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June 16, 2010

Lisbeth Landsman-Smith
Staff Counsel
California Department of Insurance
300 Capitol Mall, Suite 1700
Sacramento, CA 95814

Sent via email to: landsmanl@insurance.ca.gov.

RE: RH05042805, Proposed Amended Principally at-Fault Regulation Text—*Written Comments from the Personal Insurance Federation of California (PIFC)*

Dear Ms. Landsman-Smith:

The Personal Insurance Federation of California ("PIFC") appreciates the opportunity to submit comments to the California Department of Insurance ("the Department") in response to the Modifications to the Proposed Text of the Principally at-Fault Regulation ("proposed regulation").

PIFC member companies provide home, auto, flood and earthquake insurance for millions of Californians. Our member companies, State Farm, Farmers, Allstate, Liberty Mutual Group and Progressive, write more than 60 percent of the home and auto insurance sold in this state. In addition, the National Association of Mutual Insurance Companies (NAMIC) is an associate member.

PIFC has previously submitted comments through the informal workshop in June 2007, and in response to the proposed regulation in August 2009. We are aware and appreciate that some of our concerns have been addressed in the amended text and below we outline our specific comments to each of the amended sections.

Without repeating all of the arguments raised in our previous sets of comments, we would summarize by stating that we remain concerned that the regulation undermines the insurer's ability to produce accurate risk-based auto insurance and specifically, to adequately rate a driver's safety record -- in conflict with the Proposition 103 dictate to use driver safety record as the first mandatory rating factor. We refer the Department to our previous comments attached for reference.

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As to the proposed modifications to the proposed regulation, we provide additional comment below, however, our primary concern is the proposed restriction on the use of subscribing loss underwriting exchange carrier reports and the practical impact the changes would have for the industry and the consumer.

With no stated need or context, the Department proposes to dramatically alter the process by which insurers use information to assess risk and accurately rate a driver's safety record. The proposed regulation would reduce the ability of an insurer to rely upon a subscribing loss underwriting exchange carrier report – a tool used by insurers throughout the country that allows for immediate access to driver information, including at-fault accidents. We assume the Department's goal is to ensure that the information relied upon to rate a driver is accurate. We absolutely share that goal. Insurers rely on the accuracy of the information to adequately assess risk. If the Department is aware of significant problems with the current practice or the adequacy of the information contained in the reports relied upon, we would like the Department to clearly state so. PIFC would be pleased to work with the Department and the vendors that provide the subscribing loss underwriting exchange carrier reports to address any concerns. We are aware that the vendors have expressed a willingness to engage in such a dialogue.

The time constraints related to this rulemaking process make it difficult to see a reasonable outcome with the proposed regulation. We suggest allowing the deadline to pass and begin a new rulemaking proceeding to allow the opportunity to reach an improved outcome. We continue to have issues with many of the specific changes proposed. However, once the Department clarifies its concerns with the subscribing loss underwriting exchange carrier reports, we are confident that any issues can be addressed and improved to the satisfaction of the Department, while not completely upending the current industry practice.

We provide the following comments and questions for the Department in response to the modifications to the proposed regulation. Should the Department choose to move forward with the proposed regulation, we offer some specific suggested changes to the language (For ease of reading, those changes are in blue and italicized).

Administrative Procedure Act Requirements

The proposed changes to this section meet neither the "nonsubstantial" test, nor are they "sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action" as required by Government Code Section 11346.8 (c).

In addition, the proposed regulation fails to meet the standards set forth in Government Code Section 11349.1, specifically necessity and clarity. The Department has failed to provide substantial evidence, in fact the Department has provided no evidence, in the rulemaking proceeding that the proposed regulation is necessary to effectuate the purpose of the statute. As stated above and in our previous comments, PIFC submits that the regulation is actually in conflict with the underlying statute by making it more difficult to accurately assess a driver safety record.

The "Clarity" standard requires the regulation be written so that the "meaning of the regulation will be easily understood by those persons directly affected by them." As set forth below in the specific sections, the proposed regulation is often awkwardly written and invites varying interpretations. We spoke with many experts in this area and found no one confident that they understood what is required of the insurer under the proposed regulation. We pose several

questions and look forward to clarification in the rulemaking process should the Department proceed.

Specific Comments

Section 2632.13 (b)

- We note and appreciate the Department has deleted the previously proposed language, "occurring not more than three years preceding the effective or renewal date of the policy."

- Our August 2009 comments stated objection to the provision (now (b)) increasing the threshold from $750 to $1000 and we reaffirm our position that the increase is not authorized by statute. The current threshold is contained in the Vehicle Code and therefore must be amended via statutory, not regulatory change. The statement contained in the Initial Statement of Reasons contains no justification for the increase. Should the Department proceed, insurers would need extended time to implement this change as it would impact claims handling and IT processing and systems.

Section 2632.13(d)

- PIFC previously raised significant concerns regarding the solo vehicle exception to the finding of a principally at-fault accident (now (d)(2)). The creation of two categories: "rebuttable presumption" and "conclusively presumed" exacerbates rather than alleviates potential problems. We question why the second category was created and propose that all of the exceptions should be subject to the "rebuttable presumption" standard. Even under this standard, we affirm our comments and concerns reflected in our prior comments. Given solo accidents seldom provide witnesses, the provision creates a giant loophole and invites an insured to invoke the "hazardous condition" or "could not have been avoided" exception for any solo accident. The language states that the accident must be "principally caused" by the hazardous condition or "could not have been avoided." Will the insurer be able to offer any evidence that the hazardous condition was not the "principal cause" or even that the hazardous condition claimed did not exist? Will the Department explain under what circumstances a solo accident could be deemed principally at-fault? Or is the Department suggesting that in all cases the driver's recollection of the accident must be accepted even if contradictory evidence exists? This result is absolutely contrary to the notion of rating a driver for a "Good Driver" discount and in direct conflict with Proposition 103, which provides that the First Mandatory Rating Factor is the Driver Safety Record. How does the Department reconcile this proposed regulation with Insurance Code Section 1861.02?

- Again, these problems and conflicts are exacerbated by applying the principally at-fault regulations beyond the Good Driver Discount, as required by Proposition 103, to the First Mandatory Factor (Driver Safety Record).

Section 2632.13(e)(2)

- The proposed change to (e)(2) requires broadening the determination of fault that must be communicated to the insured at the time of the claim. Under current practice, insurers notify the driver if an accident is determined to be at-fault and why the determination was made according to the existing regulations. The Department has offered no justification for this new requirement and we would appreciate the Department explaining the rationale.

Suggested Change:

(~~d~~e~~e~~) An insurer providing insurance coverage at the time of an accident shall not make a determination that a driver was principally at-fault for an accident~~, other than an indisputably solo vehicle accident and which is not of the type specified in subpart (d),~~ unless the insurer first does the following:

(1) ~~t~~The insurer shall make an investigation of the accident;

(2) ~~t~~The insurer shall provide written notice to the insured of the result of such investigation, including any determination that the insured was principally at-fault. The notice shall specify the basis of any determination that a driver was principally at-fault ~~*and the basis of any determination that an injury occurred*~~. The notice shall advise the insured of the right to reconsideration of the determination of fault, as set forth ~~for~~ in Subsection (~~d~~e~~e~~)(3);

Section 3632.13(f)

- This new language appears to essentially deprive the insurer of the ability to rely on a subscribing loss underwriting exchange carrier report and would require the insurer to independently investigate any reported at-fault accident, including, specifically, to contact the previous insurer to confirm an at-fault determination. The insurer has already provided the information to the exchange carrier report vendor. What is the benefit of requiring the repetitive step of going back to the insurer for the same information? In practice, seeking and obtaining confirmation from the previous insurer will not occur within the required 15-day period, the maximum time period allowed to underwrite a policy (10 C.C.R. Section 2632.14.3(b)) . Under that scenario, will the insurer be required to offer the applicant a Good Driver Discount policy in spite of evidence that the applicant does not qualify?

- The Department has offered no evidence in promulgating this regulation that a problem exists with the current practice of using subscribing loss underwriting exchange carrier reports such that would necessitate the proposed amendments. Insurers rely on the accuracy of the information to adequately assess risk. If the Department is aware of significant problems with the current practice, or the adequacy of the information contained in the reports relied upon, we request the Department provide evidence of a problem. PIFC suggests the Department work with insurers and the vendors that provide the subscribing loss underwriting exchange carrier reports to address any concerns. Our understanding of the process suggests there are very few disputes with respect to the information provided in these reports and when those disputes arise there

is a process of review and, if necessary, correction, and the issue is resolved. If the Department has contrary information, it should provide this data in conjunction with the proposed regulations. If it does not, the Department cannot justify the necessity of these significant amendments to the existing regulations.

- In addition, the regulation as currently proposed lacks the required clarity. For example, (f)(1) is awkwardly written. What is a "reasonable effort" and what is the effect if the previous insurer does not respond to the inquiry – and under what time period? The fundamental purpose of the subscribing loss underwriting exchange carrier report is to provide that information which has been provided by a previous insurer to subsequent insurers in a timely, almost immediate fashion. This immediacy allows an insurer to provide rate information to an applicant in a timely manner as desired by an applicant for comparison or needed immediate coverage.

- Section (f)(4) could be interpreted to allow the driver to confirm an at-fault accident only in the absence of an at-fault determination of another insurer. Would the Department please clarify and provide the context or reasoning for such a limitation?

Suggested changes:

(~~e~~ff) If a driver had insurance that provided coverage for an accident, a subsequent insurer which did not provide coverage at the time of the accident and to whom an application for the issuance of a policy of insurance is made, or from whom a renewal policy is offered, may not consider the driver to be principally at-fault for the accident unless *any of* the following circumstances apply:

(1) I~~i~~f the insurer that provided coverage at the time of the accident ~~charged~~determined the driver ~~with a violation point~~to be principally at-fault for the accident in accordance with this Section, or the predecessor of this Section~~;~~, which may appear on a subscribing loss underwriting exchange carrier report, ~~*the subsequent insurer shall make reasonable efforts to contact the insurer who provided coverage at the time of the accident to confirm the principally at-fault determination and, if applicable, that an injury or death resulted unless*~~ *the subsequent insurer may use such determination if either* the driver confirms and the insurer records that the driver was principally at-fault for the accident as defined in subsection (b) and, if applicable, that an injury or death resulted or ~~*unless*~~ the subscribing loss underwriting report contains sufficient information to establish each of the elements that are necessary to determine that the driver is principally at-fault for the accident as provided in subsection (b) and, if applicable, that an injury or death resulted; or,

(2) I~~i~~f the driver was not covered by an automobile insurance policy delivered or issued for delivery in California and issued and in force pursuant to the laws of California at the time of the accident, ~~and~~ the insurer shall determin~~es~~ ~~that~~ whether the driver was ~~principaly~~ principally at-fault as provided for in Subsection (~~f~~g); or,

(3) I~~i~~f the insurer of the driver at the time of the accident did not have notice of the accident and no other insurer of any person involved in the accident made a determination that any other driver was at least 51% of the proximate cause of the accident, ~~and~~ the insurer shall determin~~es~~ ~~that~~whether the driver was principally at-fault as provided for in Subsection (g~~f~~g)~~.~~: or,

(4) *In the absence of any principally at-fault determination made by another insurer*, ~~if~~ *the If the* driver *shall* confirms ~~s~~ and the insurer *shall* records ~~in writing~~ facts sufficient to find that the driver is principally at-fault for the accident, as defined by subsection (b).

Section 2632.13(g)

- This subdivision addresses the situation where the applicant did not have coverage for an accident and no fault determination was made by another insurer for another party, but the potential insurer is aware that an accident has occurred. The additional proposed language suggests the insurer must first attempt to obtain information from other insurers and only if information cannot be obtained can the insurer then request information from the driver. This linear process would be time consuming and inefficient and also appears to conflict with subsection (i) below allowing a driver's declaration as proof of accident history - unless it is anticipated that the insurer may only consider such declaration after attempting to obtain the information from third party insurers. Also, the requirement in subsection (h) that insurers shall not refuse to disclose information applies only to the situation where an insurer has made a determination that its insured was principally at-fault. Yet, the proposed regulation contemplates a subsequent/potential insurer seeking information from other insurers ((g)(2)) "…reasonable efforts to obtain information concerning the accident from other insurers…" These other insurers would not be required to provide the information and, in fact, may be prohibited from doing so. Would the Department clarify what is intended as the record indicates no evidence for the necessity of a change in practice as proposed by the regulation?

Suggested Changes:

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

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

(2*) ~~If the insurer cannot obtain information concerning the accident from other insurers,~~* the insurer *~~shall~~ may* request sufficient information from the driver~~;~~

~~(3) upon reasonable request by the insurer, a driver shall provide sufficient information concerning the accident to the insurer for the insurer~~ ~~t~~To determine whether the driver was principally at~~-~~ fault~~. If~~; if the driver fails or refuses to provide such information within ~~2~~30 days of ~~receipt~~ the date a *~~written~~* request is *~~sent~~ made ~~of an insurers' written request~~*, then the insurer

may ~~count a violation point for the accident or may~~ consider the driver to be principally at-fault~~.~~ ~~The insurer may not count the accident as one involving bodily injury or death based solely on an~~ *Without either (i) the driver's confirmation or (ii) the driver's failure to respond to a request for confirmation , A*~~a~~n insurer shall not presume that a driver is principally at-fault for an accident listed on the driver's public record of traffic violation convictions available from the California Department of Motor Vehicles and similar public records of traffic violation convictions that are available from other jurisdictions (hereinafter sometimes referred to as the "MVR") or on a subscribing loss underwriting exchange carrier report that does not contain all information necessary to determine that a driver was principally at-fault for an accident as defined in subsection (b) and, if applicable, that the accident resulted in a bodily injury or death. ~~C.L.U.E. report~~.

Section 2632.13(i)

- The current regulation is straightforward – it allows the driver to provide, under penalty of perjury, a declaration attesting to at-fault history and also allows contrary evidence by an independent source to dispute that information and can be used to rate the policy. The proposed regulation lacks clarity, but appears to impose a burden on the potential insurer to investigate, including contacting the insurer at the time of the accident and the confirmation of the accuracy by the driver. The required timeframes will not allow an insurer to appropriately classify the potential insured as to the Good Driver Discount or properly rate under the driver safety record (First Mandatory Factor) at policy inception. The result will be that drivers will be de facto Good Drivers at the initiation of the policy. Is this the intent of the Department? What process does the Department envision for "corrections" in classifying drivers once the requirements of confirmation of an at-fault accident are met? Will reclassifications and rate changes be retroactive to the date of policy inception? A prospective correction mid-policy? Or will drivers simply remain inaccurately assessed for their risk until policy renewal – at which time they may choose to change carriers and begin the process again?

- The current process provides consumers with information as to the source and status of at-fault accidents that an insurer relies upon and a process for disputing the information should the consumer choose. Insurers are required under the Insurance Information and Privacy Protection Act (IIPPA) to provide notice to the consumer when an adverse action is taken due to an at-fault accident listed in a subscribing loss underwriting exchange carrier report. Disputes can often be resolved by the applicant/insured providing evidence from a previous insurer or police report, etc., to refute the at-fault charge. Additionally, the notice includes contact information for the reporting entity should the consumer desire to challenge the finding with the reporting entity. We have been provided statistics from CLUE that show very few claims are disputed – approximately four in every 10,000 claim reports and only half of those (.0002%) involve a dispute over fault indicators. The Department has provided no evidence showing the necessity for the process prescribed in the proposed regulation that will be costly and time consuming for insurers with likely no added benefit to the consumer.

Suggested Changes:

(~~h~~i) Notwithstanding any other provision of this section, in determining a driver's at-fault accident history, a driver's declaration, under penalty of perjury, attesting to his or her at-fault accident history, shall be sufficient proof of that accident history in the absence of contrary information from an independent source. If an insurer discovers ~~that~~contrary information from an independent source disputing the driver's declaration ~~contains a fraudulent or material misrepresentation, the insurer may~~ , and wishes to use ~~that~~~~said~~ such information to rate the policy, the insurer shall make reasonable efforts to ~~*confirm any principally at-fault notation on a subscribing loss underwriting exchange carrier report with the insurer at the time of the accident and*~~ notify the driver in writing and request that the driver confirm the accuracy of the contrary information within ~~2~~30 days of ~~receipt~~ the date the request is sent. If the driver confirms the accuracy of the contrary information and the insurer records the contrary information and confirmation *or the driver fails to respond*, the insurer may use the information to determine ~~the driver's at-fault history as confirmed by the driver~~whether the driver is principally at-fault for the accident pursuant to subsection (b) and rate the policy accordingly. If the driver disaffirms the accuracy of the information, the insurer shall provide the driver with a reasonable opportunity to provide evidence to the contrary and then, using all of the information available to it, determine whether the driver is principally-at fault pursuant to subsection (b). ~~*If the driver does not respond to the insurer's request to confirm the accuracy of the information*~~ *confirm the accuracy of the contrary information in writing, the insurer may only find the driver to be principally at-fault as follows:*~~*use the contrary information as follows: may cancel the policy pursuant to California Insurance Code sections 661 and 1861.03(c)(1) and take any other action authorized by law.*~~

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

~~*(2) If the driver did not have insurance that provided coverage for an accident, and if no other insurer of any person involved in the accident made a determination that any other driver was at least 51% of the proximate cause of the accident*~~*principally at-fault as defined in subsection (b), the insurer may consider a driver to be principally at-fault if the insurer has sufficient information to establish each of the elements that are necessary to determine that the driver is principally at-fault for an accident make that determination as provided in subsection (b). For the purposes of this subsection, an accident reported solely on an MVR shall not be considered "sufficient information."An insurer shall not presume that a driver is principally at-fault for an accident listed on the driver's MVR or on a subscribing loss underwriting exchange carrier report that does not contain all information necessary to determine that a driver was principally at-fault for an accident as defined in subsection (b) and, if applicable, that the accident resulted in a bodily injury or death.*~~

Nothing in this subdivision shall prevent an insurer from using information available from the public record of traffic violation convictions as set forth in section 2632.5(c)(1)(A), principally at-fault accidents as set forth in this section, or information from a subscribing loss underwriting exchange carrier provided that the insurer informs a driver of the source of the information upon which it relies at the time that it makes a determination that a driver is principally at-fault for an accident and offers the driver the contact information for the source. Nothing in this subdivision shall prevent an insurer from asking follow-up questions about the information contained in the declaration attesting to a driver's principally at-fault accident history, and nothing in this subdivision shall authorize a driver to refuse to answer a reasonable follow-up question.

Notwithstanding any other provision of this section, a driver who is the applicant or policyholder may provide an insurer information (including responses to requests for confirmation) regarding principally at-fault accident history of any and all drivers who are or will be listed on the policy, and the insurer may consider and use such information as if it came from the respective drivers.

This proposed regulation will completely alter the way insurers handle the initial transaction and rating process with a potential insured. It conflicts with timeframes established in existing regulation that will be infeasible given the mandated discovery process. The proposed regulation will have the consequence of inaccurately rating a driver's risk, creating a false pool of those eligible for a Good Driver Discount, to be followed by a "correction" once the information is confirmed in the manner proposed. It is troubling that the Department is seeking these massive changes to a long standing process without offering any evidence that a problem exists and with a 15-day response time, only weeks away from the expiration of this rulemaking proceeding.

PIFC appreciates the opportunity to provide comments and questions regarding the proposed regulation as modified. We hope the Department will consider our suggestion to resist pushing forward with the proposed regulation under the constrained timeline. As outlined, there are considerable issues that need to be addressed. We do believe the issue of the subscribing loss underwriting exchange carrier report can be effectively resolved with additional time and we are committed to working with the Department to addressing questions and concerns of accuracy and fairness in relying on the reports to accurately rate drivers.

Sincerely,

Kimberley Dellinger Dunn
General Counsel, PIFC