STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
45 Fremont Street, 24th Floor
San Francisco, California 94105

FINAL STATEMENT OF REASONS

STANDARDS FOR REPAIR AND THE USE OF AFTERMARKET PARTS

Date: November 15, 2012 **REG-2011-00024**

UPDATE OF INITIAL STATEMENT OF REASONS AND INFORMATIVE DIGEST

There is no need to update any of the information contained in the Initial Statement of Reasons, or in the Informative Digest, for this matter, Except as follows:

On October 9, 2012, a 15-day Notice of Amendment of Text of Regulations and the Amended Text of Regulation was issued in this matter. The proposed regulation was amended to clarify the concept of knowledge and the notice requirements when insurer has knowledge of use of a non-compliant aftermarket part. The public comment period closed on October 25, 2012.

UPDATE OF MATERIAL RELIED UPON

No other material other than the transcript of the public hearing, the public comments, the revised table of contents, and this Final Statement of Reasons has been added to the rulemaking file since the time the rulemaking record was opened, and no additional material has been relied upon.

MANDATE UPON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Department of Insurance has determined that the proposed amendments to the regulation will not impose a mandate upon local agencies or school districts.

UPDATE TO THE INITIAL STATEMENT OF REASONS:

Section 2695.8(f):

1. Amend: Minor text change to first sentence were made to change "partial losses" from plural to singular.: " (f) If a partial loss~~es are~~ is settled on the basis of a written estimate prepared by or for the insurer, the insurer shall supply the claimant with a copy of the estimate upon which the settlement is based."

2. Delete: "No insurer shall willfully depart from or disregard accepted trade standards for good and workmanlike repair in the preparation of claim settlement offers or estimates prepared by or for the insurer."

This above noted proposed text was deleted as it is redundant to the prior proposed language "accordance with accepted trade standards for good and workmanlike automotive repairs by an "auto body repair shop" as defined in section 9889.51 of the Business and Professions Code, and in accordance with the standards of automotive repair required of auto body repair shops, as described in the Business and Professions Code, and associated regulations, including but not limited to Section 3365 of the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8."

3. Amend:

"An insurer shall not prepare an estimate that is less favorable to the claimant than the standards, costs, and guidelines provided by the third-party automobile collision repair estimating software used by the insurer to prepare the estimate."

to;

"An insurer shall not prepare an estimate that ~~is less favorable to the claimant than~~ deviates from the standards, costs, and/or guidelines provided by the third-party automobile collision repair estimating software used by the insurer to prepare the estimate, if such deviation would result in an estimate that would not allow for repairs to be made in accordance with accepted trade standards for good and workmanlike automotive repairs by an auto body repair shop, as described in this section (f)."

Based upon concern expressed by stakeholders that the originally noticed language created the impression that the software program is the final say on a repair, rather than the actual condition and repair needs on a particular vehicle this section was amended. Both shops and insurers should have flexibility to deviate from the software program, as long as, such deviation does not result in a repair that falls below the standard of repair required by this section and consistent with the B&P Code and BAR rules. This amendment was effected to recognize that a deviation (even a downward one) from guidelines provided by the third-party automobile collision repair estimating software may be appropriate in certain factual situations, as long as that deviation does not infer a repair be made below the Bureau of Automotive Repair standard or repair.

Section 2695.8(g):

1. Amend: Minor text change to the first sentence in section (g) to clarify that all the conditions must be met in order for an insurer to "require the use of non-original equipment manufacturer replacement crash parts" and to ensure that the newly proposed subsection (g)(8) is properly read into this section (g).

2. Delete reference to "inspections, and tests" in subsection (g)(2):

This text was deleted because including it created a legitimate concern that repair shops could add unnecessary costs to the estimate associated with routine unpacking and inspection of the part, activities already included in every shops' process for Non-OEM or OEM parts. Since the current regulations already require payment for "modifications" to the part (and the proposed regulations will require payment for returning the part and the cost to remove and replace the non-original equipment manufacturer part), there does not appear to be a current issue that would necessitate keeping inspections and tests in this rulemaking.

3. Amend Subsection (g) (3): This subsection is amended to (1) change "insurers" to the singular "insurer", and (2) add "are at least equal to" and delete the term "like" to retain consistency with the other subsections of (g).

4. Amend Subsection (g) (5): Replace reference to Business and Professions (B&P) Code section "9875" with reference to Business and Professions (B&P) Code section "9875.1". CDI cites B&P code section 9875 in both subsection 2695.8(g)(5) and in the Reference to Section 2695.8. This citation/reference has been in existence prior to this current rulemaking, and has not been previously challenged. However, after reviewing submitted comments, CDI has determined that the more appropriate citation/reference is B&P Code section 9875.1.

5. Delete and/or combine originally proposed subsections (g) (6), (7), and (8):

Originally proposed subsections (g) (6), (7), and (8) required notice of a defective non-OEM part to the collision repair estimating software provider; distributor of the part; and non-original equipment manufacturer replacement crash part certifying entity. CDI amended these subsections to limit the notice requirement to the part distributor.

6. Amend originally noticed Subsection (g)(7), now renumbered Subsection (g)(6): CDI has deleted a portion of this subsection as unnecessary to this rulemaking. CDI has determined that solely using the phrase "non-compliant aspect of the part" is sufficient to serve the purpose of this section.

7. Delete reference to the phrase "implied, actual, or constructive knowledge" in subsection (g) (6) and originally noticed Subsection (g)(9), renumbered to Subsection (g)(7):

CDI has removed the modifying terms "implied, actual, or constructive" from this section. CDI intends the removal of the modifiers "implied, actual, or constructive" to result in the narrowing of the term to "actual knowledge". For purposes of subsection (g)(6), CDI intends the proposed amendments to apply to instances where the facts reflect the insurer has actual knowledge that a part is not equal to the original equipment manufacturer parts in terms of kind, quality, safety, fit, and performance, or does not otherwise comply with this section.

8. Amend originally noticed Subsection (g)(9), now renumbered to Subsection (g)(7):

Added "in the repair of a particular vehicle," to clarify that the requirements of this subsection apply to the particular repair.

9. Adopt a new Subsection (g)(8):

This subsection is added to make clear that the regulations are not intended to have the effect of prohibiting an insurer from seeking reimbursement or indemnification from a third party for the costs associated with the insurer's compliance with this section. CDI has proposed this amendment to recognize that third parties (i.e. part distributors, suppliers, manufacturers, etc) may provide some type of warranty on a non-OEM part, which might independently obligate that third party to reimburse a shop or claimant for certain costs. This newly proposed section makes clear that the section (g) requirements are not intended to prohibit an insurer from seeking reimbursement of some or all of the costs associated with the insurer's compliance. To the degree an insurer desires to "require" the use of non-OEM parts and wants to seek indemnification or reimbursement from third parties, it may, as long as the insurer retains primary responsibility to comply with this section (g).

REQUIRED DETERMINATION REGARDING ALTERNATIVES

The Commissioner has determined that there are no alternatives that would be more effective, or as effective and less burdensome to affected persons, than the amendments to the regulation. In support of this determination is the fact that no alternatives were suggested during the public comment period, despite the express invitation that was extended in the Notice of Proposed Action to comment on alternatives to the regulations.

Additionally, in its EIA the Department has demonstrated that the impact on costs to insurers due to the adoption of the proposed regulations would be immaterial. (The EIA is incorporated into this Final Statement of Reasons by this reference, pursuant to subdivision (d) of Government Code section 11346.9.) At the same time, the alternatives would significantly reduce the regulation's effectiveness in carrying out the purpose for which the regulation is proposed and implementing the statutory policy.

The Commissioner has considered and rejected the following reasonable alternatives to the proposed regulations:

Alternative #1. Retain the status quo. CDI has considered not adopting the amendments to the current regulations and allowing the existing regulations to remain in place. Some suggest leaving things as they are would be less burdensome and more cost-effective for insurers than the proposed regulations, and equally effective or more effective in carrying out the purpose of the proposed regulations because the provisions of Insurance Code Section 790.03 are clear and there is currently no impediment to full compliance with the statute.

Reasons for rejecting Alternative #1: While it may be somewhat less burdensome or more cost-effective for insurers in some respects to not adopt the proposed regulations, it is more burdensome overall not to do so, since consumers would not be better protected and body shops would still not be paid for some of the costs being passed on to them by insurers. Non-OEM parts have high defect rates, according to some in the body shop industry. It has been stated that certified aftermarket parts fit only 56% of the time and non-certified parts are worse, with a

history of fitting just 29% of the time. The body shop industry also contends there are problems with reporting defects, and shops apparently get penalized for reporting defects, so underreporting occurs. However, CDI has no independent verification that shops are penalized for reporting defects in aftermarket parts. Aftermarket parts supplier have rebutted this notion, citing a return rate of just 2%.

While the market share of OEM parts has been decreasing over the years, the market share of aftermarket parts has been increasing. The Mitchell data for repairable vehicles in California illustrate this trend. The percentage of aftermarket parts measured in both dollars and units has consistently increased in the seven years between 2005 and 2012. Relying on just the metric of percentage of parts stated in dollars can overstate growth where there has been inflationary parts pricing, according to a Mitchell spokesman. The market share of OEM parts shows a decline in dollar terms from 81% to 70%, but in terms of units, the decline was more modest from 84% to 78% since OEM's have expanded their discounting/part price matching programs. Nonetheless, the Mitchell data show a rise in dollar terms from 10% to 15% for the market share of aftermarket parts, and in terms of units, an increase from 6% to 10%. If the status quo is maintained, there may be more non-compliant parts used in the repair process. Maintaining the status quo and doing nothing will allow a negative trend to continue.

Even though the status quo might be less expensive than the proposed regulation in the short run, it would not remedy the problems addressed by the proposed changes to sections 2695.8(g)(6)-(9). The amendments to those five sections are necessary to help ensure that parts that are not of like kind, quality, safety, fit and performance are removed from the marketing and distribution chain and to protect consumers from the financial and physical harm that could result from the use of non compliant aftermarket parts.

Alternative #2. Implement regulations similar to SB 1460 instead of the proposed amendments. A bill introduced by California Senator Leland Yee, SB 1460, would require an automotive repair dealer or insurer who uses or directs the use of replacement crash parts to (a) follow specified procedures when using replacement crash parts, (b) notify the automobile owner regarding the use of specific categories of crash parts in making the repairs, and (c) provide disclosures as to the warranty for those parts.

Reasons for rejecting Alternative #2: CDI determined that SB 1460 would result in less consumer protection, rather than more. While, in the short run, it may be somewhat less burdensome or more cost-effective for insurers in some respects to not adopt the proposed regulations, it is more burdensome overall. As in Alternative #1, consumers would not be better protected. Compared to CDI's proposed amendments to the regulation, this bill will not as effectively address the higher defect rates of aftermarket parts versus OEM parts and will not improve the quality of crash parts and repairs.

SB 1460 creates a new and unprecedented legal presumption that "certified, new non-OEM crash parts" are sufficient to return the vehicle to its pre-loss condition using an arbitrary, largely unknown certification process – an unqualified standard that may harm consumers. There are no assurances in this bill that these certifiers are mandated to actually inspect and test these parts prior to certification and, therefore, no assurance is given that these parts are any safer than a

non-certified part.

REG-2012-000024
Standard of Repair and Use of Aftermarket Parts
California Code of Regulations Title 10, Chapter 5, Subchapter 7.5, Article 1, Section 2695.8

Summary and Response to Public Comments re Proposed Regulations

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		NOTE: As referenced in this Summary and Response to Public Comments, the following designations shall apply: California Department of Insurance (CDI), California Insurance Code (IC), Unfair Practices Act, Sections 790.03 et seq. (UPA), Fair Claims Settlement Practices Regulations (FCSP), Bureau of Automotive Repair (BAR), CDI's amendments to these regulations in this rulemaking, which were noticed October 10, 2012, (Revised Regulations), Business and Professions Code (B&P), Non-Original Equipment Manufacturer or aftermarket parts (Non-OEM), and Original Equipment Manufacturer parts (OEM).	
Armand Feliciano Association of California Insurance Companies (ACIC) 1415 L Street Sacramento, CA 95814 Written and Verbal Comments Written Comments: August 9, 2012	2695.8 (f) and (g)	**WRITTEN:** ACIC opposes the regulations on several grounds: The regulations are not necessary and fail to satisfy the "necessity" standard under the APA. ACIC has not yet seen any complaints in regards to aftermarket parts. In addition, there are no safety issues in regards to the use of aftermarket parts. (**Verbal** – Similar verbal comments were made at the public hearing.) The proposed regulations seeks to establish prohibited acts not defined and determined by the Unfair Practices Act (Insurance Code section 790.03). The following terms or sections are not in section 790.03 and therefore	**REJECT IN PART AND ACCEPT IN PART:** Except where specifically noted below, CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards. Necessity Comment: Reject: Over the past several years, CDI has received several complaints from consumers and auto body repair shops that include: • Denial by insurers to pay for the cost of OEM parts, even in cases where the manufacturer's service and/or corrosion warranties may be impacted by the use of aftermarket

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Verbal Comments: August 9, 2012	2695.8 (f) 2695.8 (f)	do not effectuate the purpose of that section: (1) Insurer's estimate conform to "accepted trade standards" by the auto body repair shop (2) Adjusted estimates be "either an edited copy of the claimant's repair shop" (3) The inspection and testing requirements in 2695.8 (g) (2) (4) The warranty requirements in 2695.8 (g) (3) (5) The notice and reporting requirements in 2695.8 (g) (6) to (8) (6) The payment, removal, return and replacement requirements in 2695.8 (9). CDI's use of Business and Profession's Code section 9875 (Motor Vehicle Replacement Part Act of 1989) does not remedy the CDI's failure to satisfy the necessity requirement. Section's 2695.8 (g) (3)'s attempt to require insurers to	parts, and even in cases where the required use of aftermarket parts conflict with the manufacturer's required or recommended specifications for repair. • Failure to pay for the additional costs associated with renting a substitute vehicle for the additional period of repair caused by the insurer's required use of an aftermarket part, which parts required additional modifications to properly fit on the damaged vehicle. • Failure by the insurers to consider the legitimate safety concerns of consumers in the required use of aftermarket parts. • Improper repair of vehicles caused by poor fitting aftermarket parts, which necessitate supplemental repairs to the vehicles. These consumer and other complaints, along with several more documents that support the necessity for this rulemaking,

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		disclose in writing "the fact that is warrants that such parts are of like kind, quality, safety, fit and performance as original equipment manufacturer replacement crash parts …." fails the necessity requirement because it attempts to effectuate a purpose that is simply non-existent in the limited purpose of the Motor Vehicle Replacement Part Act of 1989 (B&P Code section 9875). The sections cited by CDI (Insurance Code sections 790.10, 12921 and 12926; Civil Code section 3333; Government Code sections 11152 and 11342.2) does not give CDI the authority to propose regulations related to the standards of repair and use of aftermarket parts. Specifically, the above cited six sections of authority do not allow CDI to propose the following sections: 2695.8(f); 2695.8 (f) (3) 2695.8 (g) (2) 2695.8 (g) (3) 2695.8 (g) (6)	are contained in the public rulemaking file. As of the date of the public hearing on these regulations, and the expiration of the 45-day comment period on August 9, 2012, no person or entity, including this particular association, has requested to view the comprehensive public rulemaking file. Therefore, any suggestion that this rulemaking does not meet the necessity standard, based upon a lack of support, is without merit. Authority Comment: Reject: The comment that seeks to assert that CDI is proposing regulations that prohibit acts not defined and determined by the Unfair Practices Act (UPA), IC Sections 790.03 et seq, is without merit. It is well established that the Fair Claims Settlement Practices (FCSP) Regulations, of which this rulemaking is merely a minor amendment thereto, are appropriately promulgated under the authority in IC Section 790.10. The FCSP regulations were promulgated in 1992 (effective in 1993) pursuant to the

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	2695.8 (f) 2695.8 (f) (3)	2695.8 (g) (7) 2695.8 (g) (8) 2695.8 (g) (9) (**Verbal** – Similar verbal comments were made at the public hearing.) *The regulations are not clear, as required by Government Code section 11349 (c).* *(**Verbal** – Similar verbal comments were made at the public hearing.)* The following parts of section 2695.8 (f) are ambiguous and need to be clarified: "Acceptable trade standards for good and workmanlike automotive repairs by an auto body repair shop." "Nationally distributed and periodically updated service specifications that are generally accepted by the auto body repair industry as specified in Title 16, section 3365." "In accordance with 'associated regulations, including but not limited to…'" "Willfully depart from or disregard accepted trade standards." (**Verbal** – Similar verbal comments were made	Legislature's grant of legislative power to the Commissioner. Not only does section 790.10 authorize the Commissioner to adopt rules and regulations he finds necessary to administer the UPA, section 790.035, subdivision (a) grants the Commissioner **"the discretion to establish what constitutes an act."** By this, the Legislature acknowledged CDI's technical expertise and its familiarity with the (insurance) industry being regulated, granting the resulting regulations considerable deference. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8 [heightened deference for quasi-legislative enactments]; *Pitts v. Perluss* (1962) 58 Cal.2d 824, 832, [formally adopted regulation on disability insurance held reasonable where intricate and technical nature of the subject matter not within expertise of the court]; *Spanish Speaking Citizens' Foundation, Inc. v. Low* (2000) 85 Cal.App.4th 1179, 1215 ["'specialization gives . . . agencies an intimate knowledge of the problems dealt with in the statute and the

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		at the public hearing.) ACIC proposes adding the following underlined language to section 2695.8 (f) (3): "and the claimant's repair shop upon request" *The following parts of section 2695.8 (g) (2) are unclear:* "inspections and tests" (**Verbal** – Similar verbal comments were made at the public hearing.) The following words or phrases contained in section 2695.8 (g) (7) are unclear: "defect" "safety issue" "non-complaint aspect of the part" The following words contained in section 2695.8 (g) 6-9 are unclear: "the insurer has implied, actual or constructive knowledge." (**Verbal** – Similar verbal comments were made at the public hearing.)	various administrative consequences arising from particular interpretations'"], referring to the Insurance Commissioner's regulations and quoting Michael Asimow, The Scope of Judicial Review of Decisions of California Administrative Agencies (1995) 42 UCLA L. Rev. 1157, 1195-1195.) Since the Commissioner adopted the Fair Claims Settlement Regulations, the Legislature has amended section 790.03 twice. (Stats. 2001, ch. 253 (AB 1193), § 2; Stats. 2011, ch. 426 (SB 712), § 1.) In addition, the Legislature amended the UPA by adding to section 790.034 explicit reference to the Commissioner's regulations, explaining that the Fair Claims Settlement Practices Regulations **"govern how insurance claims must be processed in this state,"** and requiring that claimants must be told how to obtain a copy. (§ 790.034, subd. (b), added by Stats. 2001, ch. 583, § 3.) Both the age of the regulations and the Legislature's express identification and implicit approval of them confirm their

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		Regarding the proposed regulations, ACIC **proposes** eliminating the standard of whatever is "accepted" or "generally accepted" by auto body repair shops because those standards are unworkable. ACIC **proposes** deleting "inspections and tests" and "defect, safety issue, or non-complaint aspect of the part" from the proposed regulations. ACIC proposes that insurers be deleted from section 2695.8 (g) 6 – 9 and replaced with "manufactures or distributors" of non-original equipment crash parts. Sections 2695.8 (f) and (g) fail to satisfy the "consistency" standard under the Government Code section 11349 (d). (**Verbal** – Similar verbal comments were made at the public hearing.) Section 2695.8 (g)(3) conflict with its enabling law, Business and Professions (B&P) Code section 9875 and Business and Professions	alignment with the legislative intent. The current version of these FCSP regulations already contains several provisions, which interpret, define, and make more specific, one or more of the unfair claims practices enumerated in IC 790.03(h). This rulemaking merely proposes clarifying language to resolve instances where licensees have (over the years) attempted to dilute the meaning and implementation of these provisions in a way that was not intended. For example, the amendment to Section 2695.8(f) is intended to address the problem where insurers have instituted their own standards of repair, when insurers are not licensed by the Bureau of Automotive Repair (BAR) to repair vehicles in California. Many of the insurer-driven standards are contrary to BAR's own standards, required of repair shops that are licensed by BAR. To offer less on an insurance claim based upon standards of repair that conflict with BAR standards (the very standards required of shops that

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		Code section 9875.1. It conflicts with B&P section 9875 because section 2695.8 goes beyond the limited requirement in section 9875. Section 2695.8 also conflicts with B&P section 9875.1 because section 2695.8 extends the warranty requirement to insurers. Section 2695.8 (g) (3) also conflicts with Government Code section 11342.2 because section 2695.8 goes beyond the purpose and requirements of its enabling sections, B&P sections 9875 and 9875.1. (**Verbal** – Similar verbal comments were made at the public hearing.) To harmonize the current and proposed amendments to section 2695.8 (g) (3), **ACIC proposes the following amendments and deletions**: "Insurers specifying the use of non-original equipment manufacturer replacement crash parts shall ~~warrant that such parts are of like kind, quality, safety, fit, and performance as original equipment manufacturer replacement~~	licensed by BAR to actually repair these vehicles), is certainly an unfair claims practice. IC Section 790.03(h) contains several provisions that are implicated by unfair claims settlements. Specifically, Section 790.03(h) (5) states: **"Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.".** At minimum, this statute is violated when an insurer offers less than the actual and true cost to repair a vehicle, based upon the inappropriate use of standards of repair not sanctioned by BAR. CDI has the authority to more clearly identify what the proper claims settlement process is in order to prevent violations of the Unfair Practices Act (UPA). This rulemaking assists insurers in knowing what the proper standards of repair are that should be the basis of a fair claims settlement.

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		~~crash parts~~ disclose that any warranties applicable to these replacement parts are provided by the manufacturer or distributor of the parts, rather than by the original manufacturer of your vehicle. ~~The insurer must disclose in writing, in any estimate prepared by the insurer, the fact that it warrants that such parts are of like kind, quality, safety, fit, and performance as original equipment manufacturer replacement crash parts.~~ The proposed regulations also conflict with Insurance Code sections 790.03 and 790.06 because the regulations attempt to circumvent the proceedings requirement in section 790.06 by creating new unfair practices via the regulatory process (e.g. 2695 (f): insurers must conform to accept trade standards deemed acceptable by auto body repair shops and 2695.8 (g): insurers must pay for costs associated with replacement of non-OEM parts.) (**Verbal** – Similar verbal comments were made at the public hearing.)	With regard to the comment's reference to Civil Code (CC) Section 3333, the comment is misplaced. This CC section describes a tortfeaser's measure of damages to an injured party. This section is highly relevant to third party insurance claims. The use of this CC section is intended to recognize how and when these regulations pertain to third party automobile liability property damage claims. With regard to the comment's reference to specific sections of this proposed rulemaking that CDI allegedly lacks authority in amending and/or promulgating, for all the reasons described above, CDI rejects all of these assertions. As noted above, the amendments to Section 2695.8(f) merely clarify the prohibition on an insurer from paying less on a claim, based upon a lesser repair standard than the repair standard required of the shop, licensed by BAR, already in law. It is inconceivable that any insurer would contend that an insurer may limit its payment on a repair, if that reduced

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		Provisions of Insurance Code section 790.10 cited by CDI as authority do not cure CDI's failure to satisfy the "consistency" standard because CDI is creating new laws via regulation. ACIA proposes deletion of the following sentence in 2695.8 (f): "~~An insurer shall not prepare an estimate that is less favorable to the claimant than the standards, costs, and guidelines provided by the third-party automobile collision repair estimating software used by the insurer to prepare the estimate.~~" ACIA believes the above sentence would contradict some policyholder contracts that contain a provision that obligates insurers to provide their "best efforts" for certain services required under the contract. In some cases, the insurer may make a lower estimate based on non-OEM parts and the auto body repair shop software produces an estimate 60% more based on OEM parts. By contract, an insurer following its best efforts would choose the	payment was based upon an estimate of repair for an amount that would result in an illegal repair. CDI has not heard from any insurers that have made such an argument. Further, when BAR promulgated its repair standards (in Section 3365 of the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8) in 1997, insurers did not then oppose the reasonable repair standards set forth in that rulemaking. To now contend that these standards are unreasonable or should be replaced with lower standards that an insurer feels is acceptable, is absurd on its face. Clarity Comment: Reject: The comment seeks to assert that CDI is proposing regulations that lack clarity. CDI disagrees with this assertion. However, CDI is proposing several amendments in its Revised Regulations. While these edits were not made to resolve any alleged clarity issues, CDI is hopeful that these edits may resolve some of the commentator's concern in this area.

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		lower estimate for its policyholder. CDI's proposed amendments Sections 2695.8 (f) and (g) fail to satisfy the "reference" standard until Government Code section 11349 (e). CDI's citation of B&P Code section 9875 to define "insurer" "aftermarket crash part" and "non-original equipment aftermarket crash part" does not satisfy the reference requirement because section 2695.8 (f) or (g) does not further define those terms. Even if CDI cited B&P code section 9875.1 as "reference" such attempt would fail the reference standard because the proposed regulations create new laws unavailable in B&P Code section 9875.1. The proposed regulations also attempt to establish prohibited acts not defined and determined by Insurance Code section 790.03. Specifically, "accepted trade standards," "either an edited copy of the claimant's repair shop" [2695.8 (f)], the inspection and testing requirements in section 2695.8 (g) (2), the	With respect to the clarity of CDI's amendments to section 2695.8(f), the comment suggests that specific repair standards set forth in: "accordance with accepted trade standards for good and workmanlike automotive repairs by an "auto body repair shop" as defined in section 9889.51 of the Business and Professions Code, and in accordance with the standards of automotive repair required of auto body repair shops, as described in the Business and Professions Code, and associated regulations, including but not limited to Section 3365 of the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8." are unclear. CDI rejects this assertion. These are the very standards that auto body repair shops are required to adhere to under BAR statutes and regulations. Insurers have been aware of these standards for decades. Further, as noted above, during BAR's public rulemaking process whereby it set these standards, insurers did not then oppose the reasonable repair standards set

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		warranty requirements in 2695.8 (g) (3), the notice and reporting requirements in 2695.8 (g) (6) to (8), and the payment, removal, return and replacement requirements in 2695.8 (9) fail the reference requirement because they are not defined in Insurance Code section 790.03. ACIC maintains that the proposed regulations will raise auto repair costs because OEM parts are more expensive and can raise policyholder's rates an additional $26 per year. The proposed regulations could lead to non-OEM parts manufactures to close and cause additional unemployment. (**Verbal** – Similar verbal comments were made at the public hearing.) The proposed regulations are anti-competitive because non-OEM parts provide competition in the marketplace. (**Verbal** – Similar verbal comments were made at the public hearing.) The proposed regulations will limit consumer	forth in that rulemaking. With regard to the comment that suggests accepted trade standards may be different in one part of the state as compared to other parts of the state, CDI rejects this assertion as having any basis for challenging this rulemaking. While there are some local county or city codes or zoning requirements that may differ within the state, these regulations do not conflict with these local rules. Should there in fact be geographical differences in the standards of repair recognized by BAR, then an insurer would certainly be required to ensure that the amount it pays on repair insurance claims is commensurate with the amount it would cost to repair that vehicle in that whatever part of the state it does business in. For example, if a particular county requires a certain method of hazardous waste removal the shop must follow, it is expected the insurer will include this standard in estimates it prepares in this county (to the degree it results in a cost differential).

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		choice. (**Verbal** – Similar verbal comments were made at the public hearing.) The proposed regulations will give auto repair shops too much sway because the regulations mandates that auto body shops are "always right." CDI needs to exempt antique auto parts from the proposed regulations because original auto parts for cars 25 years or older likely do not exist. **VERBAL:** ACIC would like to see copies of the complaints prompting these regulations. Auto repair shops have a financial incentive on these proposed regulations. ACIC wants to see the studies which state that aftermarket parts are connected to safety. ACIC does not believe that aftermarket parts	With regard to the assertion that the "willfully depart" language in (f) lacks clarity, CDI rejects this assertion. However, based upon other comments regarding this subsection (f), CDI has, in the Revised Regulations, deleted the sentence: "No insurer shall willfully depart from or disregard accepted trade standards for good and workmanlike repair in the preparation of claim settlement offers or estimates prepared by or for the insurer." While CDI does not believe this language lacks clarity, CDI finds this language to be redundant to the previous sentence in proposed (f) and is therefore unnecessary. CDI, while rejecting that this language lacks clarity, has amended, in the Revised Regulations, the next sentence in (f) to read: An insurer shall not prepare an estimate that deviates from the standards, costs, and/or guidelines provided by the third-party

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		are connected to the safety of a vehicle. The proposed regulations will increase costs by over 60 percent. It will cost $380 million more for auto repair in the State of California. It averages out to $26 per policyholder. CDI will be unable to enforce the proposed regulations.	automobile collision repair estimating software used by the insurer to prepare the estimate, if such deviation would result in an estimate that would not allow for repairs to be made in accordance with accepted trade standards for good and workmanlike automotive repairs by an auto body repair shop, as described in this section (f).” This amendment was effected to recognize that a deviation (even a downward one) from guidelines provided by the third-party automobile collision repair estimating software may be appropriate in certain factual situations, as long as that deviation does not infer a repair be made below the BAR standard or repair. RE: The comments to CDI’s proposed amendment to section 2695.8(f)(3) regarding authority and clarity. CDI rejects these comments. This current section, which has been in essentially the same form since 1993, requires the insurer to “reasonably adjust any written estimates prepared by the repair shop

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			of the claimant's choice". The proposed amendment to this section adds the language: "The adjusted estimate provided to the claimant and repair shop shall be either an edited copy of the claimant's repair shop estimate or a supplemental estimate based on the itemized copy of the claimant's repair shop estimate." This new language merely clarifies the already existing law that requires adjustments be made only to the shop's estimate. However, based upon consumer and other complaints, CDI has found that some insurers do not in fact make the required adjustments to the shop's estimate, but, instead create their own new estimate. In many cases, this new estimate does not identify the adjustments made to the shop's estimate and prevents the claimant (the customer) from knowing what portion of the shop's estimate is being paid and what portion is being denied. This failure to identify the specific amounts being denied and the reason for the denial also violates current FCSP Section 2695.7(b), which requires the "amounts accepted or denied

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			shall be clearly documented" and requires the insurer to provide the specific reason for any whole or partial denial. CDI's proposed amendments to this subsection (f)(3), merely clarify the current law in this area. This comment also asserts that this proposed amendment to subsection (f)(3) confuses insurers as the insurer does not know which repair shop should receive the adjusted estimate. CDI rejects this assertion. The requirement to provide the adjusted estimate to the repair shop is only triggered when and if the insurer receives a higher estimate from claimant's repair shop. Therefore, the insurer will have full knowledge of the identity of the repair shop that wrote the estimate and to what shop the insurer must send the adjusted estimate. With regard to the commentator's opposition to adding "inspections, and tests" to subsection 2695.8(g)(2), CDI rejects all allegations that this amendment fails to meet the authority, clarity, and/or consistency

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			standards. However, CDI, in the Revised Regulations, has deleted this language. Given that the current regulations require payment for "modifications" to the part (and the proposed regulations will require payment returning the part and the cost to remove and replace the non-original equipment manufacturer part), there does not appear to be a current issue that would necessitate keeping inspections and tests as part of these regulations, at this time. With regard to the commentator's assertion that the phrase in subsection 2695.8(g)(7), "defect, safety issue, or non-compliant aspect of the part" is overly broad,, CDI disagrees. However, for other unrelated reasons, CDI has deleted a portion of this phrase, "defect, safety issue, or" as unnecessary to this rulemaking. CDI has determined that solely using the phrase "non-compliant aspect of the part" is sufficient to serve the purpose of this section. With regard to the commentator's assertion

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			that the phrase in subsections 2695.8(g)(6-9), "implied, actual, or constructive knowledge" is overly broad, and difficult for insurers to comply with, CDI disagrees, as these terms are common in the law and insurers fully understand these terms. However, CDI has in the Revised Regulations removed the modifying terms "implied, actual, or constructive". Section 2695.2(l) of these FCSP regulations does use these very modifying terms in defining "knowingly committed". However, CDI does not intend that the term 'knowledge" as used in these proposed regulations be incorporated into the definition of "knowingly committed". CDI intends the removal of the modifiers "implied, actual, or constructive" to achieve the result of narrowing the term to "actual knowledge". Therefore, for purposes of subsection (g)(6), CDI intends the proposed amendments to apply to instances where the facts reflect the insurer has actual knowledge that a part is not equal to the original equipment

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			manufacturer parts in terms of kind, quality, safety, fit, and performance, or does not otherwise comply with this section. Whether an insurer has "knowledge" will be a question of fact that CDI intends to show, on a case-by-case basis, when CDI is faced with enforcing this regulation. The comment asserts that subsection 2695.8(g)(3) lacks consistency with B&P code sections 9875 and 9875.1. CDI rejects this assertion. First, in reference to Business and Professions (B&P) Code Section 9875, CDI cites B&P code section 9875 in both subsection 2695.8(g)(5) and in the Reference to Section 2695.8. This citation/reference has been in existence prior to this current rulemaking, and has not been previously challenged. However, after reviewing this comment, CDI has determined that the more appropriate citation/reference is B&P Code section 9875.1. Therefore, this change is made in the Revised Regulations, which were noticed October 10, 2012.

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			Also, CDI did not promulgate subsection 2695.8(g)(3) using the authority of B&P code sections 9875 or 9875.1. CDI authority for this subsection, as noted above, is derived from IC section 790.10, and based upon CDI's interpretation and implementation of IC section 790.03. The commentator asserts that, in general, the entire body of Fair Claims Settlement Practices Regulations, and certain provisions in sections (f) and (g), fail for lack of consistency. The comment suggests that CDI may not set forth any regulations that falls outside the list of enumerated unfair practices as set forth in IC section 790.03, and that this rulemaking conflicts with IC section 790.06. For all the reasons described above, CDI rejects this assertion. This proposed rulemaking is seeking to amend the already in existence Fair Claims Settlement Practices Regulations, which were promulgated to interpret, define, or make more specific the standards set forth in IC 790.03. As the preamble to these

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			regulations, section 2695.1(a), makes clear: **"Section 790.03(h) of the California Insurance Code enumerates sixteen claims settlement practices that, when either knowingly committed on a single occasion, or performed with such frequency as to indicate a general business practice, are considered to be unfair claims settlement practices and are, thus, prohibited by this section of the California Insurance Code. The Insurance Commissioner has promulgated these regulations in order to accomplish the following objectives:** **(1) To delineate certain minimum standards for the settlement of claims which, when violated knowingly on a single occasion or performed with such frequency as to indicate a general business practice shall constitute an unfair claims settlement practice within the meaning of Insurance Code Section 790.03(h)."** The FCSP regulations have been in existence,

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			in much of its current form since 1993. There have been no successful challenges to these regulations on the grounds that CDI cannot set forth minimum standards that, when violated, constitute an unfair claims practice under IC section 790.03(h). Further, the preamble to these regulations, section 2695.1(b), also recognizes the existence of IC Section 790.06. However, in doing do confirms that violations of IC Section 790.06 and/or IC section 790.03(h) may exist, if not specifically delineated in these regulations. CDI's position is that it is not precluded from setting forth minimum standards, or specifically prohibited acts or practices, that may violate 790.03(h), and doing so would not conflict with IC section 790.06. The commentator asserts that CDI's proposed regulations would raise auto repair costs. CDI disagrees with this assertion. First, the commentator asserts that "the proposed regulations allow auto body repair shops to exclusively use OEM parts because the proposed regulations compel insurer's to

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			follow "whatever" the auto body repair shops estimate under all circumstances". CDI disagrees. No part of these regulations require the insurer to follow or agree to whatever the auto body repair shop estimates. To the contrary, these regulations, section 2695.8(f)(3), expressly permit the insurer to reasonably adjust the claimant's shop's estimate. Also, section 2695.8(g) of these regulations, pertaining to non-OEM (aftermarket parts), does not require the insurer to only use OEM parts. To the contrary, this section permits the insurer to use non-OEM parts, as long as certain reasonable standards (most of which are already current law) are followed. Likewise, for the same reasons described above, these regulations will not impact non-OEM parts distributors, to the degree these distributors sell parts that that are compliant with this section (g). The commentator also asserts that "mandating anti-competitive regulations are bad for consumers". First, as discussed above, these regulations do not give "carte blanch" to repair

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			shops. Instead, these regulations, and the minor amendments thereto, protect consumers from being forced to use non-compliant and potentially defective non-OEM parts. The commentator also asserts that these regulations take away consumer choice. CDI disagrees with this comment. Contrary to the assertion, these regulations do not give the repair shops complete control over the auto repair process. Consumers, by law, have the right to choose what repair shop to use for repairs (IC section 758.5) and what specific repairs are effected and what parts may be used in the repair on their vehicles. The proposed regulations do not alter that consumer choice. Specifically, section 2695.8(g) only applies when an insurer decides to "require" the use of a non-OEM part. At any point in time, a policyholder or claimant, may choose to use a non-OEM part, even if that non-OEM part does not comply with this section (g). Therefore, consumer choice is never hindered.

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			Lastly, this commentator requests that antique auto parts be exempt from the proposed regulations. CDI rejects this request. While CDI recognizes that OEM replacement parts for antique automobiles may be more rare and/or not available, this fact has no impact on these regulations. First, if non-OEM parts are the only available parts for certain vehicles, then either the insurer would not be requiring the use of a non-OEM part or the consumer would be choosing to use the non-OEM part. Under either scenario, these regulations would not be triggered. However, to the degree an insurer requires the use of one particular non-OEM part over another particular non-OEM part, these regulations would appropriately apply.
Christian John Rataj, Esq. National Association of Mutual Insurance Companies (NAMIC) **Milo Pearson**		***WRITTEN:*** *NAMIC and PADIC provided a summary of both organization's missions and functions. Then the organizations outlined their concerns about the proposed regulations.* *(**Verbal** – Similar verbal comments were made at the public hearing.)*	**REJECT IN PART AND ACCEPT IN PART:** Except where specifically noted below, CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards.

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Pacific Association of Domestic Insurance Companies (PADIC) Written and Verbal Comments Written Comment: August 9, 2012 Verbal Comment: August 9, 2012		Both NAMIC and PADIC are concerned that the proposed regulations essentially create a "de facto" ban on the use of aftermarket parts in California. They have proposed changes to section 2695.8 (f) (1) as follows: "Insurer should follow accepted trade standards for good and workmanlike repair in the preparation of claim settlement offers or estimates prepared for the insurer. Any departure by the insurer from accepted trade standards for good and workmanlike repair shall be noted in the claim settlement offers or estimates prepared by or for the insurer." Section 2695.8 (g) (6) to (9) would require insurers to act as a quasi-regulator of aftermarket parts because they have to provide notice of alleged problems with aftermarket parts. However, insurers are not equipped and should not be required to conduct this function. The terms in sections 2695.8 (g) (6) to (9) are ambiguous and fail the "clarity" standard of the Administrative Procedure Act. For	To the degree this commentator makes the same or similar assertions as those made by ACIC (as summarized above), CDI incorporates its response to ACIC into its response to this comment. CDI disagrees that this rulemaking creates a de facto ban on the use of aftermarket parts, hinders an insurer's ability to provide timely cost-effective repairs, creates an unfair advantage on OEM parts vs non-OEM parts, or facilitates and empowers unscrupulous auto repair shops to engage in auto repair fraud. The commentator fails to provide any credible evidence to support these assertions. In short, this rulemaking does not create a ban or further restrict the use of aftermarket parts, as most of these rules already exist in the current regulations, which have been in existence (in substantially the same form) since 1993. However, CDI has proposed amendments to remove some of the proposed requirements

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		example, "implied, actual or constructive knowledge" is very broad. These ambiguous terms will expose insurers to civil liability. The additional burdens of the proposed regulations will prevent insurers from providing consumers with timely and cost-effective aftermarket part repairs. CDI does not have the authority to impose blanket prohibitions on the use of any particular automotive part. The terms "*not equal*" to the original equipment manufacturer parts in terms of kind, quality, safety, fit, and performance is not clear. The regulations create an unfair competitive advantage for OEM manufactures and will increase costs for consumers. The regulations permit OEM manufacturers and auto repair shops to dictate acceptable trade standards and put them "in the figurative	in this rulemaking, (that the commentator has asserted a concern with) as reflected in the Revised Regulations. The commentator makes the assertion that the rulemaking, which requires the insurer to write estimates of repair based upon accepted trade standards required of the body repair shops, is unfair and creates a ban on the use of aftermarket parts. First, this subsection 2695.8(f) has no impact on the use of aftermarket parts. For example, there are no trade standards required to be used by shops that prohibit the use of aftermarket parts. Also, the amendment to Section 2695.8(f) is intended to address the problem where insurers have instituted their own standards of repair, when insurers are not licensed by the Bureau of Automotive Repair (BAR) to repair vehicles in California. Many of the insurer-driven standards are contrary to BAR's own standards, required of repair shops that are licensed by BAR. To offer less on an insurance claim based upon standards of repair that conflict with BAR

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		driver's seat." There is no way for insurers to contest what OEM manufacturers and auto repair shops dictate. The regulations expose insurers to new tort claims and extra contractual duties that will increase costs for consumers. The proposed regulations are inconsistent with the Promoting Automotive Repair, Trade and Sales Act (PARTS Act) in regards to aftermarket parts because the proposed regulations stifle competition. **VERBAL:** NAMIC is wondering what problem CDI is trying to address with the proposed regulations. There is no evidence that aftermarket parts are less reliable, less safe, or less effective. They are definitely less expensive. Most consumers do not care if a part is made by Company A or B. They just want their car fixed quickly, efficiently and cost effectively.	standards, and the standards required of shops that licensed by BAR to actually repair these vehicles, is certainly an unfair claims practice. CDI asserts that this rulemaking merely assists insurers in knowing the proper standards of repair that should be the basis of a fair insurance claims settlement. With regard to the comment's proposed change to Section 2695.8(f), that would allow insurers to write estimates based upon a standard that departs from the standards required of shops, this proposal is unacceptable and would result in the payment to shops for repairs at a standard below what BAR requires. It is inconceivable that any insurer would contend that an insurer may limit its payment on a repair, if that reduced payment was based upon and estimate of repair would result in an illegal repair. CDI has not heard from any insurers that have made such an argument. Further, when BAR promulgated

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		The regulations create burdens that will make insurers say that it is no longer cost effective to use aftermarket parts. NAMIC is concerned about liabilities issues if notice is not done in a timely manner. It is not clear what " actual, implied or constructive knowledge" means. The regulations will lead to copious litigation which will eventually be paid for by consumers. Aftermarket parts are like generic medication and the regulations are akin to making doctors prescribe brand name medication because of all additional barriers to prescribe generics. It is good to have competition between aftermarket parts and OEM parts.	its repair standards (in Section 3365 of the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8) in 1997, insurers did not then oppose the reasonable repair standards set forth in that rulemaking. To now contend that these standards are unreasonable or should be replaced with lower standards that an insurer feels is acceptable, is absurd on its face. Clarity Comment: Reject: The comment seeks to assert that CDI is proposing regulations that lack clarity. CDI disagrees with this assertion. However, CDI is proposing several amendments in its Revised Regulations. While these edits were not intended to resolve any alleged clarity issues, CDI is hopeful that these edits may resolve some of the commentator's concern in this area. With regard to assertion that the "not equal" language in proposed sections 2695.8(g)(6-9) lacks clarity, CDI rejects this assertion. First, as reflected in the Revised Regulations, two

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			of the concerning sections were removed. However, as to the remaining sections that contain this phrase, this "not equal" language is clear and relates directly back to the current law, as noted in subsection 2695.8(g)(1), which requires that the non-OEM parts "are at least equal to" the OEM parts. This current language has been in existence since 1993 without any clarity issues that CDI is aware of. The commentator also asserts that the proposed regulations are inconsistent with the Promoting Automotive Repair, Trade and Sales Act (PARTS Act) in regards to aftermarket parts because the proposed regulations stifle competition. However, the commentator provides no support for this general assertion, other than pending legislation, which is not on point to this rulemaking. Also, this rulemaking does not decrease competition between non-OEM and OEM parts. Instead it clarifies and enhances existing law, which protects consumers from an insurer "requiring" the

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			use of a non-OEM part, when that part is defective or otherwise non-compliant. With regard to the commentator's assertion that the phrase in subsections 2695.8(g)(6-9), "implied, actual, or constructive knowledge" is very broad, CDI disagrees, as noted above in CDI's prior response.
David McClune California Autobody Association (CAA) 2200 L Street Sacramento, CA 95816 Written and Verbal Comments Written Comment: August 8, 2012	2695.8(f) (3)	**WRITTEN:** CAA proposes adding language to the last sentence of this section to read as follows: "The adjusted estimate shall identify the specific adjustment made to each item, the specific reason(s) for the adjustment, and the cost associated with each adjustment made to the claimant's shop's estimate. (**Verbal** – Similar verbal comments were made at the public hearing.) **VERBAL:** Mr. McClune provided a brief description of CAA. CAA supports the proposed regulations.	With regard to the CAA proposal to add language to subsection 2695.8(f)(3), that would require the insurer to include the "the specific reason(s) for the adjustment", CDI rejects this proposal. Insurer's already have the affirmative obligation, under Section 2695.7(b)(1) of these FCSP regulations to provide the claimant with all bases for a rejection or denial and the factual and legal bases for each reason given for such rejection or denial which is then within the insurer's knowledge. Therefore, if the "adjustment" made pursuant to subsection 2695.8(f)(3) is also a denial of all or a

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Verbal Comment: August 9, 2012		CAA believes the proposed regulations will clarify an insurer's obligation to provide clear and equitable settlement that allow for the repair vehicle to be made in a workman-like manner and address problems the consumers have had when insurers required installation of some crash parts.	portion of the claimed amount, the insurer, under current law, must describe the reason for the adjustment. Therefore, the suggested amendment is unnecessary.
Personal Insurance Federation of California (PIFC) Written Comment: August 9, 2012		***WRITTEN:*** *PIFC states that CDI has not provided any consumer complaints to PIFC and provided a brief history of the development of the regulations.* The regulations would create a monopoly for OEM parts manufactures. The California Legislature already addressed oversight of non-OEM parts in B&P Code section 9875.1. The regulations are not necessary and CDI has not provided any complaints to show the need for these regulations. CDI has failed to address the full economic	**REJECT IN PART AND ACCEPT IN PART:** Except where specifically noted below, CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards. To the degree this commentator makes the same or similar assertions as those made by ACIC, or any prior commentators (as summarized above), CDI incorporates its response to ACIC and any prior commentators into its response to this comment. The commentator asserts that insurers are not

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		impact of these regulations. CDI does not have the authority to adopt these regulations. Section 2695.8 (g) (6) is ambiguous and vague. The terms "implied, actual or constructive knowledge" is very vague. CDI has exceeded its authority in proposing Section 2695.8 (g) (9) and created an inconsistency between current statutory obligations and regulatory impositions. PIFC **recommends changing section** 2695.8 (f) (3) to allow insurer estimates, along with shop and supplemental estimates to be provided to claimants to satisfy the notice requirement of 2695.8 (f) (3). Section 2695.8 (g) would cause insurers to have to police the aftermarket parts industry. PFIC recommends CDI require insurers to limit their relationships to parts distributors	within the stream of commerce and do not incur an obligation to warrant any particular part. The CDI rejects this comment, as having no bearing on this rulemaking. Neither the current FCSP regulations section 2695.8(g), nor the amendments contained in this rulemaking seek to place the insurer within the stream of commerce or subject the insurer to liability associated with such status. Further this rulemaking does not create new warranty obligations not already contained in the current section 2695.8(g)(3), which has been in existence since 1993. Current 2695.8(g)(3) already requires the insurer to "warrant that such parts are of like kind, quality, safety, fit, and performance as original equipment manufacturer replacement crash parts." This rulemaking does not change this almost 20 year old obligation. Instead, this rulemaking merely adds the additional obligation that the warranty already required in law be disclosed on the estimate of repair, so the claimant is better informed, should there be an issue with the non-OEM part that the

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		who: (1) have in place a program to analyze parts that are defective (2) agree to pay the cost to the repair shop associated with returning the part and to replace the part; and (3) indemnify the auto repair shop for any part verified by the distributor to be defective.	insurer needs to address. Further, this section (g) is only triggered when and if an insurer "requires" the claimant use a non-OEM part, thus de facto depriving the claimant of the right to choose how his or her vehicle is repaired. Based upon complaints received, and other evidence presented in this rulemaking, CDI finds strong support that when an insurer requires the use of a non-OEM part, that the claimant should not be subjected to out-of-pocket costs (above and beyond the costs of using an OEM part). To do so would result in the insurer reaping a windfall at the expense of the claimant, who would bear a higher cost on an insurance claim. Such a result creates a perverse incentive for insurers require the use of more and cheaper non-OEM parts, since the insurer would have no obligation to reimburse the claimant for costs caused by the insurer's decision. CDI also rejects the assertion by the commentator that under these regulations auto repairers would repair owner-paid

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			vehicles without restrictive methods, while holding insurer-paid repairs to a different standard. CDI contends that this rulemaking does not change the standard of repair that already exists in current law. Current law (B&P Code and BAR rules discussed above) requires all repairs (whether owner-paid or insurer-paid) be effected in accordance with certain repair standards. This rulemaking does not change these standards in any way. Further, this rulemaking does not regulate consumers or repair shops, but only insurers that seek to require a claimant use non-OEM parts in a repair. CDI also rejects the assertion by the commentator that the CDI has failed to address in its record the full extent of the economic impact of these regulations. The commentator provides no support for this assertion. Insurers have contended that there are no documented problems with non-OEM parts. If we take this premise at face value, there would be virtually no instances of a non-complaint part, that then would

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			trigger any of the obligations under this section (under current law or the proposed rulemaking). Further, CDI disagrees that this rulemaking imposes any difficulty for an insurer to comply. However, CDI is hopeful that the amendments to this rulemaking, in the Revised Regulations, alleviate most or some of the concerns expressed by this commentator. CDI rejects the comment regarding the proposed amendment to section 2695.8(f)(3). This current section, which has been in essentially the same form since 1993, requires the insurer to "reasonably adjust any written estimates prepared by the repair shop of the claimant's choice". The proposed amendment to this section adds the language: "<u>The adjusted estimate provided to the claimant and repair shop shall be either an edited copy of the claimant's repair shop estimate or a supplemental estimate based on the itemized copy of the claimant's repair shop estimate.</u>" This new language merely clarifies already existing law that requires

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			adjustments be made only to the shop's estimate. However, based upon consumer and other complaints, CDI has found that some insurers do not in fact make the required adjustments to the shop's estimate, but, instead create their own new estimate. This new estimate does not identify the adjustments made to the shop's estimate and deprives the claimant (the customer) from knowing what portion of the shop's estimate is being paid and what portion is being denied. This practice also violates current FCSP Section 2695.7(b), which requires the "amounts accepted and denied to be clearly documented" and requires the insurer to provide the specific reason for any whole or partial denial. CDI's proposed amendments to this subsection (f)(3), merely clarify the current law in this area. Further, CDI's proposed amendments to this subsection (f)(3) do not alter or hinder the ability of the insurer to refuse to pay for unrelated damages, unnecessary repairs, or other alleged overcharges by repair shops.

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			CDI rejects the comment that the proposed amendments to section 2695.8(g) shift the responsibility of parts distributors and repair shops to insurers. The commentator provides no support for this assertion. The proposed amendments to section 2695.8(g) do not shift the responsibility of parts distributors and repair shops to insurers. Instead, they place an independent but different obligation on the insurer when and if the insurer "requires" the use of a non-OEM part. Also the assertion that repair shops use non-OEM parts often has no bearing on this rulemaking. However, after reviewing this and other comments to this rulemaking, CDI has added a new subsection (g)(8), which reads: "(8) nothing in this section (g) prohibits an insurer from seeking reimbursement or indemnification from a third party for the costs associated with the insurer's compliance with this section (g), including but not limited to, costs associated with the

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			insurer's obligation to warrant the part, modifications to the part, or returning, removing or replacing a non-compliant non-original equipment manufacturer part. However, seeking reimbursement or indemnification from a third party shall not in any way modify the insurer's obligation to comply with this section (g). An insurer shall retain primary responsibility to comply with this section (g) and shall not refuse or delay compliance with this section on the basis that responsibility for payment or compliance should be assumed by a third party. CDI has proposed this amendment to recognize that third parties (i.e. part distributors, suppliers, manufacturers, etc) may provide some type of warranty on a non-OEM part, which might independently obligate that third party to reimburse a shop or claimant for certain costs. This newly proposed section makes clear that the section (g) requirement are not intended to prohibit an insurer from seeking reimbursement of

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			some or all of the costs associated with the insurer's compliance. To the degree an insurer desires to "require" the use of non-OEM parts and wants to seek indemnification or reimbursement from third parties, it may, as long as, the insurer retains primary responsibility to comply with this section (g). CDI rejects the comment that the proposed amendments to section 2695.8(g) imply that only non-OEM parts have defects and OEM parts do not. CDI has made no such judgment and these regulations do not imply that OEM parts are free of defects. This rulemaking is not intended to favor OEM parts over non-OEM parts or imply that OEM parts have no defects. Instead, the purpose of the current section (g) and the proposed amendments is to address instances where an insurer "requires" the claimant use a non-OEM part, rather than the part made by the original manufacturer of the part.

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Cecil J. Autry, CPCU Associate Vice President, Regional Counsel Nationwide Insurance Group Written Comment: August 9, 2012	2695.8 (f)	***WRITTEN:*** *Nationwide urges additional dialogue with CDI in the formulation of these regulations.* Aftermarket parts provide an alternative to the high cost of OEM parts. Nationwide described its current policy regarding aftermarket parts and that it does not require the use of aftermarket parts. There is not evidence that aftermarket parts compromise the safety of vehicle occupants. The language "acceptable trade standards for good and workmanlike automotive repairs" is ambiguous and not clear.	**REJECT IN PART AND ACCEPT IN PART:** Except where specifically noted below, CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards. To the degree this commentator makes the same or similar assertions as those made by prior commentators, CDI incorporates its response to prior commentators (above) into its response to this comment. **RE: Section 2695.8(f):** In addition to CDI's incorporation of its response to any prior commentators into its response to this comment, CDI also rejects the assertion that

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (g) (3)	Insurers should not be bound by automotive repair software. The requirement to have insurers supplement a repair shop's estimate is impractical and burdensome. In section 2695.8 (g) (2), the terms "inspections" and "test" are ambiguous. Dictating specific provisions of an insurer's warranty stifles competition. In section 2695.8 (g) (6), the phrase "cease using non-OEM parts that are found to be defective" is too broad and ambiguous. In section 2695.8 (g) (7), requiring insurers to notify distributor of parts not equal to OEM parts is vague. Section 2695.8 (g) (8) is inefficient and duplicative for insurers.	proposed section 2695.8(f) is inconsistent with the fundamental obligations of insurers to indemnify for covered losses. To the contrary, CDI's proposed amendments to section 2695.8(f) are intended to recognize and align with the insurer's obligation to indemnify for covered losses. Current section 2695.8(f) requires the insurer to pay the "amount which will allow for repairs to be made in a workmanlike manner.". The proposed section 2695.8(f) merely clarifies what is meant by workmanlike manner, by identifying the standards required of repair shops licensed by BAR. CDI recognizes that an insurer may reduce from the estimate of the amount of repair when it makes the actual claims payment in certain instances. These instances may include, but are not limited to, applying a deductible amount for most first party claims, a proportionate reduction for comparative fault on third party claims, for prior and/or unrelated damages, or for other clear and unambiguous insurance contract limitations. However, an insurer could not suggest that it could fulfill its

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (g) (9)	OEM should not be the standard for quality and insurers should not be responsible for the costs associated with returning parts to the manufactures.	obligation to indemnify for a covered loss by basing its claims payment on an amount that would result in a standard of repair less than what the actual shops, licensed to perform such repairs, are required to utilize. Not withstanding the above, CDI does recognize that repair software vendors offer general guidelines for repair operations, repair times, etc. These vendors may list labor times or other operations that might not be necessary for a certain repairs, or may omit similar operations that are necessary for certain repairs. To address this concern, CDI has amended this section (f) as noted it he Revised Regulations to recognize that an insurer may deviate from the standards, costs, and/or guidelines provided by the third-party automobile collision repair estimating software used by the insurer to prepare the estimate, unless such deviation would result in an estimate that would not allow for repairs to be made in accordance with accepted trade standards for good and workmanlike automotive repairs by an auto

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			body repair shop. **RE: Section 2695.8(g):** CDI incorporates its response to all prior commentators into its response to this comment. CDI also rejects the assertion, regarding proposed section 2695.8(g)(9), that insurer's should not be responsible for the costs associated with returning parts to manufacturers, which they have required be used,. When an insurer requires the use of a non-OEM part and that part must be returned to the manufacturer, who should bear the cost; the insurer who required the use of the defective part, the body shop that was told to use that part by the insurer, or the claimant who was forced to use that part against his or her free choice? Current law, FCSP regulation section 2695.8(g)(2) already requires the insurer who requires the use of a non-OEM to pay for the costs associated with modification to the parts to effect the repair. However, when a part is patently defective or the modifications don't cure the defect and the part must be returned, it is likewise

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			reasonable and appropriate for that insurer who required the use of that defective part to cover the cost to return that part and replace it with a compliant part. To do otherwise and force this cost on the shop and/or the claimant would be an unfair claims practice.
Steven Suchil Assistant Vice President/Counsel State Affairs Western Region American Insurance Association (AIA) Written Comment: August 9, 2012	2695.8 (f)	***WRITTEN:*** *AIA provide a summary of the organization and its mission.* AIA seeks copies of complaints regarding non-OEM parts. The regulations appear to favor OEM parts. Section 2695.8 (f) appears to be imposing Bureau of Automotive Repair (BAR) regulations upon insurers. The phrase "accepted trade standards for good and workmanlike auto body and frame repair" is vague.	**REJECT IN PART AND ACCEPT IN PART:** Except where specifically noted below, CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards. To the degree this commentator makes the same or similar assertions as those made by any prior commentators, CDI incorporates its response to any and all prior commentators (above) into its response to this comment. **RE: Section 2695.8(f):** CDI also rejects

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (f)	The regulation's provision in which insurers must adhere to estimating software is problematic because the software only provides an estimate. Section 2695.8 (f) (3) creates additional burdens on insurers that is unnecessary. The requirements in section 2695.8 (g) (3) is not necessary. Sections 2695.8 (g) (6) to (9) create additional requirements that go beyond claims practices and attempt to make carriers into guarantors of non-OEM parts. CDI does not have the authority to do this and this will lead to more litigation. The provisions lack clarity as to how to determine if non-OEM parts are equal to OEM parts. Section 2695.8 (g) (6) is unnecessary because repair facilities are already asked to do this.	the assertion that the Department – by incorporating by reference the regulation adopted by BAR – has improperly delegated its authority to adopt regulations to another state agency. CDI has not delegated its authority to adopt regulations pertaining to the subject matter of this rulemaking. CDI does not regulate auto body repair shops. BAR regulates these entities and has set forth the appropriate standard of repair that auto body repair shops must follow when effecting repairs in this state. Whether an insurance claim involves reimbursement for medical treatment, reconstruction of a damaged structure, or repair of a damaged automobile, insurers do not have the authority to create, dictate, and/or set standards for how a medical doctor treats a patient, how a contractor repairs a structure, or how an auto body repair shop repairs a vehicle. These experts are regulated by other governmental agencies/laws (i.e. medical boards, county zoning laws, etc) and must adhere to rules established by

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		Section 2695.8 (g) (9) is not necessary and places unneeded burdens on insurers.	those agencies/laws. By this rulemaking, CDI is also not establishing the standard for how auto body repair shops effect repairs, but, instead, establish the standards insurers must follow to fairly settle and pay automobile insurance claims, so as to avoid violation of the Unfair Practices Act. Not withstanding the above, CDI does recognize that repair software vendors offer general guidelines for repair operations, repair times, etc. These vendors may list labor times or other operations that might not be necessary for a certain repairs, or may omit similar operations that are necessary for certain repairs. CDI has amended this section (f) as noted in the Revised Regulations to recognize that an insurer may deviate from the standards, costs, and/or guidelines provided by the third-party automobile collision repair estimating software used by the insurer to prepare the estimate, unless such deviation would result in an estimate that would not allow for repairs to be made in accordance

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			with accepted trade standards for good and workmanlike automotive repairs by an auto body repair shop. **RE: Section 2695.8(f)(3):** CDI rejects the comment regarding the proposed amendment to section 2695.8(f)(3). This current section, which has been in essentially the same form since 1993, requires the insurer to "reasonably adjust any written estimates prepared by the repair shop of the claimant's choice". The proposed amendment to this section adds the language: "The adjusted estimate provided to the claimant and repair shop shall be either an edited copy of the claimant's repair shop estimate or a supplemental estimate based on the itemized copy of the claimant's repair shop estimate." This new language merely clarifies already existing law that requires adjustments be made only to the shop's estimate. However, based upon consumer and other complaints, CDI has found that some insurers do not in fact make the

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			required adjustments to the shop's estimate, but, instead create their own new estimate. This new estimate does not identify the adjustments made to the shop's estimate and deprives the claimant (the customer) from knowing what portion of the shop's estimate is being paid and what portion is being denied. This practice also violates current FCSP Section 2695.7(b), which requires the "amounts accepted and denied to be clearly documented" and requires the insurer to provide the specific reason for any whole or partial denial. CDI's proposed amendments to this subsection (f)(3), merely clarify the current law in this area. Further, CDI's proposed amendments to this subsection (f)(3) do not alter or hinder the ability of the insurer to refuse to pay for unrelated damages, unnecessary repairs, or other alleged overcharges by repair shops. Lastly, this amendment does not require the insurer to adopt the same estimating software as used by the claimant's repair

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			shop. An insurer may easily comply with this subsection (f)(3) by making notes on the shop's estimate or even by creating a new stand alone supplemental estimate (using the insurer's own estimating software) that identifies all the specific adjustments made to the shop's estimate. This rulemaking permits an insurer to create a "supplemental estimate based on the itemized copy of the claimant's repair shop estimate" (using the insurer's choice of software), so does not limit an insurer solely to editing or marking up the actual estimate prepared by the claimant's shop. **RE: Section 2695.8(g)(3):** CDI rejects the comment on subsection 2695.8(g)(3) regarding the warranty obligation. First, CDI wishes to make clear that the warranty obligation under this subsection (g)(3) has been in existence since 1993 and is not being altered or expanded in any way by this rulemaking. This rulemaking merely now requires the insurer to disclose this longstanding warranty obligation to

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			claimants. The commentator makes additional comments regarding some of the remaining subsections of (g) that are similar to other prior comments, above. CDI hereby incorporates its response to those prior similar comments. To the degree CDI agrees with some of the comments, amendments were made to address some of the stated concerns in the Revised Regulations.
Eileen A. Sottile Vice President, Government Affairs LKQ Corporation Co-Chair, Legislation & Regulation Committee, Automotive Body Part Association Written and Verbal Comments		**WRITTEN:** LKQ provides a brief description of the company and its various company locations. (**Verbal** – Similar verbal comments were made at the public hearing.) LKQ and ABPA continue to strongly oppose CDI's proposed amendment. In regards to section 2695.8 (g) (2), CDI unfairly singles out non-OEM parts for inspection. OEM parts have also been found to be defective. The proposed regulations will increase costs	**REJECT IN PART AND ACCEPT IN PART:** Except where specifically noted below, CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards. To the degree this commentator makes the same or similar assertions as those made by any prior commentators, CDI incorporates its response to any and all prior comments (above) into its response to this comment. CDI also rejects the commentator's

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
Written Comment: August 9, 2012 Verbal Comment: August 9, 2012		for consumers. A uniform standard for OEM and non-OEM parts is the correct approach. In section 2695.8 (g) (6), CDI is overstepping its authority by requiring insurers to notify the estimating software provider of the defective part. Aftermarket crash parts are cosmetic in nature and serve no safety purpose. **VERBAL:** The discriminatory nature of the regulations puts aftermarket parts in such a diminished position that insurers will not use them anymore. The regulations are incredibly intrusive into the ordinary course of LKQ's business. Nowhere else can an item be removed from a catalog and no longer put up for sale. LKQ would like to see the complaints that CDI feels justify the proposed regulations.	assertion that this rulemaking reduces competition, increase's consumer's costs, and will result in the closure of aftermarket parts manufacturers. The commentator provides no evidence to support these assertions. While the remedy to a claimant for a non-complaint part has been slightly enhanced, the actual standard of quality of a non-OEM part has not changed by this rulemaking. The standard has essentially remained the same since 1993, which is that the non-OEM part must be at least equal to the OEM part in terms of kind, quality, safety, fit and performance. To the degree this particular aftermarket parts distributor (or any other non-OEM distributor) provides safe and otherwise compliant parts, there should little impact on this entity (or others).

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		The regulations would allow competitors of LKQ to file complaints and "wipe" LKQ out. LKQ believes the current regulations are adequate. LKQ has numerous quality controls in place. The parts being discussed – hoods, bumpers, quarter panels – are not safety related parts. LKQ provides lifetime warranties on its parts. Limiting the use of aftermarket parts will make more cars economically "total losses" and prevent more of them from being fixed. The regulations will increase consumer's costs and close many aftermarket manufacturers, costing California jobs. Many aftermarket parts are made in the same factories as OEM parts.	

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		Aftermarket parts provide competition to OEM parts and help keep OEM parts prices down.	
Steve Osborne Assistant Vice President American Honda Motor Co., Inc. Written Comment: August 9, 2012	2695.8 (f)	**WRITTEN:** American Honda is pleased that the regulations acknowledge that an inferior part may cause injury or even death if it malfunctions. American Honda recommends including that "inferior repair" may also cause injury or death. American Honda is concerned that the phrase contained in the October 20, 2011 proposal, "original equipment manufacturers service specifications," has been deleted from the proposed regulations and would like this language to be included. Sections 2695.8 (g) (6) to (9) are vague and have the following suggestions: • In section 2695.8 (g) (6), American Honda **recommends** that the repair shop report inferior parts directly to the	**REJECT IN PART AND ACCEPT IN PART:** Except where specifically noted below, CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards. To the degree this commentator makes the same or similar assertions as those made by any prior commentators, CDI incorporates its response to any and all prior comments (above) into its response to this comment. CDI rejects the recommendation that the regulation include a statement that "inferior repair" may also cause injury or death. While, injury or death, may be the result of an inferior repair, adding such language is outside the intended scope of this rulemaking, which is to clarify and amend the standards insurers must follow

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		software providers. • In section 2695.8 (g) (7), American Honda **recommends** that the distributor receive the report directly from the repair shop, instead of placing a third-party (the insurer) in the middle. • In section 2695.8 (g) (8), the term "certified" needs to be defined. • Assuming the American Honda's suggested revisions of sections 2695.8 (g) (6) and (7) are adopted, having insurers notify the "certifying entity" of inferior parts in section 2695.8 (g) (8) is redundant.	when settling and paying automobile insurance claims. CDI rejects the recommendation that this rulemaking instead require (instead of the insurer) the repair shop notify the distributor, software vender, or part certifier. First, CDI does not regulate repair shops and cannot require repair shops to report. Second, CDI has also removed the reporting requirements to software venders and part certifiers.
Nadia V. Holober Attorney for the Consumer Federation of California (CFC) **Richard Holober**		***WRITTEN:*** *The CFC is supportive of the Insurance Commissioner's proposed amendments.* CFC applauds the Department's attempt to cease the use of inferior aftermarket parts as they cause numerous problems.	**REJECT IN PART AND ACCEPT IN PART:** CDI recognizes the comment with regard to the suggestion that CDI broaden Section (f) to ensure it also applies to repair facilities other than auto body repair

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
Executive Director Consumer Federation of California (CFC) Written and Verbal Comments Written Comment: August 8, 2012 Verbal Comments: August 9, 2012		CFC proposes the following amendment to section 2695.8 (f): "The estimate prepared by or for the insurer shall be of an amount which will allow for good and workmanlike automotive repairs to be made in accordance with 'accepted trade standards,' as described in California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8 of the Business and Professions Code and associated regulations, including but not limited to section 3365 thereof, by an 'auto body repair shop,' as defined in section 9889.51 of the Business and Professions Code." The above change would include just not shops that do body work only, but also shops that do other types of "automotive collision repair." CFC recommends that insurers disclose if they provide any incentives to auto body shops to use non-OEM parts. Thus, CFC **suggests** the following revisions to section 2695.8 (g) (5): "the use of non-original equipment manufacturer replacement crash parts is	shops. However, CDI believes that this Section (f), as proposed in the Revised Regulations, is broadly written to include all repairs that fall under the relevant B&P code sections, which apply to all types of repair facilities. Therefore, CDI is not accepting this amendment at this time. CDI recognizes the comment with regard to the recommendation that insurers disclose if they provide any incentives to auto body shops to use non-OEM parts. However, CDI, by these regulations, is not intending to regulate how insurers contract with Direct Repair Program auto body repair shops. Also, to the degree an insurer does offer incentives to repair shops to use non-OEM parts, an insurer may do so as long as the insurer is in full compliance with these regulations. Therefore, CDI is not accepting this amendment at this time. CDI recognizes the comment with regard to the recommendation that insurers

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		disclosed in accordance with section 9875.1 of the California Business and Professions Code, and any financial or other incentive offered by the insurer to any auto body repair shop or other person for the use of non-original equipment manufacturer replacement crash parts or disincentive for the use of original equipment manufacturer replacement crash parts is also disclosed in writing to the insured or claimant prior to the use of the parts." (**Verbal** – Similar verbal comments were made at the public hearing.) CFC **suggests** making the following addition to section 2695.8 (g) (3): "Additionally, the insurer shall warrant that the non-original equipment manufacturer replacement crash parts are 'merchantable' and fit for their particular purposes, as described in sections 2314 and 2315, respectively, of the Cal. Commercial Code, regardless of whether the insurer is otherwise considered a 'merchant'; and," CFC supports the revisions to section 2695.8	warrant that the non-OEM part is merchantable. However, CDI, by these regulations, is not intending to regulate how and whether a non-OEM part is merchantable. However, to the degree a non-OEM is compliant with this section (g), it will be, in most cases, also be merchantable. Therefore, CDI is not accepting this amendment at this time. CDI recognizes the comments with regard to the recommendations that: (1) CDI create a form to assist insurers in filing the report required under section 2695.8 (g) (8), and (2) Section 2695.8 (g) (8) be clarified to make explicit that the insurer's duty to report nonequivalent parts to a non-original equipment manufacturer replacement certifying entity in no way should be interpreted as conveying any endorsement or State-recognized status of

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		(g) (6). CFC **suggests** that CDI create a form to assist insurers in filing the report required under section 2695.8 (g) (8). CFC **recommends** that section 2695.8 (g) (8) be clarified to make explicit that the insurer's duty to report nonequivalent parts to a non-original equipment manufacturer replacement certifying entity in no way should be interpreted as conveying any endorsement or State-recognized status of any certifying entity. CFC **recommends** adding the following to section 2695.8 (g) (9): "Nothing contained in this section 2695 shall be interpreted to suggest or imply the recognition or endorsement by the Insurance Commissioner of any non-original equipment manufacturer replacement certifying entity or any non-original equipment manufacturer replacement certifying process." CFC r**ecommends** adding the following to	any certifying entity. However, CDI takes notice of the potential that these regulations, section 2695.8 (g) (8), may unintentionally imply that a certified non-OEM part is superior to a non-certified non-OEM part. Therefore, CDI has removed the requirement of reporting to the certifying entity, and so CDI is not accepting this amendment at this time. CDI recognizes the comment with regard to the recommendation that CDI add language to section 2695.8 (g) (9), which would permit only an OEM part be used to replace a non-compliant Non-OEM part. However, CDI, by these regulations, is not intending to prohibit or restrict the use of compliant non-OEM parts. Therefore, CDI is not accepting this amendment at this time. CDI recognizes and agrees with the comments with regard to the technical edits recommended. CDI is accepting

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		section 2695.8 (g) (9): Insurers should be required to "pay for the costs associated with returning the part and the cost to remove and replace the non-original equipment manufacturer part with an original manufacturer part." CFC has the following suggested changes to the language of the proposed regulations: • Section 2695.8 (f) (5): Citation to Business and Professions Code section 9875 is incorrect. The proper section is Business and Professions Code section 9875.1. • Section 2695.8 (f): Change wording to "If a partial loss is settled" • Section 2695.8 (g): Change the wording to: "Non-original equipment manufacturer replacement crash parts" • Section 2695.8 (g) (1): Change the word "insurer" to "any insurer" • Section 2695.8 (g) (2): Change the word "insurer" to "any insurer" and change "warrant" to "warrants"	most of these suggestions, as reflected in the Revised Regulations.

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		• Section 2695.8 (g) (3) and (4): Change the wording to "Non-original equipment manufacturer replacement crash parts" • Section 2695.8 (g) (5): Add "and" to the end of the subsection • Section 2695.8 (g) (6) to (9): Change the word "insurer" to "any insurer" **VERBAL:** In the October 2010 issue of Consumer Reports magazine, there was a discussion of some of the problems with aftermarket parts. In examining the performance of aftermarket parts, you have to examine the part as well as how it impacts the increasingly complex systems that are designed to protect the passengers in the car. The proposed regulations should be amended to require disclosure of agreements that insurers enter into with Direct Repair Program (DRP) shops that would affect the decision-making of those shops in terms of choice of	

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		OEM versus aftermarket parts. In a Bureau of Automotive Repair (BAR) study, auto insurance policy rates went down in the state of Minnesota after the state virtually eliminated allowances for the use of aftermarket parts. There are no standards for aftermarket parts. The State of California should not legally recognize a private certification entity, such as CAPA.	
Alice C. Bisno Senior Vice President, Public Affairs Automobile Club of Southern California & Interinsurance		**WRITTEN:** The Exchange does not require or authorize the use of aftermarket parts and thus will only those amendments in section 2695.8 (f). The Exchange would appreciate additional information in regards to the number and	**REJECT IN PART AND ACCEPT IN PART:** Except where specifically noted below, CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards. To

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
Exchange of the Automobile Club (the "Exchange") Written Comment: August 9, 2012		nature of consumer complaints that form the basis of these amendments as it is not aware of any complaints. The proposed requirement under section 2695.8 (f) (3) is time consuming and costly. It would potentially increase costs by up to $1.6 million. The Exchange fails to see how this requirement would be beneficial to its policyholders.	the degree this commentator makes the same or similar assertions as those made by any prior commentators, CDI incorporates its response to any and all prior commentators into its response to this comment. With regard to the request that CDI provide additional information on the nature of consumer complaints, over the past several years, CDI has received several complaints from consumers and auto body repair shops. These consumer and other complaints, along with several additional documents that support the necessity for this rulemaking, are contained in the public rulemaking file. CDI rejects the comment regarding the proposed amendment to section 2695.8(f)(3). As responded to above in prior comments, this current section, which has been in essentially the same form since 1993, requires the insurer to "reasonably adjust any written estimates

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			prepared by the repair shop of the claimant's choice". The new proposed language merely clarifies already existing law that requires adjustments be made only to the shop's estimate. However, based upon consumer and other complaints, CDI has found that some insurers do not in fact make the required adjustments to the shop's estimate, but, instead create their own new estimate. This new estimate does not identify the adjustments made to the shop's estimate and deprives the claimant (the customer) from knowing what portion of the shop's estimate is being paid and what portion is being denied. This practice also violates current FCSP Section 2695.7(b), which requires the "amounts accepted and denied to be clearly documented" and requires the insurer to provide the specific reason for any whole or partial denial. CDI's proposed amendments to this subsection (f)(3), merely clarify the current law in this area.

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
Susan McCarthy Operations Manager NSF International, QAI Written and Verbal Comments Written Comment: August 9, 2012 Verbal Comment: August 9, 2012		**WRITTEN:** NSF provided a brief summary of the organization and its location. (**Verbal** – Similar verbal comments were made at the public hearing.) NSF explained its certification program and stated that it could certify various aftermarket automotive parts. (**Verbal** – Similar verbal comments were made at the public hearing.) NSF cautions the Insurance Commissioner in putting restrictions on aftermarket parts. (**Verbal** – Similar verbal comments were made at the public hearing.) NSF recommends the regulations be changed to recognize independent third party certification, such as NSF certified aftermarket parts, as equivalent to original equipment service parts.	**REJECT IN PART AND ACCEPT IN PART:** Except where specifically noted below, CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards. To the degree this commentator makes the same or similar assertions as those made by any prior commentators, CDI incorporates its response to any and all prior commentators (above) into its response to this comment. CDI rejects the recommendation that the regulations be changed to recognize independent third party certification, such as NSF certified aftermarket parts, as equivalent to original equipment service parts. There is no body of evidence to support this position.

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		(**Verbal** – Similar verbal comments were made at the public hearing.) NSF has also created a Distributor Certification Program in which the distributors met rigorous requirements related to their quality systems and handling of aftermarket automotive parts. (**Verbal** – Similar verbal comments were made at the public hearing.) NSF believes both the NSF Parts Certification program and the NSF Distributor Certification program are critical to building confidence in the use of aftermarket parts. The market continues to address the Commissioner's concerns regarding the quality of aftermarket parts and urges the Commissioner to consider this in any changes made to the regulations. (**Verbal** – Similar verbal comments were made at the public hearing.)	However, based upon this comment and other similar comments, CDI has made amendments to Section (g), as reflected in the Revised Regulations.
Monte Etherton President		**WRITTEN:** Body shops have no issues using aftermarket parts as long as they do not affect the quality of the repair or harm the shop by	With regard to the proposal to add language to subsection 2695.8(f)(3), that

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
Fender Mender, Inc. Written and Verbal Comments Written Comments: August 8, 2012 Verbal Comments: August 9, 2012		causing additional time or expense to complete the repair. (**Verbal** – Similar verbal comments were made at the public hearing.) When insurers, because they are trying to minimize costs, require body shops to use aftermarket parts, insurers should make both the consumer and the shop "whole." (**Verbal** – Similar verbal comments were made at the public hearing.) Insurers have more clout with aftermarket parts vendors than body shops. (**Verbal** – Similar verbal comments were made at the public hearing.) The proposed regulations will help improve the quality of aftermarket parts. (**Verbal** – Similar verbal comments were made at the public hearing.) Fender Mender **suggests** the following changes to section 2695.8 (f) (3): "The adjusted estimate shall identify each	would require the insurer to include the reason for the adjustment, etc, CDI rejects this proposal. Insurer's already have the affirmative obligation, under Section 2695.7(b)(1) of these FCSP regulations to provide the claimant with all bases for a rejection or denial and the factual and legal bases for each reason given for such rejection or denial which is then within the insurer's knowledge. Therefore, if the "adjustment" made pursuant to subsection 2695.8(f)(3) is also a denial of all or a portion of the claimed amount, the insurer, under current law, must describe the reason for the adjustment. Therefore, the suggested amendment is unnecessary.

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		adjustment made to the claimant's shop's estimate, the reason for each adjustment, and the total cost associated with each adjustment. The adjusted estimate shall also show the total adjustment amount as being the difference from the shop's estimate." (**Verbal** – Similar verbal comments were made at the public hearing.) Many consumers are afraid to file complaints against their insurer because they believe the insurer will "jack up" their rates. Thus, body shops have had to intercede in order to protect consumers. The only way to protect consumers is to make sure the car is repaired by the body shop's estimate, which is exactly what the proposed regulations demand. (**Verbal** – Similar verbal comments were made at the public hearing.) Commenter provides a summary of his background.	

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		VERBAL: The analogy of that aftermarket parts are similar to generic drugs is incorrect. Generic drugs are exact chemical duplicates of the brand name drugs they represent. Aftermarket parts can never be exact duplicates because aftermarket manufacturers are never privy to the design standards and specifications that the OEM manufacturers use in making those parts. Also, having a five percent return on parts is unacceptable. Perhaps one percent may be acceptable but definitely not five percent.	
Clarence Ditlow, Executive Director		**WRITTEN:** CAS provided a brief description of the organization's history and purpose. (**Verbal** – Similar verbal comments were made	**REJECT IN PART AND ACCEPT IN PART:**

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
Center for Auto Safety (CAS) Written and Verbal Comments Written Comments: August 9, 2012 Verbal Comments: August 9, 2012	2695.8 (g) (2)	at the public hearing.) The assumption that OEM parts are superior to aftermarket parts is wrong. (**Verbal** – Similar verbal comments were made at the public hearing.) CAS recommends amending section 2695.8 (g) (2) to also include OEM parts. (**Verbal** – Similar verbal comments were made at the public hearing.) CAS included a table of defects in OEM parts. (**Verbal** – Similar verbal comments were made at the public hearing.) The Certified Auto Parts Association (CAPA) has a rigorous standards and test program in which CAPA certified parts consistently outperformed OEM parts in fit and finish. (**Verbal** – Similar verbal comments were made at the public hearing.) CDI fails to distinguish between rigorously certified and non-certified crash parts in its	To the degree this commentator makes the same or similar assertions as those made by any prior commentators, CDI incorporates its response to any and all prior commentators (above) into its response to this comment. CDI rejects the recommendation that CDI should amend section 2695.8 (g) (2) to also include OEM parts. By these regulations, CDI is not intending to regulate an insurer's use of OEM parts. CDI rejects the comment that CDI fails to distinguish between rigorously certified and non-certified crash parts in its proposed regulations and creates an incentive for insurers to use non-certified non-OEM parts. By these regulations, CDI is not intending to prohibit or restrict the use of compliant non-OEM parts, whether certified or not. Also, since the legislature has not distinguished between (or set standards for) certified non-OEM parts and non-certified non-OEM parts, CDI may not create new law by

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		proposed regulations. (**Verbal** – Similar verbal comments were made at the public hearing.) The proposed regulation creates an incentive for insurers to use non-certified crash parts or non-rigorous certification crash parts because those parts will not create the actual or implied knowledge in the insurer that those parts do not have the like kind, quality, safety, fit and performance as an OEM part. (**Verbal** – Similar verbal comments were made at the public hearing.) CAPA has a program in place that CDI wants, one that aggressively goes after bad parts, stops their production and recalls them. (**Verbal** – Similar verbal comments were made at the public hearing.) CAPA includes an article entitled "Auto Industry Crash Parts Monopoly Hits the Consumer Pocketbook and Fails to Deliver Quality"	recognizing certified non-OEM parts, as superior to non-certified non-OEM parts, and prohibit the use of non-certified non-OEM parts.

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		VERBAL: The National Highway Traffic Safety Administration is recalling hundreds of imported parts. However, because many of the imported parts do not have a tracking number, they cannot be recalled and replaced.	
Marcy Tieger Principal Symphony Advisors, LLC Written and Verbal Comments Written Comments: August 9, 2012 Verbal Comment: August 9, 2012		**WRITTEN:** A brief description of Symphony Advisors is given. (**Verbal** – Similar verbal comments were made at the public hearing.) Symphony Advisors takes issue with the presumption that aftermarket parts are inferior to OEM parts. (**Verbal** – Similar verbal comments were made at the public hearing.) Consumers who prefer OEM parts can purchase policies that do not require the use of aftermarket parts. (**Verbal** – Similar verbal comments were made at the public hearing.) Symphony Advisors, through their work with	**REJECT IN PART AND ACCEPT IN PART:** To the degree this commentator makes the same or similar assertions as those made by any prior commentators, CDI incorporates its response to any and all prior comments (above) into its response to this comment. CDI also rejects the commentator's assertion that this rulemaking stifles competition. The commentator provides no evidence to support these assertions. To the degree an insurer requires the use of safe and otherwise compliant non-OEM parts, there should be no impact on competition.

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		collision repair owners and operators in California, have had few complaints about aftermarket parts. (**Verbal** – Similar verbal comments were made at the public hearing.) Aftermarket parts provide competition to OEM parts and enable more cars to be repaired and fewer cars from becoming economic total losses. Many OEM parts have been recalled in the last few years and many aftermarket parts are made in the same factories as OEM parts. (**Verbal** – Similar verbal comments were made at the public hearing.) The proposed regulations would unfairly benefit OEM manufacturers and will stifle competition. (**Verbal** – Similar verbal comments were made at the public hearing.) Insurers do not knowingly or intentionally allow a poor quality part to be put on a	CDI also rejects the comment that it is the consumers who choose to use (or not use) non-OEM parts by opting in or out of coverage via the insurance contract. This assertion is not based upon fact. CDI asserts that there are very few insurance contracts where the insured has the option so described. The rare instance where this option is available, and the insured chooses to use non-OEM parts, creates even greater importance that insurers only require safe and proper fitting non-OEM parts. Further, the unfounded comment fails to take into account that a large proportion of automobile insurance claims are third party claims, where another person's insurance company pays for damage to that third party's automobile. In this frequent occurrence, there is no contractual relationship between the third party and the insurer. The third party has not chosen by contract to use non-OEM parts.

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		consumer's vehicle.	
Senator Ron Calderon Chair Senate Insurance Committee Written Comments only Written Comments: August 8, 2012		**WRITTEN:** Senator Ron Calderon has numerous questions regarding the proposed regulations. How does Civil Code section 3333, Government Code section 11152 or Business or Professions Code section 9875 permit or obligate CDI to adopt, amend or repeal the proposed regulations? Section 2695.8 (f) incorporates section 9889.51 of the Business and Professions Code. What specific portions of the Business and Professions Code and associated regulations does CDI intend to incorporate by reference? What remedies are available to CDI in the event an insurer violates proposed section 2695.8 (f). Proposed Section 2695.8(f) incorporates "accepted trade standards for good and workmanlike automotive repairs by an 'auto body	**REJECT IN PART AND ACCEPT IN PART:** To the degree this commentator makes the same or similar assertions as those made by any prior commentators, CDI incorporates its response to any and all prior comments (above) into its response to this comment. In general, this comment does not specifically recommend a position on this rulemaking, but asks questions of CDI. CDI's response to these questions are noted below. **(Questions 1-3): How does Civil Code section 3333, Government Code section 11152 or Business or Professions Code section 9875 permit or obligate CDI to adopt, amend or repeal the proposed regulations?**

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		repair shop' as defined in section 9889.51 of the Business and Professions Code, and as described in the Business and Professions Code, and associated regulations, including but not limited to Section 3365 of the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8." Please specify which portions of the Business and Professions Code and associated regulations CDI intends to incorporate by reference? What remedies are available to CDI in the event an insurer violates proposed Section 2695.8(f)? How does CDI intend to investigate alleged violations of these standards and prosecute enforcement actions? Does CDI intend to review the appropriateness of repair estimates? If so, how would it establish the "true cost of repair"? Does CDI staff have the subject matter expertise to enforce standards designed for auto body repairs shops as defined in the Business and	Response: With regard to Civil Code (CC) Section 3333, the Insurance Commissioner has the regulatory authority and, indeed, obligation, to regulate third party claims practices by insurers. CC section 3333 describes a tortfeaser's measure of damages to an injured (third) party. This section is highly relevant to third party insurance claims. The use of this CC section is intended to recognize how and when these regulations pertain to third party automobile liability property damage claims, a large proportion of automobile insurance claims. The citing of this statute is not new and been part of the regulations for many years. CDI is not adding this reference to CC 3333 in this rulemaking and, therefore, this comment is not related to the proposed regulations. With regard to the comment's reference to Government Code (GC) Section 11152, this statute provides the Insurance Commissioner with authority to adopt rules pertaining to the duties of various units within CDI. This statute is cited as authority or reference in

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		Professions Code? Does CDI intend to hire outside experts on auto body repair to interpret these standards? If so, how will these additional expenses impact the CDI budget? lf an auto insurer's contractual obligation only covers the costs to return a damaged vehicle to its pre-loss condition, could the proposed regulations impose a greater obligation on the insurer than that imposed by the contract? Could an increase in repair casts result in an increase in auto insurance rates for consumers? Proposed Section 2695.8(f) would prohibit the insurer from preparing an estimate that is less favorable to the claimant that the standards, costs, and guidelines provided by the third-party automobile collision repair estimating software used by the insurer to prepare the estimate. Is this software designed to provide an immovable bottom floor in determining "the true cost of repair"? What evidence does CDI rely on to support the rule that an insurer would not be able	several sections of the FCSP regulations. To the degree certain provisions of these regulations pertain to the duties of the CDI, this statute is relevant. The citing of this statute is not new and as been part of the regulations for many years. CDI is not adding this reference to GC Section 11152 in this rulemaking and, therefore, this comment is not related to the proposed regulations. With regard to the comment's reference to Business and Professions (B&P) Code section 9875, the comment makes a valid point. CDI cites B&P code section 9875 in both subsection 2695.8(g)(5) and in the Reference to Section 2695.8. This citation/reference has been in existence prior to this current rulemaking, and has not been previously challenged. However, after reviewing this comment, and other similar comments, CDI has determined that the more appropriate citation/reference is B&P Code section 9875.1. Therefore, this change is made in the Revised Regulations, which were noticed October 10, 2012. CDI did not

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		to revise the estimate below the software-produced figures? Business and Professions Code Section 9884.7 provides that an auto body repair dealer must not depart from "accepted trade standards for good and workmanlike repair in any material respect" *unless consent is granted* to depart from those standards by the owner of the vehicle. If an auto body repair dealer can legitimately deviate from those standards (meaning that a violation of those standards would not provide a basis for discipline if consent was granted) and those standards do not provide bright-line guidance, will those standards properly translate if incorporated by referenced and applied to an insurer who stands in an entirely different relationship to the consumer? <u>Proposed Section 2695.8 (g)</u> Proposed section 2695.8 (g) provides that if an insurer requires the use of non-original equipment manufacturer replacement crash parts that the insurer has “implied, actual, or constructive	promulgate subsection 2695.8(g)(3) using the authority of B&P code sections 9875 or 9875.1. CDI authority for this subsection, as noted above, is derived from IC section 790.10, and based upon CDI’s authority to interpret, and implement IC Section 790.03. **Proposed Section 2695.8(f):** **(Question 4): Proposed Section 2695.8(f) incorporates "accepted trade standards for good and workmanlike automotive repairs by an 'auto body repair shop' as defined in section 9889.51 of the Business and Professions Code, and as described in the Business and Professions Code, and associated regulations, including but not limited to Section 3365 of the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8." Please specify which portions of the Business and Professions Code and associated regulations CDI intends to incorporate by reference?**

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		knowledge" that are not equal to the OEM parts in terms of kind, quality, safety, fit and performance, the insurer "shall pay for the costs associated with returning the part and the cost to remove and replace the non-original part." On what statutory authority does CDI rely on to grant the Commissioner the power to require an insurer to pay for these costs? Business and Professions Code section 9875.1 provides, in part, that an insurer shall not require the use of non-OEM parts unless the insurer discloses that the warranties applicable to the replacement parts are provided by the manufacturer or distributor of the parts, rather than by the original manufacturer of the vehicle. This section assumes that the manufacturer of the part, not the insurer, makes the contractual warranty. How is the requirement that the insurer to pay costs related to the replacement and return of defective parts consistent with Business and Profession Code section 9875.1? Business and Professions Code section 9875.2 states that the remedy for violations of section	Response: CDI intends to incorporate any and all B&P Code sections and associated rules, that relate to the standards of repair required of automobile repair shops, as required by BAR. **(Question 5): What remedies are available to CDI in the event an insurer violates proposed section 2695.8 (f).** Response: The remedies available to CDI in the event an insurer violates proposed section 2695.8 (f), include, but are not limited to, those described in IC Sections 790.05 and 790.035. **(Question 6): How does CDI intend to investigate alleged violations of these standards and prosecute enforcement actions?** Response: CDI intends to investigate alleged violations of the insurer standards for how an insurer estimates damages to an automobile through the receipt of

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		9875.1 is provide in Insurance Code section 790.06 (establishing a basis for injunctive relief but not money damages or fines). How is the requirement that the insurer pay costs related to the replacement and return of defective parts consistent with Business and Professions Code section 9875.1? Insurance Code section 12921 (b) allows the Commissioner to agree to a payment to a person or entity to whom payment may be due because of a violation of the Insurance Code or applicable law regulating the business of insurance. It does not appear to provide the Commissioner with the authority to determine how much is due for any other purpose or grant any authority outside a settlement agreement to order the payment of costs. The legislative history of section 12921 indicates that the Legislature specifically rejected a grant of power to the Commissioner to order restitution or any kind of payment. How is the requirement that the insurer pay costs related to the replacement and return of defective parts consistent with Insurance Code section 12921?	complaints and during the market conduct examination of insurers. Should CDI find that an insurer has attempted to unfairly settle or pay an automobile insurance claim for less than what is reasonably necessary to effect repairs using the appropriate repair standards set forth in the described B&P code and associated regulations, CDI may prosecute these violations through the administrative authority granted to it under IC Sections 790.05 and 790.035. **(Question 7): Does CDI intend to review the appropriateness of repair estimates? If so, how would it establish the "true cost of repair"?** Response: CDI does intend to review the appropriate of repair estimates to the determine whether or not an insurer has attempted to unfairly settle or pay an automobile insurance claim for less than what is reasonably necessary to effect repairs using the appropriate repair

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		How does CDI define "constructive" and "implied" knowledge in Proposed Section 2695.8 (g)? Would insurers subject to these regulations be familiar with these terms and their implications for the purposes of the proposed regulations? Under what circumstances would the Commissioner find that an insurer had "constructive" or "implied" knowledge? <u>Evidence to Support Conclusions</u> Please provide the Committee with the evidence or a summary of the evidence relied on by CDI in supporting its conclusions or assertions stated in the Notice of Proposed Action and Notice of Public Hearing (page 4), particularly related to documented cases or evidence of statistical probability. In particular, please provide the evidence for the following statements: a. "[A] part that is not of like kind, quality, safety, fit and performance may cause injury or even death if it malfunctions." b. "[D]isputes regarding the true cost of repairs of damaged vehicles and the	standards. However, CDI does not intend to establish the true cost of repair, nor do these regulations imply CDI will undertake such action. **(Question 8): Does CDI staff have the subject matter expertise to enforce standards designed for auto body repairs shops as defined in the Business and Professions Code?** Response: Under both the current and the proposed regulations, CDI staff does have significant expertise in evaluating whether or not an insurer has attempted to unfairly settle or pay an automobile insurance claim for less than what is reasonably necessary to effect repairs. CDI's authority is limited to ensuring that insurers reasonably settle claims and provide reasonable support in instances when the insurer denies certain repairs or certain costs, as required by current law or the insurance contract. CDI does not intend to dictate exactly what specific

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		applicable repair standard required to comply with the current regulation continue to negatively [affect] the claims handling process." c. "[A]ftermarket parts that are not compliant with the current regulations continue to infiltrate the repair process threatening public safety." d. Auto repair shops and their customers have borne substantial costs "associated with installing defective or poorly fitting parts required by insurers." e. That the proposed regulations "will result in safer cars and possibly produce a savings in liability insurance premiums." In relation to the above-listed assertions, please also provide CDI's reasoning and evidence that insurers were the primary cause of the circumstances asserted and how the proposed amendments will address the issue. In what ways are the current regulations insufficient or ineffective in requiring an	repair operation(s) is appropriate for a particular repair, and so, CDI staff does not require expertise in auto body repair processes. This regulatory approach is similar to how CDI evaluates unfair claims practices in other lines of insurance (i.e. health insurance, homeowners' insurance, etc). For example, when an insurer determines whether a health insurance claim is covered and medically necessary, it must do so based (not upon its own medical standards of what constitutes medical necessity) but upon standards of medical practice generally accepted by medical professionals and the medical community. In this context, CDI does not enforce the medical standards per se, only whether or not the insurer based its claim determination upon the appropriate medical standards that exist and it can support this action. The above description of health insurance is analogous to how CDI (does now) and will continue to enforce these automobile insurance regulations.

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		insurer to comply with its contractual obligation to repair a vehicle to its pre-loss condition? Please provide to the Committee copies of any disciplinary actions taken within the last three years against an insurer for failing to provide proper estimates or for inappropriately requiring the use of a non-OEM part.	**(Question 9): Does CDI intend to hire outside experts on auto body repair to interpret these standards? If so, how will these additional expenses impact the CDI budget?** Response: As noted above, CDI staff does have significant expertise in evaluating whether or not an insurer has attempted to unfairly settle or pay an automobile insurance claim for less than what is reasonably necessary to effect repairs. CDI does not contemplate the need to hire outside experts on auto body repair, as CDI's authority is limited to ensuring that insurers reasonably settle claims and provide reasonable support in instances when the insurer denies certain repairs or certain costs, as required by current law or the insurance contract. **(Question 10): If an auto insurer's contractual obligation only covers the costs to return a damaged vehicle to its**

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			pre-loss condition, could the proposed regulations impose a greater obligation on the insurer than that imposed by the contract? Could an increase in repair costs result in an increase in auto insurance rates for consumers? Response: No, CDI does not believe the proposed regulations conflict in any way with the insurer's contractual obligation to cover the costs to return a damaged vehicle to its pre-loss condition. First, returning a vehicle to its pre-loss condition implies the vehicle will be repaired by a repair shop that is duly licensed by BAR and that employs repair standards set forth by the legislature and by BAR under the B&P code and associated regulations. Surely, an insurer could not presume to pay less based upon an estimate of repair that falls below the amount necessary to repair the vehicle to its pre-loss condition using standards below what a licensed repair shop is required to follow.

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			CDI does not agree with the proposition that there will be an increase in repair costs associated with this proposed regulation, so does not project any increase in auto insurance rates for consumers. **(Question 11): Proposed Section 2695.8(f) would prohibit the insurer from preparing an estimate that is less favorable to the claimant that the standards, costs, and guidelines provided by the third-party automobile collision repair estimating software used by the insurer to prepare the estimate. Is this software designed to provide an immovable bottom floor in determining "the true cost of repair"? What evidence does CDI rely on to support the rule that an insurer would not be able to revise the estimate below the software-produced figures?** Response: No, CDI does not contend by this rulemaking that the estimating software is

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			designed to provide an immovable bottom floor in determining "the true cost of repair". However, based upon this question and other comments regarding this subsection (f), CDI has amended, in the Revised Regulations, the relevant sentence in (f) to read: An insurer shall not prepare an estimate that deviates from the standards, costs, and/or guidelines provided by the third-party automobile collision repair estimating software used by the insurer to prepare the estimate, if such deviation would result in an estimate that would not allow for repairs to be made in accordance with accepted trade standards for good and workmanlike automotive repairs by an auto body repair shop, as described in this section (f). This amendment is intended to recognize that a deviation (even a downward one) from guidelines provided by the third-party automobile collision repair estimating

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			software may be appropriate in certain factual situations, as long as that deviation does not infer a repair be made below the BAR standard. **(Question 12): Business and Professions Code Section 9884.7 provides that an auto body repair dealer must not depart from "accepted trade standards for good and workmanlike repair in any material respect" *unless consent is granted* to depart from those standards by the owner of the vehicle. If an auto body repair dealer can legitimately deviate from those standards (meaning that a violation of those standards would not provide a basis for discipline if consent was granted) and those standards do not provide bright-line guidance, will those standards properly translate if incorporated by referenced and applied to an insurer who stands in an entirely different relationship to the consumer?** Response: CDI, by this rulemaking, is

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			merely clarifying the intent of current Section (f), which requires that the "estimate prepared by or for the insurer shall be of an amount which will allow for repairs to be made in a workmanlike manner." While CDI does recognize that an insurer and a repair shop may disagree on the reasonable cost to repair a particular vehicle, it is inconceivable that an insurer would interpret 'workmanlike manner" to be a standard less than the minimum standards a licensed repair shop is required to follow. Whether an auto body repair shop can deviate from the required standards, when consent is granted by the owner, has no legitimate bearing on an insurer's obligation to base estimates it prepares to settle and pay claims on the required standards. For example, a claimant may decide not to have the vehicle repaired at all. This decision by the claimant does not void the insurer's obligation to pay the reasonable cost to repair. Therefore, a decision by the claimant to request or approve certain repairs that fall below the shop's standard, does not alter the insurer's

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			obligation. **Proposed Section 2695.8 (g)** **(Question 13): Proposed section 2695.8 (g) provides that if an insurer requires the use of non-original equipment manufacturer replacement crash parts that the insurer has "implied, actual, or constructive knowledge" that are not equal to the OEM parts in terms of kind, quality, safety, fit and performance, the insurer "shall pay for the costs associated with returning the part and the cost to remove and replace the non-original part." On what statutory authority does CDI rely on to grant the Commissioner the power to require an insurer to pay for these costs?** CDI relies on the Unfair Practices Act (IC Section 790 et seq) and associated statutes and regulations, which grant the commissioner the authority to adopt such rules. When an insurer requires the use of a non-OEM part and that part must be returned

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			to the manufacturer, CDI believes that the insurer who required the use of the defective part, should bear the additional costs associated with that decision, which only occurred due to the insurer's requirement. If the insurer is not responsible for this cost, which only occurred but for the insurer's requirement, then the body shop that was told to use that part by the insurer or the claimant who was forced to use that part against his or her free choice, would be unreasonably out-of-pocket for this amount. Current law, FCSP regulation section 2695.8(g)(2), already requires the insurer who requires the use of a non-OEM to pay for the costs associated with modification to the parts to effect the repair. However, when a part is patently defective or the modifications don't cure the defect and the part must be returned, it is likewise reasonable and appropriate for that insurer who required the use of that defective part to cover the cost to return that part and replace it with a compliant part. To do otherwise and force this cost on the shop or the

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			claimant would result in a windfall to the insurer and would be an unfair claims practice. **(Question 14): Business and Professions Code section 9875.1 provides, in part, that an insurer shall not require the use of non-OEM parts unless the insurer discloses that the warranties applicable to the replacement parts are provided by the manufacturer or distributor of the parts, rather than by the original manufacturer of the vehicle. This section assumes that the manufacturer of the part, not the insurer, makes the contractual warranty. How is the requirement that the insurer to pay costs related to the replacement and return of defective parts consistent with Business and Profession Code section 9875.1?** Response: B&P Code section 9875.1 does not in itself require that a manufacturer or distributor of a non-OEM part actually provide a warranty. This section reads in

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			pertinent part: "Any warranties applicable to these replacement parts are provided by the manufacturer or distributor of the parts, rather than by the original manufacturer of your vehicle." Also, even in the situation where a manufacturer or distributor of a non-OEM part actually provides a warranty, this warranty is different and separate from the warranty obligation of insurers when an insurer requires the use of a non-OEM part. CDI wishes to make clear that the warranty obligation under this subsection (g)(3) has been in existence since 1993 and is not being altered or expanded in any way by this rulemaking. This rulemaking merely now requires the insurer to disclose this longstanding warranty obligation to claimants, when the insurer requires the use of a non-OEM part. However, CDI recognizes that third parties

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			(i.e. part distributors, suppliers, manufacturers, etc) may provide some type of warranty on a non-OEM part, which might independently obligate that third party to reimburse a shop or claimant for certain costs. CDI also recognizes that insurers may wish to seek reimbursement for certain costs from third parties. Therefore, CDI has added a new subsection (g)(8), which reads: "(8) nothing in this section (g) prohibits an insurer from seeking reimbursement or indemnification from a third party for the costs associated with the insurer's compliance with this section (g), including but not limited to, costs associated with the insurer's obligation to warrant the part, modifications to the part, or returning, removing or replacing a non-compliant non-original equipment manufacturer part. However, seeking reimbursement or indemnification from a third party shall not in any way modify the insurer's obligation to

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			comply with this section (g). An insurer shall retain primary responsibility to comply with this section (g) and shall not refuse or delay compliance with this section on the basis that responsibility for payment or compliance should be assumed by a third party. This newly proposed section makes clear that the rulemaking is not intended to prohibit an insurer from seeking reimbursement of some or all of the costs associated with the insurer's compliance. To the degree an insurer requires the use of non-OEM parts and desires to seek indemnification or reimbursement from third parties, it may do so, as long as, the insurer retains primary responsibility to comply with this section (g). **(Question 15): Business and Professions Code section 9875.2 states that the remedy for violations of section 9875.1 is provide in Insurance Code section 790.06 (establishing a basis for injunctive relief**

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			but not money damages or fines). How is the requirement that the insurer pay costs related to the replacement and return of defective parts consistent with Business and Professions Code section 9875.1? Response: B&P Code section 9875.2 is not inconsistent with the requirement that an insurer pay the costs associated with replacement and return of a non-compliant non-OEM part. First, B&P Code section 9875.2 only relates to an insurer's disclosure in the written estimate. Also, the Commissioner has defined, interpreted, implemented, and made more specific, Section 790.03 by adopting the Fair Claims Settlement Practices regulations. Therefore, any unfair practices or acts described in the FCSP regulations are violations of IC Section 790.03 and subject to enforcement via IC Section 790.05. When a part is patently defective or the modifications don't cure the defect and the part must be returned, the insurer who required the use of that defective part should cover the cost to return

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			that part and replace it with a compliant part. To do otherwise and force this cost on the claimant, would be an unfair claims practice under CIC section 790.03 and enforced under IC Section 790.05. **(Question 16): Insurance Code section 12921 (b) allows the Commissioner to agree to a payment to a person or entity to whom payment may be due because of a violation of the Insurance Code or applicable law regulating the business of insurance. It does not appear to provide the Commissioner with the authority to determine how much is due for any other purpose or grant any authority outside a settlement agreement to order the payment of costs. The legislative history of section 12921 indicates that the Legislature specifically rejected a grant of power to the Commissioner to order restitution or any kind of payment. How is the requirement that the insurer pay costs related to the replacement and return of defective parts consistent with**

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			Insurance Code section 12921? Response: Insurance Code section 12921 is not inconsistent with the requirement that an insurer pay the costs associated with replacement and return of a non-compliant non-OEM part. First, IC Section 12921(b) only pertains to settlement of administrative actions, and does not restrict the Commissioner's ability and authority to interpret, implement, define, and make more specific the Unfair Practices Act under IC 790.03. The proposed rule that requires an insurer to pay the costs associated with replacement and return of a non-compliant non-OEM part, merely makes more specific the unfair claims practices described under IC Section 790.03(h). **(Question 17): How does CDI define "constructive" and "implied" knowledge in Proposed Section 2695.8 (g)? Would insurers subject to these regulations be familiar with these terms and their implications for the purposes of the**

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			proposed regulations? Under what circumstances would the Commissioner find that an insurer had "constructive" or "implied" knowledge? Response: Since CDI has removed reference to "implied, actual, or constructive" knowledge, in the Revised Regulations, we expect the Committee no longer desires a response to this question. **<u>Evidence to Support Conclusions</u>** **(Question 18): Please provide the Committee with the evidence or a summary of the evidence relied on by CDI in supporting its conclusions or assertions stated in the Notice of Proposed Action and Notice of Public Hearing (page 4), particularly related to documented cases or evidence of statistical probability. In particular, please provide the evidence for the following statements:** **f. "[A] part that is not of like kind, quality, safety, fit and**

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			performance may cause injury or even death if it malfunctions." **g. "[D]isputes regarding the true cost of repairs of damaged vehicles and the applicable repair standard required to comply with the current regulation continue to negatively [affect] the claims handling process."** **h. "[A]ftermarket parts that are not compliant with the current regulations continue to infiltrate the repair process threatening public safety."** **i. Auto repair shops and their customers have borne substantial costs "associated with installing defective or poorly fitting parts required by insurers."** **j. That the proposed regulations "will result in safer cars and possibly produce a savings in liability insurance premiums."**

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			In relation to the above-listed assertions, please also provide CDI's reasoning and evidence that insurers were the primary cause of the circumstances asserted and how the proposed amendments will address the issue. Response: At the time of the writing of this letter by the Committee, no person or organization, has requested review of the extensive public rulemaking file associated with this rulemaking, which responds to many of the requests above. CDI is confident that the public rulemaking file adequately addresses any concerns the Committee may have in this area. Should the Committee or staff desire to review this public file, it may contact: Teresa R. Campbell, Assistant Chief Counsel California Department of Insurance 45 Fremont Street, 21st Floor

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			San Francisco, CA 94105 Telephone: (415) 538-4126 **(Question 19): In what ways are the current regulations insufficient or ineffective in requiring an insurer to comply with its contractual obligation to repair a vehicle to its pre-loss condition?** Response: As described in the notice for this rulemaking, after several years of evaluating the current regulations and investigating complaints from the consumers and auto repair shops, the Department has come to the conclusion that disputes regarding the true cost of repairs of damaged vehicles and the applicable repair standard required to comply with the current regulation continue to negatively effect the claims handling process. Additionally, defective or otherwise non-compliant aftermarket parts continue to infiltrate the repair process due to insurers' failure to perform the necessary common sense steps necessary to ensure public safety.

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			The Department is aware of defective aftermarket bumper reinforcements, hoods latches, and other safety related parts being required by insurers. Also, The Department is also aware of substantial costs borne by auto repair shops and their customers associated with installing defective or poorly fitting parts required by insurers. The Commissioner proposes to amend these regulations in order to achieve the goal of clarifying and making more specific an insurer's obligation to provide prompt, fair and equitable settlements that allow for the vehicle repair be made in a workmanlike manner, particularly when the repair includes using an aftermarket part. As noted above, CDI is confident that the public rulemaking file adequately addresses any concerns the Committee may have in this area. **(Question 20): Please provide to the Committee copies of any disciplinary actions taken within the last three years against an insurer for failing to provide proper estimates or for inappropriately**

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			requiring the use of a non-OEM part. Response: CDI is not aware that disciplinary actions in this area were taken within the last three years. This fact is a primary reason why this rulemaking is so critical to consumer protection. The purpose of this rulemaking is to clarify what constitutes a fair claims settlement in the auto insurance repair context and what constitutes an unfair claim practice when an insurer requires the use of a non-OEM part. As a result of this rulemaking, it is expected that insurers will have a better understanding of what is required of them and the Department will be in a better position to take enforcement action against those insurers who continue to commit unfair claims settlement practices in this area.
Jennifer Yengoyan Senior Counsel and Director, Regulatory Affairs		**WRITTEN:** CCC One Estimating provided a description of their company and estimating software. Estimating software is not meant to provide the	**ACCEPT IN PART:** To the degree this commentator makes the same or similar assertions as those made by any prior commentators, CDI incorporates its

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
CCC One Estimating Written and Verbal Comments Written Comment: Undated Verbal Comment: August 9, 2012		absolute, final answer for every vehicle repair. **VERBAL:** CCC is concerned that the proposed regulations will mandate how estimators do their estimates, instead of simply assisting estimators in their work. CCC recommends that the proposed regulations be amended to continue to allow flexibility and judgment in the decision-making of those writing estimates.	response to prior commentators (above) into its response to this comment. CDI does recognize that repair estimating software vendors may list labor times or other operations that might not be necessary for a certain repair. To address this concern, CDI has amended this section (f) as noted in the Revised Regulations to recognize that an insurer may deviate from the standards, costs, and/or guidelines provided by the third-party automobile collision repair estimating software used by the insurer to prepare the estimate, unless such deviation would result in an estimate that would not allow for repairs to be made in accordance with accepted trade standards for good and workmanlike automotive repairs by an auto body repair shop.
Jack Gillis		**WRITTEN:** CAPA submitted description of	**REJECT:**

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
Executive Director Certified Automotive Parts Association (CAPA) Written and Verbal Comments Written Comments: August 2, 2012 Verbal Comments: August 9, 2012		the company and its function as a certifier of aftermarket parts. CAPA suggests that the insurer be required to only use aftermarket parts that have been certified by an independent third-party such as CAPA. (**Verbal** – Similar verbal comments were made at the public hearing.) CAPA can provide an independent, third party certification in order for insurers to be able to compare aftermarket parts to OEM parts. (**Verbal** – Similar verbal comments were made at the public hearing.) **VERBAL:** It is very hard to determine whether or not an independently-produced part is truly comparable to a car company brand service part. This is why CAPA created its certification program. Because of this difficultly, too many aftermarket parts used in market do not meet the needs of repairers, insures and consumers. CAPA concurs with CDI that a robust	CDI rejects the recommendation that the regulations be amended to recognize independent third party certification and require the insurer to only use certified non-OEM parts. Since the legislature has not distinguished between (and set standards for) certified non-OEM parts and non-certified non-OEM parts, CDI may not create new law by recognizing certified non-OEM parts, as superior to non-certified non-OEM parts, and prohibit the use of non-certified non-OEM parts.

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		compliant process is necessary and CAPA has such a program. CAPA is concerned that the proposed regulations implies that insurers are equipped to identify good and bad aftermarket parts. The solution to this issue is to require that insurers only use parts certified by an independent third party standard setting and certification organization. CAPA meets the criteria as an independent third party standard setting and certification organization. CAPA is also concerned with CDI's apparent preferential treatment of car company brand parts in the proposed regulations. Many car companies have had problems with defective parts. CAPA does not warranty the parts its certifies, similar to Underwriters Laboratories (UL).	

Summary and Response to Public Comments re Proposed Regulations

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
David Pajon G&C Autobody Verbal Comments only on August 9, 2012		**VERBAL:** Mr. Pajon provided a description of his company. G&C Autobody repairs about 1,500 cars a month and uses a large amount of aftermarket parts. G&C Autobody has a tracking system that tracks the return on parts. This system shows that their aftermarket parts are returned less than five percent of the time. The regulations do not define how many issues it takes to make a part "defective." One person could make a complaint and suddenly the part has to be taken out of catalogs. There also does not seem to be any certification entity. Also how is CDI defining "constructive knowledge"? The system that G&C Autobody has in place seems to be working fine. The current proposed regulations do not	**REJECT IN PART AND ACCEPT IN PART:** To the degree this commentator makes the same or similar assertions as those made by any prior commentators, CDI incorporates its response to prior commentators (above) into its response to this comment.

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		provide any protection for the insurance companies or the body shops. The regulations put liability directly on insurers and puts OEM manufacturers in an unfair advantage in the marketplace. The cost-effectiveness of aftermarket parts allows the industry to keep cars on the road that otherwise would be totaled. The market should determine whether the parts are bad and inefficient.	
Diane Klund Regulatory Affairs Manager Audatex Verbal Comments only on August 9, 2012		**VERBAL:** Ms. Klund provided a brief description of the company. In regards to the proposed regulations, Audatex objects to the restrictions placed on estimators deviating from the estimating software. The software is simply a guide. Audatex's software is intended to assist professional appraisers and estimators to write an estimate that best repairs the vehicle that	**ACCEPT IN PART:** To the degree this commentator makes the same or similar assertions as those made by any prior commentators, CDI incorporates its response to prior commentators (above) into its response to this comment. CDI does recognize that repair estimating software vendors may list labor times or

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		they are looking at.	other operations that might not be necessary for a certain repair. To address this concern, CDI has amended this section (f) as noted in the Revised Regulations to recognize that an insurer may deviate from the standards, costs, and/or guidelines provided by the third-party automobile collision repair estimating software used by the insurer to prepare the estimate, unless such deviation would result in an estimate that would not allow for repairs to be made in accordance with accepted trade standards for good and workmanlike automotive repairs by an auto body repair shop.
Michael Gunning Personal Insurance Federation (PIF) Verbal Comments only on August 9, 2012		**VERBAL:** PIF questions CDI's authority for the proposed regulations PIF would like to see the complaints that CDI has received. PIF feels that they did not have an opportunity to fully vent the issues that resulted in the proposed regulations.	**REJECT IN PART AND ACCEPT IN PART:** Except where specifically noted below, CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards. To the degree this commentator makes the same or similar assertions as those made by

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			prior commentators (as summarized above), CDI incorporates its response to prior commentators into its response to this comment. Also, please see CDI's prior response to PIF's written comments, above.
John Metz Written and Verbal Comments. Written Comments: August 9, 2012 Verbal Comments: August 9, 2012		**WRITTEN:** Mr. Metz's written comments are attached. **VERBAL:** Mr. Metz's verbal comments are similar to his written comments.	To the degree this commentator makes the same or similar assertions as those made by prior commentators (as summarized above), CDI incorporates its response to prior commentators into its response to this comment. This commentator presented CDI with three documents. The first document is 28 pages in length and provides the commentator's summary and general perspective on insurance law. As this entire document describes issues outside the scope of this rulemaking, CDI does not provide a response.

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			The second document is 5 pages in length and is a suggested version of the text by the commentator. The third document is 18 pages in length and is essentially an annotated version of the second document, which includes comments relating to each suggested text change made by this commentator. **Section 2695.8(f):** CDI rejects all the commentator's suggested text amendments, as unnecessary, as conflicting with law, as outside the scope of these regulations, or as outside of CDI's authority to regulate. With regard to setting standards for the third party estimating software providers and requiring that vendor to "certify under penalty of perjury", CDI does not regulate these third party vendors, so does not intend to require these standards. **Section 2695.8(g):** CDI rejects all the commentator's suggested text amendments, as unnecessary, as conflicting with law, as outside the scope of these regulations, or as

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			outside of CDI's authority to regulate.
Gene Crozat G&C Autobody Verbal Comments only on August 9, 2012		**VERBAL:** Reasonable regulations are needed in regards to aftermarket parts. Aftermarket parts developed because of the exorbitantly high price of OEM parts. Body shops make a judgment call as to whether to use OEM or aftermarket parts. If aftermarket parts are no longer available, the price of auto insurance will increase dramatically and many more people will go uninsured.	**REJECT IN PART AND ACCEPT IN PART:** To the degree this commentator makes the same or similar assertions as those made by prior commentators (as summarized above), CDI incorporates its response to prior commentators into its response to this comment. Commentator does not make any additional specific comments to this rulemaking that require a response. CDI has amended this rulemaking in the Revised Regulations, which CDI expects alleviate some of the concerns of this commentator.
John Torchia Direct Repair Shop		**VERBAL:** The proposed regulations will have little effect on how cars will actually be repaired. Most body shops follow what they	**REJECT IN PART AND ACCEPT IN PART:**

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
Network Verbal Comments only on August 9, 2012		are told by the insurance company because they want to be paid for the repair. Most aftermarket parts manufacturers are not in the business of producing bad parts. CDI should let the industry figure things out for itself. In California, workmanship is really a matter of opinion rather than a matter of education.	To the degree this commentator makes the same or similar assertions as those made by prior commentators (as summarized above), CDI incorporates its response to prior commentators into its response to this comment. Commentator does not make any additional specific comments to this rulemaking that require a response. CDI has amended this rulemaking in the Revised Regulations, which CDI expects alleviate some of the concerns of this commentator.
Steve Seidner Seidner Collision Centers Verbal Comments only on August 9, 2012		**VERBAL:** Currently there are a small number of insurance companies who do not do the right thing and there are a small number of body shops who do not do the right thing. CDI should just enforce the current regulations with those insurance carriers who are not doing the right thing.	**REJECT IN PART AND ACCEPT IN PART:** To the degree this commentator makes the same or similar assertions as those made by prior commentators (as summarized above), CDI incorporates its response to prior commentators into its response to this

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			comment. Commentator does not make any additional specific comments to this rulemaking that require a response. CDI has amended this rulemaking in the Revised Regulations, which CDI expects alleviate some of the concerns of this commentator.
Armand Feliciano Association of California Insurance Companies (ACIC) 1415 L Street		**WRITTEN:** The Association of California Insurance Companies (ACIC) provided a summary of the organization. ACIC applauds the California Department of Insurance's (CDI) amendments to the proposed regulations, especially that insurers must not	**REJECT** CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards. With regard to the comment's reference to

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
Sacramento, CA 95814 Written comments only Written Comments: October 25, 2012		"willfully depart" from accept trade standards, language about preparing an estimate that is "less favorable" than the auto repair shop, and the mandate to pay for "inspections and tests." However, ACIC still has some concerns about the proposed regulations because the regulations continue to fall short in satisfying the necessity, authority, clarity, consistency and reference standards under the California Administrative Procedures Act (APA) pursuant to Government Code section 11349. CDI's reliance on Civil Code section 3333, Government Code sections 11152 and 11342.2 and Insurance Code sections 790.10, 12921 and 12926 to justify the proposed regulations is without merit because none of those sections gives CDI explicit or implicit authority to regulate standards for repairs and use of aftermarket parts. ACIC remains concerned that the proposed regulations continue to skew the auto repair process in favor of the auto body repair shops	Civil Code (CC) Section 3333, the Insurance Commissioner has the regulatory authority and, indeed, obligation, to regulate third party claims practices by insurers. CC section 3333 describes a tortfeaser's measure of damages to an injured (third) party. This section is highly relevant to third party insurance claims. The use of this CC section is intended to recognize how and when these regulations pertain to third party automobile liability property damage claims. The citing of this statute is not new and has been part of the regulations for many years. CDI is not adding this reference to CC 3333 in this rulemaking and, therefore, this comment is outside the scope of this rulemaking. With regard to the comment's reference to Government Code (GC) Section 11152, this statute provides the Insurance Commissioner with authority to adopt rules pertaining to the duties of various units within CDI. This statute is cited as authority or reference in several sections of the FCSP regulations. To the degree certain provisions of these

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		and original equipment manufacturers (OEM) parts by, for example, requiring insurer estimates to be in the amount in "accordance with accepted trade standards" by auto body repair shops and that insurers cannot "deviate" from these standards are tantamount to mandating insurers "pay whatever" the auto body repair shops deem appropriate on auto repairs and parts. The proposed regulations could lead to the exclusive use of OEM parts, which cost more than 60% on average. The proposed regulations could increase the costs of auto repairs for policyholders and restrict competition, which is ill-advised considering California's fragile economy. CDI's proposed amendments fail to satisfy the necessity standard under the APA. The proposed regulations rely on "blanket statements" rather than facts, studies or expert opinions to justify its necessity.	regulations pertain to the duties of the CDI, this statute is relevant. The citing of this statute is not new and as been part of the regulations for many years. CDI is not adding this reference to GC Section 11152 in this rulemaking and, therefore, this comment is outside the scope of this rulemaking. With regard to the comment's reference to Government Code (GC) Section 11342.2, the citing of this statute is not new and as been part of the regulations for many years. CDI is not adding this reference to GC Section 11152 in this rulemaking and, therefore, this comment is outside the scope of this rulemaking. With regard to the comment's reference to Insurance Code section 12921, this statute only pertains to <u>settlement</u> of administrative actions, and does not restrict the Commissioner's ability and authority to interpret, implement, define, and make more specific the Unfair Practices Act under IC 790.03. The proposed rule that requires an

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		ACIC has yet to see a single, factual, specific consumer or auto repair shop complaint from CDI, despite's ACIC's numerous requests. Opinions from auto repair shops publicly criticizing aftermarket parts do not qualify as opinion of an unbiased expert. ACIC continues to object to CDI's characterization that the proposed regulations are necessary because aftermarket parts are threatening public safety without citing any study or data. The Institute for Highway Safety (IIHS) has concluded that aftermarket or cosmetic repair parts are irrelevant to safety because such parts serve no safety function. The proposed regulations also fail to satisfy that "necessity" standards because they cannot effectuate the purpose of the statutes cited. CDI cites Insurance Code section 790.03 (Unfair Practices Act), but the proposed	insurer to pay the costs associated with replacement and return of a non-compliant non-OEM part, merely makes more specific the unfair claims practices described under IC Section 790.03(h). With regard to the comment's reference to Insurance Code section 12926, this statute is not new and as been part of the regulations for many years. CDI is not adding this reference to Insurance Code section 12926 in this rulemaking and, therefore, this comment is not related to the proposed regulations. Further, IC Section 12926 makes clear that the "commissioner shall require from every insurer a full compliance with all provisions of this code". Therefore, this IC section provides additional authority (in addition to IC section 790.10) for the CDI to promulgate regulations that implement, interpret, clarify and/or make more specific IC Section 790.03 (UPA). With regard to the comment's reference to Insurance Code section 790.10, this statute

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (f) 2695.8 (g) (3) 2695.8 (g) (6) 2695.8 (7)	regulations seek to establish prohibited acts that are not defined and determined by the Unfair Practices Act. Specifically, the requirement that the insurer estimate conform to "accepted trade standards" by auto body repair shops and that the adjusted estimate to be "either an edited copy of the claimant's repair shop" in 2695.8 (f), the warranty requirements in 2695.8 (g) (3), the notice requirement in 2695.8 (g) (6), and the payment, removal, return and replacement of non-OEM parts in 2695.8 (7) fail the "necessity" standard because they are not in Insurance Code section 790.03 and therefore do not effectuate the purpose of that statute. CDI's citation of Business and Professions (B&P) Code section 9875.1 (Motor Vehicle Replacement Part Act of 1989) does not remedy CDI's failure to satisfy the necessity requirement. As proposed, CDI's attempts to amend 2695.8 (g) (3) by requiring insurers to warrant "that such parts are at least equal to the original	clearly provides the Commissioner with authority to interpret, implement, define, and make more specific the Unfair Practices Act under IC 790.03. The proposed amendments merely make more specific the unfair claims practices described under IC Section 790.03(h). Further, with regard to authority, the FCSP regulations were promulgated in 1992 (effective in 1993) pursuant to the Legislature's grant of legislative power to the Commissioner. Not only does section 790.10 authorize the Commissioner to adopt rules and regulations he finds necessary to administer the UPA, section 790.035, subdivision (a) grants the Commissioner "the discretion to establish what constitutes an act." By this, the Legislature acknowledged CDI's technical expertise and its familiarity with the industry being regulated, entitling the resulting regulations considerable deference. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (g) (3)	equipment….," even though B&P Code section 9875.1 puts the onus on "manufacturers or distributors" to warrant aftermarket parts. Thus, the proposed regulations attempt to effectuate a purpose that is non-existent in the enabling law (Motor Vehicle Replacement Part Act of 1989). To address the issue of whether CDI has demonstrated the necessity for the proposed regulations, ACIC requests that CDI provide the following information pursuant to Government Code sections 6250-6270: (1) Copies and specific number of policyholder complaints related to the proposed regulations. (2) Copies and specific number policyholders asking or requesting that CDI adopt the proposed regulations. (3) Copies and specific number of auto body repair shops asking or requesting that CDI adopt the proposed	[heightened deference for quasi-legislative enactments]; *Pitts v. Perluss* (1962) 58 Cal.2d 824, 832, [formally adopted regulation on disability insurance held reasonable where intricate and technical nature of the subject matter not within expertise of the court]; *Spanish Speaking Citizens' Foundation, Inc. v. Low* (2000) 85 Cal.App.4th 1179, 1215 ["'specialization gives . . . agencies an intimate knowledge of the problems dealt with in the statute and the various administrative consequences arising from particular interpretations'"], referring to the Insurance Commissioner's regulations and quoting Michael Asimow, The Scope of Judicial Review of Decisions of California Administrative Agencies (1995) 42 UCLA L. Rev. 1157, 1195-1195.) Since the Commissioner adopted the Fair Claims Settlement Regulations, the Legislature has amended section 790.03 twice. (Stats. 2001, ch. 253 (AB 1193), § 2; Stats. 2011, ch. 426 (SB 712), § 1.) In addition, the Legislature amended the UPA

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (f) & (g) 2695.8 (f)	regulations. (4) Copies of other relevant facts, studies, and expert opinion within the meaning of Government Code section 11349 (a). CDI's proposed regulations sections 2695.8 (f) and (g) fail to satisfy the "authority" standard under the APA. Section 2695.5 (f) creates an unfair claims practice not authorized by the Insurance Code. ACIC then cites the August 15, 2012 ruling of Administrative Law Judge Stephen J. Smith, pages 30-31. (*In the Matters of the Order to Show Cause; Accusation; Notice of Noncompliance and Hearing; and Demand Issued to: Globe Life and Accident Insurance Company, et al.,* Case No. UPA-2008-00017; OAH No. 2011090887) *All of the statutory provisions cited by CDI as authority for the proposed regulations have nothing to do with standards for repair and use of aftermarket parts.*	by adding to section 790.034 explicit reference to the Commissioner's regulations, explaining that the Fair Claims Settlement Practices Regulations "govern how insurance claims must be processed in this state," and requiring that claimants must be told how to obtain a copy. (§ 790.034, subd. (b), added by Stats. 2001, ch. 583, § 3.) Both the age of the regulations and the Legislature's express identification and implicit approval of them confirm their alignment with the legislative intent. Necessity Comment: Reject: while the commentator asserts that ACIC has yet to see a single, factual, specific consumer or auto body complaint from CDI, over the past several years, CDI has received several complaints from consumers and auto body repair shops that include: • Denial by insurers to pay for the cost of OEM parts, even in cases where the manufacturer's service and/or corrosion warranties may be

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		Insurance Code section 790.10, while broad and vague, only allows the Commissioner to adopt reasonable rule and regulations "to administer the article." 'To administer the article" does not mean creating new laws related to standards for repair and use of aftermarket parts. Incorporating the B&P Code into the Insurance Code as proposed in the proposed regulations requires legislative action, not simply regulations by CDI. None of the language in Insurance Code sections 12921 and 12926 authorizes the Commissioner to proposed regulations relating to aftermarket parts. Civil Code section 3333 only deals with the measure of damages for breaching an obligation outside of a contract. Nothing in this section provides an expressed or implied rulemaking authority for the Commissioner to adopt any regulations.	impacted by the use of aftermarket parts, and even in cases where the required use of aftermarket parts conflict with the manufacturer's required or recommended specifications for repair. • Failure to pay for the additional costs associated with renting a substitute vehicle for the additional period of repair caused by the insurer's required use of an aftermarket part, which parts required additional modifications to properly fit on the damaged vehicle. • Failure by the insurers to consider the legitimate safety concerns of consumers in the required use of aftermarket parts. • Improper repair of vehicles caused by poor fitting aftermarket parts, which necessitate supplemental repairs to the vehicles. These consumer and other complaints, along with several more documents that

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (f)	Government Code sections 11152 and 11342.2 likewise do not provide authority for the Commissioner to adopt the proposed regulations. Specifically, none of the statutes cited by CDI authorize it to propose the following: (1) Require insurer estimates to be in an amount that is "in accordance with accepted trade standards" by an "auto body repair shops" as defined in the Business & Professions Code Section 9889.51 and "in accordance with the standards of automotive repair required, of auto body repair shops" as described in various statutes and regulations, and not to deviate from the standards, costs, and/or guidelines provided by the third-party automobile collision repair estimating software…" as proposed in 2695.8 (f); (2) Mandate the adjusted estimate be "either an edited copy of the claimant's repair shop	support the necessity for this rulemaking, are contained in the public rulemaking file. As of the date of the public hearing on these regulations, and the expiration of the 45-day comment period on August 9, 2012, no person or entity, including this particular association, has requested to view the comprehensive public rulemaking file. Further, as of November 5, 2012, subsequent to this commentator's written public comments of October 25, 2012, neither this commentator nor his organization (ACIC) has actually made the effort to view the public file. Therefore, any assertion that this rulemaking does not meet the necessity standard, based upon an alleged lack of supporting documentation, is without merit. Authority/Necessity comment regarding the purpose of IC section 790.03 (UPA): Reject: The comment that seeks to assert that CDI is proposing regulations that prohibit acts not defined and determined by the Unfair

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (f) (3) 2695.8 (g) (3) 2695.8 (g) (6)	estimate or a supplemental estimate based on the itemized copy of the claimant's repair shop estimate" and that "the adjusted estimate shall identify the specific adjustment made to each item and the cost associated with each adjustment..." as proposed in 2695.8 (f)(3); (3) Compel insurers to warrant "that such parts are at least equal to the original equipment manufacturer parts..." as proposed in 2695.8 (g)(3); (4) Require insurers to cease use of non-original equipment manufacturer replacement crash parts whenever they have knowledge that such parts are not equal to the original equipment manufacturer parts, and that insurers provide notice to distributors as proposed in 2695.8 (g)(6); (5) Require insurers "to pay for the costs associated with returning the part and the cost to remove and replace the non-original	Practices Act (UPA), IC Sections 790.03 et seq, is without merit. It is well established that the Fair Claims Settlement Practices (FCSP) Regulations, of which this rulemaking is merely a minor amendment thereto, are appropriately promulgated under the authority in IC Section 790.10. These regulations have been in existence since 1993, without any successful challenge to CDI's authority to promulgate. The current version of these FCSP regulations already contain several provisions, that interpret, define, and make more specific, one or more of the unfair claims practices enumerated in IC 790.03(h). Further, the specific sections sought to be amended in this rulemaking have been in existence in essentially the same form since 1993. This rulemaking merely proposes clarifying language to resolve instances where licensees have (over the years) attempted to dilute the meaning and implementation of these specific regulations sections in a way that was not intended. For example, the amendment to Section 2695.8(f) is intended to address the

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (g) (7) 2695.8 (g) (8)	equipment manufacturer part ... ," as proposed in 2695.8 (g)(7); and (6) Require an insurer to retain primary responsibility with compliance to 2695.8 (g), when such obligation should be squarely on manufacturers or distributors of aftermarket parts, as proposed in 2695.8 (g)(8). Without the appropriate legislative authority, the proposed regulations attempt to create new laws, which runs afoul of the California Constitution. The proposed regulations contain a large amount of ambiguity that needs to be clarified in order to satisfy the "clarity" standard in Government Code section 11349 (c). CDI deleted the standard of like kind and quality as OEM replacement crash parts and replaced it with the standard of "at least equal" to the OEM replacement crash parts. The meaning of "like kind and quality" is easily understood by insurers, but not the meaning of "at least equal."	problem where insurers have instituted their own standards of repair, when insurers are not licensed by the Bureau of Automotive Repair (BAR) to repair vehicles in California. Many of the insurer-driven standards are contrary to BAR's own standards, required of repair shops that are licensed by BAR. To offer less on an insurance claim based upon an estimate of repair that contains standards of repair that conflict with BAR standards (the very standards required of shops that licensed by BAR to actually repair these vehicles), is certainly an unfair claims practice. IC Section 790.03(h) contains several provisions that are implicated by unfair claims settlements. Specifically, Section 790.03(h) (5) states: "Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.". Clearly, at a minimum, this statute is violated when an insurer offers less than the actual and true cost to repair a vehicle, based upon the inappropriate use of standard of repair

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (f)	The meaning of "like kind and quality" is well-established in the business of insurance and is clarified in *Lebrilla v. Farmers Group Inc.,* (2004) 119 Cal.4th 1070. **ACIC recommends that the "at least equal" standard be deleted because it violates the clarity requirement under the APA.** How is CDI defining "accepted trade standards for good and workmanlike automotive repairs by an auto body shop" under section 2695.8 (f)? "Accepted trade standards" is a subjective term that varies in the state of California. Also what does in accordance with "associated regulations, including but not limited to" mean under section 2695.8 (f)? ACIC further recommends that CDI clarify that 2695.8 (f) excludes pre-existing damages, which are not covered under an insurer's policy contract. **Thus, ACIC recommends adding the following italicized languages under 2695.8 (f): (1) In the**	not sanctioned by BAR. CDI has the authority to more clearly identify what the proper claims settlement process is in order to prevent violations of the Unfair Practices Act (UPA). This rulemaking assists insurers in knowing what the proper standards of repair are that should be the basis of a fair claims settlement (estimate of repair). With regard to the comment's reference to specific sections of this proposed rulemaking that CDI allegedly lacks authority in amending and/or promulgating, CDI rejects all of these assertions. As noted above, the amendments to Section 2695.8(f) merely clarify the prohibition on an insurer from paying less on a claim, based upon a lesser repair standard than the repair standard required of the shop, licensed by BAR, already in law. It is inconceivable that any insurer would contend that an insurer may limit its payment on a repair, if that reduced payment was based upon an amount that would result in an illegal repair. CDI has not heard from any insurers that have made such

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (f) 2695.8 (f) 2695.8 (g) (6)	**sentence "[t]he estimate prepared by or for the insurer shall be of an amount which will allow for repairs (insert) *of covered damages ... ,"; (2) in the sentence "[a]n insurer shall not prepare an estimate (insert) *for repairs of covered damages ... ,"; and (3) right after the sentence "if such deviation ...." (insert) *Nothing in this subdivision shall cover pre-existing damages to a vehicle*.** Furthermore, while ACIC appreciates the deletion of the "implied, actual, or constructive" knowledge standard, the new "knowledge" standard under section 2695.8 (g) (6) remains as problematic. The proposed "knowledge" standard under 2695.8 (g) (6) is without the "implied, actual, or constructive" language, but it remains vague because the "knowingly committed" standard under California Code of Regulations Title 10, Section 2695.2 (1) states the following: "Knowingly committed means performed with *actual, implied or constructive knowledge*, including, but not limited to, that which is implied by operation of law." (Emphasis Added) It is our interpretation that the previous	an argument. Further, when BAR promulgated its repair standards (in Section 3365 of the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8) in 1997, insurers did not then oppose the reasonable repair standards set forth in that rulemaking. To now contend that these standards are unreasonable or should be replaced with lower standards that an insurer feels is acceptable, is absurd on its face. With regard to the comment's assertion that B&P code section 9875.1 puts the onus on manufacturers and distributor to warrant aftermarket parts, CDI rejects this unfounded assertion. B&P Code section 9875.1 does not in itself require that a manufacturer or distributor of a non-OEM part actually provide a warranty. This section reads in pertinent part: "Any warranties applicable to these replacement parts are provided by the manufacturer or distributor of the parts, rather than by the original manufacturer of

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		language of "implied, actual, or constructive" was never deleted because the same language remains under the existing regulations via 2695.2 (1). If so, the following ambiguities with 2695.8 (g)(6) continue to apply: Does implied mean the non-OEM part came in a different label or box and therefore it is not the same kind as the original OEM part? Does actual mean that the non-OEM part did not fit the first or second try and therefore not have the same performance as the OEM part? Can constructive knowledge be based on a rumor that certain non-OEM parts that are being shipped from a certain country do not have the same quality as the OEM parts? More importantly, how would insurers have implied, actual, or constructive knowledge of a non-OEM part that is unequal with an OEM part when they do not manufacture these parts or install them themselves? In truth, manufacturers or distributors of non-OEM parts are in a better position to notify parties who are involved in the auto repair process. **To address this issue, ACIC recommends that 2695.8 (g)(6) be stricken completely.**	your vehicle." Even in the situation where a manufacturer or distributor of a non-OEM part actually provides a warranty, this warranty is different and separate from the warranty obligation of insurers when an insurer requires the use of a non-OEM part. CDI wishes to make clear that the warranty obligation under this subsection (g)(3) has been in existence since 1993 and is not being altered or expanded in any way by this rulemaking. This rulemaking merely now requires the insurer to disclose this longstanding warranty obligation to claimants, when the insurer requires the use of a non-OEM part. With regard to this commentator's request for information pursuant to GC sections 6250-6270, CDI's Custodian of Records is in receipt of this comment. To the degree any of the requested information is applicable to the rulemaking in question

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		As proposed, 2695.8(f) would prohibit an insurer from deviating from standards, costs, and/or guidelines provided by estimating software if the deviation would not allow the insurer's estimate to comply with trade standards described in Section 3365 of the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8. ACIC submits that CDI's attempt to impose these trade standards on insurers through the adoption of a regulation is inconsistent with *Levy v. State Farm Mutual Automobile Ins. Co.* (2007) 150 Cal.App.4th 1. In *Levy*, the Fourth Appellate District rejected the argument that an insurance policy's promise to restore a vehicle to pre-accident condition obliged the insurer to follow the trade standards in Section 3365. Based on *Levy*, CDI must reconcile the following in order for 2695.8 (f) to satisfy the consistency standard under the APA: (1) How is Section 3365 of the California Code of Regulations, Title 16, Division	and is not otherwise confidential or privileged, it is either already contained in the public file, or will be included in the final rulemaking package, which is available for public inspection. Further, as of November 5, 2012, subsequent to this commentator's written public comments of October 25, 2012, neither this commentator nor his organization (ACIC) has actually made the effort to view the public file. Therefore, any assertion that this rulemaking does not meet the necessity standard, based upon an alleged lack of supporting documentation, is without merit. With regard to this commentator's assertion that this rulemaking lacks authority based upon the ruling by Administrative Law Judge Stephen J. Smith, in Administrative Hearing case (*Globe*), CDI rejects this assertion. The *Globe* ruling is a non-binding, non-final decision by an administrative law judge and has no bearing

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (f)	33, Chapter 1, Article 8 applicable to insurers when the court found that this law is limited to policing auto repair dealers? (2) How does Section 3365 of the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8 establish "standards of automotive repair" when the court concluded this law was not intended to provide a minimum standard for repairs? (3) How does Section 3365 of the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8 carry out the purposes of the Insurance Code when the court clearly found that its purpose is to carry out Business and Professions Code Section 9884.7? (4) How does CDI justify that it is the appropriate regulator to establish an auto repair standard when such jurisdiction belongs to the Bureau of Automotive	on how CDI interprets the Insurance Code or Fair Claims Settlement Practices Regulations. CDI strongly disagrees with this ruling and is taking steps to address this clearly erroneous interpretation of the IC. Therefore, CDI continues to rely on the same IC provisions and other authority contained in the rulemaking and in the Fair Claims Settlement Practices Regulations, including, but not limited to IC Section 790.10, 790.03, etc. Clarity Comment: Reject: The comment seeks to assert that CDI is proposing regulations that lack clarity. CDI disagrees with this assertion. With regard to assertion that the replacement of the phrase "like kind and quality" in subsection (g)(3), with the phrase "at least equal to" lacks clarity, CDI rejects this assertion. CDI believes the "at least equal to" creates consistency and is clear as it relates directly back to the current law, as noted in subsection 2695.8(g)(1), which requires that

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (g) (3)	Repair based on *Levy*? **If CDI, however, is unable to harmonize the *Levy* decision with its proposed changes to 2695.8 (f), then it must delete all of its proposed changes to Section 2695.8 (f).** The current version and proposed language in 2695.8 (g)(3) go beyond the purpose and requirements of B&P Code sections 9875 and 9875.1 and thus and fail to satisfy the consistency requirement under Government Code section 11342.2. To harmonize the current and proposed amendment to 2695.8 (g)(3) with the purposes of B&P Code sections 9875 and 9875.1, and the consistency requirement under Government Code section 11342.2, we suggest the following deletions and underlined amendments to 2695.8 (g)(3): **The insurers specifying the use of non-original equipment manufacturer replacement crash parts <u>shall disclose</u>**	the non-OEM parts "are at least equal to" the OEM parts. This current language has been in existence since 1993 without any clarity issues presented to CDI. With respect to the clarity of CDI's amendments to section 2695.8(f), the comment suggests that "accepted trade standards" lacks clarity. CDI rejects this assertion. The standards described in 2695.8(f) are the very standards that auto body repair shops are required to adhere to under BAR statutes and regulations. Insurers have been aware of these standards for decades. Further, as noted above, during BAR's public rulemaking process whereby it set these standards, insurers did not then oppose or take issue with the clarity of the reasonable repair standards set forth in that rulemaking. With regard to the comment, which asserts that accepted trade standards vary in the state of California, CDI rejects this assertion as having any basis for challenging this

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
	2695.8 (g) (3)	**that any warranties applicable to these replacement parts are provided by the manufacturer or distributor of the parts. rather than by the original manufacturer of your vehicle.** ~~**warrants that such parts are at least equal to the original equipment manufacturer parts in terms of kind, quality, and safety, fit, and performance. The insurer must disclose in writing in any estimate prepared by of for the insurer, the fact that it warrants that such parts are at least equal to the original equipment manufacturer parts in terms of kind, quality, safety, fit, and performance.**~~ The proposed regulations are in conflict with Insurance Code section 790.06. The regulations attempt to circumvent the current process in section 790.06 by creating new unfair practices via the regulatory process. CDI cannot create new laws by using Insurance Code sections 790.03 and 790.06. The proposed regulation, if adopted could	rulemaking. While there are some local county or city codes or zoning requirements that may differ within the state, these regulations do not conflict with these local rules. Should there in fact be geographical differences in the standards of repair recognized by BAR, then an insurer would certainly be required to ensure that the amount it pays on repair insurance claims is commensurate with the amount it would cost to repair that vehicle in whatever part of the state it does business in. For example, if a particular county requires a certain method of hazardous waste removal the shop must follow, it is expected the insurer will include this standard in estimates it prepares in this county (to the degree it results in a cost differential). With regard to the recommendation that CDI clarify that section 2695.8(f) excludes pre-existing damages, which are not covered under an insurer's policy, CDI rejects this recommendation, as unnecessary. First, this section 2695.8(f) is not intended to set forth

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		contradict existing policyholder contracts because an insurer cannot prepare a lower estimate for it would be deemed a "deviation" if it is somehow lower than what the auto body repair estimating software produces. **To avert interfering with contracts that have "best efforts" provisions, ACIC recommends deletion of the "deviation" requirement altogether.** The citation to B&P code section 9875.1 fails to satisfy the "reference" standard because nothing in that section requires insurers to warrant non-original equipment manufacturer crash parts themselves. The requirement that the insurer estimate conform to "accepted trade standards" by auto body repair shop and that the adjusted estimate to be "either an edited copy of the claimant's repair shop" in 2695.8(f), the warranty requirements in 2695.8(g)(3), the notice and reporting requirements in 2695.8(g) (6), and the payment, removal, return and replacement requirements in 2695.8 (7) fail the "reference" standard because they are not in Insurance Code Section 790.03	an exact amount that must be paid on an automobile insurance claim. This section (f), instead, provides that if an insurer decides to settle partial loss automobile insurance claims "on the basis of a written estimate" (emphasis added), it must follow the required standards. These regulations do not require an insurer, whether settling a first or third party claim, to pay the full amount of the estimate, if it is not otherwise appropriate to do so, based upon the insurance contract, unrelated or prior damages, or comparative fault criteria. For example, if the insurer writes an estimate of repair for $1000 as the basis for settling a third party claim and the insurer determines that it's insured (first party) is only 50% at-fault for the accident, the insurer may appropriately pay only 50% of the $1,000, or $500. Further, in cases of unrelated or prior damage, or other overcharges, these regulations [subsection 2695.8(f)(3)] expressly permit an insurer to adjust the written estimates (that may contain overcharges of any type). For example, if the claimant presents the insurer with an

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		and therefore cannot be implemented under that statute via the proposed regulation. The proposed regulations will cause a substantial financial impact since the regulations will allow auto body shops to exclusively OEM parts. OEM parts are generally 60% more expensive than aftermarket parts. It is estimated that if aftermarket parts are not used in California, the cost of auto repairs could go up $379.9 million a year. CDI's economic analysis remains erroneous because it neglects to consider the financial impact of the proposed regulations on manufacturers and distributors of aftermarket parts who may end up closing. The proposed regulations will reduce choice for California consumers because it will create a monopoly for OEM parts manufacturers. Auto body shops will have complete control as to whether they recommend OEM or aftermarket parts.	estimate for $1,000, and the insurer has evidence that $300 of that estimate is to repair prior damage, subsection (f)(3) expressly permits an insurer to adjust (reduce) the written estimate for that prior damage, and pay only $700. Lastly, FCSP regulations section 2695.8(i) already contemplates an insurer's ability to deduct for prior and/or unrelated damage to the loss vehicle. Therefore, CDI rejects this recommendation as unnecessary. With regard to the commentator's assertion that the removal of the phrase in subsection 2695.8(g)(6) "implied, actual, or constructive knowledge" does not address the commentator's concern that the remaining term "knowledge" lacks clarity, CDI rejects this assertion. CDI made the proposed amendment, as noted above, in order to address some commentators concerns that the terms in originally noticed subsections 2695.8(g)(6-9), "implied, actual, or constructive knowledge" are overly broad and difficult for insurers to comply with.

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		ACIC continues to urge CDI to exempt antique auto parts from the proposed regulation because they are not within the scope of the proposed regulations. First, there are no original auto parts for automobiles that are 25 years or older and it is also unlikely that "standards of repairs"" would be available. The numbers of parties who deal with antique auto repair parts are minimal because they are mostly collectors or small businesses. **ACIC is, therefore, taking CDI's invitation to submit an exemption pursuant to CDI's Adverse Economic Impact Statement on page 6.** ACIC includes the following documents: (1) The text of the Motor Vehicle Replacement Parts Act of 1989 (Business and Professions Code section 9875.1). (2) The Decision of Administrative Law Judge Stephen J. Smith, dated August 15, 2012, *In the Matters of the Order to Show Cause; Accusation; Notice of Noncompliance and Hearing; Demand Issued to Globe Life and Accident Insurance Company, et al.* (Case	CDI disagrees that these terms are overly broad or difficult to comply with, as these terms are common in the law and insurers fully understand these terms. Section 2695.2(l) of these FCSP regulations does use these very modifying terms in defining "knowingly committed". However, CDI does not intend that the term 'knowledge" as used in these proposed regulations be incorporated into the definition of "knowingly committed". CDI intends the removal of the modifiers "implied, actual, or constructive" to achieve the result of narrowing the term to "actual knowledge". Therefore, for purposes of subsection (g)(6), CDI intends the proposed amendments to apply to instances where the facts reflect the insurer has actual knowledge that a part is not equal to the original equipment manufacturer parts in terms of kind, quality, safety, fit, and performance, or does not otherwise comply with this section. Whether an insurer has "knowledge" will be a question of fact that CDI intends to show, on a case-by-case basis, when CDI is faced with

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		No. UPA-2008-00017; OAH No. 2011090887).	enforcing this regulation. ACIC asserts that CDI's amendments to Section 2695.8(f) is inconsistent with *Levy v. State Farm Mutual Automobile Ins. Co.* (2007) 150 Cal.App.4th 1. CDI rejects this assertion. The *Levy* case does not conflict with the proposed amendments to section 2695.8(f). *Levy* is a case for breach of contract and the court was interpreting the provisions of the contract. To the extent the case purports to limit or even address the Commissioner's rulemaking authority, it cannot and does not. *Levy* addressed whether an insurer was required to follow specific repair standards as defined by the Inter-Industry Conference on Auto Collision Repair (I-CAR) and/or the National Institute for Automobile Service Excellence (ASE). The *Levy* court held that that "California regulators…have not specified any particular repair standards and have not required insurers to follow such standards.". By this, the *Levy* court appears to base its ruling on the fact that CDI had not (or had not yet)

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			specified the required repair standard(s) an insurer must utilize in estimating repairs, not that CDI, as regulator, did not have the authority to specify by regulation the required repair standard(s) an insurer must utilize in estimating repairs. By this rulemaking, CDI is making it clear that an insurer cannot base settlement of the claim on an estimate of repair using repair standards that fall below the standards required of shops. To the degree a reasonable estimate of repair prepared by an insurer is for an amount that is higher than the amount required to return the damaged vehicle to its pre-loss condition, an insurer may (in theory) reduce the estimate to conform with such policy provision, to the degree this provision in fact limits payment. On other words, under both the current regulations and this proposed rulemaking, an insurer must prepare an estimate that uses the proper repair standards, and to the degree, the policy limits the amount of the claims payment (based upon clear an unambiguous contract language), then the insurer may pay

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			less than the estimated amount. However, in most instances, CDI believes it is doubtful an insurer can fulfill its contractual obligation to return the damaged vehicle to its pre-loss condition by forcing the vehicle to be repaired using standards below that required of shops. 16 CCR s 3365 is applicable to insurers via incorporation into the Commissioner's regulations that apply to insurers. The *State Farm v. Levy*'s ruling was that 16 CCR s 3365 "does not purport to apply to insurers." Incorporation of standards in other regulations or statutes via reference is standard rulemaking practice. Moreover, ACIC's claim that incorporating standards via reference results in *inconsistent* regulations is unfounded. Contrary to ACIC's contention, CDI believes that adopting the standards from section 3365 *fosters* consistency. Otherwise, there would be different standards for shops and insurers.

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			ACIC's statement of the court's ruling is incomplete and inapplicable to the draft regulation. The court does not state that 3365 "was not intended to provide a minimum standard of repair." The court found that 3365 "does not purport . . . to provide a minimum standard for repairs required to return a vehicle to its pre-collision condition." On the other hand, the draft regulation requires that estimates be prepared in such a way that repairs may be made in accordance with, among other things, the requirements in section 3365. Section 3365 *does* contain repair standards for auto body and frames. Thus the two regulations are not inconsistent nor are they inconsistent with the court's ruling in *State Farm v. Levy*. ACIC's comment effectively asserts that that *Levy* held that it is within the exclusive jurisdiction of the BAR "to establish an auto repair standard." *Levy* does nothing of the sort. The court merely concludes that 16 CCR s 3365 is a BAR regulation, which it is,

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			and that the regulation does not purport to apply to insurers. CDI recognizes that there may be a legitimate range of what constitutes a reasonable repair and that an insurer and a repair shop may disagree on whether a particular repair falls within the required standard of repair required of repair shops. However, it is inconceivable that any insurer would contend that an insurer may limit its payment on a repair, if that reduced payment was for an amount that would result in an illegal repair. Further, to the degree some insurers may conclude that the repair standards set forth in section 3365 are not appropriate standards for repair, they had the opportunity to oppose these regulations. When BAR promulgated its repair standards (in Section 3365 of the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8) in 1997, insurers did not then oppose the reasonable repair standards set forth in that rulemaking. To now contend that these standards are unreasonable or

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			should be replaced with lower standards that an insurer feels is acceptable, is absurd on its face. The comment asserts that subsection 2695.8(g)(3) lacks consistency with B&P code sections 9875 and 9875.1. CDI rejects this assertion and the recommended language amendments to address this assertion. As noted above, B&P code section 9875.1 does not put the onus on manufacturers and distributor to warrant aftermarket parts, so the stated reason for the inconsistency is wrong. B&P Code section 9875.1 does not in itself require that a manufacturer or distributor of a non-OEM part actually provide a warranty. This section reads in pertinent part: "Any warranties applicable to these replacement parts are provided by the manufacturer or distributor of the parts, rather than by the original manufacturer of your vehicle."

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			Even in the situation where a manufacturer or distributor of a non-OEM part actually provides a warranty, this warranty is different and separate from the warranty obligation of insurers when an insurer requires the use of a non-OEM part. CDI wishes to make clear that the warranty obligation under this subsection (g)(3) has been in existence since 1993 and is not being altered or expanded in any way by this rulemaking. This rulemaking merely now requires the insurer to disclose this longstanding warranty obligation to claimants, when the insurer requires the use of a non-OEM part. Business and Professions (B&P) Code Section 9875, CDI cites B&P code section 9875 in both subsection 2695.8(g)(5) and in the Reference to Section 2695.8. This citation/reference has been in existence prior to this current rulemaking, and has not been previously challenged. However, after reviewing this comment, CDI has determined that the more appropriate citation/reference is B&P Code section 9875.1. Therefore, this change is

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			made in the Revised Regulations, which were noticed October 10, 2012. Also, CDI did not promulgate subsection 2695.8(g)(3) using the authority of B&P code sections 9875 or 9875.1. CDI authority for this subsection, as noted above, is derived from IC section 790.10, and based upon CDI's interpretation and implementation of the UPA. The commentator asserts that the proposed regulation conflicts with IC section 790.06. CDI rejects this assertion. First, this proposed rulemaking is seeking to amend the already in existence Fair Claims Settlement Practices Regulations, which were promulgated to interpret, define, or make more specific the standards set forth in IC 790.03. As the preamble to these regulations, section 2695.1(a), makes clear: "Section 790.03(h) of the California Insurance Code enumerates sixteen claims settlement practices that, when either knowingly committed on a single occasion,

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			or performed with such frequency as to indicate a general business practice, are considered to be unfair claims settlement practices and are, thus, prohibited by this section of the California Insurance Code. The Insurance Commissioner has promulgated these regulations in order to accomplish the following objectives: (1) To delineate certain minimum standards for the settlement of claims which, when violated knowingly on a single occasion or performed with such frequency as to indicate a general business practice shall constitute an unfair claims settlement practice within the meaning of Insurance Code Section 790.03(h)". The FCSP regulations have been in existence, in much of its current form since 1993. There have been no successful challenges to these regulations on the grounds that CDI cannot set forth minimum claims standards that, when violated, constitute an unfair claims practice under IC section 790.03(h). Further, the

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
			preamble to these regulations, section 2695.1(b), also recognizes the existence of IC Section 790.06. However, in doing so, it confirms that violations of IC Section 790.06 and/or IC section 790.03(h) may exist, if not specifically delineated in these regulations. CDI's position is that it is not precluded from setting forth minimum standards, or specifically prohibited acts or practices, that may violate 790.03(h), and doing so would not conflict with IC section 790.06. The commentator asserts that CDI's proposed regulations would raise auto repair costs. CDI disagrees with this assertion. First, the commentator asserts that the proposed regulations allow auto body repair shops to exclusively use OEM parts. CDI disagrees. No part of these regulations require the insurer to follow or agree to whatever the auto body repair shop estimates. To the contrary, these regulations, section 2695.8(f)(3), expressly permit the insurer to reasonably adjust the claimant's shop's estimate. Also, section 2695.8(g) of these regulations, pertaining to

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			non-OEM (aftermarket parts) does not require the insurer to only use OEM parts. To the contrary, this section permits the insurer to use non-OEM parts, as long as certain reasonable standards (most of which is already current law) are followed. Lastly, this commentator requests that antique auto parts be exempt from the proposed regulations. CDI rejects this request. While CDI recognizes that OEM replacement parts for antique automobiles may be more rare and/or not available, this fact has no impact on these regulations. First, if non-OEM parts are the only available parts for certain vehicles, then either the insurer would not be requiring the use of a non-OEM part or the consumer would be choosing to use the non-OEM part. Under either scenario, these regulations would not be triggered. However, to the degree an insurer requires the use of one particular non-OEM part over another particular non-OEM part, these regulations would appropriately apply.

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
David McClune California Autobody Association (CAA) 2200 L Street Sacramento, CA 95816 Written comment only Written Comment: October 22, 2012		**WRITTEN:** CAA supports the changes to the proposed regulations. CAA believes the changes and the regulations themselves are fair and reasonable for consumers, repair shops and insurers.	Since CAA supports the changes to the proposed regulations, and provides no specific recommendation, no response to this comment is necessary.
Personal Insurance Federation of California (PIFC) Written comment only Written Comment:		**WRITTEN:** PIFC provided a brief summary of the organization. PIFC believes the modified regulations still present numerous problems by encouraging	**REJECT** CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards. Also, to the degree this commentator makes the same or similar

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October 25, 2012		auto body shops to use more OEM parts, thereby increasing costs for consumers. CDI has not demonstrated the need for the regulations and the consumers complaints in the rulemaking file were orchestrated by auto body shops who would like to base their estimates on more expensive OEM parts. Insurers do not mandate, manufacture, replace or otherwise interact in a legally-significant way with repair parts. CDI does not have the authority to adopt the proposed regulations. PIFC cites *In the Matters of the Order to Show Cause; Accusation; Notice of Noncompliance and Hearing; Demand Issued to Globe Life and Accident Insurance Company, et al.* (Case No. UPA-2008-00017; OAH No. 2011090887) for the proposition that CDI cannot create new unfair practices in addition to the sixteen (16) identified by the Legislature under Insurance Code section 790.03.	assertions as those made by prior commentators, CDI incorporates its response to any prior commentators (above) into its response to this comment. With regard to the assumption that CDI revised the Authority section of the regulations to refer to IC section 790.03 as a whole, rather than to IC section 790.03(h)(3), due to a recent ALJ Opinion (OAH No. 2011090887), CDI rejects this comment. The recent ALJ opinion referenced was signed August 15, 2012. CDI formally made the revision to the Authority section in the originally noticed rulemaking in June 2012, well prior to, and with no knowledge of, this ALJ opinion. Further, the *Globe* ruling is a non-binding, non-final decision by an administrative law judge and has no bearing on how CDI interprets the Insurance Code or Fair Claims Settlement Practices Regulations. CDI strongly disagrees with this ruling and is taking steps to address this clearly erroneous interpretation of the IC. Therefore, CDI continues to rely on the same

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		CDI has not shown that the regulations are necessary. PIFC has consistently asked for evidence of valid consumer complaints that justify the need for the proposed regulations. CDI has not provided any documentation of the deficiency in the existing regulations and the corresponding need for the proposed regulations. The proposed regulations will create extensive economic impacts on multiple players in the marketplace and CDI has not properly addressed these impacts. The proposed changes to section 2695.8 (g) (6) is unclear: (6) if an insurer specifying the use of non-original equipment manufacturer replacement crash parts has knowledge that the part is not equal to the original equipment manufacturer part in terms of kind, quality, safety, fit, and performance, or does not otherwise comply with this section shall immediately cease requiring the use of the part and shall within thirty (30) calendar days notify	IC provisions and other authority contained in the rulemaking and in the Fair Claims Settlement Practices Regulations, including, but not limited to IC Section 790.10, 790.03, etc. CDI also rejects the assertion by the commentator that the CDI has failed to address in its record the full extent of the economic impact of these regulations. The commentator provides no support for this assertion. Insurers have contended that there are no documented problems with non-OEM parts. If we take this premise at face value, there would be virtually no instances of a non-complaint part, that then would trigger any of the obligations under this section (under current law or the proposed rulemaking). Further, CDI disagrees that this rulemaking imposes any difficulty for an insurer to comply. With regard to the assertion that Section 2695.8(g)(7) is inconsistent with B&P code Section 9875.1, CDI rejects this assertion.

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	2695.8 (g) (7)	the distributor of the noncompliant aspect of the part. PIFC has numerous questions about how this section will operate once CDI adopts this regulation. It is not the role of the insurance industry to perform quality assurances on parts because there is rampant switching of parts. In the Proposed Regulations, specifically section 2695.8 (g) (7), CDI has taken these disclosure obligations related to non-OEM parts from a twenty year old statute and created a completely new :warranty" obligation for insurers. In the absence of CDI's proposed regulations, the market already sufficiently addresses the warranty issue. When a part is faulty, in any way, the repair shop contacts the part distributor (whether it is an OEM part or an aftermarket part) and has them replace the part or, if necessary, provide alternate restitution to the problem. Repair shop warranties, part manufacturer warranties, insurance contracts and customer service/competition already address the warranty issue in the market today and no new regulations	This rulemaking does not create new warranty obligations not already contained in the current section 2695.8(g)(3), which has been in existence since 1993. Current 2695.8(g)(3) already requires the insurer to "warrant that such parts are of like kind, quality, safety, fit, and performance as original equipment manufacturer replacement crash parts." This rulemaking does not change this almost 20 year old obligation. Instead, this rulemaking merely adds the additional obligation that the warranty already required in law is disclosed on the estimate of repair, so the claimant is better informed, should there be an issue with the non-OEM part that the insurer should be asked to address. Further, this section (g) is only triggered when and if an insurer "requires" the claimant use a non-OEM part, thus de facto depriving the claimant of the right to choose how his or her vehicle is repaired. Based upon complaints received, and other evidence presented in this rulemaking, CDI finds strong support that when an insurer requires the use of a

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	2695.8 (f)	are necessary. The proposed regulations add an extra and unnecessary layer that will result in inefficiencies and increased costs. We fail to understand the need for CDI to "protect" body shop owners while increasing costs to California insurance consumers. **This body shop protection requirement is inconsistent with existing law and should be eliminated.** *PIFC supports the changes made by CDI to section 2695.8 (f). However, PIFC continues to have concerns that the proposed language presumes that a repair shop is the ultimate authority as to the scope of the repairs. The proposed regulations reference service specifications that are written for all OEM parts and for operations and repairs that are not completed in the real world. The language "An insurer shall not prepare an estimate that deviates from the standards, costs, and/or guidelines provided by the third-party automobile collision repair estimating software used by the insurer to prepare the estimate ... " does not allow for repair issues that are not encapsulated into estimating software (i.e., paintless dent*	non-OEM part, that the claimant should not be subjected to out-of-pocket costs (above and beyond the costs of using an OEM part). To do so would result in the insurer reaping a windfall at the expense of the claimant, who would bear a higher cost on a claim. Such a result creates a perverse incentive for insurers to require the use of more and cheaper non-OEM parts, since the insurer would have no obligation to reimburse the claimant for costs that would not have occurred, but for the insurer's decision. Also, the commentator asserts that the market already addresses the warranty issue by the fact that the part distributor currently will replace a faulty non-OEM part and provide reimbursement. CDI disagrees that because some distributors may stand behind the parts they sell, the problem is adequately addressed and that insurers should not be held responsible when they require a non-OEM part be used that is faulty. However, CDI has added a new subsection (g)(8), which reads:

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		repair, sublet work, glass, partial refinishing, etc). We would also like to point out, as CDI heard in testimony at both its workshop and its formal rulemaking hearing from the estimating company representatives, that estimating software is not intended to be used as a conclusive standard. Also, the new language does not specify who decides if the deviation is allowable or not allowable. **PIFC has the following suggested changes to section 2695.8 (f):** If a partial loss~~es are~~ is settled on the basis of a written estimate prepared by or for the insurer, the insurer shall supply the claimant with a copy of the estimate upon which the settlement is based. The estimate prepared by or for the insurer shall be of an amount which will allow for repairs **of covered damage** to be made in accordance with accepted trade standards for good and workmanlike automotive repairs by an "auto body repair shop" as defined in section 9889.51 of the Business and Professions Code, and in accordance with the standards of automotive	"(8) nothing in this section (g) prohibits an insurer from seeking reimbursement or indemnification from a third party for the costs associated with the insurer's compliance with this section (g), including but not limited to, costs associated with the insurer's obligation to warrant the part, modifications to the part, or returning, removing or replacing a non-compliant non-original equipment manufacturer part. However, seeking reimbursement or indemnification from a third party shall not in any way modify the insurer's obligation to comply with this section (g). An insurer shall retain primary responsibility to comply with this section (g) and shall not refuse or delay compliance with this section on the basis that responsibility for payment or compliance should be assumed by a third party. CDI has proposed this amendment to recognize that third parties (i.e. part distributors, suppliers, manufacturers, etc)

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		repair required of auto body repair shops, as described in the Business and Professions Code, and associated regulations, including but not limited to Section 3365 of the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 8. ~~No insurer shall willfully depart from or disregard accepted trade standards for good and workmanlike repair in the preparation of claim settlement offers or estimates prepared by or for the insurer.~~ An insurer shall not prepare an estimate **for repairs of covered damage** that is less favorable to the claimant than deviates from the standards, costs, and/or guidelines provided by the third-party automobile collision repair estimating software used by the insurer to prepare the estimate, if such deviation would result in an estimate that would not allow for repairs to be made in accordance with accepted trade standards for good and workmanlike automotive repairs by an auto body repair shop, as described in this section (f). ~~a workmanlike manner.~~ **The insurer is not responsible to pay to repair damage not covered by the insurance contract.** If the claimant subsequently contends, based upon a written estimate which he or she obtains, that	may provide some type of warranty on a non-OEM part, which might independently obligate that third party to reimburse a shop or claimant for certain costs. This newly proposed section also makes clear that the rulemaking is not intended to prohibit an insurer from seeking reimbursement of some or all of the costs associated with the insurer's compliance. To the degree an insurer desires to "require" the use of non-OEM parts and wants to seek indemnification or reimbursement from third parties, it may, as long as, the insurer retains primary responsibility to comply with this section (g). Also, CDI rejects the assertion that this rulemaking is primarily intended to protect body shops at the expense of consumers. CDI is undertaking this rulemaking to protect consumers, who are left paying the repair bill when the insurers refuse to pay for legitimate repairs and/or pay for additional costs on consumers for modification, return or replacement of non-compliant non-OEM

COMMENTER	SECTION	SUMMARY OF COMMENT	CDI RESPONSE
		necessary repairs **for covered damage** will exceed the written estimate prepared by or for the insurer, the insurer shall: Utilizing an edited copy of the repair shop estimate or a supplemental estimate to resolve differences unnecessarily disadvantages the estimate prepared by the insurer, which may be lower than what is recommended by the repair shop. It will have a deleterious impact on customer relations. It has the effect of making the repair shop's estimate the "starting point" (or point of accuracy) for making any adjustments. By doing so, the changes made by the insurer will be judged as the denial of segments of the loss. In reality, many of these changes would be audits to non-claimed damages, non-loss related damages and possible other over charges and unnecessary repairs and operations. To the consumer, the insurer's adjustments will look as if the insurer is somehow shortchanging the payments instead of stopping an overpayment or otherwise complying with the insurer's obligations under its contract.	parts, which were required to be used by the insurer. CDI rejects the comment regarding the proposed amendment to section 2695.8(f)(3). This current section, which has been in essentially the same form since 1993, requires the insurer to "reasonably adjust any written estimates prepared by the repair shop of the claimant's choice". The proposed amendment to this section adds the language: "The adjusted estimate provided to the claimant and repair shop shall be either an edited copy of the claimant's repair shop estimate or a supplemental estimate based on the itemized copy of the claimant's repair shop estimate." This new language merely clarifies already existing law that requires adjustments be made only to the shop's estimate. However, based upon consumer and other complaints, CDI has found that some insurers do not in fact make the required adjustments to the shop's estimate, but, instead create their own new estimate. In many cases, this new (stand alone)

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	2695.8 (f) (3) 2695.8 (g) (1)	**PIFC would rectify this problem by amending the Proposed Regulation to allow insurer estimates, along with shop and supplemental estimates, to be provided to claimants to satisfy the notice demands of 2695.8(f)(3)-thus providing a greater balance between the repair shop and the insurer.** PIFC would like to suggestions changes to section 2695.8 (g) (1). They suggest: A number of sections have removed "like" from " ... kind, quality, safety, fit, etc." We recommend that the original language of "like kind, quality, safety, fit and performance" be added back into the sections where it is not currently included. This is what is consistent with our current regulatory obligations and contractual language. Deviations from the original language open up hew litigation avenues, whereas the current language has settled case law. PIFC supports CDI's changes to section 2695.8 (g) (2) by striking "inspections and tests" from	estimate prepared by these insurers does not identify the adjustments made to the shop's estimate and deprives the claimant (the customer) from knowing what portion of the shop's estimate is being paid and what portion is being denied. This practice also violates current FCSP Section 2695.7(b), which requires the "amounts accepted and denied to be clearly documented" and requires the insurer to provide the specific reason for any whole or partial denial. CDI's proposed amendments to this subsection (f)(3), merely clarify the current law in this area. Further, CDI's proposed amendments to this subsection (f)(3) do not alter or hinder the ability of the insurer to refuse to pay for unrelated damages, unnecessary repairs, or other alleged overcharges by repair shops. With regard to assertion that the replacement of the phrase "like kind and quality" in subsection (g)(3), with the phrase "at least equal to" lacks clarity. CDI rejects this assertion. CDI believes the "at least equal to" creates consistency and is clear as it relates

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	2695.8 (g) (2)	the proposed regulations. PIFC viewed the language as an unnecessary cost driver. The proposed regulations will increase costs for consumers because more OEM parts will be used in repairs. It also places a burden on insurers to police the parts industry. PIFC believes the proposed regulations imply that only aftermarket parts have defects. In fact both OEM and non-OEM parts have been found with defects.	directly back to the current law, as noted in subsection 2695.8(g)(1), which requires that the non-OEM parts "are at least equal to" the OEM parts. This current language has been in existence since 1993 without any clarity issues presented to CDI. CDI rejects the comment that the proposed amendments to section 2695.8(g) imply that only non-OEM parts have defects and OEM parts do not. CDI has made no such judgment and these regulations do not imply that OEM parts are free of defects. The commentator fails to acknowledge that this rulemaking is not intended to favor OEM parts over non-OEM parts or imply that OEM parts have no defects. Instead, the purpose of the current section (g) and the proposed amendments is to deal with instances where an insurer "requires" the claimant use a non-OEM part, rather than the part made by the original manufacturer of the part.

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Steven Suchil Assistant Vice President/Counsel State Affairs Western Region American Insurance Association (AIA) Written comment only Written Comment: October 25, 2012		**WRITTEN:** AIA provides a summary of the organization. AIA continues to believe that the proposed amendments will insert unpredictability and opportunities to increase conflict between carriers and repair shops. The regulations tie the hands of' insurers, are punitive in nature, do not add to consumer protection, make auto repair shops the final arbiters, and provide little benefit to consumers. The intent of the amendments appears to be steering toward OEM parts, with resultant increased costs and removal of choice. **Section 2695.8(f)** The proposed changes state that an insurer cannot prepare an estimate that deviates from the estimating software used by the insurer if the deviation: "…would result in an estimate that would not allow for repairs to with be made in accordance with accepted trade standards for good and workmanlike automotive repairs by an auto body	**REJECT** CDI rejects all assertions that this amendment fails to meet the necessity, authority, clarity, reference and/or consistency standards. Also, to the degree this commentator makes the same or similar assertions as those made by prior commentators, CDI incorporates its response to any prior commentators (above) into its response to this comment. With regard to Section 2695.8(f), the commentator asserts that this rulemaking establishes the repair shop as the final arbiter of what constitutes acceptable parts or repair procedures. CDI rejects this assertion. CDI's proposed amendments to this section (f) do not alter or hinder the ability of the insurer to refuse to pay for unrelated damages, unnecessary repairs, or other alleged overcharges by repair shops. With regard to Section 2695.8(g)(6), the commentator asserts that this subsection

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		repair shop…." We have previously pointed out the vagueness and lack of clarity for similar language, and the failure to comply with the clarity standard required for regulations by Government Code Sec. 11349. Further, as written this proposal appears to give an auto body shop the discretion to define what is acceptable for trade standards for good and workmanlike automotive repairs. We are concerned that the intent of the regulations is to establish a repair facility as the final and unquestionable arbiter of what constitute acceptable parts or repair procedures. Nothing in this language requires the repair facility to make a fair, objective and reasonable standard. This proposal could result in unsubstantiated opinions based on vague standards arbitrarily driving up the cost of repairs. While the Department supervises the activities of insurers, it has no such role for auto body shops. **Section 2685(g)**	lacks clarity. CDI rejects this assertion. CDI made the proposed amendment, as noted above, in order to address some commentators concerns that the terms in originally noticed subsections 2695.8(g)(6-9), "implied, actual, or constructive knowledge" are overly broad and difficult for insurers to comply with. CDI disagrees that these terms are overly broad or difficult to comply with, as these terms are common in the law and insurers fully understand these terms. Section 2695.2(l) of these FCSP regulations does use these very modifying terms in defining "knowingly committed". However, CDI does not intend that the term 'knowledge" (as used in these proposed regulations) be incorporated into the definition of "knowingly committed". CDI intends the removal of the modifiers "implied, actual, or constructive" to achieve the result of narrowing the term to "actual knowledge". Therefore, for purposes of subsection (g)(6), CDI intends the proposed amendments to apply to instances where the facts reflect the insurer has actual knowledge

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		Section 2685 (g) (6) provides that if an insurer has knowledge that a non-OEM part is not equal to an OEM part it must stop requiring use of such parts and notify the distributor of the part. We are concerned that it is not clear as to what constitutes knowledge that a part is not equivalent, who decides such non-equivalency, and what would happen should a repair shop unilaterally declare non-equivalency and use a different part that that identified on the insurer's estimate. This lack of clarity is contrary to the requirement in Gov. C. Sec. 11349.	that a part is not equal to the original equipment manufacturer parts in terms of kind, quality, safety, fit, and performance, or does not otherwise comply with this section. Whether an insurer has "knowledge" will be a question of fact that CDI intends to show, on a case-by-case basis, when and CDI is faced with enforcing this regulation.
Steve Osborne Assistant Vice President American Honda Motor Co., Inc. Written comment only Written Comment: October 25, 2012		**WRITTEN:** We are concerned that the proposed regulations imply expectations that cannot be measured rather than verifying performance that can be. Mandating insurers to self-report parts failures to a parts distributor with whom the insurer has no commercial relationship presents significant risk. Failing to police the mandate compounds that risk. We believe California's consumers will be better protected if that risk is mitigated.	**REJECT** To the degree this commentator makes the same or similar assertions as those made by prior commentators, CDI incorporates its response to any prior commentators (above) into its response to this comment. With regard to Section 2695.8(g)(3), CDI agrees that non-OEM part manufacturers should test the parts they make and sell to ensure they are "at least equal" to the OEM

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	2695.8(g)(3)	**2695.8(g)(3)** As mentioned previously, no valid process is specified to determine a competitors part is "at least equal in terms of quality, safety or performance." Without testing, those words are meaningless. Some aftermarket manufacturers do test their parts. While the preceding claims of parts equality remain questionable, we must believe that a part that meets even questionable test criteria performs better than one that has not passed the most basic certification. Some aftermarket suppliers offer two levels of part quality. The top-level parts have achieved a certain basic measure of quality while the second level parts have not. We suggest that when two quality levels of a single part application are available in the market, the second or lesser quality part be automatically eliminated from consideration as it does not meet the condition of 2695.8(g). This can be easily managed via the insurer's estimation software. One large aftermarket supplier hints that they can provide insurance companies "additional validation of the quality" that includes production traceability."	part. However, CDI does not regulate non-OEM part manufacturers, but only insurers. Also, by these regulations, CDI is not intending to restrict an insurer's ability to base settlements on non-OEM parts, as long as they warrant those parts are at least equal to the OEM part, as specified by these regulations. With regard to Section 2695.8(g)(6), the commentator asserts that the removal of the terms "implied, actual, or constructive" is troubling. CDI rejects this assertion. CDI made the proposed amendment, as noted above, in order to address some commentators concerns that the terms in originally noticed subsections 2695.8(g)(6-9), "implied, actual, or constructive knowledge" are overly broad and difficult for insurers to comply with. CDI disagrees that these terms are overly broad or difficult to comply with, as these terms are common in the law and insurers fully understand these terms. However, CDI intends the removal of the modifiers "implied, actual, or

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	2695.8(g)(6)	Again, this implies knowledge certain alternative parts lack such quality validation. These parts necessarily fail the "at least equal" requirement. **2695.8(g)(6)** The passage mentioning "implied, actual, or constructive knowledge" of part performance by insurers has been stricken from the latest version of the regulation. This is troubling. Per the preceding paragraph, the mere offer of parts that have passed basic test standards implies that the same application of a part that has not passed that basic standard is not allowed under the conditions of 2695.8(g). The stricken text provides the ability to enforce the regulation standard. We recommend reinstatement of that text.	constructive" to achieve the result of narrowing the term to "actual knowledge". Therefore, for purposes of subsection (g)(6), CDI intends the proposed amendments to apply to instances where the facts reflect the insurer has actual knowledge that a part is not equal to the original equipment manufacturer parts in terms of kind, quality, safety, fit, and performance, or does not otherwise comply with this section. Whether an insurer has "knowledge" will be a question of fact that CDI intends to show, on a case-by-case basis, when and CDI is faced with enforcing this regulation. CDI does not believe this amendment results in less protection for consumers.
	2695.8 (g) (7)	Section 2695.8(g)(7) is a moot point based upon 2695.8(g)(3). If a part by definition is "not equal to the original equipment manufacturer" part then no insurer can warrant that it is equal. Honda suggests consideration of variable repair standards that reflect a newer vehicle owner's need to return their car to factory specification	Lastly, Honda suggests consideration of variable repair standards that reflect a newer vehicle owner's need to return their car to factory specification and an older vehicle owner's need to control costs through the use alternative parts. CDI rejects this approach, as beyond the scope of these regulations.

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		and an older vehicle owner's need to control costs through the use alternative parts that can include salvage and remanufactured parts. The language of the current CDI proposal exemplifies a sound approach for older vehicles.	
Senator Ron Calderon Chair Senate Insurance Committee Written comments only Written Comments: October 25, 2012		**WRITTEN:** Senator Ron Calderon has numerous questions regarding the proposed regulations. **Fair Claims Settlement Practices Regulations** 1. On August 15,2012, the administrative law judge in the case *In the Matters of the Order to Show Cause; Accusation; Notice of Noncompliance and Hearing; and Demand Issue to Globe Life .Ins. and Accident* Co. *et al.* (Department No. UPA- 2008-00017; OAH No. 2011090887) issued a ruling directly related to the Fair Claims Settlement Practices (FCSP) regulations. Although the ruling in that case involves life insurance, the reasoning applies to any FCSP regulation that adds or defines new	To the degree this commentator makes the same or similar comments as those made by any prior commentators, CDI incorporates its response to any and all prior comments (above) into its response to this comment. In general, since this comment does not specifically recommend a position on this rulemaking, or suggest amendments thereto, but asks questions of CDI, CDI does not accept or reject the comments. CDI's responses to these questions are noted below. **Fair Claims Settlement Practices Regulations** **1. On August 15,2012, the administrative law judge in the case *In***

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		categories of unfair claims practices. In essence; the judge determined that CDl lacks the authority to categorically define additional unfair claims practices through the rulemaking process and must follow the adjudicatory process described in Insurance Code Section 790.06. The ruling is consistent with and supported by two other cases, including *Association of California Life & Health Insurance Companies v. California Department* of *Insurance, et al.* (Super. Ct. Sacramento County, 2010, No. 34-2010:.80000637) that resulted in an order to withdraw the offending regulations because the language of Section 790.06 provides CDl with an exclusive method of defining additional unfair practices. A similar ruling was made in another administrative proceeding two years prior in *In the Matter of the Order to Show Cause and Statement of Charges Against Western General Insurance Company* (Department Case No. UPA 2008 00018, OAH No. 2010030989, 2010). a. Has CDI appealed these decisions or	***the Matters of the Order to Show Cause; Accusation; Notice of Noncompliance and Hearing; and Demand Issue to Globe Life .Ins. and Accident* Co. *et al.* (Department No. UPA- 2008-00017; OAH No. 2011090887) issued a ruling directly related to the Fair Claims Settlement Practices (FCSP) regulations. Although the ruling in that case involves life insurance, the reasoning applies to any FCSP regulation that adds or defines new categories of unfair claims practices. In essence; the judge determined that CDl lacks the authority to categorically define additional unfair claims practices through the rulemaking process and must follow the adjudicatory process described in Insurance Code Section 790.06. The ruling is consistent with and supported by two other cases, including *Association of California Life & Health Insurance Companies v. California Department* of *Insurance, et al.* (Super. Ct. Sacramento County, 2010, No. 34-2010:.80000637) that resulted in an order**

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		formally challenged the reasoning presented in these rulings? b. If not, on what authority does CDI continue to define or revise categories of unfair claims practices through the rulemaking process? 2. Additionally, those cases involve another dispute. The preamble to the FCSP regulations (10 CCR § 2695.1) states: "Section 790.03(h) of the California Insurance Code enumerates sixteen claims settlement practices that, when either knowingly committed on a single occasion, or performed with such frequency as to indicate a general business practice, are considered to be unfair claims settlement practices[.]" The above-discussed cases read the elements of Insurance Code Section 790.03(h) conjunctively so that an unfair practice must be knowingly committed *and* performed with such frequency as to indicate a general business practice to be considered an unfair claims settlement practice, meaning that both elements must be present to be considered an unfair	**to withdraw the offending regulations because the language of Section 790.06 provides CDI with an exclusive method of defining additional unfair practices. A similar ruling was made in another administrative proceeding two years prior in *In the Matter of the Order to Show Cause and Statement of Charges Against Western General Insurance Company* (Department Case No. UPA 2008 00018, OAH No. 2010030989, 2010).** **a. Has CDI appealed these decisions or formally challenged the reasoning presented in these rulings?** **CDI Response:** As the *Globe* ruling is a non-binding, non-final decision by an administrative law judge, it has no bearing on how CDI interprets the Insurance Code or Fair Claims Settlement Practices Regulations. CDI strongly disagrees with this ruling and is taking steps to address this clearly erroneous interpretation of the IC.

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		claims settlement practice. This reasoning is consistently supported by language in California case law at all levels, but in contradiction to the FCSP preamble. **a.** Does CDI intend to enforce the proposed Section 2695.8(f) and (g) for violations committed on a single occasion? **b.** If so, on what authority, other than the regulations in questions, does CDI proceed to enforce unfair claims practices for a single violation? **Section 2695.8 (f)** 3. The new version of the proposed amendment deletes language prohibiting an insurer from willfully departing or disregarding accepted trades standards for workmanlike repair in the preparation of claim settlement offers or estimates. It also adds language that prohibits an insurer from deviating from the standards, costs, and/or guidelines provided by the third-party automobile repair software, if the	As such CDI continues to rely on the same IC provisions and other authority contained in the rulemaking and in the Fair Claims Settlement Practices Regulations, including, but not limited to IC Section 790.10, 790.03, etc. **b. If not, on what authority does CDI continue to define or revise categories of unfair claims practices through the rulemaking process?** **CDI Response:** A noted above, the *Globe* decision is a non-binding, non-final decision by an administrative law judge, and it has no bearing on how CDI interprets the Insurance Code or Fair Claims Settlement Practices Regulations. As such CDI continues to rely on the same IC provision and other authority contained in the rulemaking and in the Fair claims settlement Practices Regulations, including, but not limited to IC Section 790.10, 790.03, etc. **2. Additionally, those cases involve**

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		deviation would result in an estimate that would not allow for repairs to be made in accordance with accepted trade standards for good and workmanlike automotive repairs by an auto body shop. a. An insurer must restore the vehicle to its preloss condition but is not otherwise required to ensure that the vehicle is repaired to specific standards unless required by contract. Would the adoption of the revised language impose obligations on the insurer that exceed its contractual obligations? b. If so, on what statutory or case authority does CDI rely to enforce that policy? 4. The proposed amendment to Section 2695.8(g) uses the term "warrant" in an ambiguous manner. "·Warrant" may mean to assure that a certain fact is as it is represented to be and it appears this is how the term is used in	**another dispute. The preamble to the FCSP regulations (10 CCR § 2695.1) states: "Section 790.03(h) of the California Insurance Code enumerates sixteen claims settlement practices that, when either knowingly committed on a single occasion, or performed with such frequency as to indicate a general business practice, are considered to be unfair claims settlement practices[.]" The above-discussed cases read the elements of Insurance Code Section 790.03(h) conjunctively so that an unfair practice must be knowingly committed *and* performed with such frequency as to indicate a general business practice to be considered an unfair claims settlement practice, meaning that both elements must be present to be considered an unfair claims settlement practice. This reasoning is consistently supported by language in California case law at all levels, but in contradiction to the FCSP preamble.**

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		the revised subparagraph (3) that requires the insurer to disclose to the consumer that it "warrants that such parts are at least equal to the original equipment manufacturer parts in terms of kind, quality, safety, fit, and performance." On the other hand, "warrant" may be read to impose civil liability for the quality of the product as used in subparagraphs (7) and (8). Revised subparagraph (7) refers to "the insurer's obligation to warrant the part, modifications to the part, or returning, removing or replacing a non-compliant non-original equipment manufacturer part." a. How does CDI intend to interpret the term "warrant" as it is used in the revised proposed Section 2695(g)? b. Business and Profession Code Section 9875.1 only requires an insurer to disclose that non-OEM parts are guaranteed by the manufacturer of the part (rather than the original manufacturer of the vehicle) and does not impose a requirement that the	**a. Does CDI intend to enforce the proposed Section 2695.8(f) and (g) for violations committed on a single occasion?** **CDI Response:** Yes. **b. If so, on what authority, other than the regulations in questions, does CDI proceed to enforce unfair claims practices for a single violation?** **CDI Response:** It continues to be CDI's position that a violation of subdivision 790.03(h) may be found in either the knowing commission of a single act or engaging in a general business practice. None of the above administrative cases change this position or CDI's authority in this area. **<u>Section 2695.8(f)</u>** **3. The new version of the proposed amendment deletes language prohibiting**

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		insurer bear the burden of the manufacturer's warranty. If CDI intends to impose civil liability, on what authority does CDI rely to propose the Section 2695.8(g) as revised? 5. The revised proposed amendments to subparagraph (6) strikes the language that expands the term "knowledge" to include "implied, actual, or constructive" knowledge. Section 2695.2(l), defines the term "knowingly committed" as used in the FCSP to include "actual, implied or constructive knowledge, including; but not limited to, that which is implied by operation of law." a. Given the provision in Section 2695.2(l), does this change to proposed subparagraph (6) have any practical effect? Does CDI intend the proposed amendments to apply to cases involving implied or constructive knowledge? b. The broad reading of "knowingly committed" in Section 2695.2(l) appears	**an insurer from willfully departing or disregarding accepted trades standards for workmanlike repair in the preparation of claim settlement offers or estimates. It also adds language that prohibits an insurer from deviating from the standards, costs, and/or guidelines provided by the third-party automobile repair software, if the deviation would result in an estimate that would not allow for repairs to be made in accordance with accepted trade standards for good and workmanlike automotive repairs by an auto body shop.** **a. An insurer must restore the vehicle to its preloss condition but is not otherwise required to ensure that the vehicle is repaired to specific standards unless required by contract. Would the adoption of the revised language impose obligations on the insurer that exceed its contractual obligations?** **CDI Response:** No, CDI does not believe

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		to impose a form of strict liability. The *Royal Globe* court held that private litigants are entitled to relief if they can "demonstrate that the insurer acted deliberately"; this appears to conflict with Section 26.95.2(l). Does CDI impose a form of strict liability for the purposes of FCSP regulations? If so, please provide statutory or case law citations that support CDl's authority to interpret the statute in that way.	the proposed regulations conflict in any way with the insurer's contractual obligation to cover the costs to return a damaged vehicle to its pre-loss condition. First, returning a vehicle to its pre-loss condition implies the vehicle will be repaired by a repair shop that is duly licensed by BAR and that employs repair standards set forth by the legislature and by BAR under the B&P code and associated regulations. CDI believes that the fact that the insurance contract does obligate an insurer to restore a vehicle to its pre-loss condition is strong support for these regulations. An insurer could not presume to pay less than the amount reasonably necessary to repair the vehicle to its pre-loss condition using standards below what a repair shop is required to follow. Also, to the degree an insurance contract does clearly and unambiguously limit payment on an automobile insurance claim to an amount less than the estimate of repairs (prepared using the required repair standards) an insurer, may pay less than the amount of the estimate, but such limitation would not

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			remove the obligation to prepare a valid estimate. However, in most instances, CDI believes it is doubtful an insurer can fulfill its contractual obligation to return the damaged vehicle to its pre-loss condition by forcing the vehicle to be repaired using standards below that required of shops. Further, it should be noted that a large proportion of automobile damage insurance claims are third party claims, where there is no contract between the insurer and the third party, so the pre-loss condition contractual requirement has no bearing on third party claims. Civil Code (CC) Section 3333, describes a tortfeaser's measure of damages to an injured (third) party. This CC section is highly relevant to third party insurance claims and requires the insurer to pay the reasonable costs repair the vehicle. An insurer paying a third party claim could not presume to pay using standards <u>below</u> the standards a repair shop is required to follow.

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			b. If so, on what statutory or case authority does CDI rely to enforce that policy? **CDI Response:** CDI continues to rely on the same IC provisions and other authority contained in the rulemaking and in the Fair claims settlement Practices Regulations, including, but not limited to IC Section 790.10, 790.03, etc. The FCSP regulations were promulgated in 1992 (effective in 1993) pursuant to the Legislature's grant of legislative power to the Commissioner. Not only does section 790.10 authorize the Commissioner to adopt rules and regulations he finds necessary to administer the UPA, section 790.035, subdivision (a) grants the Commissioner "the discretion to establish what constitutes an act." By this, the Legislature acknowledged CDI's technical expertise and its familiarity with the industry being regulated, entitling the resulting regulations considerable deference. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8

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			[heightened deference for quasi-legislative enactments]; *Pitts v. Perluss* (1962) 58 Cal.2d 824, 832, [formally adopted regulation on disability insurance held reasonable where intricate and technical nature of the subject matter not within expertise of the court]; *Spanish Speaking Citizens' Foundation, Inc. v. Low* (2000) 85 Cal.App.4th 1179, 1215 ["'specialization gives . . . agencies an intimate knowledge of the problems dealt with in the statute and the various administrative consequences arising from particular interpretations'"], referring to the Insurance Commissioner's regulations and quoting Michael Asimow, The Scope of Judicial Review of Decisions of California Administrative Agencies (1995) 42 UCLA L. Rev. 1157, 1195-1195.) Since the Commissioner adopted the Fair Claims Settlement Regulations, the Legislature has amended section 790.03 twice. (Stats. 2001, ch. 253 (AB 1193), § 2; Stats. 2011, ch. 426 (SB 712), § 1.) In addition, the Legislature amended the UPA

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			by adding to section 790.034 explicit reference to the Commissioner's regulations, explaining that the Fair Claims Settlement Practices Regulations "govern how insurance claims must be processed in this state," and requiring that claimants must be told how to obtain a copy. (§ 790.034, subd. (b), added by Stats. 2001, ch. 583, § 3.) Both the age of the regulations and the Legislature's express identification and implicit approval of them confirm their alignment with the legislative intent. **4. The proposed amendment to Section 2695.8(g) uses the term "warrant" in an ambiguous manner. "Warrant" may mean to assure that a certain fact is as it is represented to be and it appears this is how the term is used in the revised subparagraph (3) that requires the insurer to disclose to the consumer that it "warrants that such parts are at least equal to the original equipment manufacturer parts in terms of kind, quality, safety, fit, and performance."**

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			On the other hand, "warrant" may be read to impose civil liability for the quality of the product as used in subparagraphs (7) and (8). Revised subparagraph (7) refers to "the insurer's obligation to warrant the part, modifications to the part, or returning, removing or replacing a non-compliant non-original equipment manufacturer part." **a. How does CDI intend to interpret the term "warrant" as it is used in the revised proposed Section 2695(g)?** **CDI Response:** CDI intends to interpret the terms "warrant" and "warrants", as described in the comment's first alternative, "to assure that a certain fact is as it is represented to be". However, to the degree the insurer's assurance that the non-OEM part is at least equal to the original equipment manufacturer parts in terms of like kind, quality, safety, fit, and performance, the insurer is responsible to

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			address this issue by complying with certain of the other subsections of (g). Those obligations include such actions as to pay the costs to modify the part, or costs associated with returning the part and the cost to remove and replace the non-original equipment manufacturer part with a compliant non-original equipment manufacturer part or an original equipment manufacturer part. To the degree an insurer is in violation of these regulations, it may be subject to a "civil penalty" as described in IC Section 790.035, through an administrative proceeding, as described in IC 790.05. However, to the degree the reference to "civil liability" is directed towards civil actions by the civil court system, CDI does not control how civil courts view an insurer's obligation to warrant a non-OEM part or how a court might determine if civil liability may be imposed. **b. Business and Profession Code Section 9875.1 only requires an insurer to disclose that non-OEM parts are**

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			guaranteed by the manufacturer of the part (rather than the original manufacturer of the vehicle) and does not impose a requirement that the insurer bear the burden of the manufacturer's warranty. If CDI intends to impose civil liability, on what authority does CDI rely to propose the Section 2695.8(g) as revised? **CDI Response:** Please see response to prior question. Also, by these regulations, CDI does not intend to require the insurer to "bear the burden of the manufacturer's warranty". **5. The revised proposed amendments to subparagraph (6) strikes the language that expands the term "knowledge" to include "implied, actual, or constructive" knowledge. Section 2695.2(l), defines the term "knowingly committed" as used in the FCSP to include "actual, implied or constructive knowledge, including; but not limited to,**

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			that which is implied by operation of law." **a. Given the provision in Section 2695.2(l), does this change to proposed subparagraph (6) have any practical effect? Does CDI intend the proposed amendments to apply to cases involving implied or constructive knowledge?** **CDI Response:** CDI made the proposed amendment, as noted above, in order to address some commentators concerns that the terms in originally noticed subsections 2695.8(g)(6-9), "implied, actual, or constructive knowledge" are overly broad and difficult for insurers to comply with. CDI disagrees that these terms are overly broad or difficult to comply with, as these terms are common in the law and insurers fully understand these terms. As the comment correctly points out, Section 2695.2(l) does use these very modifying terms in defining "knowingly committed". However, CDI does not intend that the term

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			'knowledge" as used in these proposed regulations be incorporated into the definition of "knowingly committed". CDI intends the removal of the modifiers "implied, actual, or constructive" to achieve the result of narrowing the term to "actual knowledge". Therefore, for purposes of subsection (g)(6), CDI intends the proposed amendments to apply to instances where the facts reflect the insurer has actual knowledge that a part is not equal to the original equipment manufacturer parts in terms of kind, quality, safety, fit, and performance, or does not otherwise comply with this section. Whether an insurer has "knowledge" will be a question of fact that CDI intends to show, on a case-by-case basis, when CDI is faced with enforcing this regulation. **b. The broad reading of "knowingly committed" in Section 2695.2(l) appears to impose a form of strict liability. The *Royal Globe* court held that private litigants are entitled to relief if they can "demonstrate that the insurer acted**

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			deliberately"; this appears to conflict with Section 26.95.2(l). Does CDI impose a form of strict liability for the purposes of FCSP regulations? If so, please provide statutory or case law citations that support CDI's authority to interpret the statute in that way. **CDI Response:** CDI does not believe that either the definition of "knowingly committed" in Section 2695.2(l) or the term "knowledge" as proposed in this rulemaking, are interpreted to impose a form of strict liability.
Jack Gillis Executive Director Certified Automotive Parts Association (CAPA) Written comments only		**WRITTEN:** CAPA expressed strong support for the Department's proposal rule recognizing that alternative parts, certified by a legitimate crash replacement part certifying entity, represent a unique and specific part type available to consumers along with car company brand, non-certified aftermarket, and salvaged parts. We also expressed concern about requiring insurers to specify parts that are equal to car	**REJECT:** CDI rejects the recommendation that the regulations be amended to recognize independent third party certification and require the insurer to only use certified non-OEM parts. Since the legislature has not distinguished between (or set standards for) certified non-OEM parts and non-certified non-OEM parts, CDI may not create new law by recognizing

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		What is particularly frustrating is that CDI appears to be listening exclusively to the California auto body shops that have dramatically increased their list of untested, non- certified, potentially unsafe, hazardous and poor quality parts during the past few years. CAPA provided additional information about their testing and certification program. CAPA includes letters it has sent out: two letters of complaints to manufactures that do not meet its standards and one letter to the California Autobody Association thanking them for their recent notifications regarding aftermarket headlight assemblies.	
John Metz Written comments only		**WRITTEN:** Mr. Metz's written comments are attached.	**REJECT** To the degree this commentator makes the same or similar comments as those made by any prior commentators, CDI incorporates its response to any and all prior comments

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Written Comments: October 24, 2012			(above) into its response to this comment. The commentator reiterates his August 9, 2012 comments submitted at the close of the 45-day public comment period for this rulemaking. **Section 2695.8(f):** CDI rejects all the commentator's suggested text amendments, as unnecessary, as conflicting with law, as outside the scope of these regulations, or as outside of CDI's authority to regulate. With regard to setting standards for the third party estimating software providers and requiring that vendor to "certify under penalty of perjury", CDI does not regulate these third party vendors, so does not intend to require these standards. **Section 2695.8(g):** CDI rejects all the commentator's suggested text amendments, as unnecessary, as conflicting with law, as outside the scope of these regulations, or as outside of CDI's authority to regulate.

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Eileen A. Sottile Vice President, Government Affairs LKQ Corporation & Co-Chair of the Legislation & Regulation Committee for the Automotive Body Parts Association (ABPA) Written comments only Written Comments: October 31, 2012		**WRITTEN**: LKQ believes the proposed regulations create an untenable bias against the use of aftermarket crash parts and in favor of car companies which CDI cannot justify or defend based on the empirical evidence surrounding the use of aftermarket crash parts and LKQ and ABPA continues to strongly oppose the proposed regulations. There is no basis for singling out aftermarket parts in the regulations and not including car company parts as well. The standard for an oversight burden placed upon the insurers should apply to all claims, not just claims involving aftermarket parts. If CDI is interested in protecting consumers by amending current regulations, a uniform standard for both car company and aftermarket parts is the correct approach. CDI has no authority to adopt the proposed	This comment was received after the deadline set forth in the Notice of Amendment to Text of Regulation for timely receipt of comments and therefore, no response will be made. However, LKQ's comments are not dissimilar to its comments to the originally noticed (45-Day) proposed regulations. Therefore, CDI incorporates its response to public comments to LKQ for the originally noticed regulations.

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		regulations because CDI exceeded it statutory authority in promulgating the proposed regulations. LKQ/ABPA cite *Cullinan v. McColgan*, 80 Cal.App.2d 976 (1947) and *Pulaski v. California Occupational Safety and Health Standards Board,* 75 Cal.App.4th 1315 (1999), to support their claim. CDI has not demonstrated the need for the proposed regulations. Aftermarket parts have proved over time to be a safe and economical alternative to more expensive car company parts. The CDI's assertion that the proposed regulations are necessary because aftermarket parts are threatening public safety (CDI Policy Statement page 4 and Economic Impact Assessment page 7) is wholly without basis or merit. The Proposed Amendment will have an unnecessary negative economic impact upon California consumers if the Regulation's strict requirements for the use of aftermarket parts lead to significantly more repairs with car company parts which on average cost 60% or	

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		more than aftermarket parts. The use of more costly car company parts in repairs will lead to an increase in the number of vehicles deemed uneconomical to repair under California law and therefore a declared a "total loss" and not repaired. The proposed regulations threaten to provide a state-sponsored mechanism to enhance the car companies' efforts to monopolize the replacement crash parts industry and drive LKQ and the aftermarket crash parts industry out of the California market and all at the ultimate expense of California's consumers who these regulations are purportedly being promulgated to protect. The CDI assessment of the economic impact of the proposed regulations completely ignores the impacts on the aftermarket crash parts industry and California's consumers and there will be significant impacts on these two stakeholders with significant impacts on California's economy and no rulemaking should continue without a full assessment of these economic impacts.	

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		CDI argues that this regulation is necessary to protect consumers from the financial and physical harm "that could result from the use of non-compliant aftermarket parts." What about the use of defective car company parts? CDI should be inclusive of all parties and not selectively discriminate against one specific industry.	