <p>would result in significant challenge for stakeholders to understand what is meant and could increase disputes. Also, to the degree new materials are used in auto body repairs and a labor rate is attached to work associated with that new material, the Department would consider future amendments to these regulations.</p> |
| <p><b>John Tyczki</b></p> <p>April 21, 2016<br/><u>Testimony at Hearing:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 23</b></p> <p>First of all, I want to thank you for allowing us to have this hearing to happen today. My name is John Tyczki. I own three collision shops in San Diego County. I'm talking about market shares. I'm three different markets according to the insurance companies. I don't understand that.</p> <p>I would also like to mention first before I totally get into this. I'm not a public speaker. I'm not a lobbyist. I'm a body shop guy. I barely finished high school, been in this industry 40 years. I've seen a lot of changes but not labor rate changes.</p> <p>I know we're going to have discussion tomorrow about steering but what we need to understand is these labor rates -- these suppressing labor rates, the insurance companies are using them to steer the customers to their shops. We heard other people talk today about, We should take a sample size of the big box. The big boxes are controlled by those guys. They're the ones that are shoving that work into those big boxes and the big boxes -- and that's the labor rate they want to use for us shops that are doing the repairs properly, and are doing the OEM certifications, and buying the \$30,000 welders, and the \$60,000 aluminum pullers, and all the proper adhesives, and all data. That stuff costs money.</p> | <p><b>Response to Comment # 23:</b></p> <p>Thank you. Commenters raised issues supporting the need for the currently proposed regulations.</p>   |

Today, I can't even hire a detailer with the labor rates that we can afford to pay. Because they make more money on unemployment than I can afford to pay them to come to work. Three years ago we put an ad in the paper, we would get 30, 40 applicants. Today, one in three weeks for an entry level position. They make more money on unemployment than we can afford to pay them in our shops because of the suppressed labor rates by the insurance companies.

I'm not sure what to recommend. I did hear a couple things today from the gentleman that just spoke. I like the free market. If you're not going to recommend, then what rates are we going to use? Do we survey? You know, that was a great option.

The insurance companies negotiate. Insurance companies don't negotiate. This is all we're paying. This is -- Well, we're here. You're there. Well, that's how we're paying. You need to call my boss. Here's his e-mail. No response. There is no negotiation. They're the big boys. They're the ones with all the money.

Talk about collusion. I heard one of the gentlemen talk about collusion. He's worried about us body shops creating a collusion here. They collude every day. It's amazing how all of a sudden they're going to do spot reduction on panels which, you know, really when you go back to it and you look at fair practices, that's another issue. You're not supposed to manipulate the software, but they're manipulating it to suppress. So all of a sudden we see that out of one insurance company. And the next day the next insurance companies come in and they do it, and they do it, and they do it. It just goes down the line. But if we try to do any little thing, they want to sue us.

But what's funny is, when it comes to labor rates -- well, you know, it's amazing to me, they don't collude over that. Because here we got -- let's

give an example. Farmers Insurance. They actually did a survey about two years ago. And guess what? Their labor rate is about where it needs to be, the rates they're paying right now in the market. But nobody else is. So they're not colluding on who's paying what as far as the labor rates go. But Farmers did an actual survey. And, we're getting what we need at this point in time which is going to change through every year. This whole thing about every two years, you guys -- they raise their rates every year. Look, we're all insured here. One gentleman said, We're not consumers. Really? I'm a consumer. He said, Body shops aren't consumers. Of course, we're all consumers in here. And we're here to represent the people. Right? So that statement was ... I didn't understand that statement by him, but ...

I know I don't get an insurance check every year or every year back from my insurance company. I know my rates go up every month -- every year. Does anybody get any checks back from your insurance company? We're going to save money. It's going to be driven down to the consumer. It doesn't get driven down. Rates continue to go up. Why can't we raise our rates when we need them to survive?

This whole thing about -- you know, the big market area. Look, I have a shop in a market in Poway, California. It's more expensive than Santee, California. And Miramar, California, it -- the land alone is expensive. And then you have the regulations by air pollution control, hazmat. How do you keep up? You almost have to hire somebody just to spend endless hours keeping up with those regulations and training your people. And how do you continue to train and educate your people without wanting to do it?

I wrote some notes. Like I said, I'm not a public speaker but I do care about what goes on in our industry. And I think what's going on, if there

isn't something set by you folks here today or down the road, where are we going to be? They're driving the little guy out for a reason. So they can control the big boxes. And one day – you know, I've been in this business 40 years and I got to tell you, the last 20 I firmly believe their motivation is to run us all out of business so then they could have their own body shops. And then, let me tell you what's going to happen then, because what you see on national news all across the United States about shoddy repairs. You know?

I agree with the gentleman that made the comment about shops that don't have the proper equipment. They should not be – they should get paid less. But how do we figure that out? How is that done? We need your help. To let them – you know, it's like letting the fox watch the hound hen. They're going to do their own survey. They don't want to pay anything. How come insurance companies can complain that they have \$4.4 billion in automobile losses in one sentence. In the very next, say they made – Oh, but by the way, we made \$6.9 billion. And we can't make a dime? We can't make enough money to hire entry level people. They don't even want to come to work.

So we need your help to figure something out. I'm not sure. I bounce around a lot. You know, like I said, this is not what I do. What I do is fix cars. And I want to – I want my people that work for me and more importantly the consumer to feel comfortable that this industry they can trust and this is an industry that we can grow. And this is an industry that is – we're here to provide a service for all of you and all of us in this room here to make sure your vehicle is back on the road safe. Not only for yourself but the person next to you.

So I hope I didn't bounce around too much. It's what I do. I appreciate it. Thank you.

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| <p><b>Nathan Simmons, CMC Collision</b></p> <p>April 21, 2016<br/> <u>Testimony at Hearing:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p>Good morning. Nathan Simmons from CMC Collision.</p> <p><b>Comment # 24.1</b></p> <p>I think it's a great – it's a great mechanism to allow the survey to be – the survey process to be an option. But I do think – or for it to be recommended. But I do feel that it creates a loophole that will be exploited. What I would like to know, I guess, in written responses: What does the Department – like what avenues would they offer for remediation when, let's say, an insurance company realizes that by doing the survey it's causing them to pay more money on an annual basis than they would like to, so they just opt out and they don't do the survey? So then, they come into my business and they say, This is all we're paying.</p> <p>And I say, Well, this is my posted door rate and I base that upon talking to my accounting and my cost of doing business and yadda, yadda, yadda.</p> <p>And they say, We don't care. In your market, this is what's the going rate and this is what we're paying you.</p> <p>What type of, you know, remediation will the Department offer a shop in my position when the insurer does that? Not if. When? Because they will.</p> <p>And currently, that's been a problem. It's pretty much, Take it to small claims court. Charge your customer the difference. Your customer could then take the insurance to small claims court. Customer always wins because the judge, you know, sees the case coming from ten miles away. Typical insurer taking advantage of the shop, of the consumer, but there needs to be a mechanism with the Insurance Commission to help us deal with that. We have to close that loophole up. Because otherwise, we're</p> | <p><b>Response to Comment # 24.1:</b></p> <p>Thank you</p> |
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going to end up with all the big insurers that currently do the survey under the current reg that really has no rules and that's why we're here today. We'll see those insurers opting to not do a survey and just limiting their payment to what they feel they want to limit it to.

So I want to be able to then fire off a letter – a complaint form to you saying, Hey, they didn't pay my door rate and I want to know that you guys are going to do something about it to prevent it just from turning into a non-survey market.

I think that if this all falls to worst case scenario, this were all to fall apart and nothing were to ever happen, we would be better off without any reg. The current reg, we would be better off without it because it allows insurers to do the survey however they ... They dictate the outcome of the survey. They determine the market size. They determine who's in the survey. They determine how often it's done. They determine the mathematical equation that's used to calculate it. So that has created this situation where they determine rates. So we would be better off not to allow them that at all. Period.

If we're not going to move forward for some odd reason, if we get an impasse and the Department of Insurance cannot come to an equitable solution, we would be better to rewind the tape, you know, ten, 15 years, however long ago we ever put that stupid reg in place. To allow them to say, Hey, if you want to do a survey, just give it to us and we put it on public record. Because that somehow created an illusion and an understanding by the insurers that if they did it, that that's what they were allowed to now limit their rates to to my shop. That they did this survey based on their own rules, that that's all they had to pay me. So, you know, I think we got to make sure we come up with some sort of a solution here that is not just we go back home and it's the way it is.

**Comment # 24.2**

And we also need to close up the loophole that allows them to opt out of the survey because then they're just – it's going to be – they're still going to just dictate what they pay.

Did you have comment regarding that before I moved on away from it?

MR. MARGOLIS: I just wanted to maybe get a little clarification from you, because you keep using the word “regulation” but it sounds like your criticism is not with our regulation that we're proposing today –

MR. SIMMONS: Not the proposed.

MR. MARGOLIS: -- but the statute that currently exists.

MR. SIMMONS: Sure.

MR. MARGOLIS: That doesn't require insurance companies to do surveys, but just merely says that if they do them, they must submit them to the Department.

And so, I just wanted to be clear as to what you were criticizing because it sounded to me that your criticism went to the world that the statute has created rather than what the Department of Insurance is proposing to do with your regulation, because I would suggest the Department was trying to address as much of what you were saying with our regulations.

MR. SIMMONS: Yeah. I apologize. I didn't realize that the current statute wasn't referred to as a regulation. But I am not criticizing the proposed regulations. Just perhaps the loophole in the fact that it's a

**Response to Comment # 24.2:**

Whether or not the Department currently has the statutory authority to require insurers to conduct labor rate surveys, the Department has determined that creating a recommended survey is more appropriate at this time to address the purpose of these regulations.

recommended survey and that they have the option to not do the survey and then that's going to – I feel like that's going to be exercised – once ... If they don't get their way with the way they determine the market, the make-up of the market, the area market, if they can include their DRP shops and all those things, if they lose those battles, and indeed that it is the way you propose and they do see shops getting paid more on an annual basis and it's costing them too much money, they're just going to simply opt out of the process and limit their payment to whatever they see fit.

So yeah, I don't have a problem at all with the proposed regs. I think it's great. I have – we all have a problem, I think – except – well, excuse me.

**Comment # 24.3**

The repair industry has a problem and consumers have a problem with the current statute that it's just so basic ... I mean, I believe the history of that was because State Farm was doing a survey. They were saying they were doing a survey and the trades associations wanted to know how exactly. We don't believe you. We want to see the survey. So we passed a statute to make them present those findings to you and we didn't realize what that opened up – what that was going to open up. And it turned into this ability for them to dictate a rate based on their survey and limit their payment to us based on that survey that they created.

So yeah, I apologize for the confusion there. I just wanted to kind of comment on some of the earlier comments. I hope that the Commission sees kind of through the comments and concerns of the insurers with – because, you know, their suggestions about allowing DRPs into it, obviously we can see that. You know, it's

**Response to Comment # 24.3:**

Thank you for providing examples of why the currently proposed regulations are being proposed and are needed.

glaringly obvious why they want to do that. That will obviously lower the outcome of the survey. You know, they want to say, Oh, you know, maybe we only allow 50 percent of the DRPs in the market to be allowed in the survey. But previously to that, he said, Well, maybe we only include 25 shops in the market and not 100 percent of shops in the market.

So I'm not amazing at math but I think that if you guys were to agree to those terms, they could in essence have 100 percent DRP in the survey based on their ability to pluck 25 percent of the shops in the market and they all end up being DRPs coincidentally in that market for them. And bingo, you know, wallah, you end up with the results they desired once again.

So I hope we see right through those suggestions. Again, like what John was saying about, They want the larger shops to have a greater weight in the survey process because they own those shops. Some of them even have their names flying outside of those shops and they know that they'll be able to dictate what that shop puts on their survey or that shop would face the repercussions of losing this enormous abundance source of business probably putting them out of business if they don't cooperate. So they don't legally own these shops, but they do. They do technically. I just learned today that we have a local auto body association member, a president, that had to step down as president because he became affiliated with one of the big insurance companies and they probably – I'm assuming this. But based on my experience in this industry, they probably asked him to step down as president of an auto body trade association and that's just a small example of what occurs.

Lastly, I guess, that there's another side to this coin that there will ultimately need to be mechanisms in place to prevent the trade – the trade associations from taking advantage of the insurers. And that, you know,

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|  | <p>theorize that, We're going to have – you know, We're going to end up with rates \$500 per hour because the Department's leaving it up to us to dictate what our rates are going to be. Eventually, and little by little by little the rates are going to keep climbing and climbing and climbing and it's going to get to a point where it's not fair for them.</p> <p>And I think my response to that is, just like we're here today, trying to figure something that's not fair to us, the body shops, they're more than welcome ten years down the road from now when it becomes unfair, if it does, to petition and lobby to the Department of Insurance to figure out a solution at that time.</p> <p>It's all a theoretical problem. It doesn't currently exist and I don't think we need to waste a whole bunch of time trying to prevent shops from overinflating their rates in hopes of getting a raise. I think there's simple mechanisms that you guys could probably come up with to prevent that. And I don't think we should put a kibosh on this whole thing because of the theory, This is going to get out of control.</p> <p>I think insurers are heavily regulated but that's because they were out of control. And so, when we're out of control, then you can regulate us. We've yet to ever be out of control. So let's cross that bridge when we get it to, I would say. Thank you.</p> |   |
| <p><b>Hillel Shamman</b></p> <p>April 21, 2016<br/> <u>Testimony at Hearing:</u><br/> Verbatim, but with</p> | <p><b>Comment # 25</b></p> <p>So my name is Hillel and I'm super grateful for you guys having this meeting today. I've been in the business for over 20 years. And, you know, I've always found it odd, this things with the labor rates and how skewed and screwed up it is, and how it really messes with our industry</p>   | <p><b>Response to Comment # 25</b></p> <p>The commenters issue regarding disparity between auto body shop rates and mechanical repair rates is beyond the scope of the currently proposed</p> |

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| <p>inserted <b>Comment Numbers</b> keyed to responses.</p> | <p>and our livelihood. And most importantly, how the consumer really doesn't get a fair bill. Bottom line is, is that mechanics get double of what we get. That's ridiculous. Why? Why should they get double of what we get? My tax costs just as much. I have more equipment. And honestly, the work that we do is more complicated than what they do. Period. I can argue that all day long. So why are we getting 50 and Beverly Hills BMW gets \$220 an hour? Why? Because it's a free market and they skew the rate. Bottom line, they skew it.</p> <p>And so, I'm going to try and not get too passionate about it because I've obviously been keeping this inside for over 20 years, but the bottom line is, is it's just plain wrong. And if they try and get to deal -- one guy's laughing over there and it's really not funny. Because the bottom line is, if you put in the DRP rates, it is a wholesale rate. It is not a retail rate. And it's not fair. And you should stop including it.</p> <p>You know, we wouldn't even have to have this if you guys would just follow the rules. We are the small guy. We just want to get paid fairly. The bottom line -- you know, DRS, they have a fair labor rate right now. They just don't want to pay. Why? They can charge and they're complaining now they're going to raise -- that they can't raise their rates for their policyholders. I agree with that. They should be able to charge what they want, but pay us what we should get paid.</p> <p>So, anyway, the bottom line the way I see is it that, if you don't want to pay my posted rate -- and I get it. We're a unique industry. It's like, it's not completely like when you go to a mechanic shop, you're paying out of your own pocket. You come it into a body shop, the insurance company is paying your bill.</p> <p>So I get it. What if I put 500 bucks an hour? It's ridiculous. You're not going to want to pay and that's when you should be able to have a labor</p> | <p>regulations.</p> |
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|   | <p>rate survey. But that's when you follow a guideline of what you guys should put in as a fair labor rate survey. And in all that, it should be no DRP rates. I just want to emphasize that. No DRP rates in a survey. Period. It's skewed. It's wholesale.</p> <p>You know, bottom line is, a mechanic shop charges about \$149. Toyota gets \$140 an hour, you know. I mean, I work on Porches. We work on high-end cars. It's the same amount of work. It's the same -- they also require a lot of equipment. They're also using high strength steels. They're also using aluminum. They require, you know, a fixture bench, particular welders, rivet guns. My guys spend about \$10,000 a month on training. They're just as well trained. They're even better trained.</p> <p>I have so much admin that I have to pay for to deal with insurance companies not wanting to pay. I'm constantly having to go to court with my customers to make them pay the right bill. Why? Why does it have to continue to happen? Can they please just follow the rules?</p> <p>So I'm -- anyway, with all due respect, thank you for this meeting and that's all I really have to say.</p> <p>If there's any questions? I'm good.</p> |  |
| <p><b>Joseph Miller, Mercury Insurance</b></p> <p>April 21, 2016</p> <p><u>Testimony at Hearing:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to</p> | <p>Hi, it's Joseph Miller. I'm from Mercury Insurance, in-house attorney.</p> <p><b>Comment # 26.1</b></p> <p>Just a few comments what we see as the fatal flaw, really is the biggest problem, the way the regulations are currently drafted, is that the survey responses are not tied in any way to the real market price or what the shop is actually charging and getting paid for on a real transaction.</p>  | <p><b>Response to Comment # 26.1</b></p> <p>The Department disagrees that the proposed regulations are not tied in any way to the real market price or what the shop is actually charging.</p> |

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| <p>responses.</p> | <p>The survey responses encourage them to put their posted rate or their market rate which is really what they would like to get paid. There's really no incentive on them to keep a cap on that.</p> <p><b>Comment # 26.2</b></p> <p>What the survey response you're going to get is going to be the charge that they would like to collect if they were a monopoly, but nobody gets to charge that. At least of all insurance companies. No businesses get to charge that unfortunately.</p> | <p>Auto body repair shops have every incentive to post the market rate, as noted by auto body shops during the public hearing. Consumers, concerned about the price of repairs will look at the posted rate and will be deterred by a posted rate that is too high above the market price, and go to another shop. In fact, the posted rate does often reflect the market price, for fear of a lost consumer to a competitor.</p> <p><b>Response to Comment # 26.2</b></p> <p>The Department disagrees that the survey response is what you would collect with a monopoly. A monopoly would require collusion and the Department feels collusion and price manipulation is highly unlikely with the proposed regulations. A periphery was added to the Final Text of Regulations, so that a geographic area may include more than six shops, given that one more mile is added to the sixth closest shop, and all shops within that mile are also included in the geographic area. This means that collusion must be done on the exponential scale, a level of conspiracy that is highly unlikely and the chances</p> |
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|  | <p><b>Comment # 26.3</b></p> <p>So there needs to be some sort of tie in the regulations, if you go forward with them, to an actual price that they're charged that is being paid. Currently the regulation not only doesn't require that, but it specifically prevents an insurer from not filing survey responses based on evidence of what prices the shop is actually charged.</p> <p>And if you can draw an analogy to the Total Loss regulation, 2695.8(b), this was amended a few years ago, maybe in 2006, to prevent insurers from using the price of a comparable automobile on something other than the true price of car that was sold. Instead of -- what was happening before was insurers were using a formula based upon an asking price and</p> | <p>miniscule. Additionally, existing anti-trust laws act as a deterrent, and prohibit auto body shops from manipulating the market and engaging in monopolistic activities. Further, most surveys conducted by insurers today rely in this very concept, asking the shop how much they charge. Insurers use these survey results now to settle and pay claim. Insurers have never provided the Department with any evidence (in any of the surveys being conducted today) that a shop has exaggerated the rate the shop charges. Therefore, these proposed regulations do not change the current practice and are not expected to result in the outcome suggested by this comment.</p> <p><b>Response to Comment # 26.3</b></p> <p>As noted above, most surveys conducted by insurers today rely in this very concept, asking the shop how much they charge. Insurers use these survey results now to settle and pay claim. Insurers have never provided the Department with any evidence (in any of the surveys being conducted today) that a shop has exaggerated the rate the shop charges. Therefore, these proposed regulations do not change the</p> |
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a take price. But the take price was really an estimate and the Department modified that regulation so you could use the asking price, which may be high but at least it was a real number, or you could use the actual sales price which is a real number.

With this survey, you're not going to necessarily get a real number, so that needs to be corrected if anything. Because you're not going to get a free market price. You're going to get the shops best-hope-for price.

current practice and are not expected to result in the outcome suggested by this comment.

However, based upon this comment and others, in the Final Text of Regulation, under section 2695.81(e)(3), insurers are allowed to adjust the labor rate to an amount lower than the prevailing rate, if the insurer is aware through invoices that the shop charged a lower rate in the past 60 days. The regulations now would be able to take into account the actual price that the shops charge.

The total loss regulation from 2006 is beyond the scope of the proposed regulations. However, the Department does not feel that the total loss regulations support the commenter's comment since those regulations support the use of surveys from posing the question to the shop as to how much it charges for labor. A shop cannot charge more than its posted labor rate. A posted labor rate is a real number, which the commenter suggests is reasonable.

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|  | <p><b>Comment # 26.4</b></p> <p>The other problem we see is with the geocoding in the market area. That's been discussed already. Aside from just the technical problems in managing that, which by itself our company would probably choose to opt out of this survey for that reason alone, just for the technical problems of administering the market area.</p> <p>But what that does -- and there was another commenter who made this point already. We won't have a market area with a prevailing rate. You'll have each shop with a prevailing rate. And maybe for the prevailing rate for that shop, the six shops in that area, one of those other shops will have a different prevailing rate because his market area will be based on a different market shop. And what that's going to do is at the claims level, it's going to complicate the process at the claims level because the field appraiser is going in there, and trying to adjust the shop's estimate, is not going to have a prevailing rate for that area. He's going to have to go back and look at the survey result and figure out what the prevailing rate is for that shop, not just that area. So it's just unnecessarily complicating.</p> | <p>The Department proposed regulations defines the “prevailing rate” in a geographic area, which does not mean the market rate.</p> <p><b>Response to Comment # 26.4</b></p> <p>The Department submitted a proof of concept in its Notice of Amendment to Text, demonstrating the geocoding concept in its proposed regulations. This proof of concept was presented to interested parties. The Commenter’s statement regarding “technical problems” is unsubstantiated, especially given the proof of concept that successfully implemented the geocoding concept in the proposed regulations.</p> <p>Each shop is considered its own geographic area, which was demonstrated in the proof of concept. At the claims level, the appraiser can simply access a spreadsheet that has the prevailing rate for each shop , which can easily be accessed on a cell phone or a laptop, or even on printed sheets of paper. The concept is not as complicated as the Commenter believes it is.</p> |
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**Comment # 26.5**

And part of that goes to something I haven't heard anybody comment on, which is, if this kind of standardized survey is such a good idea, it really should be done by a regulator. By the BAR preferably because they have the jurisdiction over the shops. Because what you're going to get is -- you're going to get a varying response.

Because the survey should deliver the same results uniformly throughout the business if they're done correctly. But I think what -- as a practical matter, what's going to happen is, you're going to get varying responses from different insurers. It depends on whether the shop likes that insurer or they don't. With all due respect to the commenters in the room, I'm sure none of them would do that. But I could see getting varying responses from different surveys from different insurers. It really needs to be done by one regulator.

**Comment # 26.6**

And to go back to one comment that Tony made before is that it's not for - it's not prescriptive. It's voluntary. The survey process is voluntary. That may be true, but what we're concerned about is that if a company chooses not to do the survey, and we have our own survey methodology, and we are confident that the rate that we're paying is justified, it's legal, it's fair, we may be confident of that. But if -- in the complaint process, if the shop makes a complaint about that, the Department based on how enforcement is handled in other areas, the Department is going to make us justify that rate. And the first thing they're going to go to is, Well, do you have the Standardized Auto Body Survey? And if you don't, it's going to put the burden on the insurer to justify its rate. And the insurer may be able to justify the rate. But what we see happening is justified complaints. That's the enforcement mechanism that will -- it will be defaulted to, is justified complaints.

**Response to Comment # 26.5**

The Department has reached out to the Bureau of Automotive Repair, who were invited to participate, but chose not to. Only the Bureau of Automotive Repair has the authority to regulate auto body repair shops.

The Department does not have the authority require that insurers conduct a labor rate survey, nor is there authority for the Department as a regulator to conduct a survey. Thus the Department cannot mandate that all of the results are the same for different insurers.

**Response to Comment # 26.6**

These proposed regulations provide insurers with a voluntary mechanism to support the use of labor rate surveys when settling automobile insurance repair claims in a fair, equitable and reasonable manner, as required by Ins. Code section 790.03(h), in an effort to protect all insurance consumers and claimants who may be financially harmed by the use of unreliable labor rate surveys. Insurers may choose to conduct a Standardized survey, may choose to conduct a survey that does not follow the Standardized survey

And I haven't seen the Department's file of the complaints in this rulemaking. But in our company, the vast majority of complaints on this issue are -- are made by the shops. Very few consumer complaints. They're all the shops that are pushing the complaint process, so. Thank you.

methods and requirements, or may choose to not conduct any auto body labor rate survey. However, no matter what option the insurer chooses, the insurer is still subject to settling automobile insurance repair claims in a fair, equitable and reasonable manner, as required by Ins. Code section 790.03(h). These proposed regulations merely provide one way an insurer may evidence compliance with Ins. Code section 790.03(h), and, by doing so, receive the significant benefit of a rebuttable presumption by the Commissioner that the insurer has attempted in good faith to effectuate a fair and equitable labor rate component of a claim settlement, or adjustment of the labor rate component of a written estimate provided by a claimant pursuant to subdivision (f)(3) of Section 2695.8. Should an insurer choose to conduct a survey that is not in compliance with the proposed Standardized Labor Rate Survey, they will not receive a rebuttable presumption that they acted in good faith to effectuate a fair and equitable claim settlement or adjustment of a written estimate, but that does not mean that all surveys (that are not a Standardized Survey) will not result in

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|   |  | <p>a effectuate a fair and equitable claim settlement or adjustment of a written estimate meet this burden. The Department will want to know whether or not the survey the insurer conducted was in compliance with the Standardized in order to determine if the rebuttable presumption applies. Enforcement actions have occurred prior to the proposed regulations, and will continue regardless, and insurers have always had the burden to justify its actions to the Department and/or in an enforcement action.</p>                                   |
| <p><b>Terry Lambert</b><br/> April 21, 2016<br/> <u>Testimony at Hearing:</u><br/> Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 27:</b><br/> Hi, Terry Lambert again.<br/> With the survey rates, when they're talking DRP rates versus regular rates and the size of the shops, I will tell you that my facility only does about 3 percent DRP work. My drive-in rates are probably \$2 higher than what most insurance companies pay me right now. My poster rate on the wall is \$54. State Farm pays me \$52. Farmers pays me \$51. And Auto Club pays me \$50. So I'm getting the right rates. I'm not a DRP with any of those companies.<br/> If I were a DRP with them, every single one of those companies wants at least \$5 to \$8 per hour discounted rate to be on their program. So a DRP rate definitely is lower. I belong to three insurance companies that send me DRP work. They're very minor. Like I say, only 3 percent of my gross a year goes to them. My DRP rates are \$44 and \$45 an hour. I don't like it. I do it only because I have customers that have that insurance and they ask me on it.</p> | <p><b>Response to Comment # 27:</b><br/> The regulations as proposed exclude DRP rates from the survey. As noted in the Department's Statement of Reasons, the proposed regulations prohibit the use of Direct Repair Program rates because DRP rates tend to be a contractual lower rate based on increased work volume from the insurer and do not accurately reflect market prices. However, shops participating in a DRP program are free to participate in the survey using non-discounted rates, in order to avoid unfairly excluding those shops.</p> |

Allstate and with it 21st Century are two insurance companies that at this point are standing firm with, This is our rate. This is what we pay. This is what you're going to get. They're paying me \$42 per hour. Lower than any of my DRP rates. Way lower than State Farm, Farmers and Auto Club which pay me close to my posted rate. And Allstate and 21st Century and two other ones get away with it by simply saying, This is what we're going to pay. You don't like it. Don't do the work. Send it somewhere else.

So this is what we have to deal with in the shop and the insurance companies -- I'm sorry -- but they're talking about if they have to do a survey rate, it might cost them \$10 million.

How many insureds are there in the state of California? 100,000? 200,000? So if there's 100,000 and it costs them -- or 100,000,000 -- excuse me. 100,000,000 drivers in California and it costs them \$10 million, it costs less than a dollar per customer for them to do a survey rate. One way or the other, we need survey rates that are right. I don't care if the Bureau of Automotive Repair does it.

**Comment # 27.1**

I would like to see the Bureau Automotive Repair kick out half the shops. Because today's technology, we are an I-CAR certified shop. We're a Honda certified shop. We're a five star shop. We're a Medallion shop with VeriFacts, who is an independent company, who does check the quality of our work, and we pay for that. I pay for that, because I want every single one of my customers that gets into a car to be safe. I want them to know their children and their family are going to live through the next crash.

**Comment # 27.2**

And if we can't get the right rates, we can't buy the equipment. I spend hundreds of thousands of dollars a year in equipment and training. It's

**Response to Comment # 27.1**

This comment is beyond the scope of the proposed standardized labor rate survey methodology regulations. The Bureau of Automotive Repairs activities are beyond the jurisdiction of the Department.

**Response to Comment #27.2**

The currently proposed standardized labor rate survey methodology

astronomical what we spend. We don't get that money back. Nobody's paying it back. It's all, Cost of overhead. It is cost of overhead. But we're not getting the raises to make up for that. The profits aren't there any more. It's unbelievable how they're just chopping it down and chopping it down.

regulations do take into account future increases in the Consumer Price Index. The proposed regulations attempt to account for increasing costs on an annual basis by requiring either a new survey be conducted, or applying a CPI adjustment as described in section 2695.81(d)(1)(C). This CPI adjustment utilizes the Monthly (All Items) Consumer Price Index for All Urban Consumers for California. Using annualized monthly data based on when the survey was conducted should minimize any lag of minimum wage increases in the CPI data and lead to a fair result while also minimizing costs to insurers. Additionally, this adjustment is only allowed once, after which a new survey needs to be conducted to retain the rebuttable presumption.

The proposed standardized labor rate survey methodology does address the issue of conducting up to date labor rate surveys which would include updated data by designating that only surveys filed less than a year will qualify as a Standardized Labor Rate Survey, with a mechanism for a possible extension to a maximum of two years.

**Comment # 27.3**

Steering I know is tomorrow. But I will tell you with the DRPs, the rates are discounted. They're discounted greatly. State Farm, if you want to join up as a DRP, will go into your computer and ask for your lowest labor rate you're charging anybody. And that's what they want you to match to be on their DRP program.

So if you do work for Joe Blow's Carpeting, and he has a fleet of trucks and he's got a hundred trucks and you cut a deal with him, you make me your guy. I'll do all your repairs and I'll do it for 38 bucks an hour. Now you got to get -- if you want State Farm, you got to do it for 38 bucks an hour because that's what they dictate. Now, that's up to the shop owner whether you want to take that or you don't want to take it.

But what I'm saying is, the DRP rates are so much different than a posted rate. And with them saying, Oh, no, their posted rates are inflated.

Nobody charges that. I charge my posted rate to every single customer that walks in my door. The only time it's ever discounted is when I have to deal with State Farm, Farmers or Auto Club to say, Our survey shows \$50 an hour, \$51 an hour, \$52 an hour. That's all we're going to pay.

Fine. I'll take the 1 or \$2 off. I'm not going to argue or fight over it. It's not a big deal. But when they're wanting to pay me \$45 or something else because that's what they pay their DRPs or even lower than that, \$42, because that's what they pay their DRPs and their survey is eight years old and they don't care, that's wrong.

I fought against one of the ones I named. I won't mention who it is.

Through the Department of Insurance. And they realized that they were getting away with murder, and they had come back to me, and they said, Oh, we're so sorry. You have a unique shop in a unique area. We'll now pay you \$50 an hour. Before they were paying me \$42.

So they get away with it unless the independents complain. And they are owning most of the MSOs. Caliber Collision and Service King is huge in

**Response to Comment # 27.3**

The comment clearly touches on issues outside of the scope of the proposed standardized labor rate survey.

As noted in the Department's Statement of Reasons, the proposed regulations prohibit the use of Direct Repair Program rates because DRP rates tend to be a contractual lower rate based on increased work volume from the insurer and do not accurately reflect market prices. However, shops participating in a DRP program are free to participate in the survey using non-discounted rates, in order to avoid unfairly excluding those shops.

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|  | <p>California. They're coming in here. They're in bed with every major, major insurance company there is. And, I mean, out of the 170, or whoever says there's 170 in California, they're probably in bed with 125 of them. And they do all their rates discounted and they get all the work sent to them. The reason that you can discount a rate to a DRP, they're flooding your shop full of work. You don't have any advertising costs. You don't have any of the overhead with that. My door rates have to reflect. I don't have the DRPs. Three percent of my total gross is DRP. All my work and where I get all of my customers is from advertising. That costs money. I don't want to discount that because the insurance company is not sending me anybody and they're not supposed to send you anybody. But they are. And that's what's wrong. Tomorrow, I'll be here for the steering.</p> <p>Thank you.</p> |  |
| <p><b>Nathan Simmons</b></p> <p>April 21, 2016</p> <p><u>Testimony at Hearing:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 28:</b></p> <p>I'll make it quick. I promise.</p> <p>Nathan Simmons. I have a suggestion that would probably involve BAR. But there's concern that shops would kind of -- they would turn in survey rates based upon their like or dislike for an insurance company, the weather, who knows. Maybe the BAR can help with regulating posted rates. Maybe we can have rates posted in California as a regulation to all the shops. They have to have their rates posted on the wall for BAR regulation.</p> <p><b>Comment # 28.1</b></p> <p>And then you might -- an insurer might argue, Well, you're just going to put \$500 on a wall and you can charge up to that amount or discount it however low you want. Well, I'll tell you what. I'm probably the highest</p>  | <p><b>Response to Comment # 28:</b></p> <p>Shops are not mandated to answer any labor rate surveys. Shops can voluntarily choose not to participate in any labor rate survey.</p> <p>Only the Bureau of Automotive Repairs (BAR) can regulate auto body shops.</p> <p><b>Response to Comment #27.1</b></p> <p>Thank you for the supportive comments which reflect real world auto body shop practices and demonstrates</p> |

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|  | <p>posted labor rate in the greater LA area, or at least I used to be, and there's an effect to that. I lose business because of that. I have people walk in the door. They look at my rate. They look at their insurance company's estimate that says it pays less. They look at the body shop down the street that charges less. They walk right out that door. They don't even give me the chance or opportunity to try to win their business.</p> <p>So there is another side to just putting whatever rate you want on that wall. It's a business decision that a shop would have to make and you put a lot of thought and effort into that decision. You don't just throw a number up on the wall willy-nilly because it's going to help get more money at the end of the next year with this new survey process. So perhaps that will have to be something that can help streamline this that all shops will have to post their rates and then you would have to put that rate on the survey.</p> <p>And then, that brings up the point that then theoretically every single survey that each shop does is going to be identical, so what's the point of each shop having to answer each insurance company's survey? It's almost like they should all go into one pool and then the insurance companies can access that pool, and you guys verify and validate it or something. I'm not sure.</p> <p>Lastly, some insurers are worried about the cost of doing a survey every year. Well, maybe you can buy the data from NABR that they're already collecting. You can get with them and get the survey results from them and use that -- use that as your survey as long as it meets all the parameters that the Insurance Commission has set forth. So that's all. Thank you.</p> | <p>that posted labor rates at auto body shops do have validity and are excellent indicia of the actual market rate and that there is no incentive to post inflated posted rates.</p> <p>With regard to using NABR or some toher third party to supply data for surveys, nothing in these proposed regulations prohibit an insurer from entering into a contract with a third party to conduct the Standardized survey on behalf of the insurer or several insurers. In that case, the use of a third party to conduct a labor rate survey for contracting parties would be an agreement that must be reached by the parties themselves, thus negating the need for the designation of a "recognized" third party. Further if the shops were to agree to send survey data to a single source and allow that data to be obtained by insurers to generate surveys, these regulations do not prohibit this practice.</p> |
| <p><b>Hillel Shamman</b><br/><b>Nathan Simmons</b><br/><br/>April 21, 2016</p> | <p><b>Comment # 29:</b><br/>I just want to follow up.<br/>Hillel, H-i-l-l-e-l. And I just wanted to also say that I noticed also when I first started that, I think, the labor rates back then were like \$36 an hour,</p>  | <p><b>Response to Comment # 29:</b><br/>Thank you.</p>   |

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| <p><u>Testimony at Hearing:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p>  | <p>\$38 an hour, and mechanics had \$76 hour. And now 20 years later we're at \$55 or \$50 and they're at \$150, \$200, and the only reason I can see that's the reason is because of DRPs and there's been a lot of DRPs in the last 20 years. And it's because they've been able to hold down those rates to their benefit. I mean, I can't figure out any other way.</p> <p>And as far as us posting a rate like \$500 an hour, this is not realistic. I mean, we're going to be in the market area. It's going to grow in the market. And the way I see it is, if you pay the posted rate, if you don't want to pay a posted, you have to have a legitimate labor rate survey to go after. And if you can put up those parameters that make sense and of course not include a DRP rate, it's fine. They definitely are able to hold down rates with DRPs in this -- when they get some of the auto body shops and their rates set. So I might be repeating myself and I really wanted to just strike that point home.</p> |   |
| <p><b>Sam Valenzuela</b></p> <p>April 21, 2016</p> <p><u>Testimony at Hearing:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 30:</b></p> <p>Hi, my name is Sam Valenzuela. I have some additional commentary from earlier.</p> <p>Just based on the comments that we've heard today, I thought that the panel might appreciate an independent third party perspective. We're not a shop. We're not an insurer. We're simply a research and technology company that serves this industry.</p> <p>And on the topic of collusion -- or maybe we've heard comments coming from both sides talking about collusion from opposite perspectives and suppression of rates. I think what we can tell you is the story that the data tells. We can just let the data speak for itself.</p> <p>And in looking at the data, it would appear that shops have in fact colluded by getting together and agreeing to charge a low, barely profitable price. That's what the data would suggest. Rationally that doesn't make sense that these companies would get together and put</p>   | <p><b>Response to Comment # 30:</b></p> <p>Thank you. The issue raised by the commenter is one reason the current regulations are being proposed.</p> |

themselves under tremendous profit pressure given all the investments you've heard that they have to make.

We don't see those same trends in comparable industries. I think the next best closest comparison I can think of is mechanical service. It's automotive. They're repairing cars. But it's mechanical. It's collision repair. It's probably the closest comparison. And you don't see that. We'll be happy to send some of that data to you. It looks like a distorted bell curve that's been squished to the left.

Our independent explanation of that is that there's an outside force acting on that to push those prices to those levels. We don't see any rational explanation in the data to suggest why it would be skewed left and it would be skewed low. When I say left, I mean, you know, on a scale of low to high prices and that bell curve is squished left.

**Comment # 30.1**

So we don't see shops colluding to drive rates up. We definitely see downward pressure and we see a variety of tactics used which we could name that -- that help drive that price to that level.

With free market prices and this notion that shops have an asking price, and I think in the free market we agree. There was an ask and, Here's what I'm asking for it but here's what I'll give you for it. And buyer and seller come together and agree on a price.

Probably the best comparison or the best data point for the Department to consider there would be what an actual customer pays. There's plenty of cases where a consumer does not want to report an accident to their insurer and they just want to get the car fixed on their own and so they'll cover the full cost on their own. So they're willing to pay whatever they pay. A door rate of \$500, if that's, you know, really the price, clearly a consumer is not going to pay for that.

So I think that the free market rationalizes that shops are not incentive to put a ridiculous price on a wall and call that their price because I think we've heard -- we've heard one example and we've seen this across the

**Response to Comment # 30.1**

Thank you for the comments which provide a practical, "real world" explanation of why collusion is very unlikely.

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|  | <p>country. We work with shops all over the country, not just California. Plaintiff customers pay out of pocket and the rate that they pay would be clearly suggestive of what a market rate is and it tends to be door rates. It tends to be much closer to what customers want to pay than something \$5, \$8, \$10 almost.</p> <p><b>Comment # 30.2</b></p> <p>I know the steering issue is tomorrow. I'll just make the point -- we would make the point again as an independent just doing research in this area. Maybe I'm stating the obvious. There's clear linkage there.</p> <p>And so, getting the pricing issue right is key. In our opinion, if you solve the pricing issue, steering goes away. We've never encountered in our research any steering that occurs because an insurer wants to send a consumer to a more expensive, more equipped, more OEM certified shop. It almost always is ... Well, I guess I would say always. I have not seen one case to the contrary, is about price: Driving a consumer to another shop that has a lower price. Never to another shop that has the Mercedes certification that you need to get your car fixed right back to the manufacturer's specification. So potentially, solve the pricing problem and you solve the steering problem as well.</p> <p>Thank you.</p> | <p><b>Response to Comment # 30.2</b></p> <p>Commenter's comments are regarding steering, which is outside the scope of the currently proposed regulations regarding a standardized labor rate survey methodology.</p>   |
| <p><b>Insurance Industry Coalition</b></p> <p>May 31, 2016</p> <p><u>Written Comments 18Q:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 31.1:</b></p> <p>Since our April 21 and 22, 2016 comment submissions to the California Department of Insurance (CDI) regarding the "Labor Rate Survey" regulations (Reg-2012-00002) and the "Anti-Steering" regulations (Reg-2015-00015) (together, the "Proposed Regulations"), the above-listed associations have worked diligently to formulate a suggested approach for the Proposed Regulations which would simultaneously ensure the CDI accomplishes its policy goals while regulating the insurance industry in a lawful, prudent manner.</p>  | <p><b>Response to Comment # 31.1:</b></p> <p>The Department thanks the Commenter for the additional comments and suggestions. These comments are not timely, as they were received after the deadline to submit comments, which passed on April 22, 2016.</p> |

We offer the following additional comments on the Proposed Regulations. We hope to resolve these issues in a collaborative fashion with the CDI without need for further action following the CDI's closure of the rulemaking file.

Labor Rate Survey Regulations

**Comment # 31.2:**

Our additional consideration of the Labor Rate Survey regulations has only strengthened the concerns we outlined in our April 21, 2016 comment submission. With its proposal, the CDI is offering a model methodology for conducting labor rate surveys which would produce claims costs that are unreasonably and unnecessarily expensive. The proposal would artificially inflate the cost of insured auto repairs with no corresponding benefit for insurance customers.

Because the Labor Rate Survey regulations would be voluntary, insurers would face two choices: 1) adopt new business practices which produce unwarranted claims payment inflation which they cannot readily pass along due to the difficult rating environment in California, or 2) use alternative methods that are currently allowed (like Cost of Living Adjustments) but not recognized in the Proposed Regulations, leading to uncertainty as to whether the CDI would attempt to force insurer use of the Proposed Regulations when reviewing consumer complaints or conducting field examinations. Our guess is that most carriers would take the second option, which would defeat the whole point of doing regulations in the first place. Our thought is that this is counterproductive for the CDI and insurers.

A better option would be to fix the Labor Rate Survey regulations so they ensure fair results and provide flexibility and options for the industry that can be widely adopted. To accomplish this, we urge the CDI to revise the Labor Rate Survey regulations, in addition to the comments we submitted, as follows:

**Response to Comment # 31.2:**

The Department disagrees with the Commenter that the proposed regulations would inflate the cost of insured auto repairs with no corresponding insurance benefits. The comment is unsubstantiated and unsupported. Whereas in the Department Economic Impact Analysis outlines with specificity the estimate of costs to the insurer and consumers, and the Initial Statement of Reasons outline the multiple benefits to the public. Although the proposed regulations Standardized Labor Rate Survey is optional, the Department is hopeful and confident that insurers will adopt the new business practices outlined in the proposed regulations, based on the incentive of the rebuttable presumption. However, as noted by the Commenter, insurers are free to continue with their current practices, to the degree they result in fair and equitable claims settlements, but will not receive the rebuttable presumption of the

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|  | <p><b>Comment # 31.3:</b><br/> <i>Arithmetic Mean or Simple Majority</i><br/> Proposed Section 2695.81(d)(5) requires insurers to calculate a local “prevailing auto body rate” that is based on “posted rates” and, therefore, results in inflated payments. This would create a system in which body shops are paid one rate with a cash customer and another, higher rate for insured jobs. Insurers look forward to meeting their contractual and legal obligations to make fair offers to pay for car repairs, but will not accept a state regulation which requires obvious overpayment.<br/> We urge the CDI to fix its proposal for calculating a “prevailing auto body rate.” We request eliminating the regulation’s reference to the “arithmetic mean” and, instead, just rely upon a median survey result that would eliminate the bias of outliers -- which could be particularly acute when used with the regulation’s requirement to only use survey results from six body shops.</p> <p><b>Comment # 31.4:</b><br/> <i>Use of DRP Rates in a Labor Rate Survey</i><br/> Proposed Section 2695.81(d)(6) prohibits labor rate surveys from including any discounted labor rate obtained as part of a direct repair program. We understand that the CDI strongly believes that labor rate surveys should only include labor rate survey results that an auto repair customer could get without the benefit of a contracted discount. However, CDI must address our legitimate concerns about the mischief that body shop survey respondents can play with their “posted” rates. There has to be a check and balance to address the possibility of inflated labor rates.</p> | <p>Standardized Labor Rate Survey. Even if insurers proceed with this second option, this would not defeat the whole point of doing regulations in the first place, nor is it counterproductive. The Department has taken the Commenter’s suggestions with great consideration, as noted below.</p> <p><b>Response to Comment # 31.3:</b><br/> The Department thanks the Commenter for this suggestion. Based upon this comment and others, the Department eliminated the greater of the arithmetic mean or average in its Final Text of Regulation. The prevailing rate is now calculated as the simple majority of surveyed shops, and all reference to arithmetic mean or average was eliminated. The Department believes this amendment addresses the concerns raised by the commenter.</p> <p><b>Response to Comment # 31.4:</b><br/> As noted in the Department’s Statement of Reasons, the proposed regulations prohibit the use of Direct Repair Program rates because DRP rates tend to be a contractual lower rate based on increased work volume from the insurer and do not accurately reflect</p> |
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The labor rate survey regulations should include a provision that allows survey results to be adjusted when an insurer documents that body shops accept payment at rates less than their reported, posted labor rates. There is no justification for a state regulation which creates two, different “market” rates: the lower rate that cash-pay customers pay and then a higher rate which shops are able to extract from insurance companies. If the CDI ensures that insurers have a mechanism for challenging body shop collusion or falsification of labor rates, then insurers will accept the exclusion of DRP rates from labor rate surveys without further disagreement.

market prices. However, shops participating in a DRP program are free to participate in the survey using non-discounted rates, in order to avoid unfairly excluding those shops. The Department disagrees with the Commenter regarding potentially inflating posted rates. Auto body repair shops, have every incentive to post the market rate, as noted by auto body shops during the public hearing. Consumers, concerned about the price of repairs will look at the posted rate and will be deterred by a posted rate that is too high above the market price or purposefully inflationary, and go to another shop. The Department has taken the Commenter’s suggestion into great consideration. In the Final Text of Regulation, under section 2695.81(e)(3), insurers are allowed to adjust the labor rate to an amount lower than the prevailing rate, if the insurer is aware through invoices that the shop charged a lower rate in the past 60 days. The Department disagrees with the Commenter, and believes that collusion is highly unlikely. As previously explained, a periphery was added, so

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|  |  | <p>that a geographic area may include many more than six shops, with the average number of shops per geographic area of about 20 shops. This means that in order to manipulate the market, a shop must collude with the five or six closest shops, add one mile and include all of those shops. In turn every single one of those shops must collude with every other shop in its geographic area. Collusion must be done on the exponential scale, a level of conspiracy that is highly unlikely and the chances miniscule. Additionally, in the case where any autobody shop colludes and manipulates prices in an insurance claim, the Commissioner has the authority to investigate and work with District Attorney's Offices throughout the State to prosecute for insurance fraud. In fact, the Department has prosecuted claims against autobody shops for insurance fraud in the past. Furthermore, existing anti-trust laws act as a deterrent, and prohibit auto body shops from manipulating the market and engaging in monopolistic activities.</p> <p>Although the Department disagrees that there will be shop collusion and that</p> |
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|  |  | <p>there will be minimal falsification of labor rates, this provision provides the flexibility that the Commenter seeks, and the assurance for challenging possible price manipulation by shops.</p> <p>Further, as stated in the Initial Statement of Reasons, the proposed subdivision prohibits insurers from using a discounted rate negotiated or contracted with members of its Direct Repair Program. Discounted rates or rates from insurers' Direct Repair Program, tend to be lower than the actual market rate since insurers are able to negotiate a lower labor rate in return for promising the shop an increased volume of work will be referred to that DRP shop. The purpose of the Standardized Labor Rate Survey is intended to settle claims for repairs in the <u>non-discounted or open market</u>. Also, since Ins. Code section 758.5 confers upon a claimant the right to select the automotive repair dealer (repair shop), using discounted or negotiated rates from DRP hinders that right, misrepresents the actual market labor rates in a given geographic area and results in unreasonably low insurance settlements. The proposed language is reasonably necessary to address the skewed data that may result</p> |
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|  | <p><b>Comment # 31.5:</b><br/> <i>Geocoding &amp; Permissible Methodologies</i><br/> Proposed Section 2695.81(d)(8) sets forth the one, and only one, acceptable method for surveying a geographic area for determining a local, prevailing labor rate. The CDI method would require survey of the closest six (6) body shops, when measured in a straight-line distance, to the shop making the repair in question. The CDI method would require the survey to use a “geocoding” method selecting the surveyed shops based upon their latitude and longitude.<br/> Such a geocoding method is, to our knowledge, not a commonly-used method in the insurance industry. While staff at the CDI may have concluded that this method is the only one capable of producing consistent and fair survey results, this is certainly not the consensus viewpoint in the insurance industry. Insurers would be open to participating in a presentation where CDI staff could explain its proposed methodology and attempt to educate insurers on why this methodology is feasible. Absent such dialogue, it seems unlikely that the CDI’s geocoding proposal would be broadly adopted.<br/> Insurers urge the CDI to add additional, permissible methodologies that would increase the likelihood that insurers adopt a model survey approach. For instance, the CDI distributed a working draft of an alternate methodology, dated October 1, 2015, which relies upon commonly-understood city, and, when necessary, county, boundaries for the selection</p> | <p>by including discounted or DRP labor rates. The proposed language does not prohibit the use of non-discounted rates of a DRP shop, which will equitably be included in the Standardized Labor Rate Survey. However insurers must report their use of DRP shops in its survey under proposed CCR section 2698.91(d) for transparency purposes.</p> <p><b>Response to Comment # 31.5:</b><br/> Based upon this comment and similar comments, the Final Text of Regulations reflects a change to Geographic Area under subdivision (8)(D). A periphery was added, so that a geographic area may include more than six shops, given that one more mile is added to the sixth closest shop, and all shops within that mile are also included in the geographic area. The Department disagrees that geocoding is not a commonly used method in the insurance industry. Geocoding is used in many aspects in the insurance industry. The Department submitted a proof of concept in its Notice of Amendment to Text, demonstrating the low cost of the geocoding concept in its proposed</p> |
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of a survey area. Insurers would be willing to seek a negotiated resolution of this particular issue with the addition of a methodology substantially similar to the approach in that working draft. Providing multiple defensible methodologies for selecting a geographic survey area, including methods with appropriate sampling techniques, will increase the likelihood of broad adoption, as opposed to only one, new, untested methodology.

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

Further, we are willing to explore the feasibility of insurers being able to voluntarily subscribe to a statewide labor rate survey conducted by a neutral, credible organization. Some have mentioned the possibility of the Bureau of Automotive Repair being involved with such an endeavor, which seems appropriate for consideration.

regulations. This proof of concept was presented to interested parties.

The Department considered and rejected SMSA, census data, or zip codes, and other alternatives as explained in the Department's Initial Statement of Reasons. The Department has made a determination that no reasonable alternative to geocoding that would be more effective in carrying out the purpose of the proposed regulation, or would be more cost effective.

However, since the Standardized Labor Rate Survey, is a recommended survey, insurers are not prohibited from using another methodology in their labor rate surveys, to the extent those surveys result in fair and equitable claims settlements.

The Department rejects a weighted survey response based on shop capacity for the Standardized Labor Rate Survey. First, the Commenter did not suggest an accurate means for the Department to measure shop capacity. Counting the number of vehicle bays, for example does not necessarily mean that a shop with less bays will have less capacity, or a lower rate. Furthermore, there is no accurate way for the Department to count number of bays,

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|  | <p><b>Comment # 31.6:</b><br/> <i>Duration of Surveys</i><br/> Proposed Section 2695.81(d)(1) restricts use of a particular labor rate survey to one year. This time period is too short.<br/> While the CDI attempts to provide a mechanism for use of a survey for a second year of time, the method is based upon broad consumer data unrelated to the price of auto repairs.<br/> Interestingly, and unacceptably, the Proposed Regulations actually prohibit insurers from adjusting survey results downward if the consumer</p> | <p>nor is the Department aware of an accurate measurement of shop capacity. Additionally, when consumers are making a choice regarding auto body repair, “shop capacity” is not a consideration for cost or market value. However, since the Standardized Labor Rate Survey is not mandatory, insurers are free to consider volume in their methodology, or any methodology for their labor rate surveys to the degree insurers can support than this practice results in fair and equitable labor rates in each geographic area surveyed.</p> <p>The Department has reached out to the Bureau of Automotive Repair, who were invited to participate, but chose not to be involved. As noted above in response to other comments, nothing in the proposed regulations prohibits insurers from independently working with another neutral, credible organization to voluntarily subscribe to a statewide labor rate survey.</p> <p><b>Response to Comment # 31.6:</b><br/> The Department disagrees that the one-year time frame is too short. This is especially true if a CPI calculation is applied to extend the useful life of the survey for up to 24 months.</p> |
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|  | <p>price index (CPI) has gone down – abandoning the CDI’s own argument that CPI should be used to adjust labor rate surveys in the second year of use.</p> <p>Insurers believe that a two year period of use for labor rate surveys is reasonable. We request abandonment of the CDI’s upward-bias CPI method for the second year of a survey and, instead, simplify the process by allowing a labor rate survey to be used for two years.</p> <p><b>Comment # 31.7:</b><br/>Anti-Steering Regulations<br/>Synopsis – Suggestions related to the Anti-Steering Regulations.</p> | <p>The CPI is a standard methodology and measure of inflation that can accurately account for inflation for the auto body repair industry. As stated in the Department Economic Impact Analysis, the Department estimates minimal costs to the Insurer. However, based upon this comment and others , the Department has changed the text in its Final Text of Regulation for section 2695.81(d)(1)(C)3.b., which states that “[l]abor rates and prevailing rates shall be increased or <u>decreased</u> commensurately with any increase or <u>decrease</u> in the California CPI-U.” This eliminates any upward-bias the Commenter is concerned about. The Department believes this amendment addresses the concerns raised in this comment.</p> <p><b>Response to Comment # 31.7:</b><br/>These comments are beyond the scope of the proposed regulations, and are addressed in the Anti-Steering Regulations rulemaking.</p> |
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**SUMMARY AND RESPONSE TO COMMENTS RECEIVED  
DURING THE MODIFIED TEXT AVAILABILITY PERIOD OF SEPTEMBER 26, 2016 THROUGH OCTOBER 11, 2016**

| Commenter  | Synopsis or Verbatim Text of Comment  | Department's Response   |
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| <p><b>Eric Dash</b><br/><b>Black Walnut Body Works (PA)</b></p> <p>September 28, 2016<br/><u>Written Comments 18R:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 32.1</b></p> <p><u>Subject:</u> weakening consumer rights</p> <p>Dear Mr. Dave Jones,</p> <p>As an shop owner, 35yrs now, I'm seeing so much Insurance abuse I'm wishing and planning an exit strategy as I can't take the abuse, and profit loosing stupid insurer driven mandates much longer!</p> <p>I ask you to re-consider softening or giving Insurers any more latitude to manipulate claimants than they currently do now. Here in PA we have NO way to facilitate any grievances', as our Insurance Commission is filled with ex insurance executives and was founded by the insurance industry, the ole fox in hen house politics as usual BS!</p> <p>I hope my home state of CA would be more progressive and democratic to the needs of "the People" vs. the corporate dollar.....My reason for writing is to try and help myself as CA often leads the rest of the country so please reconsider the current issues and reverse the trend towards corporate domination over us all!</p> <p>Sincerely Eric Dash<br/>Black Walnut Body Works, Ltd.<br/>1620 Zion Road<br/>Bellefonte, PA 16823</p> | <p><b>Response to Comment # 32.1</b></p> <p>The Department thanks Commenter for the comment. The Department disagrees that the proposed regulations weaken any rights currently enjoyed by consumers. The proposed regulations are intended to add an additional level of consumer protection by providing a standardized labor rate survey as an alternative to the current surveys conducted by insurers, which are the subject of many Department complaint files.</p> <p>Auto repairer trade press reporting on the proposed regulations included discussion about how the amended regulations noticed in the 15 Day Notice removed the requirement for labor rates contained in survey responses to be made public. This requirement, which was never in statute or regulation, was removed in response to commenters who were concerned that posting of the rates from all responding shops might lead to</p> |

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|  |  | <p>collusive behavior by the auto repair shops. The proposed regulation still requires that the labor rate for each geographic area be made public. The Department believes that Commenter may be referring to the removal of this requirement when stating that the proposed regulation would weaken consumer protections. However, this shop-specific labor rate is required, per these proposed regulations, to be made available to the Department in order for the Department to carry out its regulatory functions.</p>                                   |
| <p><b>Danny Discola</b><br/> <b>America's Auto-Body (IL)</b></p> <p>September 28, 2016<br/> <u>Written Comments 18S:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 33.1</b><br/> <u>Subject:</u> SURVEY</p> <p>Please advise what can be done in are state ,Illinois</p> <p>THANK YOU , DANNY</p> <p>AMERICAS AUTO-BODY<br/> 810 LUNT AVE<br/> SCHAUMBURG ILL 60193<br/> 847-985-3760<br/> 847-985-1837 FAX</p> | <p><b>Response to Comment # 33.1</b></p> <p>The Department thanks Commenter for the comment. While the Department cannot assist with regulations in the State of Illinois, the Department suggests that Commenter check to see if Illinois has a labor rate survey statute similar to Ins. Code §758. If so, he can speak to the Illinois Department of Insurance regarding adoption of labor rate survey regulations. If no labor rate survey statute exists in Illinois, Commenter should speak to his representative regarding having a statute enacted.</p> |

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| <p><b>Robert Peterson, Santa Clara University School of Law</b></p> <p>October 6, 2016<br/> <u>Written Comments 18T:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 34.1</b></p> <p>To: Damon Diederich<br/> California Department of Insurance<br/> 300 Capitol Mall, 17<sup>th</sup> Floor<br/> Sacramento, CA 95814<br/> <a href="mailto:Damon.Diederich@insurance.ca.gov">Damon.Diederich@insurance.ca.gov</a></p> <p>From: Robert W. Peterson<br/> Professor of Law<br/> School of Law<br/> Santa Clara University<br/> Santa Clara, CA 65053<br/> <a href="mailto:rpeterson@scu.edu">rpeterson@scu.edu</a></p> <p>Date: October 6, 2016</p> <p>Below, in regular type, are my comments submitted following the April 21, 2016 hearing in Sacramento. I am resubmitting these, as the September 23, 2016 revisions have not remedied the basic defects in the approach taken by the Department in trying to establish fair and equitable labor rates. In <b>Bold type</b> following these comments I have added my new comments on the September 23, 2016 revisions. I hope they are helpful.<br/> <u>April 21, 2016 comments</u></p> <p>Thank you for the opportunity to attend today’s hearing on labor rate surveys.</p> <p>I have a suggestion. Generally speaking, would it be possible to extend the comment time for a few days after hearings? Otherwise, it is almost impossible to digest the comments made by others at the hearing into one’s own comments.</p> | <p><b>Response to Comment # 34.1</b></p> <p>By Commenter’s own admission, the plain-text comments in the first part of his letter are a verbatim recitation of his comment letter of April 22, 2016, found at Comments 15.1-15.6. Therefore, the Department reiterates and reincorporates here by reference its responses to Comments 15.1 – 15.6.</p> |
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Once California decided to allow consumers to choose their own repair shops (a P.P.O. rather than an HMO system), it is obviously necessary to have some kind of cost control. Otherwise shops could quote any rate, and insureds, through their insurers, would be obliged to pay it. The labor rate survey has been the tool of choice to discover the fair market rate for auto repair.

The use of outdated surveys or improperly skewed surveys is a legitimate concern for consumers and regulators. Likewise, the high cost of collision insurance, which is a pass-through of auto repair rates, is a serious concern for consumers. Speaking personally, my collision rate is higher than the rate I pay for my 300/500/100 liability coverage. And my car is a modest one.

The DOI's current attempt to bring certainty and fairness to this difficult issue is, in my opinion, seriously flawed in a number of respects.  
The Rebuttable Presumption

The survey is now voluntary, and if done in the prescribed way, the insurer receives a "rebuttable presumption" that the rate is fair and equitable. Just which kind of rebuttable presumption is left an open question. More to the point, if the presumption is a carrot to encourage insurer's to do surveys in accordance with these regulations, it is thin sustenance. This is because of the way presumptions work in California. Does it shift the burden of going forward with evidence, or does it shift the burden of proof to the DOI? Probably neither.

In California, presumptions are not evidence. Ev. Code sec. 600. Thus, they may not be "weighed."

There are three kinds of presumptions.

Conclusive—Ev. Code sec. 620. It is not one of those.

There are two kinds of rebuttable presumptions. Those that shift the burden of producing evidence (Ev. Code sec. 630) and those that shift the burden of proof (Ev. Code sec. 660).

The regulation does not tell which kind of rebuttable presumption this one would be. If, however, the burden of proof or burden of producing evidence is on the Commissioner, then the presumption does nothing. You can't shift either burden to the party that already has the burden.

If the Commissioner would have the burden of production and proof in a market conduct action, then this presumption is illusory. At most, it bespeaks a favorable attitude towards the insurer who surveys in accordance with the regulation.

I think, too, that it has no effect outside an enforcement action. It only applies to the Commissioner. So it would have no impact on a suit by the insured or, if under an assignment from the insured, the auto repair shop.

#### The Survey Design

The survey design is calculated to get the wrong result (inflated rates) for all of the reasons I outlined in my earlier comments. They also do not define "charge," nor do they define "non-discounted." Without these defined, shops may interpret them as they please.

The proposed regulations require that a geographic area yield rates that are "fair and equitable." They then define geographic area. "The geographic area for an auto body repair shop shall comprise six (6) Responding Qualified Auto Body Repair shops" closest to the shop in question. Since it says "shall," it does not appear to permit a geographic

area larger than the six nearest responding body shops. We heard testimony today from both sides suggesting that this arbitrary limitation will result in unintended consequences. Any survey so narrowly drawn will seldom yield fair and equitable labor rates, as required.

There is an area close to my university that looks like auto body row. Just click on this Google Map link:

<https://www.google.com/maps/search/Auto+Body+Repair+Shops+Near+Santa+Clara+University/@37.3643458,-121.9435833,14.53z>

Note that one of them is called German Auto Body. If they specialize in Mercedes repair and charge \$100/hour, does that mean that Economy Auto Body and Paint can raise its rates to \$100/hour simply because it is located near German Auto Body? If a number of dealerships, with high auto body repair rates, are within a few blocks of Economy Auto Body and Paint, does that mean that Economy can raise its rates to insurers to the dealer rate, even though Economy is not a dealer?

#### Comment # 34.2

You could get six shops within a block or two. Any outside that area simply do not count, even if they are within a 5 minute walk [**This has been partially remedied by the addition of the peripheral area – see additional comments below**]. This is particularly odd because the distances that are considered “unreasonable” in the proposed steering regulations are more than 10 [**now increased to 15 per the September 23, 2016 revisions**] or more than 25 miles, depending on the area. This would suggest that the relevant market is more congruent with these distances.

The regulation requires that the survey results be submitted to the DOI. Again, if I am reading this correctly, the survey for each shop consists of the rates of that shop and the nearest 5 other responding shops. This means that there are as many geographic areas as there are shops.

#### Response to Comment # 34.2

This is responsive to the bolded text only. The six-shop geography size for surveys has been substantially revised. Most shops will now be compared with an average of 20 shops.

Steering is a very different problem from those encountered with labor rate surveys. Hence, there are different solutions. With steering, insurers try to coax consumers to go further than they might otherwise prefer from their homes or offices to a direct repair shop

5,000 shops, 5,000 different geographic areas, and 5,000 surveys to be submitted. Perhaps I am reading this incorrectly.

Much turns on the shop's "posted rate." The insurer may lower a rate to the posted rate, so shops, unless there is some good reason to the contrary, will simply post higher rates, then "discount" them. The discounted rates are not, then, to be included in the survey. The market rate then becomes the posted rate regardless of what repair shops actually charge. Who pays the MSRP on a new car? Likewise, while one may not use a DRP rate in the survey, they may use a "non-discounted posted labor rate" in the survey. Again, a reason to post an inflated rate. In California, shops need not post their rates, and when they do, they need not charge the posted rate.

While one witness said he would lose business if he posted a higher rate, that seems doubtful. Pushing the posted rate by \$15 or \$20 is not likely to make a potential customer turn on his or her heels. Once engaged, the manager can present the lower, discounted, rate. After reviling the insurance company, the shop can then also ask the customer to sign a complaint that they will obligingly send to the DOI.

Although this seems to be an almost intractable issue that has been churning for over 15 years, I would respectfully suggest that these proposed regulations need further work.

(DRP) favored by the insurer, so there is a distance parameter to keep the insurers from imposing long drive times on consumers who wish to take advantage of the lowest possible out-of-pocket costs. With the surveys, a customer may have already chosen a shop close to their home/office and the insurer may be trying to reduce the price paid for the repair of their chosen shop by using the survey as a justification to pay lower repair rates.

Further, comparing the fifteen (15) or twenty five (25) mile parameters and the one (1) mile periphery would not be accurate, as they are two completely different concepts serving different purposes. The fifteen mile and twenty five miles is the entire distance set forth in the proposed Anti-Steering regulations, while the one (1) mile is being added to the distance of the sixth furthest shop in the core area. The sixth furthest shop may be a few miles from the subject shop, or even twenty or more miles from the subject shop.

**Comment # 34.3**

**Comments related to September 23, 2016 Draft**

**The September 23, 2016 draft makes some slight improvements, but not enough to save the proposal from the serious flaws noted above. This is not surprising since the regulatory architecture imposed on this economic debate is asymmetrical. The Department of Insurance can regulate, to some extent, prices, profits and settlement practices of insurance companies. It has no regulatory control over the prices, profits and practices of auto repair shops. BAR, the auto repair shop regulator, does not regulated prices or profits of auto repair shops, nor does it require that rates be posted, nor does it require that a rate, if posted, be the rate charged. One may analogize this to a game of tug-o-war where one team’s regulator limits the number and weight of players, while the other team may engage linebackers and sumo wrestlers in whatever number they please.**

**Response to Comment # 34.3**

The Sept. 23 draft includes substantial and numerous changes based upon two rounds of meetings and negotiations with insurers and auto body shops. While the Department has no regulatory authority over repair shops, it does have an interest in ensuring that claims are paid fairly. If an insurance company is lowballing a shop, they are likely creating an unfair market advantage and putting cost pressures on the auto repair shop industry that will likely lead to lower quality repairs, or forcing the shop to collect this difference from the consumer who paid an insurance premium believing they would have these repairs fully or mostly covered by the insurer. Furthermore, by proposing a consistent methodology the Department believes it will foster an environment where fair and equitable claim settlements can be reached for insurers and consumers. This will also likely allow the shops to

**Comment # 34.4**

**Nor does this regulatory architecture serve the ultimate public interests of getting cars properly repaired at the lowest possible cost to the public. Auto repair shops, quite understandably, want to charge the highest rate the market will bear. Car owners and their insurers want to pay the lowest price the market will bear. These regulations, which are crafted to increase auto repair costs, serve the interest of auto repair shops, but not the interest of the car owning public.**

**Let me turn to some of the specific amendments to the earlier regulations.**

**Comment # 34.5**

**The earlier regulation defined the relevant geographic area to include the actual repair shop and the 5 or 6 nearest shops. This geographic restriction was artificial, easily gamed, and cumbersome. The amended regulations now restrict the geographic area to a circle with the actual repair shop at the center and with a radius extending one mile beyond the furthest of the 5 or 6 nearest responding body**

provide higher quality repairs to consumers over the long run.

**Response to Comment # 34.4**

The Department disagrees that the geographic area as defined in the Text of Regulation was artificial, easily gamed, and cumbersome. This is a false assumption. These regulations are drafted to address goals in the ISOR. The regulations are not designed to raise repair costs, but instead are crafted to stop insurers from using outdated surveys, discounted DRP rates that are not representative of prevailing rates, plus increase transparency, among other things. The goal is not to give consumers the cheapest repair possible, but give them the best repair possible at the lowest reasonable rate. Shops compete on price and there is little incentive from them to artificially raise the price which will harm the shops ability to attract business.

**Response to Comment # 34.5**

The Department disagrees that the system is easily gamed because price is one of the most important aspects of competition in this highly competitive market with large numbers of competitors except in rural areas.

**shops. This radius is calculated to the nearest 5.284 feet from the posted address of the shop.**

**This amendment is a slight improvement (it sometimes will embrace enough auto repair shops to yield a more representative cross-section), but it is arbitrary, cumbersome, and will result in unacceptable outcomes. Let me illustrate with some specific examples.**

**First, although the circle is a beautiful Platonic form, it does not impress city planners or zoning authorities. With the exception of Washington D.C. and Paris, the circle rarely finds its imprint on city planning. Commercial areas which include auto repair shops are more usually found along commercial corridors, so a circle drawn around any auto repair shop will likely embrace only a few shops along the corridor along with residential areas, farmland or forest in the remainder of the circle.**

**A circle drawn around an auto repair shop in Mendocino will include a great deal of ocean to the west and a number of marijuana farms to the east. A circle drawn around the county seats of Markleville or Bridgeport will include ranches and national forest. A circle drawn around any town bordering Lake Tahoe will include a large body of water and a large portion of another state.**

**The Department included in the rulemaking file a Draft Autobody Analyzer (item 69). This example illustrates in part how arbitrary the results can be. The example given in the Analyzer begins with a shop in the small town of Alturas –apparently the only Qualified shop in Alturas. It must be a very good shop because it claims to charge \$90 per hour. Among the 47 Qualified shops within 117.19 miles, there are only two others that claim that high a rate.**

**In order to bring in 6 shops (7 in all because the two furthest shops were at the same distance), one must draw a circle 75.348 miles in radius with the Alturas shop in the center. This brings in the**

These arguments are unsupported. The Department demonstrated the Auto Body Analyzer as a cost-effective, efficient way of conducting the survey. The circle was used to show which shops would be included in given shop's prevailing rate. The same result can be achieved by analyzing straight line distances. Depicting a geographic area as a circle is commonly used to depict many different datasets. Furthermore, the illustration of a geographic area as a circle does not render the geographic area inaccurate.

A geographic area is not hindered by the existence of farms, ranches, forests, or bodies of water, but is instead defined by it. Many small rural towns in California have similar demographics to their neighbors. Markleeville and Bridgeport will likely have more in common with their rural neighbors than large urban centers. This point argues for the definition of a geographic area as the 6 closest shops. In these rural areas it is likely that the number of shops in the periphery will be limited, similar to how the rest of the economy functions in rural areas. The number of shops in the geographic

equally small town of Burney (one shop) and the larger town of Susanville (5 shops). Applying the simple majority rule, the labor rate in the example is \$78. Note, however, that if the two shops with the lowest rates among the original 7 (\$61 and \$68) failed to answer the survey, the survey would have to be expanded to include one shop in Chester (\$71) to total 6 Qualified shops. The simple majority among the remaining Qualified shops would then raise the prevailing rate from \$78 to \$84.

Note, too, that adding one mile to this 75.348 original radius will include no further shops. The next shop is in Chester at 89.76 miles, and the next shop is in Mount Shasta at 92.557 miles. In mountainous areas, the linear distance between shops may also have little bearing on how one may drive to the shops. While the linear distance from the shop in Alturas to the furthest Susanville shop in the sample is 75.348 miles, the driving distance between Alturas and Susanville is 104 miles.

If, however, one expanded the radius to 114.538 miles (52%), it would include the city of Redding, with 15 shops, along with 14 shops in the towns of Chester, Mount Shasta, Weed, Yreka, Quincy and Shasta Lake. Averaging these shops, one gets a rate of \$75.97. Taking the simple majority, one gets a rate of \$76. Using the simple majority among the shops used by the Analyzer, the rate was \$78. Among these, rates range from \$60 (the lowest – Accurate Auto Body in Redding) to \$90 (the subject shop and Mt. View Auto Body in Mount Shasta).

Among these 35 shops, 11 charge under \$70. If these 11 simply declined to answer the survey, the simple majority rate would jump to \$83.

Perhaps the proposed method might work if auto repair shops were evenly distributed in their areas. Let's make the best-case (and false) assumption that auto repair shops are more or less evenly

area is constrained by lower demand given the lower population levels when compared to more urban areas. The proposed regulations do not include shops in other states, but do not preclude consumers from choosing an out-of-state shop. Concentric circles offer drive time analysis, e.g at 5, 10 and 15 minutes and are often used for marketing, consumer analysis or retail sales analysis.

The rate data in the Auto Body Analyzer was randomly generated to show the capabilities of the software and has no bearing on what these shops actually charge. The Department does not know the basis for the rates presented by the commenter as they do not match the Analyzer and the expansion of the radius the commenter chose is arbitrary. The Department believes that the economic markets in Alturas and Redding are not similar and their geographic areas should be separate.

As described in the regulation, insurers should conduct a complete survey and attempt to get responses for all body shops. With the one-mile periphery the

**distributed throughout any square mile of California, then see if this method is a reasonable way to include a more representative sample group.**

**Assume a core radius area of .5 miles and a peripheral radius of 1.5 miles. Using the formula for the area of a circle ( $\text{Pi} \times \text{radius}^2$ ), the core area is .785 square miles and the total area (core plus peripheral) is 7.068 square miles. By adding one mile to the radius, we have increased the sample size by 800%. This should add 40-48 (5 x 8 or 6 x 8) more shops to the original 6. This is certainly a more representative sample.**

**Do the same calculation for the example in the regulation (sec. 2695.81(d)(5)(A). With a core radius of 2.007 miles and a core plus peripheral radius of 3.007 miles, we increase the sample area from 12.65 miles to 28.41 miles. This is now an increase in the sample size of 123%. This would add between 7 and 8 more shops.**

**Now assume a core radius of 4 miles. The same calculation increases the total sample size by 56.25% (between 3 and 4 more shops). A core radius of 5 miles increases the sample size by 44% (between 2 and 3 more shops). A core radius of 10 miles (an area sparsely populated with auto repair shops), increases the sample size by only 21%. Since the area is more sparsely populated with auto shops, the one mile increase in radius will add only a few shops (between 1 and 2 new shops). As noted above, extending the radius of the Analyzer example will include no new shops.**

average number of shops in a geographic area is approximately 21. The goal was not to proportionately expand the geographic area in all cases, but instead to include shops just outside the previously defined geographic area that still represent a reasonable alternative to the subject shop by virtue of their proximity. In some cases the mile periphery could add 20 shops and in some it is just 5 shops. It depends on the unique characteristics of each individual area and as such the calculations presented in the comment are irrelevant. What is most important about the periphery is adding shops that represent a reasonable alternative to the consumer searching for repair shops.

Driving distances and times can vary based on the time of day a person is driving or the route they choose. Straight line distance is representative of what constitutes a reasonable geographic area and the measurement is repeatable and concise.

This comment mischaracterizes the goal of the change made to the proposed regulations and draws false conclusions on artificial labor rate data

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|  | <p><b>Comment # 34.6</b></p> <p><b>Recall that this system yields these odd results based on the unrealistic assumption that auto shops are evenly distributed throughout the sample area. Given that this method in reality will include large areas of ocean, farmland, forest and residences in the sample area, as does the example in the Analyzer, it has even less to recommend it.</b></p> | <p>that was generated simply for the purpose of displaying the capabilities of the software system. Disclaimers were made to workshop participants that the data used were for demonstration purposes and did not reflect actual surveyed rates in any of the areas or for any of the shops. Disclaimers were also prominent on the CDs distributed to interested parties. The goal was not to proportionately expand the geographic area, but instead to include shops just outside the geographic area that still represent a reasonable alternative to the subject shop by virtue of their proximity. As such the one-mile periphery was chosen to add these shops.</p> <p><b>Response to Comment # 34.6</b></p> <p>All areas where people live include large areas of ocean, farmland, forest or residences. That does not detract from the definition of geographic area in the regulation. In no way do shops have to be evenly distributed to form a realistic economic market. For instance, gas stations are concentrated on roads possessing a high volume of traffic, or near highways and not usually near schools or parks. Retail stores are</p> |
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|  | <p><b>Comment # 34.7</b></p> <p><b>As noted in my earlier comments, the proposed survey system invites adverse selection by auto repair shops. Insurers may not require that shops participate as a condition of authorizing repair at a shop, so there is little incentive to participate. Shops charging lower rates may choose not to participate because it is not in their interest to lower the outcome of the survey. Shops that do participate will be incentivized to claim higher rates than those they commonly charge. There are no consequences for claiming a higher rate. By contrast, shops charging higher rates will enthusiastically participate in the survey to keep rates higher. Since the labor rate will trend higher, the labor rate will likewise increase with each iteration of the survey.</b></p> | <p>concentrated in malls. Concentration of similar businesses is driven by demand and zoning laws. There is no assumption that the shops are evenly distributed, and this methodology in no way supposes that shops are located at evenly spaced out intervals.</p> <p><b>Comment # 34.7</b></p> <p>Adverse selection occurs when prices are not cost based and the buyer has the option to purchase from different sellers. If a shop tries to artificially charge a higher rate that is not cost based and competitive with other nearby shops, then they will lose business. Many of the flaws cited for the proposed survey process are just as applicable, if not more so, to the existing environment. Why would low rate shops respond to any survey? Because many shops compete on price, they will want to attract the attention and the business of insurers and customers by responding. Shops seem to want to be included in every survey or at least have the choice of responding to each insurer. In the current environment, not all shops are included. Artificially raising a labor</p> |
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|  |  | <p>rate will severely hinder a shop's ability to attract new or repeat business. Adverse selection, if it exists, exists already and will not be created or worsened by the survey recommended in the proposed regulation. There is an incentive for every shop to respond because they will not automatically get the higher rate, they will get their posted rate. The shops use price to attract consumers. Incentives for competitive pricing among shops will be unchanged by these regulations.</p> <p>It is expected that in each survey iteration the labor rate would increase due to inflation. Over the long-run the cost of labor, land, and supplies will increase and the prevailing rate will need to increase commensurately to cover those costs. Shops will also be contending with a rising minimum wage due to recent actions of the legislature and governor. Minimum wages are a benchmark for many of the skilled labor rates that are factored into repair costs. Shops are unlikely to know which of their competitors have the lowest rates. Claiming that all rate increases are due to the illegal (e.g.</p> |
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|  | <p><b>Comment # 34.8</b></p> <p>The Department implicitly recognized this problem when it proposed new section 2695.81(e)(2)(C). This permits an insurer to use a lower rate if they have three lower invoices for the same type of work within the last 60 days from the shop. While this amendment implicitly recognizes the problem of adverse selection and charge inflation, it is an inadequate solution for a number of reasons.</p> <ol style="list-style-type: none"> <li>1) How is the insurer to come into possession of these three invoices without the power to require their production?</li> <li>2) The invoices must be for “completed” work. This, then, prohibits the most effective way to ferret out gaming the system – the secret shopper. When one is trying to establish unlawful discrimination in housing, it is common to send a test family to rent or buy the property. Under this regulation, an insurer could not send a vehicle for a quote to establish that the rate posted, quoted or entered on the survey is inaccurate.</li> <li>3) The invoice may not be from a direct-repair program. This, as I have argued earlier, artificially skews repair rates upward. Compare <i>Howell v. Hamilton Meats &amp; Provisions</i> (2011) 52 C.4th 541, 129 C.R.3d 325, 257 P.3d 1130 (injured parties may collect only the discounted amount paid by insurers to medical providers and not the usual and customary rate billed by the providers). More importantly, the invoice must be for “non-discounted” repairs. “Non-discounted” is not defined in the regulation,</li> </ol> | <p>collusive) actions of shops artificially gaming the system is untrue and unfounded.</p> <p><b>Response Comment # 34.8</b></p> <p>Adverse selection and inflation were addressed in the preceding response to the commenter.</p> <ol style="list-style-type: none"> <li>1. Auto repair shops may present the insurer paid invoices upon request to support their claim for their stated labor rate. Insurers may also have proof of paid invoices in their files from previous claims involving the shop in question.</li> <li>2. There is no evidence that a Secret shopper is the most effective way to ferret out gaming in the system, especially in this market. The claim is unsubstantiated. Nothing in this regulation prevents insurers from asking several body shops for quotes on a damaged vehicle. Unlawful discrimination is beyond the scope of the regulations.</li> </ol> |
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so it is perfectly plausible for the repair shop to assert that they discounted the invoices for any number of reasons, including that the individual could not afford it or even that the other insurance company with which there were dealing would not authorize their higher rate. Without a workable definition for “non-discounted” this countermeasure against adverse selection is unlikely to work. Any takers for a modest bet that the Alturas shop in the Analyzer example would “discount” their \$90 rate to \$78 or less? If they did lower their rate, this lower rate could not be used in the survey even if that is what an insurer actually pays for the work.

**Comment # 34.9**

Adverse selection also means that the calculation of the rate outlined in 2695.81(d)(5)(A) is easily gamed. For example, the Geographic Area for the example given in 2695.8(d)(5)(F) includes 20 Qualified Auto Body Shops. Assume that there are 10 shops among this group that charge \$64 or \$65. The remaining 10 charge \$70, \$70, \$70, \$70, \$70, \$76, \$77, \$78, \$79 and \$80. As explained above, the 10 shops charging \$64 or \$65 have little or no incentive to respond to the survey – it will reduce the leverage they have with insurers. Assume the remaining 10 shops respond. They are now the only Qualified shops for survey purposes. The prevailing rate for this Geographic Area is now \$76 – the simple majority of those responding. The ten shops that did not respond, by dint of their failure to do so, may now

3. Direct Repair rates include a trade-off of a lower hourly labor rate for an increased business volume and as such do not represent a market rate that non-DRP shops should be held to. All rates for the body shops in the analyzer were fictitious (used for demonstration purposes only) and the commenter provides no source for quoted rates.

The Alturas shop in the Auto Body Analyzer has multiple repair rates listed and none were \$90. As stated in earlier responses, all rates were merely used to show what the software was capable of, not to suggest that they were representative or actual rates.

**Response to Comment # 34.9**

This theoretical example requires that every auto body repair shop knows exactly who is in their geographic area and what they charge, so that they can make a decision about who responds. This scenario is highly unlikely.

**raise their rates by over \$10 and expect insurers to pay that rate. This is so even though 15 of the 20 shops actually charge less than \$76.**

**Recall that in the Department's Analyzer example, the failure of 2 among 7 shops to respond to the survey would raise the prevailing rate for Alturas from \$78 to \$84.**

**This proposal includes not only incentives for some shops not to respond, but also includes no effective method to correct the survey to adjust for the market share served by nonresponsive shops. For this reason alone, the survey results are invalid.**

The Department disagrees with the Commenter, and believes that collusion is highly unlikely. As previously explained, a periphery was added, so that a geographic area may include many more than six shops, with the average number of shops per geographic area of about 20 shops. This means that in order to manipulate the market, a shop must collude with the five or six closest shops, add one mile and include all of those shops. In turn every single one of those shops must collude with every other shop in its geographic area. Collusion must be done on the exponential scale, a level of conspiracy that is highly unlikely and the chances miniscule. Additionally, in the case where any autobody shop colludes and manipulates prices in an insurance claim, the Commissioner has the authority to investigate and work with District Attorney's Offices throughout the State to prosecute for insurance fraud. In fact, the Department has prosecuted claims against autobody shops for insurance fraud in the past. Furthermore, existing anti-trust laws act as a deterrent, and prohibit auto body shops from manipulating the

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|  |  | <p>market and engaging in monopolistic activities.</p> <p>Collusion is not a problem now, nor will it be more likely under this new proposed regulation. The results of the surveys come into play only when the insured has chosen their own repair shop and there is a dispute with the insurer over the repair cost quote. This is expected to be considerably less than the majority of claim situations, so the effect of the surveys on the total repair market is not going to be as pervasive as the commenter seems to imply.</p> <p>Furthermore, there is no incentive for lower charging shops not to respond, as insurers will not raise their posted or stated rates to the prevailing rate. Each shop sets their own rates to cover their own costs and that is how they compete for business. What is suggested by the commenter requires all shops to collude when they compete on price. In the commenter's scenario, the lower charging shops are disadvantaged as their competitors get paid more and they gain no benefit. In fact, the reverse would be more likely. The lower-charging shop (all other things being</p> |
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|  |  | <p>equal) would be more likely to retain the customer's or insurer's future business.</p> <p>As noted, the Auto Body Analyzer's data was generated merely to demonstrate the calculations and methodology. The figures presented by the commenter have no basis in fact and do not even match the numbers in the Analyzer.</p> <p>The Department does not agree that this regulation creates a disincentive to respond.</p> <p>There may be non-respondents in the survey process and this can affect results up or down. To assume that all instances of a shop not responding to a survey is malicious and based on perfect market knowledge, is both unfounded and highly implausible. However, these regulations do not preclude an insurer from using a weighted non-respondent adjustment, to the extent the insurer can show that this practice results in a fair and equitable claims settlement. In doing so, the only impact would be that the</p> |
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|  | <p><b>Comment # 34.10</b><br/> <b>For reasons stated above, the 3-invoices-within-60-days device outlined in 2695.81(e)(2)(C) will not accomplish this correction. It will also be ineffective because the auto repair shop can now use the umbrella of this proposal to raise the rate it actually charges to \$76.</b></p> <p><b>Comment # 34.11</b><br/> <b>Accompanying the April hearing the Department included an excerpt from a report titled <i>Auto Body Labor Rate Surveys, A Statistical Review</i>. The quoted portion of this report suggested that, if a designated area includes “as few as 6 shops,” then if only 3 respond to the survey, this would “give us a 10% tolerance error around the mean under a 10% Coefficient of Variation (CV) and 90% confidence level – this can be considered an acceptable accuracy.” This is erroneous for at least three reasons. First, it does not account for adverse selection as outlined above. Second, it assumes, but does not say, that a designated area of the nearest 6 shops is a fair representation of the relative market for auto repairs. Third, it assumes that those who respond to the survey will accurately state the rate they actually charge.</b></p> | <p>insurer would not have the benefit of the rebuttable presumption. The regulation defines the Core Area as the 6 closest qualified responding shops. This ensures that if a shop doesn’t respond, the area would expand to include the next closest qualified responding shop. There will never be an area with less than 6 shops, so no further adjustment is necessary.</p> <p><b>Response to Comment # 34.10</b><br/> Rates will rise with the rising cost of business, as discussed in earlier responses, not for reasons implied by the commenter.</p> <p><b>Response to Comment # 34.11</b><br/> This report cited by the commenter was the basis for setting the limit as low as 6 shops. Due to comments received, the periphery zone was added so that the average size is approximately 21 shops. The Department still finds it reasonable to define a geographic area as 6 shops and to include any shops that are close enough in distance to present a reasonable alternative to the consumer. Adverse selection, if it exists, exists already and will not be created or worsened by the survey recommended</p> |
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|  | <p><b>Comment # 34.12</b><br/> <b>Perhaps an unintended, or unanticipated, consequence of raising repair rates is an increase in the number of cars that will not be repaired. These vehicles will be “totaled” by their insurer and scrapped for their salvage value. This will leave the owner with both the task of negotiating the price for totaling the vehicle and the burden of acquiring a replacement vehicle with whatever the recovery (less deductible in the event of collision and comprehensive coverage) is from the insurer.</b></p> | <p>in the proposed regulation. Adverse selection usually refers to a small group of people with information others do not have and usually applies to shrinking markets or participants as discussed more fully in the extensive response about adverse selection and inflation.. Applying it so extensively across the industry is unfounded.</p> <p>The second point is not particularly relevant as only 135 of more than 5,000 shops have a geographic area of only 6 shops under the amended regulations, and these are mostly rural areas where 6 shops accurately reflect the geographic area.</p> <p>Third, for a market that competes heavily on price, it is assumed that shops will accurately report.</p> <p><b>Response to Comment # 34.12</b><br/> This is not based on any facts or studies that the Department is aware of. The commenter offers no studies or evidence that this will occur. This practice seems highly unlikely because insurers still have to answer to their customers and policyholders. Not all insurers conduct surveys, and not all</p> |
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**Comment # 34.13**

**Conclusion**

**This tug-o-war has different referees for different sides with different rules. The rules for the insurer side are quite complex and are out of balance. The offer of an ill-defined “presumption” as a carrot may be no more appealing than broccoli.**

**When, for example, health insurers set rates they use much larger and more representative rating zones. The proposed system of concentric circles is unlikely to achieve acceptable results. Likewise, the adverse selection invited by the survey design will skew the result.**

**If adopted, will insurers embrace this system? Insurers are free to use their own surveys and negotiate whatever price the market will bear. 2695.81(i). If they opt to do so, an opportunity to achieve fair, equitable, current, and predictable auto repair rates will have been needlessly lost.**

will do standardized surveys. It is highly unlikely that the insurers conducting a standardized survey will significantly alter business practices, to the detriment of their customers, based on the proposed regulation.

**Response to Comment # 34.13**

The regulation does not require insurers to conduct a standardized survey. Carrots and broccoli may both be acceptable vegetables, if prepared correctly.

The circle is secondary to the straight-line distance between the subject shop and surrounding shops and was mainly meant as an illustration. Adverse selection, if it exists, exists already and will not be created or worsened by the survey recommended in the proposed regulation. Adverse selection may apply to health care where a small group of people (insurers) have information others do not have. Applying this concept so extensively across the auto body industry is unfounded as mentioned in the earlier extensive response which defines how adverse selection might work in the

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|   |   | <p>context of this market and addresses why standardized surveys will not be inflationary or skew results<br/>         Insurers are free to calculate prevailing rates in any way that consistently leads to fair and equitable claim settlements. This proposed regulation will bring more transparency and equity to claims settlements and will offer insurers a guideline for using surveys for more equitable and fair claim settlements.</p> |
| <p><b>David McClune</b><br/> <b>CAA</b></p> <p>October 10, 2016<br/> <u>Written Comments 18U:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 35.1</b></p> <p>October 10, 2016</p> <p>Damon Diederich<br/>         California Department of Insurance<br/>         300 Capitol Mall, 17th Floor Sacramento, CA 95814<br/>         Damon.Diederich@insurance.ca.gov</p> <p>Re: Amended Auto Body Repair Labor Rate Regulation-Support CDI<br/>         Regulation File: REG-2012-00002</p> <p>Dear Mr. Diederich:</p> <p>The California Autobody Association (CAA) is pleased to support the amended Auto Body Repair Labor Rate Surveys Regulation. The CAA is a non-profit trade association comprised of over 1100 individual and independent repair businesses within the collision repair industry.</p> | <p><b>Response to Comment # 35.1</b></p> <p>The Department thanks Commenter for his Comment in support of the proposed Labor Rate Survey regulation, as amended.</p>   |

We appreciate the extensive time and energy the Department has spent working on these regulations with the various stakeholders. The CAA believes that the proposed labor rate surveys regulations will provide clarification and address many of the issues and concerns by standardizing the surveys to effectuate fair and equitable claims settlement for consumers. These regulations will finally enable insurers to conduct consistent and reliable auto body repair labor rate surveys.

**Comment # 35.2**

The CAA requests that the Department reconsider the proposed deletion of section 2698.91

(d) (7) from the original text which require insurers to make public the labor rate reported by each shop that responded to the survey. We believe this section is very important and increases transparency by providing those seeking information to have easy access to the labor rates relied upon by insurers to determine a prevailing auto body rate in a specific geographical. Moreover, without this section there is more room for possible abuse by insurers.

Thank you for your consideration.

[Signed David McClune, Executive Director]

Cc: CAA Executive Committee  
Jack Molodanof, Attorney at Law

**Response to Comment # 35.2**

The requirement that insurers make public the labor rate of each responding shop was deleted due to the concern of other commenters that making such information public would tend to lead to collusion among auto repairers and cause increased repair rates. Although the labor rate of each responding shop will not be public under the proposed regulations, the prevailing rate for each individual shop will be public information. The Department believes that making the prevailing rate public provides sufficient transparency for an individual shop to determine whether they are being paid at the appropriate rate by an insurer. However, this shop-specific labor rate is required, per these proposed regulations, to be made

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|  |  | available to the Department in order for the Department to carry out its regulatory functions. |
| <p><b>Insurance Industry Coalition</b></p> <p>October 11, 2016<br/> <u>Written Comments 18V:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 36.1</b></p> <p>October 11, 2016<br/> Damon Diederich<br/> California Department of Insurance<br/> 300 Capitol Mall, 17th Floor<br/> Sacramento CA 95814<br/> Email: <a href="mailto:Damon.Diederich@insurance.ca.gov">Damon.Diederich@insurance.ca.gov</a></p> <p>RE: Notice of Availability of Revised Text And of Addition to Rulemaking File– Auto Body Repair Labor Rates Surveys - CDI</p> <p>Regulation File: Reg-2012-00002</p> <p>Dear Mr. Diederich:<br/> 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</p> | <p><b>Response to Comment # 36.1</b></p> <p>Thank you.</p>                                     |

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.

**Comment 36.2**

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:

**Response to Comment 36.2**

The Department disagrees with the Commenter. There is sufficient authority in the proposed rulemaking. The cited statutes clearly speak to Labor Rate Surveys and the Department's position is strongly supported by the statutory language cited in the proposed regulations. In addition, the commenter incorrectly states that the Labor Rate Survey described in the proposed regulations are prescriptive – they are not – the proposed regulations are purely, 100% optional for all insurers and in fact all Labor Rate Surveys are purely, 100% optional for all insurers. The commenter is misstating the text of 790.10. 790.10 actually is an extremely broad and explicitly clear

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|  | <p>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;”</p> <p>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</p> <p>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."</p> | <p>statute that supports the Commissioners authority to promulgate these propose regulations. 790.10 states in part “...The commissioner shall...promulgate reasonable rules and regulations...”</p> <p>To be clear, these proposed regulations provide insurers with a <u>voluntary</u> mechanism to support the use of labor rate surveys when settling automobile insurance repair claims in a fair, equitable and reasonable manner, as required by Ins. Code section 790.03(h), in an effort to protect all insurance consumers and claimants who may be financially harmed be the use of unreliable labor rate surveys. Insurers may choose to conduct a Standardized survey, may choose to conduct a survey that does <u>not</u> follow the Standardized survey methods and requirements, or may choose to not conduct any auto body labor rate survey. However, no matter what option the insurer chooses, the insurer is still subject to settling automobile insurance repair claims in a fair, equitable and reasonable manner, as required by Ins. Code section 790.03(h). These proposed regulations merely provide one way an insurer may evidence compliance with Ins. Code section</p> |
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|  |  | <p>790.03(h), and, by doing so, receive the significant benefit of a rebuttable presumption by the Commissioner that the insurer has attempted in good faith to effectuate a fair and equitable labor rate component of a claim settlement, or adjustment of the labor rate component of a written estimate provided by a claimant pursuant to subdivision (f)(3) of Section 2695.8. Given this significant benefit to insurers, it is hoped and expected that many insurers will avail themselves of this mechanism.</p> <p>Further, the proposed regulations from 2007 that the commenter references is completely different from the regulations proposed today. The differences between the 2016 propose regulation and the 2007 proposed regulations are different many crucial aspects.</p> <p>The Department disagrees since the proposed regulations are substantially different from the Regulations from 2006. The 2006 Regulations required insurers to conduct a specific, prescribed, methodology, whereas the proposed regulations are a purely, 100% optional labor rate survey</p> |
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|  | <p><b>Comment 36.3</b></p> <p>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:</p> <p>2006 Department’s Proposed Labor Rate Regulation</p> <ul style="list-style-type: none"> <li>* Declares that the regulations do not require insurers to conduct labor rate surveys</li> <li>* Declares that the regulations do not prevent an insurer from negotiating for a specific rate.</li> <li>* 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.</li> <li>* Prohibits insurers from including any rates in their surveys if the rates are used in any direct repair program.</li> <li>* Requires surveys to be done not less than annually if “survey data used by an insurer is changing on a regular basis.”</li> </ul> | <p>methodology that would result in but a rebuttable presumption of validity. Therefore on the most basic level the proposed regulations are completely different and distinguishable from the 2006 Regulations, and will be approved by the OAL.</p> <p><b>Response to Comment 36.3</b></p> <p>The Department disagrees since the proposed regulations are substantially different from the Regulations from 2006. The 2006 Regulations required insurers to conduct a specific, prescribed, methodology, whereas the proposed regulations are a purely, 100% optional labor rate survey methodology that would result in but a rebuttable presumption of validity. Therefore on the most basic level the proposed regulations are completely different and distinguishable from the 2006 Regulations, and will be approved by the OAL.</p> <p>The points of similarity that the commenter mentions are in fact points that are inconsequential were not in fact the reasons why the 2007 regulations were not successful. Just because the current proposed regulations have some inconsequential similarities to the current proposed</p> |
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|  | <p>2016 Department’s Proposed Labor Rate Regulation</p> <p>*Section 2698.91 (j) “Nothing in this section shall be construed to require an insurer to conduct an auto body repair labor rate survey.”</p> <p>*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.”</p> <p>*Section 2698.91 (g) (6) The labor rates reported by each shop that responded to the survey.</p> <p>*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....”</p> <p>*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.”</p> <p><b>Comment 36.4</b><br/>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.</p> | <p>regulations in no way impugns any significance to the current proposed regulations. The important points of the current regulation, such as method of conducting the labor rate survey and the purely optional methodology being proposed in this labor rate survey are vastly different from the 2007 proposed regulations.</p> <p><b>Response to Comment 36.4</b><br/>The Commenter grossly misstates the laws of jurisprudence and OAL disapprovals in fact are not precedential decisions, especially in light of the fact that the two proposed regulations are vastly different as stated above.</p> |
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**Comment 36.5**

**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

**Response to Comment 36.5**

The Department disagrees that the proposed regulations do not comply with the standards of authority, reference, consistency, clarity and necessity, as outlined in our Responses below.

The Department thanks the Commenter for the summary of Ins. Code § 758(c).

The Department agrees that the Department's authority under Ins. Code § 758 (c) is not unlimited, and thanks the Commenter for the acknowledging the authority the Department does have under this code section.

The Commenter incorrectly states that the Department is setting requirements for labor rate surveys under sections 2695.81 and 2695.82, based solely upon Ins. Code § 758 (c) . On the contrary, as stated in the Initial Statement of Reasons (among other documents), the Department proposes to amend and adopt these sections under the authority granted by California Insurance Code ("Ins. Code") sections 758, 790.10, 12921, and 12926.

The Department disagrees with the Commenter that the reference cited is only limited in scope to Ins. Code §

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|  | <p>[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)</p> <p>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.</p> <p>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).</p> <p>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</p> | <p>758. On the contrary, reference under Gov. Code § 11394(e) requires us to list a reference if the proposed regulations “implement, interprets, or makes specific” a provision of law. The proposed regulations, as stated in the Department’s filing documents does interpret and make specific Ins. Code. § 758, but also interprets and makes specific Ins. Code. § 790.03, as noted above.</p> <p>The Department thanks the Commenter for the summary of Ins. Code § 758(c). As stated, the Standardized Survey is a recommended survey, and conducting a labor rate survey is not mandatory. The first paragraph of section 2695.81 states that the Commissioner is promulgating the proposed regulation to “establish a standardized labor rate survey...<i>if the insurer elects to use a survey.</i>” (Emphasis added). The Department disagrees that the proposed regulations creates a mandatory requirement that insurers “shall conduct” labor surveys, as noted by the Commenter. The commenter misconstrues the plain meaning of the subject proposed language. The Commenter alludes to the Department’s alleged interpretation of</p> |
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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.

the code that is not referenced anywhere in the Department’s filing documents. The proposed regulations do not create a “de facto” requirement for insurers to conduct a labor rate survey. In fact, the definition of survey is defined in the currently effective regulations, Section 2698.91(a). The proposed rulemaking merely makes a non-substantive amendment to the definition of “survey” in current Section 2698.91(a). Therefore, the Department disagrees that this proposed rulemaking changes an insurer’s longstanding obligation from the original effective date of this definition. Insurers have never questioned this definition or how the Department applies this definition. Further, the Commenter’s comment regarding definition of survey being incompatible with common parlance understanding is unsubstantiated. However, the Commenter incorrectly states that the Department is setting requirements for labor rate surveys under sections 2695.81 and 2695.82, based solely upon Ins. Code § 758 (c) . On the contrary, as stated in the Initial Statement of Reasons (among other documents), the Department proposes to

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|  | <p><b>Comment 36.6</b><br/> Relevance of California Supreme Court Ruling in the Association of California Insurance Companies v. Jones Case (2015) 235 Cal.App.4th 1009<br/> 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</p> | <p>amend and adopt these sections under the authority granted by California Insurance Code (“Ins. Code”) sections 758, 790.10, 12921, and 12926.<br/> The Department disagrees with the Commenter. The proposed regulations under section 2698.91 has sufficient authority and necessity.<br/> The Commenters unsubstantiated implication that the proposed voluntary regulations are not really voluntary is not supported by any evidence other than pure conjecture. To suggest that the Department instead of duly following statute and promulgating a regulation that details a voluntary labor rate survey and instead suggest to insurers a preferred method for conducting labor rate surveys would be invite allegations of underground regulations and in fact would be a method of insurance regulation that is not in compliance with the law.<br/> <b>Response to Comment 36.6</b><br/> The <i>Association of California Insurance Companies v. Jones</i> (“ACIC”) case, as cited by the Commenter is not a final decision. The case is pending before the California Supreme Court on appeal, and therefore, does not apply in the</p> |
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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.

interpretation of the proposed regulations. The Department believes that *ACIC* case will be overturned by the Supreme Court, and will not likely impact the proposed regulations. In any case, the proposed regulations are distinguishable from the regulations in the *ACIC* case, since the proposed regulations outline a recommended standardized method of conducting labor rate surveys and interpret a different Ins Code Section, 790.03(h). Again, the Department believes that *ACIC* case will be overturned by the Supreme Court, and will not likely impact the proposed regulations. In any case, the proposed regulations are distinguishable from the regulations in the *ACIC* case, since the proposed regulations outlines a recommended standardized method of conducting labor rate surveys.

The proposed regulations does interpret, implement, or make specific Ins. Code § 790.03, which defines what are unfair or deceptive practices. Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear, includes auto claims based on labor rate surveys. Therefore,

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|  | <p><b>Comment 36.7</b></p> <p>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."</p> <p>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.</p> <p>Absence of reference in Insurance Code section 758</p> <p>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.</p> <p>The Department may adopt a regulation that interprets or implements the provisions of subdivision (c) of section 758, but the Department's</p> | <p>reference was properly cited in our filing documents.</p> <p><b>Response to Comment 36.7</b></p> <p>Insurance Code 758 is a proper reference. The Commenter's interpretation of Ins. Code § 758(c) is incorrect. Although the 758(c) does require that insurers report the "results" of the survey to the Department, the Commenter's interpretation is too narrow. Results of the survey includes the survey responses. When a questionnaire is sent, an auto shop is asked to respond to it. Thus the responses are the result of the survey. Under 758(c) insurers are required to report the "results" of their labor rate surveys to the Department. Results of the survey includes the requirements under subdivision (g)(1) – (g)(5). The Department agrees that the Department's authority under Ins. Code § 758 (c) is not unlimited, and thanks the Commenter for the acknowledging the authority the Department does have under this code section. The Commenter incorrectly states that the Department is setting requirements for labor rate surveys under sections 2695.81 and 2695.82, based solely upon Ins. Code § 758 (c) . On the</p> |
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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.

**Comment 36.8**

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.

contrary, as stated in the Initial Statement of Reasons (among other documents), the Department proposes to amend and adopt these sections under the authority granted by California Insurance Code ("Ins. Code") sections 758, 790.10, 12921, and 12926.

Under 758(c) insurers are required to report the "results" of their labor rate surveys to the Department. Results of the survey includes the requirements under subdivision (g)(1) – (g)(5). The Department is not exceeding the authority of 758. The Department's proposed regulations are purely optional and but illustrate one of many possible methods for complying with the requirement for fair and equitable claims handling in this area of insurance. To claim that the Department is exceeding the authority of 758 would be the equivalent of muting and improperly silencing the Department from communicating one possible avenue for proper claims handling.

**Response to Comment 36.8**

Again, 790.03 is a proper reference because the *ACIC v. Jones* decision cited by the commenter is not a final decision and is up on appeal before the Supreme Court. The *Association of California Insurance Companies v. Jones*

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|  | <p>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.</p> <p>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.</p> <p>The Court of Appeal rejected the Commissioner's argument. The first case on which the Commissioner relied, <i>Ford Dealers Assn. v. Department of Motor Vehicles</i> (1982) 32 Cal.3d 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 <i>Ford Dealers</i>; it did not do so in the UIPA." (Jones at p. 1033)</p> <p>The second case relied on by the Commissioner, <i>Credit Ins. Gen. Agents Assn. v. Payne</i> (1976) 16 Cal.3d 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</p> | <p>("ACIC") case, as cited by the Commenter is not a final decision. The case is pending before the California Supreme Court on appeal, and therefore, does not apply in the interpretation of the proposed regulations. The Department believes that ACIC case will be overturned by the Supreme Court, and will not likely impact the proposed regulations. In any case, the proposed regulations are distinguishable from the regulations in the ACIC case, since the proposed regulations outline a recommended standardized method of conducting labor rate surveys and interpret a different Ins Code Section, 790.03(h). Again, the Department believes that ACIC case will be overturned by the Supreme Court, and will not likely impact the proposed regulations. In any case, the proposed regulations are distinguishable from the regulations in the ACIC case, since the proposed regulations outlines a recommended standardized method of conducting labor rate surveys.</p> <p>The Commenters cited <i>Ford Dealers</i> case is not germane to the current proposed regulations as there are no other agencies proposed regulations to</p> |
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|  | <p>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)</p> <p>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)</p> <p>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.</p> <p><b>Comment 36.9</b><br/>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</p> | <p>juxtapose against as in the <i>Ford Dealers</i> matter. Again the citation to the <i>Payne</i> case only supports the Commissioner's authority to promulgate regulations. The commenter's statement regarding the interplay between the <i>Payne</i> case and the <i>ACIC vs. Jones</i> matter is illusory as the <i>Jones</i> case is on appeal to the Supreme Court and thus not a final decision which and thus has no weight in consideration of this proposed regulation.</p> <p>The proposed regulations does interpret, implement, or make specific Ins. Code § 790.03, which defines what are unfair or deceptive practices. Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear, includes auto claims based on labor rate surveys. Therefore, reference was properly cited in our filing documents.</p> <p><b>Response to Comment 36.9</b><br/>The commenter fails to provide a cogent or valid reason why waiting for a Supreme Court decision that may have many possible outcomes is a reasonable justification for delaying proper promulgation of a regulation to</p> |
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|  | <p>Insurance Practices Act until the Department has the benefit of the Supreme Court's ruling in the Jones case.</p> <p><b>Comment 36.10</b></p> <p>III. Consistency - The September 26, 2016, revisions to sections 2695.81, 2695.82 and 2698.91 fail to comply with the consistency standard.</p> <p>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."</p> <p>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.</p> <p>Inconsistent with Association of California Insurance Companies v. Jones<br/>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</p> | <p>further the fair and equitable handling of claims.</p> <p><b>Response to Comment 36.10</b></p> <p>The Department thanks the Commenter for its summary of the consistency standard. The Department disagrees with the Commenter, the proposed regulations do not fail to comply with the consistency standard.</p> <p>The Department disagrees with the Commenter; the proposed regulations do not fail to comply with the consistency standard.</p> <p>The <i>Association of California Insurance Companies v. Jones</i> ("ACIC") case, as cited by the Commenter is not a final decision. The case is pending before the California Supreme Court on appeal, and therefore, does not apply in the interpretation of the proposed regulations. The Department believes that ACIC case will be overturned by the Supreme Court, and will not likely impact the proposed regulations. In any case, the proposed regulations are distinguishable from the regulations in the ACIC case, since the proposed regulations outline a recommended standardized method of conducting</p> |
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|  | <p>until the Department has the benefit of the Supreme Court's ruling in the Jones case.</p> <p>Inconsistent with Insurance Code section 790.05<br/>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.</p> <p>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.</p> <p>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.</p> <p>In contrast to the statutorily created rebuttable presumption of broker status, there is no statute that creates a rebuttable presumption that an</p> | <p>labor rate surveys and interpret a different Ins Code Section, 790.03(h)<br/>The Department disagrees with the Commenter; there is no issue of consistency with Ins. Code § 790.05 or the Administrative Procedures Act (“APA”), which is codified in Gov. Code § 11500 <i>et seq.</i></p> <p>The rebuttable presumption applies in all relevant regulatory and enforcement actions where it is allowed and not contradicted by the law. The rebuttable presumption does not violate any known statute, including the APA.</p> <p>The APA only applies in an enforcement action. To commence an enforcement action, when the Commissioner has reason to believe that a person has engaged in any unfair method of competition, or any unfair or deceptive act or practice under Ins. Code § 790.05, after issuing an order to show cause and a notice of hearing, an Administrative Law Judge (“ALJ”) conducts a hearing in accordance with the APA. However, the Hearing is still held before the Insurance Commissioner, and the decision administered by the ALJ is only a</p> |
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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.

"Proposed Decision." Under the APA, the final decision is with the Insurance Commissioner, who is free to either fully adopt the ALJ's Proposed Decision, adopt with changes, or reject the Proposed Decision in its entirety and order something completely different. *Or* under Gov't Code 11517, the Commissioner at his sole discretion could have from the outset heard the entire matter himself and dispense with an ALJ (except in an advisory role as to APA issues), thus making both factual findings and applications of the law him/herself - this choice is the sole discretion of the Commissioner - the ALJ does not have any such discretion.

The Commenter's statement that the rebuttable presumption can only be directed by the Legislature during an administrative hearing is fundamentally false. When an enforcement action is delegated to an ALJ for a Proposed Decision, the ALJ is required to develop a Proposed Decision based upon the APA, the Insurance Code, and any regulations that relate to the allegations charged and the administrative process being conducted. Since regulations are

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|  | <p><b>Comment 36.11</b><br/> IV. Clarity - The September 26, 2016, proposed revisions to sections 2695.81, 2695.82, and 2698.91 fail to comply with the clarity standard.</p> <p>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."</p> <p>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.</p> | <p>passed by Departments under the rulemaking process, the Legislature is not involved in "directing" the rebuttable presumption. Where an ALJ is required to apply the provisions of any relevant regulation at a Hearing, ALJs will apply the rebuttable presumption in the proposed regulations, and will not violate the APA or any other statute.</p> <p><b>Response to Comment 36.11</b><br/> The Department disagrees that the proposed amendments fail to comply with the APA clarity standard. The Department thanks Commenters for their summary of the APA clarity standard, and for acknowledging that some of the proposed amendments do, in fact, add clarity.</p> <p>The Department disagrees that the proposed amendments are difficult to understand, or will cause compliance issues for insurers.</p> |
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|  | <p><b>Comment 36.12</b><br/> Section 2695.81 Subdivisions (d) (8) (4) (C), (E), and (F) - Geocoding Core Area and Periphery</p> <p>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.</p> | <p><b>Response to Comment 36.12</b><br/> The Department disputes that the regulation language regarding geocoding lacks clarity.</p> <p>Commenters assert that the proposed regulation does not “provide the clarity needed for persons directly affected by the regulation.” The Department disagrees that <i>any</i> persons are directly affected by the proposed regulation; the labor rate survey in the proposed regulation is not required to be done by any insurer or person. The survey may be completed voluntarily; any insurer properly completing and using the survey receives the benefit of a rebuttable presumption that claims adjusted using the survey rates have been adjusted fairly and equitably, as required by the Fair Claims Settlement Practices Regulations.</p> <p>While the language of the proposed regulation is necessarily technical, given the nature of the subject matter, it should be easily comprehensible to any person accustomed to designing and conducting labor rate surveys, particularly when combined with the demonstration tool which the</p> |
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|  |  | <p>Department has made freely available to all requestors.</p> <p>Geocoding shops in a rural area works exactly the same as geocoding shops which are in an urban area. The proposed regulation does not create separate processes for urban versus rural areas.</p> <p>Commenters state that the proposed regulation lacks clarity with respect to compliance guidance for insurers using other survey methodologies; this comment is outside the scope of the proposed regulation. This comment does not pertain specifically to the amended text and, therefore, is not timely because it was received after the 45 Day comment period closed. The proposed regulation creates an optional standardized survey; an insurer that completes the survey and uses it according to the regulation is afforded a rebuttable presumption that a claim settled in accordance with labor rates from the survey has been settled fairly and equitably. The proposed regulation has no effect on insurers electing not to complete the standardized survey; the proposed regulation allows insurers to</p> |
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|  | <p><b>Comment 36.13</b></p> <p>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</p> | <p>continue using whatever survey method they choose, so long as the survey produces a fair and equitable result. Therefore, compliance guidance for insurers not using the standard survey is irrelevant to the proposed regulation; absence of such guidance cannot present a clarity problem.</p> <p><b>Response to Comment 36.13</b></p> <p>These comments do not pertain specifically to the amended text and, therefore, are not timely because they were received after the 45 Day comment period closed. Commenters are incorrect in assuming that geocoding is the only permissible survey methodology under the proposed regulation; as discussed above, insurers are still free under the proposed regulations to conduct surveys in any manner they wish, but will not be entitled to any presumption.</p> <p>Commenters fail to state what “unsuccessful” means in context of the proposed regulations, or why the proposed regulations will be “unsuccessful” if geocoding is the only methodology entitling the insurer to a rebuttable presumption. Insurers’ use of other survey methods does not affect</p> |
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|  |  | <p>the “success” of the proposed regulation.</p> <p>Commenters assert that geocoding will lead to inflated auto body repair rates and promote collusion, leading to increased cost to insurers and consumers. However, Commenters fail to state the assumptions underlying their assertions and fail to identify the mechanism by which the proposed regulation is supposed to have the unsavory effect described. Current labor rate surveys performed by insurers take the rate responses from repairers at face value without independent verification; the standardized survey is no more susceptible to inflated rates than current insurer practices. Market forces dictate an upper limit to what body shops can charge and the proposed regulation incorporates a cost control mechanism whereby insurers may present evidence that a repairer has charged a lower rate than that indicated on the survey, and thereby pay that lower rate. Commenters have complained bitterly to the Department that auto repairers collude to inflate prices, but have yet to produce any evidence showing this</p> |
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|  |  | <p>allegation to be true. Collusion has never been a problem in the past and is unlikely to become a problem due to the proposed regulation.</p> <p>As previously explained, a periphery was added, so that a geographic area may include many more than six shops, with the average number of shops per geographic area of about 20 shops. This means that in order to manipulate the market, a shop must collude with the five or six closest shops, add one mile and include all of those shops. In turn every single one of those shops must collude with every other shop in its geographic area. Collusion must be done on the exponential scale, a level of conspiracy that is highly unlikely and the chances miniscule.</p> <p>Additionally, in the case where any autobody shop colludes and manipulates prices in an insurance claim, the Commissioner has the authority to investigate and work with District Attorney's Offices throughout the State to prosecute for insurance fraud. In fact, the Department has prosecuted claims against autobody shops for insurance fraud in the past. Furthermore, existing anti-trust laws act as a deterrent, and prohibit auto</p> |
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|  |  | <p>body shops from manipulating the market and engaging in monopolistic activities.</p> <p>To the extent that shops artificially inflate their rates when responding to a survey, or collude to raise prices, such conduct is potentially a form of fraud against the insurer; the Commissioner can, and does prosecute repairers who defraud insurers.</p> <p>Insurers are free to adopt or ignore the proposed regulation as they will; their election does not concern the Department. There is no reason an insurer should be entitled to a presumption that their survey produces a fair result if the Department has not had the ability to vet the survey methodology and its results. Commenters insist that insurers conducting other types of rate surveys will be subject to increased scrutiny, which is not true. Commenters attempt to conflate lack of compliance guidance with a lack of clarity in the regulation; in truth, the lack of compliance guidance reflects the current status quo.</p> |
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|  | <p><b>Comment 36.14</b><br/> Sections 2695.81 Subdivisions (d) (8) (A) (3) (a-f) and 2695.82 Question 3 (g) and (h) - Types of Labor<br/> 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?</p> <p><b>Comment 36.15</b><br/> Section 2695.81 Subdivisions (e) (2) (C) - Adjustment of Labor Rates<br/> 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</p> | <p>The Department rejects Commenters’ suggestion that the Department adopt a “best practices” standard with respect to labor rate surveys. Such a standard would likely fail the clarity standard as it would not articulate an actionable rule.</p> <p><b>Response to Comment 36.14</b><br/> A shop is not required to report all types of labor rates, and should omit labor rates for types of work they do not perform. In the event that an insurer needs to determine a rate for shops dealing in “exotic” or uncommon materials, the insurer would find the 6 closest qualified shops that responded with rates for that particular type of labor, and then add a 1 mile periphery to that core area.</p> <p><b>Response to Comment 36.15</b><br/> Section (e)(2)(C) was added to the proposed regulation at the specific request of insurers, who requested a mechanism permitting them to pay a lower rate if they could prove that a repairer was charging a lower rate than reported on the labor rate survey. An insurer seeking to establish a lower rate may ask the auto repairer for recent invoices for this purpose. If the repairer is unwilling to provide</p> |
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|  | <p>twice in the past? What if the auto body shop is unwilling to provide previous invoices?</p> <p><b>Comment 36.16</b><br/>Other Additional Questions:<br/>1) What happens if not every auto body shop responds to each type of labor in the survey, how would insurers comply?</p> <p>2) How many times is an insurer required to rewrite its estimates?</p> | <p>invoices, the insurer should attempt to obtain them from other sources.</p> <p>Repair invoices are the only fair and equitable means to document the rate that a repairer charges; it is unreasonable to alter the rate paid to a shop using anything other than <i>bona fide</i> invoices showing payment for work actually done.</p> <p><b>Comment 36.16</b></p> <p>1) There is no requirement that a survey respondent submit rates for each labor category; repairers should not list rates for labor types they do not perform. Insurer compliance is not affected by survey responses; the geocoding methodology only accounts for the six closest shops, plus periphery, that have submitted a rate for the labor type required by the survey user.</p> <p>2) There is nothing in the regulation requiring rewriting of estimates.</p> <p>3) Google maps and similar GPS tools can easily identify the closest shop.</p> |
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|  | <p>3) If an inspection is performed at a residence, how is the insurer to find a closest shop under geocoding in that instance?</p> <p>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?</p> <p><b>Comment 36.17</b><br/> V. Necessity – The September 26, 2016, proposed revisions to sections 2695.81, 2695.82, 2698.91 fail to comply with the necessity standard.</p> <p>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." Title 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.</p> <p>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.</p> | <p>4) Commenters do not identify the "challenges with the re-estimation process" or explain how this purported issue is related to the proposed regulation. Nothing in the proposed regulation requires supplemental estimates.</p> <p><b>Response to Comment 36.17</b><br/> The Department disagrees that the proposed regulations fail to comply with the necessity standard. The filing documents includes a statement of the specific purpose of each subdivision of the in the proposed rulemaking, and information explaining why each provision of the regulation is required to carry out the described purpose. The Commenter fails to provide the relevant portion of CCR title 1 section 10(b), which states that when the explanation is based upon "policies, conclusions, speculation, or conjecture, the rulemaking record must include ...supporting facts, studies, expert opinion or other information." Here, the rulemaking file contains significant supporting facts, studies and other information that support the necessity of this rulemaking.</p> |
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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).

Commenters reference the 45 complaints added to the rulemaking file in the Notice of Availability of Amended Text, but conveniently fail to mention the hundreds of complaints included in the 45 Day rulemaking file. The Department has produced substantial evidence sufficient to support the proposed regulation.

Many consumers are not aware that insurers conduct labor rate surveys, the consumer just assumes that they will be made whole for their loss. That disconnect further demonstrates the need for these regulations.

The issue of whether body shops are consumers is not a substantive issue in the proposed regulations. However, auto body shops are stakeholders who may be financially harmed by the use of unreliable labor rate surveys and, in many cases, pass this financial harm caused by insurers on to their customers, who are forced to pay the out-of-pocket cost difference between labor rates based upon unreliable surveys. Also, in some cases, shops may not receive sufficient labor rate reimbursements to cover costs

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|  |  | <p>necessary to ensure that the repair be made in a workmanlike and safe manner thus subjecting the customer to the risk of future harm.</p> <p>Commenters incorrectly cite B&amp;P 9884.9(d) in a misplaced attempt to discredit auto body shops that have brought complaints against Commenters' constituent insurers. B&amp;P 9884.9(d) merely stands for the proposition that, while the consumer may designate another person to authorize repairs in excess of the estimate quote, such designee cannot be the repair dealer providing services, or a representative of such dealer. Nothing in Commenters' vague assertion suggests that this has taken place in any of the complaints included in the rulemaking file; the complaints in the file address insurers not paying for work actually done. In contrast, B&amp;P 9884.9(d) would only apply when a repairer, of its own accord, authorizes additional repairs to a vehicle it is repairing.</p> <p>Despite Commenters' attempts to ignore, minimize, or wrongly discredit</p> |
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|  | <p><b>Comment 36.18</b><br/> Section 2698.91 – Reporting Auto Body Repair Labor Rate Surveys<br/> 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.</p> | <p>the hundreds of consumer complaints included in the rulemaking file, these complaints alone constitute sufficient evidence to support the proposed regulation.</p> <p>In addition, Commenters do not even attempt to address the additional types of evidence contained in the rulemaking file. The proposed regulations are supported by studies and reports, economic analysis, and lawsuits involving labor rate surveys, among others.</p> <p><b>Response to Comment 36.18</b><br/> Commenters comment is inapplicable to the proposed regulation, as reporting of labor rate survey results is already required by statute. The regulations specify physical address, as opposed to address, adding clarity to the statutory language and specificity that is necessary to determine where the shop is located. They also provide additional information relating to the standardized survey and add a date the survey was completed so that the Department can ensure old surveys are not being used to settle claims.</p> |
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|  |  | <p>The information reporting requirements of the proposed regulation impose a burden no more onerous than current statutory reporting requirements and are reasonably necessary to allow the Department to determine whether the survey was done in accordance with the parameters of the standardized survey methodology. The Department notes that the “requirement” for a public and private report was added at the request of Commenters, who alleged that making the rates of responding shops public would lead to collusion. In response to Commenters’ overamplified concerns about collusion, the Department amended the reporting requirement such that survey rates would be private information and the prevailing rate for each shop would be public; both data points are necessary for the Department to determine whether the survey was done correctly.</p> <p>Commenters’ complaints about the “onerous” reporting requirements conveniently overlook the fact that no insurer is required to complete a standardized labor rate survey; insurers correctly completing the survey receive</p> |
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|  | <p><b>Comment 36.19</b><br/> Section 2698.91(g) – Reporting Auto Body Repair Labor Rate Surveys<br/> 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 statute 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.</p> | <p>the benefit of the rebuttable presumption. Names of shops are required of any survey to verify that the data reported is correct.</p> <p><b>Response to Comment 36.19</b><br/> Commenters fail to state which portion of the proposed regulation allegedly requires mailing of a written survey. Section 2698.91(g) deals with the reporting of nonpublic information to the Department. There is nothing in that section that prevents requires the insurer to mail a labor rate survey. Furthermore, Section 2695.81(d)(9) of the proposed regulation explicitly provides for electronic transmission of survey questionnaires:<br/> (A) The survey questionnaire shall be mailed to the auto body repair shops in accordance with Insurance Code Section 38, or in the case of electronic transmission of the survey, in accordance with Insurance Code Section 38.5.<br/> (B) Auto body repair shops may be allowed to respond electronically, e.g., by email, by reporting to a phone interview or by entering information into a secure web site; however, an auto body repair shop must be allowed</p> |
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|  |  | <p>to respond by hard copy via U.S. mail or courier if the auto body repair shop does not consent to electronic receipt or submission. If the auto body repair shop responds to the survey electronically, the insurer's electronic survey system must allow the shop to print a copy of the completed survey which contains all the information it submitted.</p> <p>As can be seen from the regulation sections cited above, there is no requirement that insurers conduct any survey by mail.</p> <p>There is strong necessity for the requirement that insurers identify shops in their Direct Repair Program that have responded to the survey; the standardized survey excludes DRP rates, which arise from a contractual relationship between insurer and DRP shop, in favor of market rates. It is necessary for insurers to identify responding DRP shops so that the Department may verify that any responding DRP shops responded with their posted rates and do not artificially skew the prevailing rate lower by reporting contractual DRP rates. This</p> |
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|  | <p><b>Comment 36.20</b><br/> Policy and Cost Implications<br/> 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.</p> | <p>is a past practice of insurers that the Department is attempting to correct.<br/> <b>Response to Comment 36.20</b><br/> The Department’s ultimate goal with these proposed regulation is to protect consumers and the public. The Department continues to consider and strive to reduce undue costs or unfair results for insurers with these proposed regulations. What has been occurring in the past is that insurers have been using outdated surveys, using DRP (discounted) rates in their surveys rather than body shops’ market or posted rates, plus many other methods to suppress repair shop labor rates unfairly. These practices have resulted in many shops not being able to keep up with training, technology or rising wages and adequately recover costs with their labor rates and insurers’ practices have generated numerous complaints. The cost of using these surveys has been estimated in the ISOR’s Economic Impact Assessment (EIA) as costing only 20 cents per policyholder (\$1.15 million) in 2016. The Department assumed that in the first year of the regulation’s effectiveness that only a third of the 14 insurers already conducting surveys</p> |
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|  | <p><b>Comment 36.21</b></p> <p>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.</p> | <p>would switch to the standardized survey or test the survey results against their existing methods to gauge feasibility.</p> <p><b>Response to Comment 36.21</b></p> <p>Commenters continue to speculate and offer no evidence to support the claim that the survey methodology would result in collusion. However, as described above, the Department has made changes in the survey reporting requirements in an attempt to address Commenters’ unsubstantiated concerns. The Department evaluated geographic boundaries carefully and considered many alternatives. In Los Angeles county many shops have more than 20 shops in their geographic area. There is a benefit to having a standard geographic definition that applies to the whole state. With this type of highly competitive market and with so many competitors (auto body shops), the auto body repair market is close to what is known as a perfectly competitive market. In this situation, shops compete primarily on prices. Shops will not have an incentive to raise prices arbitrarily because prices are one of the most fundamental ways they attract</p> |
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|  |  | <p>customers. Collusion is highly unlikely under the proposed regulations. As previously explained, a periphery was added, so that a geographic area may include many more than six shops, with the average number of shops per geographic area of about 20 shops. This means that in order to manipulate the market, a shop must collude with the five or six closest shops, add one mile and include all of those shops. In turn every single one of those shops must collude with every other shop in its geographic area. Collusion must be done on the exponential scale, a level of conspiracy that is highly unlikely and the chances miniscule. Additionally, in the case where any autobody shop colludes and manipulates prices in an insurance claim, the Commissioner has the authority to investigate and work with District Attorney's Offices throughout the State to prosecute for insurance fraud. In fact, the Department has prosecuted claims against autobody shops for insurance fraud in the past. Furthermore, existing anti-trust laws act as a deterrent, and prohibit auto body shops from manipulating the</p> |
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|  | <p><b>Comment 36.22</b></p> <p>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.</p> | <p>market and engaging in monopolistic activities.</p> <p><b>Response to Comment 36.22</b></p> <p>As stated in the ISOR’s EIA, “the Department projects that for the 27.9 million covered vehicles in California, insurers will incur \$1.15 million in direct costs (half of the annual total in Table 2) in the first year that the regulation is in effect.” The Department has since produced the geocoding tool for the insurance industry and has made templates of the software and Excel output files available. This has gone a long way to keeping the development costs in check. This also proves the standardized survey can be done for very little cost over existing survey costs. The estimate prepared by the Department is based on many studies and experience with geocoding software vendors. The commenter provides no evidence to support their disagreement.</p> |
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**Comment 36.23**

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.

**Response to Comment 36.23**

The Department is required to account for the projected cost of the proposed regulation. As stated in the ISOR's EIA, "there are expected to be some additional administrative costs to insurers who conduct a more rigorous, better defined Standardized Labor Rate Survey in compliance with the proposed regulation. These additional costs could include mailing or emailing more surveys, an increase in survey-related follow up costs, additional software, and legal costs related to compliance. The total cost of conducting a survey was estimated at \$41,727. This estimate assumes a simple majority response rate (51 % of 5,397 auto body shops) and would cost \$15.16 per usable response." The EIA further stated, "The Department assumes that on average, these insurance companies already spend 90% of what a standardized survey would cost and would only incur extra costs equal to 10% of the survey total. For each of these companies the incremental cost increase due to conducting a Standardized Labor Rate Survey would be \$4,173. Based on the

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|  |  | <p>assumptions above, insurers will incur about \$19,600 (<math>\\$4,173 \times 4.7 = \\$19,613</math>) in administrative costs to conduct the Standardized Labor Rate Survey.” These are the costs stated in the EIA for implementation, which bring the total to \$1.17 million in the first year. The higher claims costs were also included in the EIA at 20 cents per policyholder (\$1.15 million). The Department stands behind its estimate in the EIA.</p> <p>The results of the surveys come into play only when the insured has chosen their own repair shop and there is a dispute with the insurer over the repair cost quote. This is expected to be considerably less than the majority of claim situations, so the effect of the surveys on the total repair market is not going to be as pervasive as the commenter seems to imply. The figures cited by the commenter provide no context as to the age of the survey being replaced, the geographic area covered, or even the size of the unnamed company when applying its results to the entire industry.</p> <p>This example is not completely elaborated and is misleading because of the omissions. Perhaps the insurer had</p> |
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|  | <p><b>Comment 36.24</b></p> <p>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</p> | <p>not conducted a survey in several years and thus had not compensated the shops through rates that were reflective of increased wages, material costs, and rents. Again, the EIA has very reasonable, carefully vetted assumptions of costs the insurance industry will experience with the proposed regulations which offer insurers a voluntary method for conducting surveys.</p> <p>It is expected that in each survey cycle labor rates would increase due to inflation. Moreover, in the long-run the cost of labor, land, rents, and supplies will increase and the prevailing rate will need to increase commensurately to cover those costs. Shops will also be contending with a rising minimum wage due to recent actions of the legislature and governor. Minimum wages are a benchmark for many of the skilled labor rates that are factored into repair costs.</p> <p><b>Response to Comment 36.24</b></p> <p>The posted rate on the back of a hotel door is an improper analogy to the posted rate in an auto body shop. California Civ. Code § 1863 requires</p> |
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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.

all hotels to post the nightly rate in every room, and it prohibits hotels from charging more than the posted price. Thus, hotels have an incentive to post the highest possible “walk-in price” that they could charge given when demand for the rooms in the area is the highest because they are prohibited from charging anything more. The Commenter may benefit from reviewing California Civ. Code § 1863, or this article:  
<http://mentalfloss.com/article/74828/why-are-hotel-rack-rates-so-exorbitantly-high> that explains posted rates for hotels in California.  
Auto body repair shops, on the other hand, have every incentive to post the market rate, as noted by auto body shops during the public hearings. California Civ. Code § 1863 does not apply to auto body repair shops, nor does a comparable rule apply. Consumers, concerned about the price of repairs will look at the posted rate and will be deterred by a posted rate that is too high above the market price, and go to another shop. In fact, the posted rate does often reflect the market price, for fear of a lost consumer to a competitor.

**Response to Comment 36.25**

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

1 "SURVEYS." National AutoBody Research. N.p., n.d. Web. 24 Nov.

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.

**Response to Comment 36.25**

National Auto Body Research (NABR) is a private, for profit company who sells consulting services to the auto body repair and insurance industries. Their motive is not representative of the Department’s. Other of NABR’s comments are discussed separately since it also responded with comments during the 45-day and 15-day comment periods. The comment regarding “inappropriate labor rate comparisons” is unclear. However, as stated above, body shop collusion is illegal. Further, the amendments to these proposed regulations [2695.81(e)(2)(C)] permit insurers to adjust a shop’s estimate if the insurer has evidence that the shop actually charges a lower rate than the rate being charged for the claim in question.

Commenters’ comment regarding use of technological innovations is not relevant to the proposed regulation, which does not contain any mandates regarding the non/adoption of claims technologies. Using technological improvements such as apps or photo

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|  | <p><b>Response to Comment 36.26</b></p> <p>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 differently, the effectuation of the proposed labor rate</p> | <p>estimates is not discouraged by these regulations. There is no barrier to innovation established by this voluntary survey process.</p> <p>The comment regarding how insurers may use an app to send estimates or photos is unrelated to auto body labor rate surveys and these proposed regulations. Regardless of the means used to produce an estimate, technological, or otherwise, an app cannot repair your vehicle. A body shop will always be required to repair a vehicle and the insurer will always be expected to adjust the claim fairly and equitably based on prevailing repair rates. As stated previously, nothing the proposed regulation affects the adoption of claims technology by the insurer.</p> <p><b>Response to Comment 36.26</b></p> <p>The survey offers an acceptable methodology to achieve fair and equitable claim settlements, which is an improvement from surveys that include outdated information and/or DRP rates that do not reflect actual market rates. Nothing requires insurers to conduct a</p> |
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|  | <p>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.</p> | <p>Standardized Survey. Furthermore, a properly conducted survey that represents a real market rate will likely spur innovation and training in the auto body repair industry, leading to timelier and higher quality repairs, a benefit to consumers.</p> <p>It is the insurance consuming public that the Department aims to protect with the proposed regulation. By providing a mechanism to ensure that claims are adjusted in a fair and equitable manner, the Department is protecting consumers from difficulties in the claims process, being forced to pay out of pocket for repairs, and shoddy workmanship that tends to arise from low labor rates.</p> <p>The Department agrees that the Department's role is not to interfere in the free market system. However, the proposed regulations do not interfere in the free market system. Further, the proposed regulations are not intended to financially benefit auto body repair shops. As noted above, the stated purpose of the regulations (as noted in the Initial Statement of Reasons) is to</p> |
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|  |  | <p>provide insurers with a voluntary mechanism to support the use of labor rate surveys when settling automobile insurance repair claims in a fair, equitable and reasonable manner, as required by Ins. Code section 790.03(h), in an effort to protect all insurance consumers and claimants who may be financially harmed by the use of unreliable labor rate surveys.</p> <p>Auto body shops are members of the public who may be financially harmed by the use of unreliable labor rate surveys. Thus, if insurers choose to conduct and use the reliable Standardized Survey, as proposed in these regulations, more fair equitable and reasonable claims settlements will result, thus benefiting consumers who are now forced to pay the out-of-pocket cost difference between labor rates based upon unreliable surveys and reasonable rates charged by auto body repair shops. While in some cases auto body repair shops may also be paid a more fair, equitable and reasonable labor rate in order to repair damaged automobiles to a workmanlike and safe condition, the proposed regulations are not intended to fully compensate those</p> |
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|  | <p><b>Comment 36.27</b><br/> <b>Other Challenges</b><br/> 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.</p> <p>2695.81 – The Standardized Auto Body Repair Labor Rate Survey<br/> * (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.</p> | <p>repair shops that might still charge rates higher than the fair and equitable labor rate in a particular geographic market area. Although policyholders and insurers may be bound by the provisions contracted in their policies, the Department’s regulatory role obligates us to protect consumers, especially where inaccurate, unreliable, or inconsistent labor rate surveys are used to settle consumer claims.</p> <p><b>Response to Comment 36.27</b></p> <p>Regarding Section (d)(1)(A)(1), there is no requirement that any insurer complete the standardized survey. The proposed regulations do not interfere in the free market system, nor are they intended to financially benefit auto body repair shops. One of the problems the proposed regulations addresses are unfair or unequitable settlements based on unreliable or outdated auto body labor rate surveys. Consumers are then forced to pay the out-of-pocket cost difference, and therefore, is aimed at consumer protection. The survey needs to be timely to be accurate as costs increase over time. An</p> |
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|  | <p>* (d) (1) (A) (2) As a whole, this section is confusing and further complicates the regulations.</p> <p>* (d) (1) (B) Given the extensive nature of the survey requirements, four months is insufficient time to prepare the information.</p> <p>* (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.</p> | <p>old survey will lead to an increase in unfair claim settlements.</p> <p>Section (d)(1)(A)(2) is necessary to ensure survey data is accurate.</p> <p>Section (d)(1)(B) Insurers have been given substantial help and tools by the Department to conduct the standardized survey. Four months should be sufficient, especially if insurers are using a web portal or electronic means to collect and process data. The Department has already developed the output Excel template worksheets for the insurers.</p> <p>Section (d)(1)(C) This section was added at the request of insurers, who felt that it was too costly to conduct a new labor rate survey each year. The benefit to the insurer from the CPI-U adjustment is obvious, in that the insurer realizes a cost savings. Moreover, to the extent that cost increases in the auto body repair industry outstrip the rate of CPI-U growth, the insurer realizes a labor rate savings. It is necessary to provide some mechanism for modifying rates in non-survey years, in order to protect</p> |
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|  | <p>* (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:</p> | <p>the consumer from paying out of pocket due to a claim being adjusted using an old, out of date survey.</p> <p>Section (d)(2) The proposed regulation does not require any insurer to complete the standardized survey. Sampling is a commonly accepted survey methodology, as long as it is random and results are statistically significant. These regulations do not preclude an insurer from using valid sampling and other statistical techniques to conduct a survey, as long as this practice results in fair and equitable claims settlements, with the only affect being that the insurer would not receive the rebuttable presumption described in these proposed regulations. However, by expanding the geographic area too much, the results may no longer be representative of the shop in question. The proposed regulation does not stand for the proposition that a sample-based survey cannot produce an equitable result. However, the methodology of the standardized survey consistently yields an accurate result, whereas a sample introduces variance. Because a</p> |
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|  | <ul style="list-style-type: none"> <li>o Where do we get accurate information on all licensed bar shops?</li> <li>o 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?</li> <li>o 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?</li> <li>o Is there a difference between licensed and registered shops?</li> </ul> | <p>properly conducted survey conveys on the insurer the rebuttable presumption, it is necessary that the survey methodology cannot be gamed; eliminating the possibility of selective sampling accomplishes this goal. To restate what is obvious from the regulation text: six shops are the <i>minimum</i> to establish a prevailing rate; in most areas, the one mile periphery brings many additional shops into the labor rate calculation. Commenters repeated argument regarding collusion is unsupported by any facts. As addressed above, to the extent the Commissioner becomes aware of collusive behavior, he has the ability to prosecute such behavior as fraud against and insurer.</p> <p>To address the remainder of Commenter’s questions regarding this section: Insurers are likely aware that BAR is the source for lists of auto repair dealers. The standardized survey does not require a survey of all licensed repairers, only those licensed as “Auto Body and/or Paint Shop” (Type 13). New auto body shops would be treated as non-responding shops, with a prevailing rate set by the six closest</p> |
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|  | <p>* (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?</p> <p>* (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</p> | <p>surround shops, plus periphery; old shops will drop off the survey once it is conducted again. The difference between licensed and registered shops is irrelevant to the proposed regulation.</p> <p>Section (d)(3) Insurers can use the same methods they currently use to determine if the shop is qualified or licensed. If not qualified, the shop can be left out of the survey. Further, this provision was requested by insurers early on in the public discussion phase in order to ensure that insurers would not be required to conduct their own investigation into whether a shops is licensed and may rely on the shop’s survey response unless the insurer has other information to the contrary. Further, since the insurers are expected to get the list of shops for the survey from BAR, it is expected that BAR will only produce a list of shops it deems licensed at the time the list is generated.</p> <p>Section (d)(4) There is nothing in the proposed regulation that suggests insurers exclude shops that they currently work with. The purpose of this section is to ensure that survey</p> |
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|  | <p>basically will be a way to exclude shops that carriers work closely with but who are not in our direct repair programs (DRP).</p> <p>* (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.</p> | <p>respondents have all the necessary equipment and meet legal requirements to conduct repair work, and thereby ensure that substandard shops not skew prevailing rates lower. If shops do not have rates for some types of repairs they will be included only for work they can complete (e.g. 6 of 12 rates). Moreover, given that the standardized survey attempts to find the market rate that a consumer would pay to have repairs completed, it is unreasonable to expect that a consumer would visit numerous, marginally qualified shops to have each discrete aspect of the repair performed by a different shop. It is hoped that insurers are only partnering with repairers that meet all legal requirements and have sufficient equipment to complete all needed repairs.</p> <p>Section (d)(5) The originally noticed text allowed for either an arithmetic mean or simple majority calculation; arithmetic mean was removed at the request of insurers. Median is a statistical midpoint and, therefore cannot represent a “prevailing rate” as required by statute. Commenters fail to</p> |
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|  | <p>* (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?</p> | <p>state what “statistical confusion” they are referencing.</p> <p>Section (d)(6) As noted in the Department’s Statement of Reasons, the proposed regulations prohibit the use of Direct Repair Program rates because DRP rates tend to be a contractual lower rate based on increased work volume from the insurer and do not accurately reflect market prices. Insurers use labor rate surveys for one sole purpose, which is to settle and pay for repairs completed by non-DRP shops in the open market. To use discounted DRP rates to pay market rates is inherently unfair. However, shops participating in a DRP program are free to participate in the survey using non-discounted rates, in order to avoid unfairly excluding those shops. The proposed regulations do not apply to health insurance, and the Department does not agree with the comparison. Shops rates are necessarily different to cover differing employment, land, or equipment costs. The survey excludes DRP rates and other discounted rates</p> |
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\* (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?

because they are not representative of the market rate. For example DRP rates tend to be a lower rate based on increased work volume from the insurer. Discounted rates represent a discount and do not accurately reflect market prices. The Department’s regulatory role obligates us to protect consumers, especially where inaccurate, unreliable, or inconsistent labor rate surveys are used to settle consumer claims.

Section (d)(7) has nothing to do with “checks and balances,” but is designed to prevent labor rates from being artificially deflated using sources other than auto repairers. Only auto repairers actually repair vehicles, so it is reasonable that only survey responses from auto repairers be included in the labor rate calculation. Total loss claim valuations are significantly different than partial loss (or repair) claims. In a total loss claim the insurer that uses a computerized valuation service must comply with the current Fair Claims Settlement Practices Regulations, Section 2695.8. This section sets forth specific criteria to be used by insurers in valuing a total loss

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|  |  | <p>vehicle. Without any known exceptions, the computerized valuation services provider for total loss valuations use actual sales price data of comparable vehicles obtained from the Department of Motor Vehicles (DMV) per subdivision 2695.8 which states:</p> <p>(3) Notwithstanding subsection (2), above, upon approval by the Department of Insurance, an insurer may use private sales data from the Department of Motor Vehicles, or other approved sources, which does not contain the seller's telephone number or street address. Approval by the Department of Insurance shall be contingent on the Department's determination that reasonable steps have been taken to limit the use of private sales data that may be inaccurately reported to the Department of Motor Vehicles or other approved sources."</p> <p>An insurer's use of this sales data from DMV is conditioned upon the Department (of Insurance's) approval to use this data and that the insurer has taken reasonable steps to avoid using inaccurate data. Given this requirement that a governmental source</p> |
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|  | <p>* (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?</p> | <p>(DMV) is able to provide this actual sales data, it is deemed reliable for use in the valuation of total loss claims. However, in repair claims, there is no similar governmental or other reliable source that collects actual repair invoice data to accurately reflect the actual amounts charged by repair shops to customers. The sources prohibited in these proposed regulations are not reliable sources and in many cases provide inaccurate labor rate data.</p> <p>Section (d)(8) The Geocoding currently proposed will provide more precise accurate, and reliable surveys for each shop in each city in the state versus relying on set or gerrymandered geographic boundaries, such as cities, counties, regions, or artificial boundaries, which vary significantly in size and demographics throughout the State. Due to the change in the 15 day notice that added the periphery, the average geographic area size is now approximately 21 shops. A geographic area needs to represent shops that are a reasonable alternative to the consumer</p> |
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\* 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.

and be representative of the market where they do business.

Paint material rates were considered but rejected as an individual repair component because of industry wide standard practices relating to payment for paint services. Also, “paint and materials” and “Daily Storage” rates are not labor rates and so are not included in these proposed regulations designed to deal only with labor rates. Some distinction among labor rates is needed as training and equipment to complete different types of repair can differ.

Commenters do not articulate their concerns about “when a shop opens, closes, loses licensing, or has their paint booth do down for a week...” in any coherent fashion. However, a survey duration is for at least one year, meaning temporary status changes do not affect the result.

The suggestion of potentially allowing an insurer to use the rate previously provided by a shop if the shop doesn’t

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|  | <p>* (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.</p> <p>* (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</p> | <p>respond to the survey is a way of continuing to use outdated data, or data pertaining to a shop no longer in business, to settle claims. Also, about 14 insurers currently conduct surveys, it is unlikely that all insurers will conduct surveys at the same time, or that shops will get dozens of surveys at the same time.</p> <p>Under Section (d)(9), surveys are optional; not every insurer will send out a survey. As discussed above, there is no requirement that a survey be mailed or e-mailed; insurers are free to complete surveys in person, or over the phone. If a shop tries to artificially charge a higher rate that is not cost based and competitive with other nearby shops, then they will lose business. If a shop posts rates that are unreasonable and a customer walks in with an existing quote, the customer may be immediately discouraged from even asking for an estimate if the labor rates quoted are already lower than those posted.</p> <p>Regarding Section (d)(9)(e)(1): Note: this is not the correct cite for this</p> |
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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.

subdivision, this comment is most likely referring to subdivision (e)(1): This proposed regulation does not require insurers do prepare estimates using the Standard survey if they choose to use some other method when the claimant has not yet chosen a repair shop. This proposed subsection was added at the direct request of insurers who requested a way to use the Standard survey to prepare estimates, even when the claimant had not yet chosen a repair shop. Insurers advised that if they were going to conduct a Standard survey they did not want to also be forced to conduct a different survey for this scenario. This provision would save insurers the potential cost a second survey for this other purpose. Instead, it allows the insurer to choose the nearest shop to the customer and use the prevailing rate for that nearest shop to prepare the estimate. These regulations do not impose additional costs on the insurer once the claimant does choose a shop since insurers are already required to adjust a previously prepared estimate if the claimant presents the insurer with a higher estimate from the shop they chose for the repairs per Section 2695.8(f). In

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|  | <p>* (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.</p> <p>* (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</p> | <p>other words, this proposed provision does not add any obligation on insurers than what already exists and only provides the insurer with the additional ability to use the Standard survey for this situation.</p> <p>RE: (d)(9)(e)(1)(b)(2): Note: this is not the correct cite for this subdivision, this comment is most likely referring to subdivision (e)(1)(B)(2.): Shortest driving distance cannot be interpreted any other way and is easily calculable on almost every computer or mobile device that insurers may use. It is also reasonable to assume that most adjusters know which shops are closest to where they are preparing an estimate, especially when many estimates are being prepared in insurer operated locations.</p> <p>RE: (d)(9)(e)(2)(C): Note: this is not the correct cite for this subdivision, this comment is most likely referring to subdivision (e)(2)(C): This provision was added at the direct request of insurers, who wanted to be able to reduce the claims payment when they</p> |
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|  | <p>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?</p> | <p>had evidence that a shop was actually charging less than what they were now charging on a particular recently filed claim. Insurers wanted to be able to reduce that shop's estimate to what it was actually charging. This added subdivision accomplishes this purpose. It is limited to 60 days since it is intended to address what the insurer believes is an unreasonable amount on a current claim being processed by the insurer. There are legitimate reasons for a shop to raise rates, for example the recently passed minimum wage increase will likely lead to an increase in wages throughout the economy. Allowing overly old invoices will lead to a result that is no longer current. The purpose of providing multiple invoices is to account for cases wherein one invoice where the shop may have charged less is an exception to how much the shop actually charges on a regular basis. For example, a shop may accept a lower rate on one or two repairs in return for other consideration by the insurer, such as, the insurer adding more hours to the estimate. Shops compete on price and almost all shops post their labor rates. The commenter does not describe what</p> |
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|  | <p>* 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.</p> | <p>further proof shops would need to provide.</p> <p>Regarding Section 2695.82 Survey Questionnaire: the survey excludes DRP rates and other discounted rates because they are not representative of the market rate. For example DRP rates tend to be a lower rate based on increased work volume from the insurer. Discounted rates represent a discount and do not accurately reflect market prices. Because surveys are used to pay or reduce labor rates for non-DRP work, DRP rates would not be an accurate reflection of non-DRP market rates.</p> <p>The suggestion to allow the shop to call the insurer and respond over the phone, is in direct conflict with the insurers’ assertions that there is no checks or balances in the credibility of the shop responses. Requiring the shop to respond in writing and sign the survey provides a documentation trail and record of how the shop responded so is more apt to result in a more credible survey response.</p> |
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|  | <p>Conclusions</p> <p>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.”</p> | <p>The Department admits that it has not been able to reach agreement with industry on all issues relating to the proposed regulations. However, the Department believes it has addressed, through the course of this entire rulemaking, almost all of the substantive issues raised by industry. Also, the Department represents the interests of the Consumer, which, in this case, do not appear to be aligned with the interests of insurers. In Commenters’ view, “regulatory overreach” consists of any attempt to impose reasonable regulation on insurers; the Department does not share this perspective.</p> <p>As discussed above, the <i>Jones</i> decision is inapplicable to the proposed regulations, as the court specifically noted that its opinion was limited to the Department’s replacement cost regulations.</p> |
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|  | <p>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.</p> <p>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).</p> | <p>The Department declines Commenters’ request for a “task force” regarding labor rate regulations. The proposed regulations are the result of years of workshops, public hearings, correspondence, and countless discussions between Department and insurance industry members. During this time, insurers have continually downplayed the importance of consumer complaints and sought to promote weak or ineffective regulations. The Department represents the interests of consumers, which, in this case, are not aligned with the interests of insurers. Given the long-standing differences between the stakeholders, the Department believes that there will always be disagreement about the labor rate regulations and that further delay will not resolve these differences. Therefore, the Department will move forward with its rulemaking at this time.</p> |
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| <p><b>Sam Valenzuela</b><br/><b>NABR</b></p> <p>October 11, 2016<br/><u>Written Comments 18W:</u></p> <p>Verbatim, but with inserted <b>Comment Numbers</b> keyed to responses.</p> | <p><b>Comment # 37.1</b></p> <p>October 11, 2016<br/>Damon Diederich<br/>California Department of Insurance<br/>300 Capitol Mall, 17th Floor<br/>Sacramento, CA 95814</p> <p>cc: Diane Pinney</p> <p>Re: Written comments on proposed rulemaking for auto body repair labor rate surveys.</p> <p>Dear Sir or Madam:</p> <p>Following the recent release of revised text of the proposed rulemaking for auto body repair labor rate surveys, we at National AutoBody Research (NABR) felt compelled to offer respectfully our feedback, observations, and commentary, in hopes of helping the Department craft regulation that effectively achieves the Commissioner’s stated goal of fair and equitable settlement of automotive insurance claims.</p> <p><b>Comment # 37.2</b><br/>Background on NABR<br/>NABR is an independent, third-party research, technology, and strategic business consulting firm serving the automotive collision repair industry, working to enable a more efficient free market for labor rate pricing, for the ultimate purpose of consumer care and safety. Utilizing labor rate surveys conducted nationwide, including California, we have collected labor rate and other key data from nearly 2,900 collision centers around the country. Through both the analysis of this data and our direct</p> | <p><b>Response to Comment # 37.1</b><br/>Thank you for your interest and comments.</p> <p><b>Response to Comment # 37.2</b><br/>While NABR appears to be knowledgeable in this area and offers well-reasoned comments, it is not true that the firm has no interest in labor rate prices or the process. NABR sells specialized consulting services to help shops or insurers set their labor rates, collects survey data and sells it to shops</p> |
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|  | <p>conversations with nearly a thousand body shops, NABR has developed considerable expertise on the labor rate topic.</p> <p>As an independent company, NABR has no specific interest in labor rate prices and acts as a neutral party among insurers, body shops, and consumers. Our primary concern is seeing the free market work and work properly, so that prices charged by shops and paid by insurers reflect a proper equilibrium of market dynamics – supply, demand, capability and quality of body shops, repair costs, and cost of living, to name but a few. Therefore, we conduct impartial online surveys, maintain high standards of data integrity (e.g., do not hide, exclude, or manipulate survey data or results for any party's interest), and report results transparently, creating a level playing field for everybody and an independent standard that both insurers and body shops can trust and use.</p> <p>Based on our work, NABR sees labor rates as the “life blood” of the auto body shop. Without healthy labor rates, collision repairers are significantly challenged to generate sufficient profits to reinvest in the training, tooling, equipment, facilities, and manufacturer certifications required to properly and safely repair the automotive industry’s modern vehicles, which increasingly include new technologies, new manufacturing and construction techniques, and advanced materials. The lack of knowledge, skill, or capability to make these repairs may seriously jeopardize consumer care and safety, which is irrefutably unacceptable.</p> <p><b>Comment # 37.3</b></p> <p>Summary of Feedback<br/> NABR supports the overall concept and theory of using a standard, methodical approach that both insurers and body shops can use as “a basis</p> | <p>and/or insurers. NABR has a business interest in pushing its methodology forward. NABR’s survey methodology appears thorough and if it leads to fair and equitable claim settlements would not be prohibited by California law or these regulations. When demonstrated for the Department, NABR’s methodology showed small sample sizes and no distinction between very different northern and southern California pricing practices.</p> <p>Free market is a term that ignores the role that governments play. All markets need laws or regulations to set the rules by which the participants need to abide and enforcement of those rules to ensure fair results for all parties. The Department believes that the proposed regulations offer a better solution and will foster competition and high quality repairs. The Department has done nothing with its proposed regulations that will incentivize shops to make lesser quality repairs and the commenter provides no evidence to support that assertion.</p> <p><b>Response Comment # 37.3</b></p> |
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|  | <p>to settle or pay automobile repair insurance claims in a fair and equitable manner.”</p> <p>We understand that the proposed regulations add much greater clarity and room for measurement and enforceability than the current regulations, and it’s clear that the Department put in a lot of thought, time, and effort to get the proposed rules to their current state.</p> <p>Yet, while the proposal may provide clearer rules and some minor resolution to the labor rate /claims settlement problem, NABR believes that if the CDI’s proposed standardized auto body labor rate survey regulations are approved as they stand today, they will overly burden the collision repair industry with a survey standard that is almost immediately obsolete, irrelevant in some key aspects, unfair to both insurers, shops, and consumers, very costly to insurers, and it will unfortunately remain in force for a long time to come with little probability of quick revision where it’s needed.</p> <p>Especially given that it has been over a decade since the original regulations are now being revisited, and that there will be a change in Commissioner soon, NABR fears that implementing these regulations now will stick the industry with another decade of regulations that are driving the wrong behaviors and market dynamics but not solve the problem or achieve the real goal of fair and equitable claims settlements. We are deeply concerned.</p> <p>Not having time or space to cover all aspects of the proposal, we offer commentary on 5 key aspects of the proposal that we find the most salient and problematic toward achieving the goal of fair claims settlements:</p> <p>1) The idea of a “prevailing rate”</p> | <p>The Department agrees that the regulations add clarity and appreciates the support and comments.</p> <p>The Department disagrees that the regulations will be obsolete or unfair immediately. The Department also disagrees that it will be overly costly to insurers as outlined in the Initial Statement of Reasons and Economic Impact Assessment. As estimated in the EIA, in total the estimated cost of the proposed regulation is \$1.17 million for the first year following the adoption of the regulation, and in the second year, insurers may use a Consumer Price Index inflation adjustment, practically eliminating their administrative costs.</p> <p>Fear of implementation problems should not stop the Department from attempting to improve public policy. The Department disagrees that implementing these regulations will stick the industry with another decade of regulations driving the wrong behavior and market. The Department is confident that the proposed</p> |
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- 2) The survey is missing the key component of measuring shop repair capability
- 3) The geographic definition of a market drives unintended consequences of paying unfair labor rates to various body shops
- 4) The mis-application of using inflation to adjust labor rate prices
- 5) The absence of an allowance for a third-party survey standard

**Comment # 37.4**

**Prevailing Rate**

The Prevailing Rate survey paradigm was first implemented around 1983. At the time, insurers started to assert that some of the pricing paid for repairs was hugely variable and wanted to create some consistency in the market regarding price. Over the years, this “Market Rate” has come to be referred to the “Prevailing Rate.”<sup>1</sup>

1 Staff Writers. A “How-To” Guide for Increasing Labor Rates. BodyShop Business, February 2006

One industry source loosely defines, the Prevailing Rate as purported to be a representative Labor Rate for a specific geographic region that represents the “most prevalent” or “average” charge for labor regardless of any differentiating factors. Typically, most shops have a shop door / retail rate that they use for their retail customers and are requested to use the market “prevailing rate,” when insurers are involved. It is suspect, however, that the insurers who are poised to benefit most are the very people who determine the “prevailing rates” through confidential, non-transparent surveys, and then impose their resulting interpretation on shops in the market as an asserted “prevailing rate.” Invariably, the “prevailing rates” used by most insurers seem to be below the shop’s posted door /retail rate.<sup>2</sup> Johnson, James. What is a Prevailing Rate? Hammer & Dolly, August 2008.

regulations will resolve the various problems addressed in the ISOR.

These 5 key aspects will be responded to below in detail.

**Response to Comment # 37.4**

The Commenter wants the Department to reject the use of “Prevailing Rates” for a “Range of Rates” paradigm. However, the Commenter’s suggestion is flawed since “Prevailing Rate” is the statutory required standard under Ins. Code § 758(c), which states, “any insurer that conduct an auto body repair labor rate survey to determine and set a specified prevailing auto body rate...”

The Department is merely trying to define “prevailing rate” in the proposed regulations, it is beyond the Department’s authority to change the Statute.

The Department has attempted to add transparency to the process by describing steps that would result in an

NABR believes this sometimes-contentious differential in the “Shop Door / Retail Rate” and the typical insurance “Prevailing Rate” is problematic. Therefore, NABR strongly believes that any labor rate survey reports must show a range of rates in the market, not just a singular “prevailing rate” for all shops. As previously mentioned, collision repairers are different, so it makes sense that their prices will be different. Just like any other product you buy (for example, a computer), there are versions of that product that are less expensive and other versions that are more expensive. The common denominator being the various distinguishing differences that make one computer better than the other. Thus there is a range of acceptable prices in the market, not just one price for all computers. It's the same for collision repair centers and the courts agree.<sup>3</sup> *Ibid.*

In fact, courts are not very obliging in allowing insurers to only pay the lowest possible “prevailing rate” to the consumer. Instead, they say the proper amount is in a range of rates charged by various area collision repairers (emphasis added). One court even said that it can't be a single rate, but must be in a range of different rates (emphasis added). (Wilkins v. Delross and Mason v. Ellis, Sonoma City, CA, Superior Court, Case #s SMC-09-174813 & SMC-09-175738 (Oct. 2009).<sup>4</sup> 4 Eversman, E.L., J.D. Challenging Insurers' Labor Rate Surveys. BodyShop Business. April 5, 2012.

Judge James G. Bertoli stated: “There's no one set reasonable charge. It's not \$80. It's not \$98. It's not \$117. It's that range. The \$98 fell within it. The amount also – it applies the same way with the paint rates. It applies the same way with the body repair rates. It's a range of prices. It's not just

acceptable survey. The proposed regulations explain that a survey being used to settle claims must possess current shop rates and cannot include quotes, Direct Repair Program (DRP) rates, or selective sampling.

The Department of Industrial Relations (DIR) sets prevailing wage rates for different construction trades and defines prevailing wage rate as: “The prevailing wage rate is the basic hourly rate paid on public works projects to a majority of workers engaged in a particular craft, classification or type of work within the locality and in the nearest labor market area (if a majority of such workers are paid at a single rate). If there is no single rate paid to a majority, then the single or modal rate being paid to the greater number of workers is prevailing.”

The two situations are not exactly the same, but the Department is trying to achieve something similar, a rate that represents a fair market price. The state takes tax money and spends it on public works. The state then negotiates with contractors on specific projects (largely on materials as trade labor rates are set

one number. It can't be just one number. It's what is a reasonable charge." (Wilkins v. Delross and Mason v. Ellis, transcript dated October 29, 2009, pp. 48-49).<sup>5</sup> ohnson, James. What is a Prevailing Rate? Hammer & Dolly, August 2008

Although the Wilkins/Mason decision applied only to California law, judges and juries in other states have agreed that the insurer's "lowest common denominator" type pricing doesn't constitute a "prevailing competitive price." In 2003, the New York court, in Mass v. Melymont, found that the charges of 1042 Collision in Long Island at \$50 per hour for body and paint and \$55 per hour for mechanical and framework were reasonable. The court noted: "The USAA representative testified that the average per hour body repair rate offered by insurance companies and accepted by repair shops is in the range of \$38 to \$42 per hour (emphasis added). In fact, this witness stated that USAA negotiates in this range for work to be done for bodywork. The claims manager stated that State Farm pays \$50 per hour for body repair work." [2003 NY Slip Op 51551U, 2-3 (N.Y. Dist. Ct. 2003)]. <sup>6</sup> *Ibid*.

The bottom line is that one "prevailing rate" does not fit all, and the insurers' "one rate fits all" philosophy is typically not respected or upheld by courts...in fact, they're almost uniformly rejected by judges and courts.<sup>7</sup> *Ibid*. Thus the prevailing rate concept used by the CDI is a significant flaw in the proposed regulations. NABR provides these court rulings to the CDI as a sample of empirical evidence to demonstrate that while the use of a "prevailing rate" may seem perfectly acceptable, it is not ruled as adequate or satisfactory in the courts.

The DOI might want to consider the comments of Judge Bertoli from the California decision(s) of Wilkins v. Delross and Mason v. Ellis, October 29, 2009 transcript at 13, where he states: "Quite frankly, I have made no bones about it on the record before when I've heard these cases. I strongly

as defined by DIR above, but some workers may be more efficient (requiring fewer hours) trying to get the highest quality for the lowest price. However, the state is still responsible to taxpayers for the source of the money. Insurance is similar in that the insurer will largely negotiate with the shop, but is still responsible to the consumer for the outcome. The inclusion of a third party makes it more complex than a standard supply and demand pricing model, especially when a single person's loss is paid from a pool that many people have paid into. The end result has to be fair for the individual who suffered the loss, the consumers who paid premiums, the insurance company, and the repair shop.

The Department believes that the simple majority rate is an effective solution as it covers more than half the shops. As previously noted, the Department cannot implement a "range of rates" model. Nonetheless, the Department's position is that a range might represent a better way of *displaying rates* it significantly detracts from the clarity required under the Administrative Procedure Act (APA),

question the intellectual honesty of the labor market survey that's done by the insurance companies and their methodology.”

In his ruling on October 29, 2009 transcript, he declared that: “If State Farm chose to determine their price by reading chicken entrails and – consulting with the three witches from McBeth (sic), that's fine. I think that's just about as accurate as the survey itself is. I think that survey from a statistical standpoint would get a first-year college student a flunking grade.”<sup>8</sup> *Ibid.* The clear condemnation by the courts of the use of a “prevailing rate” model as opposed to a range of market-based rate concept, begs the question, “Then, why does the CDI use the prevailing rate paradigm to attempt solve the labor rate issue in California?”

NABR see's the use of the prevailing rate paradigm as a major flaw in the proposed regulations.

and will result in an unworkable model under the current statute. A range would add significant complexity and some cost to calculate. What if the range is \$60 to \$80 and the shop says I charge \$80 and the insurer says we pay \$60. Who is right? Who would be responsible for choosing the ultimate rate? A lower end for a range is not necessary, because if another shop in our example charges \$56, their rate will not be adjusted up to \$60.

Furthermore, autobody shops will inevitably request for the highest rate, while insurers will only want to pay for the lowest rate, making the range of rates an unworkable model with little utility. It is difficult to ascertain a “prevailing rate” when two different parties are polarized at the opposite ends of the spectrum.

The Commenter cites two cases, both of which have no precedential or binding value. The *Wilkins* case is a Superior Court case, while the *Mass* case arises out of New York State. Although they may act as persuasive authority, they are both contrary to the plain meaning of Ins. Code § 758(c), which states that a prevailing rate is to

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|  | <p><b>Comment # 37.5</b></p> <p><b>Shop Repair Capability</b><br/> Given the incredible pace of technology advancement in the automobile industry, it is increasingly critical for the safety of consumers that the collision center performing repairs on a vehicle is trained, equipped, and certified to repair that vehicle.</p> <p>The current CDI proposal does not go nearly far enough in measuring the repair capabilities of body shops, which need to include measuring key training, tools, equipment, facilities, and especially manufacturer certifications. NABR finds that labor rate prices are highly correlated to the investments that body shops have made in training, certifications, etc. This measurement would then enable insurers to know which shops are properly capable of repairing their customers’ vehicles, even on a brand-by-brand basis, and which shops deserve to be paid a higher labor rate versus a lower labor rate.</p> <p>The lack of measuring capability, therefore, limits the ability to differentiate among shops with regards to labor rates.</p> | <p>be used, not a range of rates. The Department agrees that labor rate calculations are flawed and proposed these regulations to offer a standardized acceptable methodology.</p> <p><b>Response to Comment # 37.5</b></p> <p>Shops are allowed to set their rate at whatever covers their costs and allows them to compete for business. The Department does not regulate how shops rates are set. The Department believes that many shops compete mainly on price, a good match for our proposed regulations. However, some could also compete on quality or advanced training. Nothing in the proposed regulations prevents a technologically advanced shop from negotiating their own rate with insurers.</p> <p>The proposed regulations do have a measure of capability to measure the repair capabilities of body shops. Section 2695.81(d)(4) sets extensive standards that auto body repair shops must meet to be included in a Standardized Labor Rate Survey, including type of equipment and tools.</p> |
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**Comment # 37.6**

**Geographic Market Definition**

Building on the capability comments above, the proposal's defining a market simply as a geography will have a significantly unfavorable unintended consequence of unfairly paying body shops too high or too low a labor rate.

Several body shops in the industry have invested literally millions of dollars to become certified to repair particular brands of vehicles. These costs are especially considerable for luxury vehicles such as Audi, Mercedes, and Tesla, as examples. Consequently, these body shops have higher labor rates, necessary to help fund their investment and earn a proper return on that investment.

Yet a body shop that has not made any of these investments may be geographically located right across the street. That shop may have no need for higher labor rates to fund these investments because they haven't made the investments. Yet, according to the proposed regulation, those two shops' labor rates will be considered in the prevailing rate. The shop that needs and deserves a higher rate can be penalized because the shops around him have lower rates and therefore the prevailing rate is too low for his shop's economics. Conversely, lesser capable shops could artificially increase their labor rates closer to the higher capable shop across the street, unfairly inflating their labor rate simply because they are within a geographic distance of a highly capable shop but without making any of the significant investments in certifications, etc. That lessor shop really may not deserve a higher rate, yet mere geography enables them to collect higher rates.

**Response to Comment # 37.6**

Insurers will not likely adjust rates up if a shop has a labor rate lower than the calculated prevailing rate, negating the comment about unfairly paying a shop too high a rate. On whether a result might be paying too low, a repair shop might feel this way while accepting less than their posted rate. However, these regulations expressly address the shop's ability to charge whatever rate their customer is willing to pay and that the shop is not required to accept the amount paid by the insurer [See 2695.81(e)(5)]. As stated in this subdivision the Standard survey only identifies the amount that shows the insurer has paid its reasonable obligation for the repairs. The end result has to be fair for the individual who suffered the loss, the consumers who paid premiums, the insurance company, and the repair shop.

Shops are allowed to set their rate at whatever covers their costs, including training investments and allows them to compete for business. The Department

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|  |  | <p>does not regulate how shops rates are set.</p> <p>Yes. Both shops will be included in the calculation, but if the one with high investment is the most expensive and the one with no investment is the least expensive, neither will represent a simple majority rate. The calculation completely ignores all rates except the one at which a simple majority charges. For example, the prevailing rate would be what the 11<sup>th</sup> shop of 20 shops charges, all other rates are irrelevant to the calculation.</p> <p>The Department disagrees that the standardized survey is any more susceptible to inflated rates than surveys currently conducted by insurers; current insurer surveys take rate responses at face value without independent verification and are equally susceptible to rate inflation. Since most shops compete on price, the lesser capable shop would probably lose business by artificially raising their price.</p> |
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**Comment # 37.7**

**Mis-application of Inflation to Adjust Rates**

NABR does not see collision repair as an entitlement. To use inflation as an adjustment to payments makes sense for something like social security payments, pension benefits, and other benefits that require cost of living adjustments. But we think that collision repairers should be in charge of their own pricing, and if they want to adjust their labor rates for inflation every year, they can do that and report it in the survey. We do not see the need for the government to adjust prices automatically for body shops via the standardized survey.

In reality, collision repairers' costs are growing well beyond inflation for items such as paint, materials, energy, and healthcare. Body shops need to account for these on their own as they continually consider their pricing. Further, there already exist in the marketplace today tools that body shops can use to account for these cost increases, including inflation, and adjust their labor rates accordingly.

**Response to Comment # 37.7**

The Department agrees and also does not see collision repair rates as an entitlement and agrees that doing a survey every year might lead to more accurate results. However, the Department is required by law to consider alternatives, especially those that provide the same benefits at a lower cost. In this regard, the Department concluded that the inflation adjustment would largely provide the same protection against rising costs for shops as another annual survey, while allowing insurers to use properly conducted survey for an additional year to minimize costs.

Many of the items listed, such as energy and healthcare, are included in the CPI calculation. The goal of the regulation is to set guidelines for how to settle claims fairly and equitably for all parties involved. The goal is not to get real time accounting of all shops rates and costs. There is also nothing in this regulation that prevents a shop from negotiating their own rate with insurers.

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|  | <p><b>Comment # 37.8</b></p> <p>Absence of Third-Party Survey Standard<br/> NABR finds the proposed survey standard to be overly restrictive in defining what labor rate prices can or cannot be. If an insurer and a body shop can agree on a price using a different approach than the CDI method, we think they should be enabled to do so. There is often more than one way to do anything, yet the current proposal appears to block the insurers' and body shops' ability to do something different or even better. Here again, this is putting limits on letting the free market work and work properly. Insurers and body shops should be able to use other methodologies to agree on price, not only the CDI's way.</p> <p>If you have any questions or wish to discuss any of this material, we are pleased to do so at anytime. You may contact us by phone or email using the contact information below.</p> <p>Sam Valenzuela Richard Valenzuela<br/> President, NABR Chief Executive Officer, NABR<br/> 602-466-1900 520-971-6110<br/> sam@nationalautobodyresearch.com<br/> richard@nationalautobodyresearch.com</p> | <p><b>Response to Comment # 37.8</b></p> <p>All labor rate surveys in California are currently voluntary and will remain voluntary under the proposed regulations. The Department is proposing regulations that describe a methodology it deems will consistently lead to fair and equitable claim settlements. There is nothing that defines what shops can charge or requires what they accept as a price. There is nothing in this regulation that prevents shops, insurers, or consulting companies such as NABR from conducting a labor rate survey that differs from the Standardized Survey as long as the different survey methodology leads to fair and equitable claim settlements.</p> |
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