October 11, 2016

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

RE: Notice of Availability of Revised Text And of Addition to Rulemaking File– Anti-Steering in Auto Body Repairs -CDI Regulation File: Reg-2015-00015

Dear Mr. Diederich:

On behalf of all the property casualty insurance trade organizations listed above, and the California Chamber of Commerce, we are writing to express our comments and questions to the California Department of Insurance's ("Department") proposed regulation on "anti- steering." At the outset, we appreciate the Department's time spent with us discussing the revisions to the proposed anti-steering regulation and recognize that some of these revisions appear to clarify some parts of the proposed regulation. Based on the feedback we have received, however, overall the proposed anti-steering regulation (even with the revisions to section 2695.8) fails to satisfy the authority, clarity, consistency, necessity, and reference standards under Government Code section 11349. Therefore, we are opposed to the proposed anti-steering regulation, and urge the Department to reconsider moving forward given our ongoing concerns as discussed below.

I. Authority - The September 26, 2016, proposed revisions to subdivision (e) of section 2695.8 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 790.10, 12921 and 12926, Civil Code sections 3333, and Government Code sections 11152 and 11342.2 as authorities for the September 26 proposed revisions to section 2695.8 falls short of satisfying the authority standard. None of the cited statutes permit or obligate the adoption of the amendments.

In citing section 790.10 as authority for the adoption of the proposed revisions to section 2695.8, the Department takes the position that the Insurance Commissioner's power to administer the Unfair Insurance Practices Act (UIPA) gives the Commissioner the authority to adopt regulations which define conduct that constitutes unfair or deceptive acts within the meaning of the provisions of UIPA. This reasoning was rejected by the Court of Appeal in *Association of California Insurance Companies v. Jones* (2015) 235 Cal.App.4th 1009. The Commissioner argued in *Jones* that the Commissioner's power to promulgate regulations to administer the UIPA gives the Commissioner the authority to define conduct that is unfair or deceptive through the adoption of a regulation. The Court of Appeal reviewed the provisions of the UIPA and concluded, "Read together, these provisions demonstrate that the Legislature did not give the Commissioner power to define by

regulation acts or conduct not otherwise deemed unfair or deceptive in the statute." (Jones at p.1030) The ruling in the *Jones* decision compels the conclusion that the power granted to the Commissioner in Insurance Code section 790.10 to adopt regulations to administer the UIPA does not authorize the adoption of the proposed revisions.

It is important to note that the *Jones* case is now pending before the California Supreme Court. A central issue in the case is whether the Insurance Commissioner has the authority to adopt a regulation that defines an unfair practice within the meaning of the UIPA. 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 1st, 2017.

The Supreme Court's decision in the *Jones* case could have implications for the validity of section 2695.8(e). Therefore, it would be imprudent to adopt amendments to section 2695.8(e) before the Supreme Court issues its decision in the *Jones* case. We urge the Department to delay the adoption of any amendments to section 2695.8 (e) until the Department has the benefit of the Supreme Court's ruling in the *Jones* case.

The Department's reliance on Subdivision (a) of section 12921 is misplaced. Section 12921(a) simply directs the Commissioner to perform the duties imposed upon him or her by the provisions of the Insurance Code and other laws relating to the business of insurance and to enforce those provisions and laws. As explained in the *Jones* case, the Insurance Code does not give the Commissioner the authority to adopt the proposed revisions that define unfair conduct within the scope of the UIPA.

The other two subdivisions of section 12921 do not provide authority for the proposed regulations. Subdivision (b) relates to the Commissioner's authority to delegate the power to approve settlements, and Subdivision (c) relates to the Commissioner's acceptance and maintenance of records.

Insurance Code section 12926, which states that the Commissioner must require every insurer to be in full compliance with the provisions of the Insurance Code, does not provide authority for the adoption of the proposed revisions.

Civil Code section 3333, which specifies the measurement of damages for the breach of an obligation not arising from a contract, does not provide authority for the adoption of the proposed revisions.

Government Code section 11152 gives the head of each state department the authority to adopt regulations governing the activities of the department. The does not provide authority for the adoption of the proposed revisions.

Government Code section 11342.2 gives a state agency general authority to adopt regulations to implement a statute, as long as the regulations do not conflict with the statute. The holding in the Court of Appeal's *Jones* decision clarifies that the Commissioner's authority to implement the UIPA does not extend to the Commissioner any authority to define new conduct, such as that specified in section 2695.8 (e), as an unfair act under the UIPA. The regulatory section is inconsistent with the limited authority granted by the statute.

II. Reference - The September 26, 2016, proposed revisions to subdivision (e) of section 2695.8 fail to comply with the reference standard.

Government Code section 11349.1 requires all regulations to comply with the standard of reference. Government Code section 11349 (e) provides, "'Reference' means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation."

The September 26 proposed revisions to section 2695.8 (e) continue to rely on Insurance Code sections 758.5 and 790.03 as reference for the regulation; however, neither statute provides reference for the revisions.

Insurance Code section subdivision (f) 758.5 states, "The powers of the commissioner to enforce this section shall include those granted in Article 6.5 (commencing with section 790) of Chapter 1 of part 2 of division 1." The enforcement powers referred to in subdivision (f) are the enforcement powers the Commissioner has under the UIPA. Those powers do not include the authority to adopt regulations which define unfair or deceptive insurance practices. In the *Jones* decision, the Court of Appeal reviewed the provisions of the UIPA, including section 790.08 which describes the powers vested in the Commissioner. The court concluded, "Thus, section 790.08 emphasizes that the enforcement role of the Commissioner is tethered to acts and 'hereby declared to be unfair or deceptive,' to wit, defined or determined in the UIPA." (Jones at p. 1032)

The Department of Insurance's reliance on Insurance Code section 790.03 as reference for the proposed revisions is not warranted. The Department seeks to define new unfair conduct within section 790.03 under the guise of implementing section 790.03. In ruling that the Legislature did not give the Commissioner the authority to adopt a regulation defining an unfair and deceptive practice set forth in section 790.03, the *Jones* decision concluded that "under the guise of 'filing in the details,' the Commissioner therefore could not do what the Legislature has chosen not to do." (Jones at p.1036)

The Supreme Court's decision in the *Jones* case could have implications for the validity of section 2695.8 (e). Therefore, it would be imprudent to adopt amendments to section 2695.8 (e) before the Supreme Court issues its decision 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 proposed regulations purporting to be referenced by the UIPA until the Department has the benefit of the Supreme Court's ruling in the *Jones* case.

III. Consistency - The September 26, 2016, proposed revisions to subdivision (e) of section 2695.8 fail to comply with the consistency standard.

Government Code section 11349.1 requires all regulations to comply with the standard of consistency. Government Code section 11349 (d) provides, "'Consistency' means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."

The September 26 proposed revisions to subdivision (e) section 2695.8 are inconsistent with the Court of Appeal's decision in *Association of California Insurance Companies v. Jones* and nothing in the proposed revisions addresses this inconsistency

The Court of Appeal specifically held in the *Jones* decision as follows: "The language of the UIPA reveals the Legislature's intent to set forth in statute what unfair or deceptive trade practices are prohibited, and not delegate that function to the Commissioner." (*Jones* at p. 1030) The existing section 2695.8 (e) and the proposed amendments to the section are at odds with the holding in *Jones*. The Court of Appeal's decision in the *Jones* case is being reviewed by the California Supreme Court. Until the Court completes its review of the decision, the Department is not free to ignore the Court of Appeal's ruling and adopt regulatory amendments that are inconsistent with the ruling.

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 proposed regulations until the Department has the benefit of the Supreme Court's ruling in the *Jones* case.

Also, the proposed regulations are inconsistent with well-settled California law confirming that a claimant can choose the body shop of his or her choice to make repairs. The proposed regulations appear to circumscribe the distance within which a customer may have the repairs made. If a claimant wants to have repairs made in a geographic area outside the distance provided in these regulations, but more convenient

to him or her, it does not appear that an insurer could accommodate that request, or allow for adequate documentation of such an accommodation that would be sufficient for the Department's purposes.

IV. Clarity - The September 26, 2016, proposed revisions to subdivision (e) to section 2695.8 fail to comply with the clarity standard.

Government Code section 11349.1 requires a regulation to comply with the standard of clarity. Government Code section 11349(c) provides, "'Clarity' means written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them."

As noted in our introductory comments above, some of the revisions help clarify parts of the subdivision (e) 2695.8, but overall there are other parts of the proposed regulation that still fail to comply with the clarity standard because insurers will have difficulty understanding several provision of the proposed regulation.

Section 2695.8 subdivision (e) (2) The proposed revision includes striking "~~to perform automotive repairs~~" and inserting "an auto body and/or paint shop." It is unclear why automotive repairs had to be changed to auto body and/ or paint shop. It seems to expand the definition of automotive repairs without much rationale and adds unnecessary confusion.

Section 2695.8 subdivision (e) (3) The proposed revision inserts the following standard: *"if the statement is known to be, or should by the exercise of reasonable care be known to be, untrue, deceptive or misleading."* This appears to be a legal standard that will not be easily understood by people directly affected by it. What does exercise of reasonable care be known to be, untrue, deceptive or misleading mean? Will word of mouth satisfy such a standard?

Also, the language proposed to be added by section 2695.8 (e) (3) is unnecessary and creates a lack of clarity. Insurance Code section 758.5 allows insurers to provide truthful non-deceptive information. As drafted, section 2695.8 (e) (3) has the potential to create confusion because it makes the law less clear. We have already seen evidence of this confusion in recent articles in repair magazines (http://www.repairerdrivennews.com/2016/09/28/14389/), which contains the following excerpt: "Any other statement."

Another confusing proposed change with section 2695.8 (e) (3) involves rewording the description of prohibited unsubstantiated comments from "has a record of poor service or poor repair quality, **or of other similar allegations against the repair shop**" to "has a record of poor service or poor repair quality, or **making any other statement to the claimant with respect to the chosen repair shop.**" This is an interesting proposal, which could even be read as barring misleading positive speech that an insurer makes about its own Direct Repair Program (DRP) shop selected by a customer.

In sum, misleading positive speech is already barred by Insurance Code section 758.5, but our concern is that auto body shops might complain if an insurer makes truthful positive statements about its network of auto body shops. If so, it would be a clear indication that the proposed regulations are likely to create confusion moving forward.

Section 2695.8 subdivision (e)(4): The September 26 proposed revisions omit a refinement the Department included in its Amended Text dated August 15, 2016 to clarify that the insurer has six business days to inspect a claimant's vehicle, starting when the claimant makes the vehicle reasonably available for inspection. Without that refinement, it is unclear what an insurer's compliance obligations are when a claimant waits until the fifth or sixth day after notice of claim, or even later, to make the vehicle available for inspection. While we continue to object to the proposed regulations overall, we note that this particular change from the August 15, 2016 Amended Text to the current version contributes to creating even more confusion. If the Department insists on

proceeding with the proposed regulation over the objections outlined herein, we propose that the Department return to its August 15, 2016 draft of paragraph (A): "For purposes of this section, if an insurer chooses to exercise its right to inspect the damaged vehicle, the insurer shall, upon receiving notice of the claim, inspect the damaged vehicle within six (6) business days after receiving the notice of claim, provided the claimant makes the vehicle reasonably available for inspection."

For the same reasons, and to avoid any confusion over the term "third-party insurer," we propose similar changes to paragraph (D): "Subdivisions (e)(4)(A) and (e)(4)(B) above notwithstanding, in the case of a third-party claim, should an third-party insurer exercise its right to inspect the damaged vehicle, the third-party insurer shall inspect the damaged vehicle within six (6) business days from the time the third-party insurer decides to inspect the third-party vehicle, provided the claimant makes the vehicle reasonably available for inspection by the third-party insurer. For purposes of the immediately preceding sentence, the third-party insurer's decision to inspect the third-party vehicle shall be deemed to have been made on the date the third-party insurer provides the third-party claimant with the information required by Subdivision (e)(2) of Section 2695.5, in the event the decision is not made prior to that date."

It's also still unclear what happens when liability in a third-party claim has not been determined. There are times when the liability determination does not hinge on an inspection of the third party claimant's vehicle, and it might not make sense to inspect it until after liability is accepted. Paragraph (D) does not take this into account.

We also note that the Department fails to address what happens in a catastrophe situation. For instance, there is no discussion of whether the time frame is subject to revision in the case of a catastrophe. What happens if there is a catastrophe in an area and an insurer receives 1000 claims? Would that insurer be required to see the vehicle within six business days? If the Department insists on proceeding with the proposed regulations over the objections outlined herein, the Department should insert an exception for disasters declared by the Governor or Federal Emergency Management Agency. Or at a minimum, we request that the Department to at least indicate in writing that they would likely apply the leniency permitted in Title 10 CCR section 2695.12 (a)(1) in those situations: "In determining whether to assess penalties and if so the appropriate amount to be assessed, the Commissioner shall consider admissible evidence on the following: the existence of extraordinary circumstances."

Further, if the Department insists on proceeding with the proposed regulation over the objections outlined herein, we raise the following general implementation questions:

- Insurers do not really have control of the time it takes a shop to return an estimate in all instances. Is the 6 day requirement applicable just to inspections? If so, what is an unreasonable period of time for a repair estimate and how do insurers control this?
- How does the 6 day requirement work with supplements?
- What does available for inspection mean? Where? How? What if vehicle is made available on the 6th day? The regulations should be clarified so that it is at least be six days from the date the vehicle is made available for inspection with some clear definition of what that is.
- What about shops that create hostile work environment for insurer representatives? Can a carrier refuse to inspect or deal with a particular shop? Under what circumstances would a carrier be able refuse to inspect or deal with a particular shop?
- How would the regulation work if two carriers are involved – with respect to 6 day requirement?
- What if a chosen shop refuses to admit carrier representatives to do inspections?
- Section 2695.8 subdivision (e) (4) (B) - Is a request for photos via an app from a customer, a request for estimate from the claimant?
- Section 2695.8 subdivision (e) (4) (C) – What defines an urban area? What specifically is "notice of claim"? Why is there no requirement for cooperation by claimant?

Section 2695.8 subdivision (e) (5) In our discussions with the Department, the Department indicated that insurers could still "request" to have a claimant's vehicle inspected at an insurer Direct Repair Program (DRP) under the proposed regulation. However, as the proposed regulation currently reads, insurers will not even be allowed to make a request that a claimant's vehicle be inspected at a DRP. Further, it appears that the Department is interpreting an insurer's reasonable request to have a vehicle inspected at a DRP as a requirement, or that the Department may interpret some carriers' inspection programs as a requirement rather than a request to have the vehicle inspected at a particular shop. As it stands, "require" is an ambiguous term.

Also, in our discussions with the Department, we have maintained that the proposal under this subdivision could be costly as some insurers may need to hire more employees to track down the location of the claimant's car so that they can inspect them. If the Department insists on proceeding with the proposed regulations despite the objections outlined herein, as an alternative, we suggest the Department strike the current proposed language and instead adopt the language below:

(5) *No insurer shall require that the claimant have a non-drivable vehicle inspected at an automobile repair shop identified by the insurer after the claimant has chosen an automobile repair shop, except that an insurer may have a non-drivable vehicle towed to an automobile repair shop chosen by the insurer for inspection at the insurer's expense.*

This proposed language is clearer and would avoid the unintended consequence of increasing costs related to hiring more employees under the current proposal.

Another issue that has come up under this subdivision is what happens when a customer requests to have his or her vehicle inspected outside the radius. For instance, where a person commutes from San Diego to Los Angeles, which is not uncommon, the customer might prefer to have the vehicle inspected in between the two locations, where the traffic is not as congested. The proposed regulation appears to prohibit insurers from accommodating the customer's reasonable request to have the vehicle inspected at a place that is more convenient for the customer. If the Department insists on proceeding with the proposed regulation despite the objections outlined herein, we urge the Department to clarify this issue.

More broadly, the proposed regulation assumes that **all** vehicles can be repaired at **all** licensed shops. This is not always the case. Some manufacturers (i.e., Audi, Land Rover and some other foreign manufacturers) do not sell OEM parts to any shop that is not certified to repair their vehicles. This is an example of a limitation that is not the fault of the insurer and an example demonstrating that we cannot always fix a vehicle in a shop picked by the claimant.

V. Necessity - The September 26, 2016, to subdivision (e) of section 2695.8 fail to comply with the necessity standard.

Government Code section 11349.1 requires all regulations 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 10 CCR section 10 (b) explains that in order to meet the necessity standard, the rulemaking file must include "facts, studies, or expert opinion."

We have reviewed the excerpts of the 16 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. From our review, the complaints are alleged violations of anti-steering laws under Insurance Code section 758.5, and they do not indicate whether such complaints were justified or whether any enforcement action ensued. If insurers are violating anti-steering laws, the Department already has the authority to enforce such laws and impose fines and penalties. We disagree that a whole new set of regulation are necessary based on a one sided representation of a particular case.

Conclusions
Given the fundamental differences between the industry and Department on the proposed anti-steering 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 anti-steering regulation. In our view, not addressing the issues here is tantamount to "regulatory overreach."

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

Should you have any questions or concerns, please feel free to contact any of the following: Michael Gunning, PIFC Vice President (916-442-6646/mgunning@pifc.org), Armand Feliciano, ACIC Vice President (916-205-2519/armand.feliciano@acicnet.org), Shari McHugh, on behalf of PADIC, (916-769-4872/smchugh@mchughgr.com), Christian Rataj, NAMIC Senior Director (303-907-0587/crataj@namic.org), Katherine Pettibone, AIA Vice President (916-402-1678/kpettibone@aiadc.org), or Marti Fisher, California Chamber of Commerce, (916-930-1265/marti.fisher@calchamber.com).