

**STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
300 Capitol Mall, 17th Floor
Sacramento, California 95814**

NOTICE OF PROPOSED RULEMAKING AND NOTICE OF PUBLIC HEARING

Auto Body Repair Labor Rate Surveys

Date: March 04, 2016

CDI Regulation File: REG-2012-00002

SUBJECT OF PROPOSED RULEMAKING

The California Department of Insurance (“the Department”) proposes to adopt under Title 10, California Code of Regulations (“CCR”), Chapter 5, Subchapter 7.5, Article 1, section 2695.81, entitled “The Standardized Auto Body Repair Labor Rate Survey, and section 2695.82, entitled, “Questionnaire For the Standardized Labor Rate Survey.” Additionally, the Department proposes to make amendments to Title 10, CCR, Chapter 5, Subchapter 9, Article 7, section 2698.91, entitled “Reporting Auto Body Repair Labor Rate Surveys.” The amendment and adoption of these three sections are collectively called “Auto Body Repair Labor Rate Surveys.” (All references to the CCR in this Initial Statement of Reasons are references to sections in CCR Title 10, unless otherwise stated.) 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 regulations will clarify the standards that govern the procedures for conducting and reporting the results of Auto Body Repair Labor Rate Surveys with the Department.

PUBLIC HEARING (Government Code § 11346.5(a)(1))

The Department will hold a public hearing to provide all interested persons an opportunity to present statements or arguments, orally or in writing, with respect to the proposed regulations, as follows:

Date: April 21, 2016

Time: 10:00 a.m. If it is necessary for the hearing to exceed two hours, there will likely be a one-hour break from 12:00 noon to 1:00 p.m.

**Location: Employment Development Department
722 Capitol Mall, 1st Floor Auditorium
Sacramento, California 95814**

The hearing will continue on the date noted above until all testimony has been submitted or until 2:00 p.m., whichever is earlier.

PRESENTATION OF WRITTEN COMMENTS; CONTACT PERSONS (Government Code § 11346.5(a)(14))

All persons are invited to submit written comments on the proposed regulations during the public comment period. The public comment period will end at **5:00 p.m. April 21, 2016**. Please direct all written comments to the following contact person:

Kara Boonsirisermsook Potts, Senior Attorney
California Department of Insurance
45 Fremont Street, 21st Floor
San Francisco, CA 94105
Telephone: (415) 538-4174
Kara.Potts@insurance.ca.gov

Questions regarding procedure, comments, or the substance of the proposed action should be addressed to the above contact person. In the event the contact person is unavailable, inquiries regarding the proposed action may be directed to the following backup contact person:

Edward Wu, Senior Attorney
California Department of Insurance
300 South Spring Street, South Tower
Los Angeles, CA 90013
Telephone: (213) 346-6635
Edward.Wu@insurance.ca.gov

DEADLINE FOR WRITTEN COMMENTS (Government Code § 11346.5(a)(15))

All written materials must be received by the Department, addressed to the contact person at her address listed above, **no later than 5:00 p.m. on April 21, 2016**. Any written materials received after that time may not be considered.

COMMENTS TRANSMITTED BY E-MAIL OR FACSIMILE

The Department will accept written comments transmitted by e-mail provided they are sent to the following two e-mail addresses: Kara.Potts@insurance.ca.gov and Edward.Wu@insurance.ca.gov. The Department will also accept written comments transmitted by facsimile provided they are directed to the attention of Kara B. Potts and sent to the following facsimile number: (415) 904-5490. However, e-mail comments are preferred.

Comments sent to other e-mail addresses or other facsimile numbers will not be accepted. Comments sent by e-mail or facsimile are subject to the deadline set forth above for written comments.

ACCESS TO HEARING ROOMS

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

AUTHORITY AND REFERENCE (Government Code § 11346.5(a)(2); 1 CCR § 14)

The Department proposes the adoption of sections 2695.81 and 2695.82 of CCR Title 10, Chapter 5, Subchapter 7.5, Article 1, pursuant to the rulemaking authority vested in him by Ins. Code sections 758, 790.10, 12921, and 12926. Additionally, the Department proposes the amendment of section 2698.91 of CCR Title 10, Chapter 5, Subchapter 9, Article 7, pursuant to the rule making authority vested in him by Ins. Code sections 758, 12921 and 12926.

The Department’s proposed adoptions to CCR sections 2695.81 and 2695.82 will implement, interpret, and make specific the provisions of Ins. Code sections 758, 790.03. The Department’s proposed amendments to CCR sections 2698.91 will implement, interpret, and make specific the provisions of Ins. Code section 758, and Government Code sections 6250-6276.48

INFORMATIVE DIGEST (Government Code § 11346.5(a)(3))

SUMMARY OF EXISTING LAW (Government Code § 11346.5(a)(3)(A))

California Business and Professions Code section 9880.1 (a) defines “automotive repair dealer” as a person who, for compensation, engages in the business of repairing or diagnosing malfunctions of motor vehicles.

CCR, Title 16, Division 33, Chapter 1, Article 6, section 3351.5 (b), which became effective in 1997, defines the equipment requirements for auto body repair shops. An auto body repair shop that performs structural repairs must have all repair, measuring, and testing equipment and reference manuals to diagnose and repair structural damage, including but not limited to a three dimensional measuring system, a four-point anchoring system, equipment capable of making multiple body and structural pulls, a metal inert gas welder, and corrosion protection equipment.

CCR section 2695.8, which became effective in 1992, describes additional standards applicable to automobile insurance. Subdivision (f) clarifies the standards of adjusting written estimates for auto insurance claims. If an auto insurance claim is settled based on a written estimate prepared by an insurer, the amount in the estimate must allow for repairs that are accepted as trade standards for good and workmanlike repairs by an auto body repair shop. If a claimant contends that the repairs will exceed the written estimate then under subdivision (f)(3), the insurer must reasonably adjust any written estimates prepared by the claimant’s repair shop and provide a copy of the adjusted estimate to the claimant and the claimant’s repair shop.

Ins. Code section 758 became effective on January 1, 2001 under Senate Bill 1988. Section 758(c) requires that any insurer that conducts an auto body repair labor rate survey, to determine and set a prevailing rate in a specific geographic area, must report the survey results to the Department. The results of the survey must be made available upon request. Additionally the section requires that the survey information must include the names and addresses of the auto body repair shops and the total number of shops surveyed.

CCR section 2698.91 became effective October 25, 2002, and clarified Ins. Code section 758(c). Currently, section 2698.91 provides some broad definitions, outlines what basic information should be included in surveys conducted by insurers, and provides a procedure for submitting the surveys to the Department under the Department's "clearing house" function. "Auto body repair labor rate survey" is defined as any gathering of information from auto body repair shops regarding labor rates charged to determine a prevailing auto body repair rate in a specific geographic area. "Prevailing auto body rate" is defined as the rate determined or set by an insurer as the result of conducting an auto body labor rate survey. Labor rate survey results must be reported to the Department including the name and address of the shops, total number of shops surveyed, the prevailing rate for each geographic area, a description of the geographic area, and a description of the formula and method used to calculate the geographic area. Confidential information is to be removed from the survey results before submitting to the Department's Market Conduct Division. The Department will make the reports available pursuant to a Public Records Act.

CCR section 2698.90 which also became effective October 25, 2002, clarifies the Direct Repair Program ("DRP") portion of Ins. Code section 758. DRP includes any program through a formal agreement where insurers refer, suggest, or recommend an auto body repair facility to claimants for auto body repair work. Auto body repair shops who deny participating in DRPs must report this to the Market Conduct Division/Field Claims Bureau of the Department.

According to Ins. Code section 790.10, the Commissioner must promulgate reasonable rules and regulations and amendments, necessary to administer the sections under 790, *et seq.*, including Ins. Code section 790.03.

Ins. Code section 790.03, which first became effective in 1959, and has since been amended numerous times, defines unfair methods of competition and unfair deceptive practices in the business of insurance. Under subdivision (h) it is considered an unfair claims settlement practice for knowingly committing or performing with such frequency as to indicate a general business practice: (1) misrepresenting to claimants pertinent facts or insurance policy provisions relating to coverage; (2) failing to acknowledge and act reasonably promptly upon communications with respect to claims; (3) failing to adopt and implement reasonable standards for the prompt investigation and processing of claims; and (5) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims. In several enforcement actions, the Department alleged that due to unreliable and outdated auto body repair labor rate surveys that were used by insurers to settle claims, they were alleged to be an unfair claims settlement practice, and a violation of these provisions of section 790.03(h).

EFFECT OF PROPOSED ACTION (Government Code § 11346.5(a)(3)(A))

The Department anticipates that the proposed rulemaking will result in auto body labor rate surveys that will be fair and equitable. For instance, 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. This will result in more

consistent and reliable surveys, which will result in more fair and equitable claims settlement. The proposed regulations are expected to lower the complaints being filed by consumers and auto body repair shops based on outdated or unreliable auto body repair labor rate surveys. Additionally, this may save the Department and the State of California money and resources by reducing enforcement actions based on unfair and deceptive practices as the result of unreliable and outdated labor rate surveys.

POLICY STATEMENT OVERVIEW (Government Code § 11346.5(a)(3)(C))

The primary overall objective of the proposed regulations is to clarify Ins. Code section 758(c) by outlining a Standardized Labor Rate Survey that the Commissioner recommends insurers use when conducting a labor rate survey to settle auto insurance claims, and to clarify the specific information and methodologies of reporting labor rate survey results to the Department.

After section 2698.91 became effective, it became apparent that additional clarification is necessary for the proper interpretation and implementation of Ins. Code section 758(c). For example, each insurer that submits a labor rate survey to the Department, submits the survey in a different format, using different terminology and with different data. Differences in formats limit the Department's ability to make these surveys public in a more effective and efficient manner. Currently, the Department must make a copy or scan in all the surveys and respond to each ad hoc public records request for these surveys. The Department seeks the ability to post these surveys on its public website rather than respond to each ad hoc survey request. The proposed amendments to section 2698.91 are intended and necessary to address these above described issues, as well as providing clarity to insurers and consumers when the results of labor rate surveys must be reported to the Department.

In addition to the above clarity issues with section 2698.1, the Department received 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 reasonably charged rates due to outdated and unreliable surveys. For example, some insurers' labor rate surveys relied on artificially large geographic areas or outdated survey data that did not reflect the market rate. Furthermore, some insurers advised claimants and/or repair shops that since a survey was submitted to the Department, that survey is reliable support for limiting the labor rate component of repair claims, or that the Department has approved the methodology of the insurers' labor rate survey. However, the fact that the Department is acting as a "clearing house" for surveys submitted to the Department pursuant to Ins. Code section 758(c), does not render these surveys "approved" by the Department. These issues culminated in several enforcement actions which the Department filed against several insurers. The enforcement actions were based on potential violations of Ins. Code section 790.03.

In order to address these issues, and to provide insurers guidance and clarity to Ins. Code section 790.03, the Department is proposing adopting sections 2695.81 and 2695.82. By recommending that insurers comply with the requirements of a Standardized Labor Rate Survey, insurers will receive a rebuttable presumption that they attempted in good faith to

effectuate a fair and equitable claim settlement, or an adjustment of the labor rate component.

Additional objectives are: 1) to provide guidance and consistent standards for insurers to conduct reliable auto body repair labor rate surveys, and 2) the creation of more fair and equitable settlements of claims that rely on auto body repair labor rate surveys.

The proposed amendments are not likely to impact worker safety and will have no effect on the state's environment.

The Department anticipates numerous benefits from the proposed action, including:

- 1) 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.
- 2) Reliable and consistent labor rate surveys will result in more accurate, prompt, fair, and equitable auto insurance claim settlements, which will promote increased fairness, openness, and transparency in business.
- 3) 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 auto body shops and policy holders (households).
- 4) The proposed regulations will provide reasonable standards for conducting Auto Body Repair Labor Rate Surveys, which will result in the prompt and equitable processing of claims that rely on Auto Body Repair Labor Rate Surveys. The proposed Auto Body Repair Labor Rate Surveys regulations will define specific terms and more clearly set out the format, purpose and use of surveys conducted pursuant to Ins. Code section 758(c) or surveys otherwise used to settle and pay claims, resulting in openness and transparency in business and government

COMPARABLE FEDERAL LAW (Government Code § 11346.5(a)(3)(B))

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

CONSISTENCY OR COMPATIBILITY WITH EXISTING STATE REGULATIONS (Government Code § 11346.5(a)(3)(D))

The Department has evaluated the proposed amendments to the regulations for any related regulations in this area and has found that these are the only regulations

concerning auto body labor rate surveys. Therefore, the proposed regulations are neither inconsistent nor incompatible with any existing state regulations.

MANDATES ON LOCAL AGENCIES OR SCHOOL DISTRICTS (Government Code § 11346.5(a)(5))

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

COST OR SAVINGS TO ANY STATE AGENCY OR COST TO ANY LOCAL AGENCY OR SCHOOL DISTRICT OR COST OR SAVINGS IN FEDERAL FUNDING TO THE STATE (Government Code § 11346.5(a)(6))

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

IMPACT ON HOUSING COSTS (Government Code § 11346.5(a)(12))

The Department makes an initial determination that the proposed regulations will have no significant effect on housing costs.

ADVERSE ECONOMIC IMPACT ON BUSINESS AND THE ABILITY OF CALIFORNIA BUSINESSES TO COMPETE (Government Code § 11346.5(a)(7))

The Department has made an initial determination that the adoption and the amendment of this regulation may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The types of businesses that may be affected are insurers.

Should an insurer choose to conduct an auto body repair labor rate survey, there are projected reporting requirements, since the proposed regulations will require that specific information from labor rate survey results be reported to the Department. Insurers must report information that will be made available to the public as well as non-public information. The projected compliance requirement would require insurers to submit the labor rate survey results to the Department's Custodian of Records within thirty (30) days of completing the survey. The projected recordkeeping requirement would require insurers to maintain their survey records, questionnaires, and information regarding the survey for a minimum of five years.

The Department has considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

- (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.
- (ii) Consolidation or simplification of compliance and reporting requirements for businesses.

- (iii) The use of performance standards rather than prescriptive standards.
- (iv) Exemption or partial exemption from the regulatory requirements for businesses.

**STATEMENT OF THE RESULTS OF THE ECONOMIC IMPACT ASSESSMENT
(Government Code § 11346.5(a)(10))**

The Department is required to assess any impact the proposed regulations may have on the creation or elimination of jobs within the State of California; to assess the creation of new businesses or the elimination of existing businesses within the State of California; and to assess the expansion of businesses currently doing business within the State of California.

The Department projects that the proposed regulations will have a negligible impact on the creation or elimination of jobs within the State of California. The Department projects a minimal job gain equivalent of up to one full-time job within the first twelve months.

The net impact on California is estimated to be a loss of about \$560,000, which represents a miniscule portion of the over two trillion dollar California Gross State Product. As such, the Department projects that there will be no impact on the creation of new businesses or the elimination of existing businesses, or the ability of California businesses to expand.

The proposed amendments will most likely not impact worker safety and will have no effect on the state's environment.

As the Department stated above in its Policy Statement Overview, the proposed amendments to the regulations will have many benefits, including the following:

- 1) 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.
- 2) Reliable and consistent labor rate surveys will result in more accurate, prompt, fair, and equitable auto insurance claim settlements, which will promote increased fairness, openness, and transparency in business.
- 3) 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 auto body shops and policy holders (households).
- 4) The proposed regulations will provide reasonable standards for conducting Auto Body Repair Labor Rate Surveys, which will result in the prompt and equitable processing of

claims that rely on Auto Body Repair Labor Rate Surveys. The proposed Auto Body Repair Labor Rate Surveys regulations will define specific terms and more clearly set out the format, purpose and use of surveys conducted pursuant to Ins. Code section 758(c) or surveys otherwise used to settle and pay claims, resulting in openness and transparency in business and government.

The full text of the Department's Economic Impact Assessment is included in the Initial Statement of Reasons.

POTENTIAL COST IMPACT ON PRIVATE PERSONS OR BUSINESSES (Government Code § 11346.5(a)(9))

There is no potential cost impact that would necessarily incur in reasonable compliance with the proposed action on a representative private person. As for cost impact on businesses, for those insurers who choose not to conduct an auto body repair labor rate survey, the cost is estimated to be zero. The cost impact that would necessarily incur in reasonable compliance with the proposed regulations, for insurers who conduct an auto body repair labor rate survey, the estimated cost of the proposed regulation is \$1.17 million for the first year following the adoption of the regulation. In the second year, insurers may use a Consumer Price Index inflation adjustment instead of conducting a survey, drastically reducing their costs.

FINDING OF NECESSITY (Government Code § 11346.3(d))

The Department finds that it is necessary for the health, safety, or welfare of the people of the state that the regulations apply to businesses.

IMPACT ON SMALL BUSINESS (1 CCR § 4(a) and (b))

The Department has made an initial determination that the adoption of the proposed regulations will have a direct, positive impact on small auto body shops and individual proprietors of body shops who will derive a benefit from the enforcement of the regulation. The regulations will also directly affect insurers but insurers are not small businesses under Government Code section 11342.610(b)(2). The Department invites public comments on the question of economic impact on small businesses.

ALTERNATIVES STATEMENT (Government Code § 11346.5(a)(13))

The Department must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which this 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 provisions of law.

AVAILABILITY STATEMENTS (Government Code § 11346.5(a)(16))

The Department has prepared an Initial Statement of Reasons that sets forth the reasons for the proposed action. Upon request, the Initial Statement of Reasons will be made available for inspection and copying. Requests for the Initial Statement of Reasons or questions regarding this proceeding should be directed to the contact person listed above.

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

MODIFIED LANGUAGE (Government Code §§ 11346.5(a)(18); 11346.8(c))

If the Department adopts regulations that differ from those that have originally been made available but are sufficiently related to original proposed amendments, the full text of the amended regulations, with the change clearly indicated, will be made available to the public for at least 15 days prior to the date the Department adopts the amended regulations. Interested persons should request a copy of the amended regulations from the contact person listed above.

AUTOMATIC MAILING (Government Code § 11346.4(a)(1))

A copy of this Notice (including the Informative Digest, which contains the general substance of the proposed amendments to the regulations) will be sent to all persons who have previously filed a request with the Department to receive notice of proposed rulemaking.

FINAL STATEMENT OF REASONS (Government Code § 11346.5(a)(19))

Upon request, the Final Statement of Reasons will be made available for inspection and copying once it has been prepared pursuant to Government Code section 11346.9(a). Requests for the Final Statement of Reasons should be directed to the contact person in this Notice.

WEBSITE POSTINGS (Government Code § 11346.5(a)(20))

Documents concerning this proceeding are available on the Department's website. To access them, go to <http://www.insurance.ca.gov>. Click on "Insurers" then "Legal Information" then "Proposed Regulations" then "Search for Proposed Regulations." When the "Proposed Regulations" screen appears, you may choose to find the documents either by conducting a search for "REG-2012-00002" or by browsing for them by name as "Auto Body Repair Labor Rate Surveys" regulations.