

**State of California
Office of Administrative Law**

In re:
Department of Insurance

Regulatory Action:

Title 10, California Code of Regulations

Adopt sections: 2695.81, 2695.82

Amend sections: 2698.91

Repeal sections:

**NOTICE OF APPROVAL OF REGULATORY
ACTION**

Government Code Section 11349.3

OAL Matter Number: 2016-1014-07

OAL Matter Type: Regular (S)

The Department of Insurance (Department) proposed this action to amend section 2698.91 of title 10 of the California Code of Regulations to clarify and make specific the reporting of auto body repair labor rate surveys to the Department pursuant to Insurance Code section 758(c). The proposed action also adopts sections 2695.81 and 2695.82 into title 10 of the California Code of Regulations to establish an optional Standardized Auto Body Labor Rate Survey (SLRS) that insurers may use to establish prevailing labor rates of auto body repair shops using specified methodologies for determining prevailing labor rates in geographic areas. Under section 2695.81(c), use of the SLRS by an insurer to settle auto body repair claims creates a rebuttable presumption that the settlement was done in a fair and equitable manner in compliance with Insurance Code section 790.03(h)(5).

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 1/1/2017.

Date: November 30, 2016

Richard L. Smith

Richard L. Smith
Senior Attorney

For: Debra M. Cornez
Director

Original: Dave Jones
Copy: George Teekell

NOTICE PUBLICATION/REGULATIONS SUBMISSION

REGULAR

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2016-0223-06	REGULATORY ACTION NUMBER 2016-1014-07S	EMERGENCY NUMBER
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For use by Office of Administrative Law (OAL) only

NOTICE	REGULATIONS
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ENDORSED - FILED
in the office of the Secretary of State
of the State of CaliforniaNOV 30 2016
1:44 p.m.2016 OCT 14 P 5:03
OFFICE OF
ADMINISTRATIVE LAWAGENCY WITH RULEMAKING AUTHORITY
Department of InsuranceAGENCY FILE NUMBER (if any)
REG-2012-00002**A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)**

1. SUBJECT OF NOTICE		TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE	
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON		TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn			NOTICE REGISTER NUMBER 2016, 10-2	PUBLICATION DATE 3/4/2016

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Autobody Repair Labor Rate Surveys	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT 2695.81, 2695.82
	AMEND 2698.91
	REPEAL
TITLE(S) 10	

3. TYPE OF FILING

<input checked="" type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))	<input type="checkbox"/> Other (Specify) _____		

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)
15-Day Notice of Modified Text and Additions to the Rulemaking File: 9/26/16 to 10/11/16

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

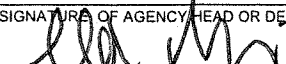
<input checked="" type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> §100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____
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6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal
<input type="checkbox"/> Other (Specify) _____		

7. CONTACT PERSON George Teekell	TELEPHONE NUMBER (415) 538-4390	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional) George.Teekell@Insurance.ca.gov
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE 	DATE October 14, 2016
TYPED NAME AND TITLE OF SIGNATORY Geoff Margolis, Deputy Commissioner & Special Counsel	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

NOV 30 2016

Office of Administrative Law

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

FINAL TEXT OF REGULATION

Auto Body Repair Labor Rate Surveys

Date: November 30, 2016

CDI Regulation File: REG-2012-00002

Title 10, Chapter 5, Subchapter 7.5, Article 1
Fair Claims Settlement Practices Regulations

Adopt Section 2695.81. The Standardized Auto Body Repair Labor Rate Survey.

The Insurance Commissioner has promulgated Section 2695.81 of these regulations in order to (1) establish a standardized labor rate survey that the Commissioner recommends insurers use as a basis to settle or pay automobile repair insurance claims in a fair and equitable manner, if the insurer elects to use a survey; and (2) ensure and enforce the good faith, prompt, fair and equitable settlement of automobile insurance claims pursuant to Insurance Code section 790.03.

(a) Nothing in this section shall be construed to require the insurer to pay for repair costs associated with prior or unrelated damages to the claimant's vehicle, to the degree an insurer is not required to pay for these costs under the insurance policy or any applicable law.

(b) Nothing in this section shall be construed to prohibit an insurer from paying a labor rate lower than the prevailing auto body rate, if the auto body repair shop, chosen by the claimant to perform repairs, charges a labor rate lower than the prevailing auto body rate.

(c) A survey that complies with the standards and requirements set forth in subdivision (d) of this Section 2695.81 (hereinafter, a "Standardized Labor Rate Survey"), that complies with Section 2698.91, and that is used pursuant to subdivision (e) of this section, shall result in a rebuttable presumption by the Commissioner that the insurer has attempted in good faith to effectuate a fair and equitable:

(1) labor rate component of a claim settlement, or

(2) adjustment of the labor rate component of a written estimate provided by a claimant pursuant to subdivision (f)(3) of Section 2695.8.

(d) The Standardized Labor Rate Survey.

(1) Currentness.

(A) Time since submittal of survey to the Department.

1. No survey that has been filed with the Department for over one calendar year shall qualify as a Standardized Labor Rate Survey.
2. No survey that has previously qualified as a Standardized Labor Rate Survey shall continue to qualify as a Standardized Labor Rate Survey for more than one calendar year after the date it was submitted to the Department.

(B) Time since collection of data.

1. Only a survey that uses no labor rate information older than sixteen (16) months shall qualify as a Standardized Labor Rate Survey.
2. No survey that has previously qualified as a Standardized Labor Rate Survey shall continue to qualify as a Standardized Labor Rate Survey after the day the oldest labor rate information used in the survey becomes sixteen months old.
3. For purposes of this subdivision (d)(1)(B), labor rate information becomes sixteen months old on the four-hundred-eighty-seventh (487th) day after it was collected.

(C) Extending the useful life of the survey.

Provided the survey satisfies the standards and requirements set forth in subdivisions (d)(2) through (d)(9) of this section, a survey that fails to meet the currentness standards set forth in subdivisions (d)(1)(A) and (d)(1)(B) of this section shall, notwithstanding those subdivisions (d)(1)(A) and (d)(1)(B), qualify as a Standardized Labor Rate Survey as long as all three of the following conditions are satisfied and, with respect to the conditions set forth in subdivisions (d)(1)(C)1. and (d)(1)(C)2. below, continue to be satisfied:

1. No longer a period than two (2) years has elapsed since the date the survey was submitted to the Department. For purposes of this subdivision (d)(1)(C)1., two years has elapsed on the two-year anniversary date of the date the survey was submitted to the Department;
2. No labor rate information older than twenty-eight (28) months is used in the survey. For purposes of this subdivision (d)(1)(C)2., labor rate information becomes twenty-eight (28) months old on the eight-hundred-fifty-second (852nd) day after it was collected; and

3. The effects of inflation are taken into account, as follows:

a. The insurer adjusts each labor rate collected in the survey, and the prevailing rate for each Geographic Area surveyed (as that term is defined in subdivision (d)(8)(A) of this section), by an inflation factor that is derived by comparing the most recently stated annualized index value of the Monthly (All Items) Consumer Price Index for All Urban Consumers for California (hereinafter, the "most recent California CPI-U") at the time the oldest labor rate survey data used in the survey was collected, on the one hand, to the most recent California CPI-U at the time the labor rate is adjusted pursuant to this subdivision (d)(1)(C)3., on the other. The Monthly (All Items) Consumer Price Index for All Urban Consumers for California is available on the California Department of Finance website.

b. Labor rates and prevailing rates shall be increased or decreased commensurately with any increase or decrease in the California CPI-U. However, if at the time the labor rate is to be adjusted the most recent California CPI-U is the same as the most recent California CPI-U at the time the oldest labor rate survey data used in the survey was collected, no adjustment shall be made, in which case the resulting determination not to change the rates shall, for purposes of the immediately following sentence, be deemed to be the adjustment described in this subdivision (d)(1)(C)3.

c. The adjustment described in this subdivision (d)(1)(C)3. may be made only once per survey, and may be made no earlier than the day after an eleven-month period has elapsed since the date the survey was submitted to the Department. For purposes of the immediately preceding sentence, eleven months elapses on the 335th day after the day the survey was submitted.

d. If an insurer exercises the option described in this subdivision (d)(1)(C), the insurer shall submit to the Department the adjusted survey results and the adjusted prevailing rate for each Geographic Area surveyed. In the event of a determination not to change rates pursuant to subdivision (d)(1)(C)3.b. of this section, the insurer shall submit to the Department a notice of the deemed adjustment pursuant to that subdivision stating the date of such deemed adjustment. In any event, the adjusted survey results and the adjusted prevailing rate for each Geographic Area surveyed, or the notice specified in the immediately preceding sentence, shall be submitted to the Department no later than the eighth calendar day after the date of the adjustment.

(2) Sample size. In order to produce a Standardized Labor Rate Survey, an insurer must send a survey questionnaire to all auto body repair shops registered with, or licensed by, the Bureau of Automotive Repair as an auto body and/or paint shop. All shops that respond to the survey, that do not indicate on the survey that they decline to participate in it, and that meet the standards set forth in subdivision (d)(4) of this Section 2695.81, shall be used to determine prevailing auto body rates. If the insurer obtains information to the effect that a shop does not meet the standards set forth in subdivision (d)(3) or (d)(4) of this Section 2695.81, the insurer shall exclude the shop from the survey results. In this instance, the information indicating that the shop does not meet these standards must be submitted as part of the information submitted pursuant to subdivision (g)(4) of Section 2698.91.

(3) A Standardized Labor Rate Survey shall use only labor rates of auto body repair shops that, at the time the insurer sends the survey questionnaire, are registered with, or licensed by, the Bureau of Automotive Repair as an auto body and/or paint shop. However, in cases where the survey questionnaire asks the repair shop to respond as to whether it is duly registered or licensed as an auto body and/or paint shop and, if so, to provide its license number, this subdivision (d) shall not be construed to require an insurer to verify the registration or license status of surveyed shops with the Bureau of Automotive Repair.

(4) Only labor rates reported by auto body repair shops that meet each of the specific standards set forth in subdivision (d)(4)(A) below may be used in a Standardized Labor Rate Survey.

(A) Specific Standards. Each body shop whose labor rates are used must:

1. Meet all equipment requirements for auto body repair shops, as required by the Bureau of Automotive Repair and as described in California Code of Regulations, Title 16, Division 33, Chapter 1, Article 6, Section 3351.5, Equipment Requirements for Auto Body Repair Shops, and any amendments thereto;
2. Have proof of garage keeper's liability and workers' compensation insurance or equivalent;
3. Have electrical or hydraulic equipment capable of making simultaneous multiple body or structural pulls;
4. Have a spray booth that meets current federal, state, and local requirements;
5. Have the ability to complete and verify four-wheel alignment through computer printout either from an in-house alignment system with at least one technician that is certified or qualified or by utilizing a qualified sublet provider;
6. Have the ability to (1) remove and reinstall frame, suspension, engine, and drive train components, or (2) use a qualified sublet provider;

7. Have the ability to evacuate, reclaim, and recharge vehicles' air conditioning systems using EPA compliant in-house equipment and certified technicians or use a qualified sublet provider; and

8. Subscribe to a provider of structural specifications with periodic updates covering the vehicle structure for the make, model, and year of the vehicle(s) being repaired and wheel alignment specifications for the make, model, and year of the vehicle(s) being repaired.

(B) This subdivision (d)(4) shall not be construed to require the insurer to inspect surveyed shops in order to confirm that the specific standards are being met.

(5) For purposes of a Standardized Labor Rate Survey, "prevailing auto body rate" or "prevailing rate" shall be calculated as the labor rate at or below which a simple majority of surveyed shops charge in a specific Geographic Area, as defined in subdivision (d)(8)(A)4. of this section.

(A) An example of how prevailing rate is to be calculated is as follows:

Assume that in a specific Geographic Area the applicable surveyed labor rates charged by the six (6) Responding Qualified Auto Body Repair Shops (as defined in Subdivision (d)(8)(A)3. of this section) that are included in the geographic area are \$64, \$65, \$66, \$66, \$71, and \$73. The rate at or below which a simple majority of surveyed shops charge is \$66, since four of the six shops (the simple majority) charge a rate of \$66 or less. Therefore, the prevailing rate in this example is \$66.

(B) If the insurer exercises the option specified in subdivision (d)(1)(C) of this section, the prevailing rate shall be the prevailing rate as determined pursuant to subdivision (d)(1)(C) of this section.

(6) No Standardized Labor Rate Survey shall use any discounted rate negotiated or contracted for with members of the insurer's Direct Repair Program, or any other Direct Repair Program, as defined in Section 2698.90. However, nothing in this subdivision (d)(6) shall be construed to prohibit the use of the non-discounted posted labor rate of a Direct Repair Program shop in a Standardized Labor Rate Survey. If the Standardized Labor Rate Survey uses a surveyed rate from one of the insurer's Direct Repair Program shops, the insurer shall state that fact in its submittal to the Department pursuant to subdivision (g)(5) of Section 2698.91.

(7) Only direct responses provided by an auto repair shop on a survey questionnaire that complies with subdivision (d)(9) of this section shall be used in a Standardized Labor Rate Survey. Labor rates obtained from the following sources shall not be used in a Standardized Labor Rate Survey:

(A) Estimates written by the insurer to estimate repair claims,

(B) Third-party automobile collision repair estimating software used by the insurer to prepare estimates,

(C) Subrogation reimbursement, or

(D) Any source other than direct responses provided by an auto repair shop on a survey questionnaire.

(8) Geographic area. Any geographic area used in a Standardized Labor Rate Survey must meet the standards set forth in subdivisions (d)(8)(A) through (d)(8)(F), below, in which case it shall be deemed to enable the survey to consistently yield prevailing labor rates that ensure that the labor rate component of the claim settlement is fair and equitable when used in paying or adjusting an automobile insurance claim in that geographic area.

(A) Definitions. For purposes of this subdivision (d) and subdivision (e) of this section:

1. Street Address means the physical address of record of an auto body repair shop as recorded with the Bureau of Automotive Repair at the time the survey is conducted.

2. Qualified Auto Body Repair Shop means an auto body repair shop that is licensed by the Bureau of Automotive Repair as an auto body and/or paint shop and that meets the standards set forth in subdivision (d)(4)(A) of this Section 2695.81.

3. Responding Qualified Auto Body Repair Shop means a Qualified Auto Body Repair Shop that responds to, and does not decline to participate in, the survey. For purposes of the immediately preceding sentence, a shop "responds to" the survey if on the survey questionnaire it specifies a rate for one or more of the types of labor listed below, in which case the shop is a Responding Qualified Auto Body Repair Shop for purposes of determining the prevailing rate for that particular type of labor:

a. Auto body/sheet metal labor,

b. Structural labor,

c. Frame labor,

d. Mechanical labor,

e. Refinish labor,

f. Aluminum repair labor,

g. Carbon fiber labor, and

h. Fiberglass labor.

4. Geographic Area includes, for any given auto body repair shop, (1) all Responding Qualified Auto Body Repair Shops lying within the given shop's core area as specified in subdivisions (d)(8)(C) and/or (d)(8)(D) of this section, and (2) any Responding Qualified Auto Body Repair shops lying within its periphery as specified in subdivision (d)(8)(E) of this section. Auto body repair shops that are situated neither within said core area nor within said periphery are excluded from the Geographic Area for the given shop. Only Responding Qualified Auto Body Repair Shops may be included in a Geographic Area.

(B) Geocoding. Distances among shops shall be based upon the latitude and longitude coordinates of the Street Address of each shop.

For purposes of this subdivision (d)(8), the latitude and longitude coordinates used as the location of each shop shall be derived using a geocoding process that entails translating a table of Street Address entries, searching for the address in the reference data embedded in an address locator, and delivering the best location candidate. In order to comply with this requirement, the survey analysis must use TIGER (Topologically Integrated Geographic Encoding and Referencing) line files from the most recent U.S. Census, which contain street locations and points of intersections. To perform address matching, the survey analysis must use address GIS (Geographic Information System) software capable of reliably computing distances between shops with at least a degree of precision that will enable the reporting of distances among shops that are accurate to the one-thousandth of a mile, such as ArcGIS (developed by Environmental Systems Research Institute, Redlands). In a Standardized Labor Rate Survey, distances among shops shall be reported in miles using at least three significant digits to the right of the decimal place.

(C) Core area. The core area for an auto body repair shop shall comprise six (6) Responding Qualified Auto Body Repair shops. If the shop in question is a Responding Qualified Auto Body Repair Shop, the core area shall be the shop in question plus the five Responding Qualified Auto Body Repair Shops closest in straight-line distance to that shop. If the shop in question is not a Responding Qualified Auto Body Repair Shop, then the core area shall be the closest six Responding Qualified Auto Body Repair Shops in straight-line distance to the shop in question.

(D) Tie breaker. Any contrary provision of subdivision (d)(8)(C) of this section notwithstanding, in the event that the Responding Qualified Auto Body Repair Shop furthest from the shop in question in the core area specified in said subdivision (d)(8)(C) is the same number of miles, rounded to the thousandth of a mile, from the shop in question as another Responding

Qualified Auto Body Repair Shop that otherwise would not be in the core area, that other Responding Qualified Auto Body Repair Shop shall also be included within the core area.

(E) Periphery included. Any Responding Qualified Auto Body Repair Shop(s) lying within the periphery of the core area for a given auto body repair shop shall also be included in the given shop's Geographic Area. In order to determine whether a shop is situated in the periphery for purposes of the immediately preceding sentence:

1. Ascertain the core area radius: The core area radius is the distance in miles, using three significant digits to the right of the decimal place, from the shop in question to the Responding Qualified Auto Body Repair Shop (or, in the event Subdivision (d)(8)(D) of this section is applicable, the Responding Qualified Auto Body Repair Shops) in the core area that is (or are) furthest from the shop in question.

2. Calculate the periphery limit, by adding one mile (1.000 miles) to the core area radius ascertained pursuant to Subdivision (d)(8)(E)1., above. The sum resulting from the operation of the immediately preceding sentence shall be the periphery limit for purposes of Subdivision (d)(8)(E)3., below.

3. Compare to the periphery limit the respective distances from the shop in question to surrounding Responding Qualified Auto Body Repair Shops outside the core area, to determine which shops lie in the periphery: Responding Qualified Auto Body Repair Shops (lying outside the core area) whose distance (in miles, using three significant digits to the right of the decimal place) from the shop in question is less than or equal to the periphery limit specified in Subdivision (d)(8)(E)2., above, shall be included in the periphery. No auto body repair shop whose distance (in miles, using three significant digits to the right of the decimal place) from the shop in question is greater than the periphery limit specified in Subdivision (d)(8)(E)2., above, shall be included in the periphery.

(F) Example.

Determine which auto body repair shops are located in the Geographic Area of Shop S1 for purposes of determining the prevailing rate for structural labor.

Assume that, except for Shops 5 and 19, each of Shops S1 through 24 is a Qualified Auto Body Repair Shop, and that each responds to the survey, specifying a rate for structural labor. Assume further that Shop 5 is not a Qualified Auto Body Repair Shop, because it does not meet one of the standards set forth in subdivision (d)(4)(A) of this section, and that Shop 19

is not a Responding Qualified Auto Body Repair Shop for purposes of determining the prevailing rate for structural labor, because although Shop 19 responded to the survey, it did not specify a rate for structural labor. Finally, assume that the respective distances from Shop S1, in miles, rounded to three significant digits to the right of the decimal point, to each of Shops 2 through 24 are as indicated below (the distance from Shop S1 to Shop S1 is zero).

Shop	Distance from Shop S1 (in Miles)	Responding Qualified Shop	Status of Shop
S1	0.000	Yes	The shop in question (the subject shop)
2	0.333	Yes	In core area
3	0.670	Yes	In core area
4	1.348	Yes	In core area
5	1.589	No	Not in core area
6	1.849	Yes	In core area
7	2.007	Yes	In core area
8	2.007	Yes	In core area
9	2.010	Yes	In periphery
10	2.156	Yes	In periphery
11	2.189	Yes	In periphery
12	2.216	Yes	In periphery
13	2.288	Yes	In periphery
14	2.301	Yes	In periphery
15	2.303	Yes	In periphery
16	2.448	Yes	In periphery
17	2.514	Yes	In periphery
18	2.684	Yes	In periphery
19	2.701	No	Not in periphery
20	2.754	Yes	In periphery
21	2.885	Yes	In periphery
22	3.007	Yes	In periphery
23	3.008	Yes	Outside the Geographic Area
24	3.328	Yes	Outside the Geographic Area

1. Ascertain the core area radius: Pursuant to subdivision (d)(8)(C) of this section, Shop S1, and the five Responding Qualified Auto Body Repair Shops nearest to Shop S1 (Shops 2, 3, 4, 6, and 7), compose the core area. However, pursuant to subdivision (d)(8)(D), Shop 8 is also included in Shop S1's core area, since Shop 8 is the same number of miles, rounded to the thousandth of a mile, from the shop in question as shop 7. Thus, the following seven shops are part of Shop S1's core area: Shop S1, Shop 2, Shop 3, Shop 4, Shop 6, Shop 7 and Shop 8. Shop 5 is not included in the core area, since it is not a Qualified Shop and, thus, is not a Responding Qualified Shop as defined in subdivision (d)(8)(C)3. Pursuant to subdivision (d)(8)(E)1.,