

COMMENTS ON THE AMENDED “PAY AS YOU DRIVE” PROPOSAL

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1. COMMENTS

We wish to register significant privacy concerns about the proposed amended “Pay as you drive” (PAYD) insurance premium pricing regulations issued by the California Department of Insurance (DOI). Our specific concerns center around the “technological device” option for obtaining verified actual mileage.

- (1) To be clear, we are not opposed to the use of verified actual mileage as a means of imposing nuanced premiums that provide incentive to reduce overall vehicle usage. Significant societal benefits could, in theory, accrue from judicious use of such information to set rates. To our knowledge, however, the DOI has presented no empirical, factual basis in the administrative record to justify its decision to permit either the use of verified actual mileage or the use of any technology beyond a simple odometer for verifying actual mileage.

For example, section 2632.5(c)(2)(F) states: “The Commissioner finds that basing the Second Mandatory Rating Factor on verified actual miles driven, rather than on estimated miles driven, may enable policyholders to reduce their premiums by driving less and create incentives for innovation in automobile insurance rating in California with numerous attendant benefits.” On what record does the Commissioner make this finding? What kind of “innovation in automobile insurance rating” is expected? What are the “numerous attendant benefits”? How much would premiums be reduced?

Even if the answers to these questions are supported by the administrative record, we are unaware of any empirical, factual basis that supports the use of “a technological device” to verify actual mileage. Every car already contains an odometer protected against tampering by federal and state law and designed to provide information about actual miles driven. What is added by permitting the use of a “technological device”? Any “technological device” would seem to be an additional cost, over and above the sunk cost of the odometer.

- (2) Apart from the lack of any record, we are very concerned about the possibility of the unregulated use of a “technological device” to collect the verified actual mileage. Many possible implementations of this technology could pose serious threats to the “location privacy” of drivers, and we believe it is essential to impose careful and serious protections in the amended regulations. We are encouraged to see that the latest draft text includes language prohibiting the use of the device to record the location of the driver. However, we believe that the current draft does not go far enough in protecting the privacy of drivers.

For one thing, we believe that it is unacceptable for insurance companies to be permitted to coercively require customers to accept such devices in their cars: it is essential that the proposed regulations be amended to permit drivers to participate in the verified actual mileage program via other means (e.g., reporting mileage to their insurance agent, sending in a photograph, etc.).

While the proposed amended regulations seem to mandate “equality” between the various verification methods, we believe that they do not. For example, section 2632.5(c)(2)(F)(iii) provides that: “An insurer that offers both a mileage estimation program and a verified actual mileage program may provide a discount to a policyholder who participates in a verified actual mileage program. Any discount provided under section (c)(2)(F) shall be based on demonstrated cost savings or actuarial accuracy associated with obtaining and using actual miles driven rather than estimated mileage. If an insurer offers a discount, the same discount shall be provided to all policyholders in the verified actual mileage program, regardless of the method of verification used.”

Similarly, section 2632.5(c)(2)(F)(iv) provides that: “If an insurer offers both an estimated mileage program and a verified actual mileage program, participation by a policyholder in a program to determine actual mileage shall be voluntary. An insurer offering an estimated mileage program shall not require any policyholder to participate in a program to provide verified actual mileage.”

Thus, insurers that offer both estimated and verified actual mileage programs must provide a discount “regardless of the method of verification used.” Conversely, however, an insurer who offers *only* a verified actual mileage program is entirely exempt from (F)(iii) and (F)(iv) and may condition participation in its program on a particular method of verification.

This implication is borne out by section (F)(v), which provides: “(v) An insurer employing verified actual mileage pursuant to section (c)(2)(F) shall market and make available *all verification methods it offers* to all insureds equally. No insurer shall offer or use a verification method that is not uniformly promoted and offered to the public.” (emphasis added).

Clearly, such insurers need not offer all verification methods equally; equality is required only for verification methods that the insurer in fact offers. Thus, it is perfectly permissible for an insurer offering *only* a verified actual mileage program to offer *only* one verification method — such as the use of a “technological device.”

Next, we believe that the restrictions on the use of the technological device must be made much more stringent. Currently, the language of the draft states that “A technological device shall not be used to collect information about the location of the insured vehicle. Information collected by a technological device shall only be used to calculate automobile insurance rates.” Section 2632.5(c)(2)(F)(i)(5).

This is not adequate protection. There are three essential components to preserving the privacy of drivers in this kind of application:

- (a) Restricting collection of information to the minimum amount necessary to allow the policy objective to be implemented.
- (b) Requiring the means of collection to be auditable so the driver can have independent verification of compliance on the part of the insurer.
- (c) Explicitly stating a policy about the use and storage of the collected data.

As stated, the text leaves open the possibility that the device could be used to collect a great deal of information about the car and the behavior of the driver, provided the location is not recorded. Unfortunately, we are unaware of *any* information in the administrative record, or at least made available to the public for the purposes of commenting on the proposed amended regulations, that describes the information-collection capability of any

“technological device.” Indeed, nothing in the proposed amended regulation even defines or specifies what a “technological device” is.

We believe that it makes no sense to permit the use of any “technological device” without making clear what it does or does not collect. It is our understanding that commercially available devices gather significant information about driving behavior, such as braking, swerving and acceleration. We fear that the “innovation” and “attendant benefits” of a verified actual mileage program lie not in greater accuracy in verifying annual miles driven but in the collection and exploitation of information that does not relate to actual mileage. This fear is amplified by the fact that insurers may use “[i]nformation collected by a technological device” to “calculate automobile insurance rates,” which is entirely different from verifying actual mileage. Mileage verification should not be used as a subterfuge for collecting other information about drivers.

Furthermore, the text does not specify adequately controls on the use and dissemination of the information collected. To this end, we recommend the following specific changes to the proposed regulations:

- The technological device will be used only to collect the verified actual mileage, and *no other* information. In particular, it will neither collect nor store nor transmit information about the position, velocity, or acceleration of the vehicle.
- The technological device will be auditable by an independent third party, so that the driver can be assured of compliance with these regulations. We note that it is technically feasible to have a device that is both auditable and tamper-proof, so that this requirement need not compromise the integrity of the information collected by the device.
- The information collected (i.e., the verified actual mileage) will only be used to calculate automobile insurance rates, and will not be disclosed to third parties (i.e., sold) except with the express written consent of the insured. No incentives can be used to induce the customer to permit transfer of this data.

We believe that having strong privacy guarantees will speed the adoption of the actual verified mileage programs by the public, and so in addition to protecting the privacy of the drivers these changes will in fact enhance the prospects of the Department of Insurance’s goals being achieved.

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