



THE COMMONWEALTH OF MASSACHUSETTS AUTO DAMAGE APPRAISER LICENSING BOARD

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CHAIRMAN

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LIEUTENANT GOVERNOR

JOSEPH COYNE
RICHARD STARBARD
WILLIAM E. JOHNSON
LYLE M. PARE

Minutes of Meeting of the Board on June 22, 2016 Approved by the Board at the August 3, 2016 Board Meeting; Motion of Board Member William Johnson, Seconded by Board Member Joseph Coyne. The Motion Passed by a Vote of: 4-0, Chairman Cox Abstained.

June 22, 2016 Minutes of Board Meeting
Held at 1000 Washington Street, Boston, Massachusetts.

Members Present:

Gilbert Cox, Chairman
Joseph Coyne
Richard Starbard
William Johnson
Lyle Pare

Attending to the Board:

Michael D. Powers, Counsel to the Board

Proceedings recorded by:

Jillian Zywiec of the Alliance of Automotive Service Providers of Massachusetts (AASP) (Audio/Video). Joel Gausten of GRECO Publishing (Audio/Photography). Chris Gervais of MAPFRE (Audio/Video). Paul Harden, Hanover Insurance Company.

Review of minutes:

The meeting was called to order by Chairman Cox, the minutes of the Board meetings held on May 25, 2016 was submitted for approval. A motion was made by Board Member Joseph Coyne to approve the minutes, as submitted, of the Board meeting held on May 25, 2016, and a second to the motion was made by Board Member Lyle Pare. The motion passed by a vote of: 4-0 with Chairman Cox abstaining.

Report on the Part-II examination for motor vehicle damage appraiser license tentatively scheduled for June 28 and August 5, 2016:

Board Member Richard Starbard reported that the Part-II examination had been scheduled for June 28, 2016, at The Neighborhood Club in Quincy by James Schlager of Schlager's Auto Body as a result of assistance provided by a representative of Geico Insurance Company and arrangements were made to hold the examination at The Neighborhood Club in Quincy, Massachusetts with 45 people selected by the Licensing Unit at the Division of Insurance to participate in the examination.

A second Part-II examination is scheduled for August 5, 2016, at the Assabet Valley Regional Technical High School.

Discussion of changing the Board's Complaint Procedure when a complaint is filed against a licensed appraiser. The proposed new procedure is the following:

Legal Counsel to the Board, Michael D. Powers, informed the Board that he had revised the drafted complaint procedure since he submitted it at the last regularly scheduled Board meeting held on April 26, 2016, and added a default procedure as requested by Board Members William Johnson and Richard Starbard. At the May 25, Board meeting he had been provided with a proposed complaint procedure by Attorney Owen Gallagher, a renowned expert in insurance laws. At that meeting Legal Counsel Powers informed the Board that he would like to review Attorney Gallagher's proposal and he reported that he was still reviewing suggestions that were made, and was conducting a cross review of other related material such as the Division of Professional Licensures regulation for processing complaints in matters filed against Real Estate Appraisers and the "Manual for Conducting Administrative Adjudicatory Proceedings" (2012 Edition) (Published by the Administrative Law Division of the Government Bureau of the Office of the Attorney General). Legal Counsel Powers informed the Board that he would be reporting back to them at the next Board meeting with a proposal which may incorporate elements of these materials.

Board Member Johnson responded by stating he reviewed Attorney Gallagher's proposal and it appeared to add another unnecessary step to the procedure. The step involves a licensed appraisers sending a rebuttal to the complaint which, thereafter, is forwarded to the complainant. In Board Member Johnson's view, this type of procedure would make sense when a private person or consumer files a complaint, but the standard case reviewed by the ADALB involves a licensed appraiser filing a complaint against another licensed appraiser, and this additional procedure will not resolve such complaints.

Board Member Starbard stated that he liked the idea of seeing a response to a complaint, under the current procedure the next step is to issue a complaint against the licensed appraiser and the Board doesn't hear from the complainant.

Legal Counsel Powers informed the Board that he will report back at the next Board meeting.

Discussion about amending the ADALB regulation 212 CMR 2.00 et seq.:

After holding a Special Public meeting of the Board on Wednesday, May 4, 2016, which welcomed interested members of the public to provide input regarding topics raised by the Board in its public notice of the meeting calling for any possible changes the public would like the Board to consider addressed during the regulation review which included, but were not limited to, the proposed amendments submitted by Board Member William Johnson at the February 23, 2016. At the May 25, 2016, Board meeting, Board Member Richard Starbard provided an additional proposal different than the one that had been submitted by Board Member Johnson at the February, 2016 Board Meeting. During that meeting, Board Member Starbard's proposal was thoroughly discussed and members of the Board made recommended changes. Board Member Starbard agreed to re-write his proposal, adding the changes, and present the new proposed amendments at the next scheduled meeting which were the following:

212 CMR: AUTO DAMAGE APPRAISERS LICENSING BOARD

212 CMR 2.00: THE APPRAISAL AND REPAIR OF DAMAGED MOTOR VEHICLES

Section

- 2.01: Scope of Regulations
- 2.02: Licensing Requirements and Standards for Appraisers
- 2.03: Duties of Insurers and Repairers
- 2.04: Procedures for the Conduct of Appraisers and Intensified Appraisals
- 2.05: Penalties
- 2.06: Severability

Additions (original)

ADALB Changes

~~Deletions~~

2.01: Scope of Regulations

(1) Purpose and Applicability. The purpose of 212 CMR 2.00 is to promote the public welfare and safety by improving the quality and economy of the appraisal and repair of damaged motor vehicles. Any licensed appraiser, individual or corporate entity who employs licensed appraisers shall be bound by 212 CMR 2.00. 212 CMR 2.00 is intended to be read in conjunction with 211 CMR 133.00, *Standards for the Repair of Damaged Motor Vehicles*. **The provisions of 212 CMR 2.00 shall apply to any approved direct payment plan pursuant to 211 CMR 123.00.**

I amended this language based on a concern raised by the Insurance Federation. The ADALB is the licensing authority for appraisers. The ADALB sets the minimum standards for appraisers AT ALL TIMES regardless of the circumstances. Therefore, an insurance company cannot submit a plan that would require their appraiser to violate the regulation governing their license.

Additionally, I left the 211 CMR 133 language as is, since the same language appears in 211 CMR 133 and additionally 211 CMR 133.08 states: “An alleged violation of 211 CMR 133.00 by a licensed auto damage appraiser may be reported to and penalized by the Auto Damage Appraisers Licensing Board in accordance with its governing statute and 212 CMR.”

Since the Board retains, under its authority, interpretation of both regulations relative to the actions of the appraiser, there should not be a conflict established by the regulations being read “in conjunction” with each other.

(2) Authority. 212 CMR 2.00 is promulgated under the authority granted to the Auto Damage Appraiser Licensing Board by M.G.L. c. 26, § 8G, as added by St. 1981, c. 775, § 1.

(3) The Board may from time to time issue Advisory Rulings and shall do so in compliance with M.G.L. c. 30A, § 8.

212 CMR: AUTO DAMAGE APPRAISERS LICENSING BOARD

(4) Definitions.

Appraisal – means a ~~written~~ motor vehicle damage report ~~written~~ prepared by an appraiser licensed by the Board, on forms approved by the board and conducted as defined in M.G.L. c. 26, 8G and in compliance with the provisions of 212 CMR 2.00, M.G.L. c. 93A, c. 100A, c. 90, § 34R, and c. 26, 8G.

While the Board asked that “as defined in M.G.L. c. 26, 8G” remain in the definition, the issue raised by the Insurance Federation remains; a motor vehicle damage report is not defined in MGL 26 8G, in fact, the MGL does not include definitions. Compliance with 26, 8G does still appear in the definition. While I included the additional language, I moved where it was placed to make it read more clearly. I left the original change pending further input from Counsel and/or the Board. I amended this definition to address an issue raised by the Insurance Federation. As a note, form approval is required under MGL 26 8G.

Appraiser - means any person licensed by the Auto Damage Appraiser Licensing Board to evaluate motor vehicle damage and determine the cost of parts and labor required to repair the motor vehicle damage.

Board – means the Auto Damage Appraiser Licensing Board established by M.G.L. c. 26, 8G.

I added this definition to address an issue raised by the Insurance Federation.

Claimant - means any person making a claim for damage to a motor vehicle for either first or third party damages.

Independent appraiser - means any appraiser other than a staff appraiser who makes appraisals under an assignment by an insurer or repair shop and shall include the owner or employee of a repair shop who makes appraisals under a contract with an insurer.

Insurer - means any insurance company authorized to write motor vehicle insurance involved with a claim in the Commonwealth.

I added this language to address an issue raised by Mr. Coyne. I added this definition to address an issue raised by the Insurance Federation and to standardize terminology between regulations. 211 CMR 123 uses the same definition.

Intensified appraisal - means the combination of the appraisal of a motor vehicle before its repair and the reinspection of the vehicle subsequent to its repair.

Staff appraiser - means an appraiser who is an employee of an insurer and whose job duties include the making of appraisals for his or her employer.

Repair Shop Appraiser – means an appraiser who is an employee of a repair shop and whose job duties include the making of appraisals for his or her employer.

I added this definition to address an issue raised by the Insurance Federation. I felt it was a good addition in order to define roles, recognizing that the same rules apply to all appraisers, in certain circumstances appraisers have different roles based on who their employer may be.

212 CMR: AUTO DAMAGE APPRAISERS LICENSING BOARD

Repair Shop – means a motor vehicle repair shop registered pursuant to the requirements of M.G.L. c. 100A.

I added this definition to address an issue raised by the Insurance Federation.

~~Supervisory appraisal – means an appraisal conducted by an insurance company or appraisal company supervisor solely for the purpose of evaluating the appraisal ability of one of his or her appraiser employees or for the purpose of providing on-the-job training of an appraiser employee.~~

I removed this definition because training and evaluation of an employee is not an element of conducting an appraisal and is the responsibility of the insurance company.

2.02: Licensing Requirements and Standards for Appraisers

(1) Requirement That License Be Obtained and Displayed. No person in Massachusetts shall appraise, estimate or determine damages to motor vehicles or otherwise present himself or herself as an appraiser unless he or she has first obtained a license from the ~~Auto Damage Appraiser Licensing~~ Board. This license shall be valid for one year or less and shall be renewed annually on July 1st. Any appraiser, while making an appraisal, shall carry his or her license and shall, upon request, display it to any person involved in the claim or to any representative of the Board.

I amended this language to align with the new definitions.

(2) Qualifications for a License. Any applicant for a license shall be 18 years of age or over and of good moral character. He or she shall furnish satisfactory proof to the Board that he or she possesses the educational qualifications required for graduation from high school or that he or she possesses relevant work experience deemed satisfactory by the Board. No applicant shall be considered competent unless the applicant has assisted in the preparation of appraisals for at least three months under the close supervision of an ~~licensed~~ appraiser. He or she shall complete an approved appraisal course or at the Board's discretion work experience may be substituted for said schooling.

(3) Application and Examination Fee for a License. Any applicant for a license shall complete an application to be prescribed by the Board and shall sign it under the penalties of perjury. He or she shall submit this application and non-refundable fee of \$100 to the Board. After an application is received and approved, the applicant shall be required to pass an examination given under the supervision of the Board. All successful applicants will be issued a numbered license. Any applicant failing to pass an examination, upon the payment of a further non-refundable fee of \$50.00, shall be entitled to a reexamination after the expiration of six months from the date of the last examination. Any applicant failing to pass an examination shall be allowed to review his or her examination.

(4) Renewal of License. The Board shall mail to each ~~licensed~~ appraiser an application for renewal. Such application shall be completed and returned to the Board. Each application shall be accompanied by a renewal fee of \$50.00. After verification of the facts stated on the renewal application, the Board shall issue a renewal license dated July first, and this license shall expire on the June thirtieth of the year following. Any ~~licensed~~ appraiser who fails to renew his or her license within 60 days after notification by the Board of his or her license expiration date, before again engaging in the practice of an ~~licensed~~ appraiser within the

212 CMR: AUTO DAMAGE APPRAISERS LICENSING BOARD

Commonwealth, shall be required to re-register, pay a penalty fee determined by the Board and any back license fees, or may be required by the Board to be reexamined and pay applicable fees.

(5) Procedure for ~~Auto-Damage~~ Appraisals.

(a) All forms used for ~~auto-damage~~ appraisals must be approved by the Board.

(b) All forms used are required to have an itemization of parts, labor and services necessary, as **required in 212 CMR 2.00**, for repairs thereof. The prepared appraisal shall be sworn to under the penalties of perjury and shall include the appraiser's name, signature, license number, seal or stamp, employer, **insurer insurance company**, repair shop registration number if applicable, fee charged, the date the vehicle was appraised and the name of the manual used (if any) in preparing the appraisal. The appraisal seal or stamp shall be of a design approved by the Board. All appraisals sent electronically need not include the appraiser's signature and his or her seal or stamp.

(6) Schedule of Appraisal Fees.

(a) The Board may consider the appraisal fees charged within the territories where said appraiser operates. Any appraiser shall establish his or her own fee schedule unless limited by the Board. Any appraiser must post his or her appraisal fee schedule in a conspicuous location at his or her work place. The Board may establish a maximum schedule of fees by territory, type of business or complexity of work. Fees charged in excess of maximums approved by the Board shall result in penalties as established by the Board.

(b) Fees paid by a claimant for an appraisal that was requested by the insurer are recoverable from the insurer. Fees for ~~auto-damage~~ appraisals not requested by the insurer in first party claims are not recoverable from the insurer.

(7) Conflict of Interest. It shall be a conflict of interest for any appraiser who has been assigned to **write an appraisal**, ~~appraise a damaged motor vehicle~~ to accept, in connection with that appraisal, anything of value from any source other than the assignor of that appraisal. Further, it shall be a conflict of interest for any **repair shop** appraiser ~~employed by a repair shop~~ to accept the assignment of an appraisal from an insurer unless that appraiser's employment contract prohibits the repair shop from repairing damaged motor vehicles that have been so appraised. In addition, it shall be a conflict of interest for any appraiser who owns or has an interest in a repair shop to have a vehicle repaired at that shop if that appraiser has appraised that vehicle at the request of an insurer.

I amended this language to align with the new definitions.

It shall be a conflict of interest if any **licensed** appraiser operates a Drive-in Appraisal Service **or Drive-in Claim and Appraisal facility** for, or on behalf of, an insurer at a repair shop. **Notwithstanding this provision, all drive-in appraisal services or drive-in claim and appraisal facilities must inform consumers of their right to have their vehicle repaired at any repair shop. No insurance company or employee, agent or insurance agency or representative thereof shall coerce or use any tactics the purpose of which is to prevent insureds or claimants from seeking damage reports on repairs from their own repair shop rather than utilizing a company appraisal drive-in facility.**

I added this language to address anti-competitive actions being taken by certain insurance companies. Additionally, this language, in part, is from MGL 26 8G, I moved it into our regulations to allow the Board direct oversight of the compliance with this language.

(8) Revocation or Suspension of a License. The Board may revoke or suspend any appraiser's license at any time for a period not exceeding one year if the Board finds, after a hearing, that the individual is either not competent or not trustworthy or has committed fraud, deceit, gross negligence, misconduct, or conflict of interest in the preparation of an **appraisal y motor vehicle damage report**. The following acts or practices

212 CMR: AUTO DAMAGE APPRAISERS LICENSING BOARD

by any appraiser are among those that may be considered as grounds for revocation or suspension of an appraiser's license:

- (a) material misrepresentations knowingly or negligently made in an application for a license or for its renewal;
- (b) material misrepresentations knowingly or negligently made to an owner of a damaged motor vehicle or to a repair shop regarding the terms or effect of any contract of insurance;
- (c) the arrangement of unfair and or unreasonable settlements offered to claimants under collision, limited collision, comprehensive, or property damage liability coverages;
- (d) the causation or facilitation of the overpayment by an insurer of a claim made under collision, limited collision, comprehensive, or property damage liability coverage as a result of an inaccurate appraisal;
- ~~(e) the refusal by any appraiser who owns or is employed by a repair shop to allow an appraiser assigned by an insurer access to that repair shop for the purpose of making an appraisal, supervisory reinspection, or intensified appraisal.~~
- ~~(f)~~ (e) the commission of any criminal act related to appraisals, or any felonious act, which results in final conviction;
- ~~(g)~~ (f) knowingly preparing an appraisal that itemizes damage to a motor vehicle that does not exist; and
- ~~(h)~~ (g) failure to comply with 212 CMR 2.00

I removed this language to address an issue raised by the Insurance Federation. Additionally, I added a new section, as recommended by the Insurance Federation.

- (9) Drive-in Claim and Appraisal Facilities. Drive-in claim and appraisal facilities shall possess the following equipment:
- (a) Operating telephone service.
 - (b) A calculator.
 - (c) Current collision, paint and body cost estimating guide manuals or an automated system.
 - (d) An operating flash light.
 - (e) A tape measure of at least 30 feet.
 - (f) An operating camera and film.
 - (g) A fax machine or other device capable of transmitting data.

2.03: Duties of Insurers and Repairers

- (1) Responsibilities for Actions of Appraisers. An insurer or repair shop shall be responsible for the actions of ~~all of its~~ **the appraisers working on their behalf whether staff or independent**, and shall be subject to the applicable penalties under law for any violation of 212 CMR 2.00 by its appraiser.

I amended this language to align with the new definitions.

The Board may assess penalties against either the appraiser, the insurer, the repair shop or all three. In the event of default by the appraiser, the insurer or the repair shop may be responsible for penalties.

- (2) Records and Analysis of Appraisals. Every ~~insurer or repair shop~~ appraiser shall retain for at least two years, copies of all records related to appraisals and inspection. Every insurer shall retain copies of all records including photographs in accordance with state law.

212 CMR: AUTO DAMAGE APPRAISERS LICENSING BOARD

2.04: Procedures for the Conduct of Appraisals and Intensified Appraisals

(1) Conduct of Appraisals.

(a) Assignment of an Appraiser. Upon receipt by an insurer or its agent of an oral or written claim for damage resulting from a motor vehicle accident, theft, or other incident for which an insurer may be liable, the insurer shall assign ~~an either a staff or an independent~~ appraiser to **conduct an appraisal** ~~appraise the damage~~. Assignment of an appraiser shall be made within two business days of the receipt of such claim. However, the insurer may exclude any claim for which the amount of loss, ~~less any applicable deductible~~, is less than **\$2,500.00**.

Amended as requested. I amended this language to align with the new definitions. Also, I removed “less any applicable deductible”. The amount should be set based on the amount of damage, without further consideration

(b) Repair Shop Appraisal. All repair shops shall maintain one or more licensed appraisers in their employment for the purpose of preparing **an motor vehicle damage** appraisals **and conducting negotiations**. No ~~staff or independent~~ appraiser shall knowingly negotiate a repair figure with an unlicensed individual or an unregistered repair shop.

Removed “motor vehicle damage” to align with the new definitions. I added this language to ensure that negotiations are being conducted between appraisers and to ensure customers are not waiting for their vehicle to be repaired because an appraiser was not present to conduct the negotiations.

(c)

Contact with Claimant and Selection of Repair Shop. No staff or independent appraiser, insurer, representative of insurer, or employer of ~~an staff or~~ independent appraiser shall refer the claimant to or away from any specific repair shop or require that repairs be made by a specific repair shop or individual. ~~The provisions of 212 CMR 2.04(c) shall not apply to any approved direct payment plan pursuant to 211 CMR 123.00.~~

I added this language, I believe it was a previous oversight. Additionally, I removed the last sentence because MGL 26 8G states: “No appraiser or insurer shall request or suggest that repairs be made in a specified repair shop.” So this language would apply to everyone, all the time, even under a plan approved under 211 CMR 123. It is the law.

(d)

Requirement of Personal Inspection and Photographs. The appraiser shall personally inspect the damaged motor vehicle and shall rely primarily on that personal inspection in making the appraisal. As part of the inspection, the appraiser shall also photograph each of the damaged areas.

(e) Determination of Damage and Cost of Repairs. The appraiser shall specify all damage attributable to the accident, theft, or other incident in question and shall also specify any unrelated damage. If the appraiser **representing the insurer** determines that preliminary **work, repairs or partial disassembly** would significantly improve the accuracy of the appraisal, he or she shall authorize the preliminary work, repair **or partial disassembly** with the approval of the claimant and shall complete the appraisal after that work has been **done by a repair shop of the claimant’s choice, if the repair shop so agrees. If the appraiser representing the repair shop determines that preliminary work, repairs or partial disassembly would significantly improve the accuracy of the appraisal, then, with the approval of the claimant, such preliminary work, repairs, or partial disassembly shall be conducted; provided however, that, if there has been a written insurance claim made, then the repair shop appraiser shall first obtain the approval**

212 CMR: AUTO DAMAGE APPRAISERS LICENSING BOARD

of the insurer, unless the claimant directs that such preliminary work, repair, or partial disassembly be made without obtaining the insurer's approval, the claimant being first informed, **in writing, by the repair shop**, that they may be held personally responsible for the costs of same and that it may affect the insurer's obligation to pay the cost of repairs. In all instances, the appraiser shall photograph or video the damaged areas before conducting preliminary work, repair, or partial disassembly. An insurer shall not unreasonably withhold its approval of preliminary work, repair, or partial disassembly. The appraisers representing the **insurer insurance company** and the **registered** repair shop selected by the

Amended as requested. I added Bill's language here. It addresses the concerns related to tear downs as submitted by several insurance companies and 2 body shops.

insured to do the repair shall attempt to agree on the estimated cost for such repairs. The **registered** repair shop must prepare an appraisal for the purpose of negotiation. No appraiser shall modify any published manual **or electronic data system** (i.e., Motors, Mitchell or any automated appraisal system) without prior negotiation between the parties. Manufacturers **recommended warranty** repair procedures, I-Car, Tec Cor and paint manufacturer procedures **shall may also** apply. **However, the selection of parts shall comply with 211 CMR 133.00 and 212 CMR 2.00.** Further, no appraiser shall use more than one manual or system for the sole purpose of gaining an advantage in the negotiation process.

Recommended change to address the Board's discussion. I added this language to ensure the proper repair of a vehicle. Given today's complex cars, it is more important than ever to ensure that the recommended repair procedures are followed. This change is necessary in order to ensure the safety of the public, after a car repair.

If, while **writing an appraisal in the performance of his or her duties as an licensed auto damage appraiser**, an appraiser recognizes that a damaged repairable vehicle has incurred damage that would impair the operational safety of the vehicle, the appraiser shall immediately notify the owner of said vehicle that the vehicle may be unsafe to drive.

Amended as requested (returned to original language). I amended this language to align with the new definitions

The ~~licensed auto damage~~ appraiser shall also comply with the requirements of M.G.L. c. 26, § 8G, the paragraph that pertains to the removal of a vehicle's safety inspection sticker in certain situations.

~~The use of used suspension and steering parts that contain wearable components may affect the operational safety of the vehicle.~~ The appraiser shall determine which parts are to be used in the repair process. ~~in accordance with 211 CMR 133.00.~~ **Determination of parts shall comply with 211 CMR 133.00 and 212 CMR 2.00, the appraiser shall recognize that certain parts, including but not limited to; used suspension and steering parts that contain wearable components may affect the operational safety of the vehicle. If both parties agree that a specified part is unfit and must be replaced, the insurer is responsible for paying the retail price cost** for all parts indicated on an appraisal, including but not limited to, parts ordered and subsequently returned based on the criteria set in 211 CMR 133. The insurer is responsible for returning the parts to the supplier and recovering their costs from the supplier. The repair shop may agree to return parts on behalf of the insurer, if the

Recommended change to address the Board's discussion. These changes reflect the conversations that we have had at prior public meetings, as well as some of Bill's changes. In general, these changes are necessary to address several issues. Including but not limited to, anti-competitive actions taken by certain companies, as well as, addressing misinterpretation of regulations that have plagued the industry. These misinterpretations result in inconsistent treatment of the insured, leaving some without the proper repairs or coverage.

212 CMR: AUTO DAMAGE APPRAISERS LICENSING BOARD

insurer agrees to pay all costs, including but not limited to freight, handling and administrative costs, associated with such return. As to such costs, nothing in 212 CMR 2.00 shall preclude an insurer from exercising any available rights of recovery against the supplier. Delays in repair cycle time shall be considered when sourcing parts and materials. The appraiser shall itemize the cost of all parts, labor times, hourly rate, materials, and necessary procedures required to restore the vehicle to pre-accident condition and shall total such items. The rental cost of frame/unibody fixtures necessary to effectively repair a damaged vehicle shall be shown on the appraisal and shall not be considered overhead costs of the repair shop. **Costs associated with the shipping and handling of parts including cores, shall not be considered overhead costs of the repair shop either and shall be listed on the appraisal and negotiated.** With respect specifically to paint, paint materials, body materials and related materials, if the formula of dollars times hours is not accepted by ~~an registered repair shop or licensed~~ appraiser ~~representing the repair shop or by an appraiser representing the insurer~~, then a published database ~~manual or other documentation~~ from a list approved by the Board and selected by the repair shop, shall be used. ~~unless otherwise negotiated between the parties~~. All appraisals written under 212 CMR 2.00 shall include the cost of replacing broken or damaged glass within the appraisal. When there is glass breakage that is the result of damage to the structural housing of the glass then the cost of replacing the glass must be included in the appraisal in accordance with 212 CMR 2.04. The total cost of repairing the damage shall be computed by adding any applicable sales tax payable on the cost of replacement parts and other materials. The appraiser shall record the cost of repairing any unrelated damage on a separate report or clearly segregated on the appraisal unless the unrelated damage is in the area of repair.

If aftermarket parts are specified in any appraisal the appraiser shall also comply with the requirements of M.G.L. c. 90, § 34R that pertain to the notice that must be given to the owner of a damaged motor vehicle. The appraiser **representing the insurer** shall mail, fax or electronically ~~submit~~ **transmit** the completed appraisal within ~~three~~ **five** business days of the assignment, or at the discretion of the repair shop, shall leave a signed copy of field notes, with the completed appraisal to be mailed, faxed **or electronically submitted** within ~~three~~ **five** business days of the assignment. The repair shop may also require a completed appraisal at the time the vehicle is viewed. If the repair shop requires a completed appraisal, then the repair shop shall make available desk space, phone facilities, calculator and necessary manuals. A reasonable extension of time is permissible when intervening circumstances such as the need for preliminary **work, repairs or partial disassembly** ~~repairs~~, severe illness, failure of the parties ~~other than the insurer~~ to communicate or cooperate, or extreme weather conditions make timely inspection of the vehicle and completion of the appraisal impossible.

While we await input from the Insurance Federation relative to the number of days, I want to highlight the requirement of MGL 26 8G, included below. I made mostly administrative changes, as well as the reduction of time, as previously discussed at prior public meetings. While here we are providing 3 days, MGL 26 8G states: “The appraiser shall leave a legible copy of his appraisal with the repair shop selected to make the repairs at the time he inspects the vehicle.” Under the law there is no allowance for additional days. While we have provided 3 days, the repair facility retains the rights to require it be provided on the day of the appraisal. Additionally, as a note, there are no requirements under the law for repair shops to provide anything in order to have the appraisal completed that day.

(f) Determination of Total Loss. Whenever the appraised cost of repair plus the estimated salvage may be reasonably expected to exceed the actual cash value of a vehicle, the insurer may deem that vehicle a total loss. No motor vehicle may be deemed a total loss unless it has been **personally** inspected ~~or~~ **and** appraised by ~~an licensed~~ appraiser nor shall any such motor vehicle be moved to a holding area without the consent of the owner. A total loss shall not be determined by the use of any percentage formula.

I added Bill's language here and administrative changes.

(g) Preparation and Distribution of Appraisal Form. All appraisers shall set forth the information compiled during the appraisal on a form that has been filed with the Board. Staff and independent appraisers shall, upon completion of the appraisal, give copies of the completed appraisal form to the claimant, the insurer, and the repair shop and shall give related photographs to the insurer.

(h) Supplemental Appraisals. If a **registered** repair shop or claimant, after commencing repairs, discovers additional damaged parts or damage that could not have been reasonably anticipated at the time of the appraisal, either may request a supplementary appraisal. The **registered appraiser representing the repair shop** shall complete a supplemental appraisal prior to making the request. The insurer shall assign an appraiser who shall personally inspect the damaged vehicle within **two three** business days of the receipt of such request. **If the personal inspection does not occur in two business days, the repair shop has the right to use the supplement written by the appraiser representing the repair shop, unless otherwise agreed upon.** The appraiser **representing the insurer** shall have the option to leave a completed copy of the supplement appraisal at the registered repair shop authorized by the insured or leave a signed copy of his or her field notes with the completed supplement to be mailed, faxed, electronically **submitted transmitted** or hand delivered to the repair shop within one business day. A reasonable extension of time is permissible when intervening circumstances such as the need for preliminary **work, repairs or partial disassembly repairs**, severe illness, failure of the parties **other than the insurer** to communicate or cooperate, or extreme weather conditions make timely inspections of the vehicle and completion of the supplemental appraisal impossible.

I made mostly administrative changes, as well as the reduction of time, as previously discussed at prior public meetings. MGL states: "Every appraiser shall reinspect damaged motor vehicles when supplementary allowances are requested by repair shops within two days of a request." I aligned the language with the law.

(i) Expedited Supplemental Appraisals. If an insurer, a repair shop and the claimant agree to utilize an expedited supplemental appraisal process, an insurer shall not be required to assign an appraiser to personally inspect the damaged vehicle. In such event, the repair shop shall fax or electronically submit to the insurer a request for a supplemental appraisal allowance in the form of an itemized supplemental appraisal of the additional cost to complete the repair of the damaged vehicle, prepared by **an appraiser representing the repair shop licensed appraiser employed by the repair shop**, together with such supporting information and documentation as may be agreed upon between the **appraiser representing the insurer** and the **appraiser representing the repair shop**. The **appraiser representing the insurer** shall then be required to fax or electronically submit to the repair shop **within one two business days** its decision as to whether it accepts the requested supplemental appraisal allowance, **by the end of the next business day, excluding weekends and holidays**. Within this same period, **an licensed** appraiser representing the insurer and **an licensed** appraiser representing the repair shop may attempt to agree upon any differences. In the event that an insurer does not accept the repair shop's request for the supplemental appraisal allowance, or if the insurer fails to respond to the repair shop **by the end of the next business day, excluding weekends and holidays within one two business days**, the insurer and the repair shop shall be obligated to proceed in accordance with 212 CMR 2.04(1)(h), and within the time limits set forth in such provision. In such event, the date of the initial request for a supplemental

212 CMR: AUTO DAMAGE APPRAISERS LICENSING BOARD
appraisal allowance shall be the starting date for when the insurer must assign an appraiser to personally inspect the damaged vehicle.

Amended as requested. I amended this language to align with the new definitions.

No insurer or repair shop shall be obligated to utilize an expedited supplemental appraisal process and the determination of whether to utilize such process shall be made separately by an insurer or by a repair shop only on an individual claim basis. Utilization of an expedited supplemental appraisal process shall not be used as a criterion by an insurer in determining the insurer's choice of shops for a referral repair shop program under an insurer's direct payment plan; and being a referral shop shall not be a criterion in determining whether to utilize an expedited supplemental appraisal process.

(j) Completed Work Claim Form. If the ~~insurer~~ ~~insurance company~~ does not have a direct payment plan or if the owner of the vehicle chooses not to accept payment under a direct payment plan, then a representative of the insurer shall provide the insured with a completed work claim form and instructions for its completion and submission to the insurer. **When a completed work claim form is utilized, the appraiser representing the insurer and the appraiser representing the repair shop shall negotiate all costs without regard to the direct payment plan/referral shop program.**

I added Bill's language here, which also complies with MGL 90 340.

(k) Access for Purpose of Appraisal. **Repair shops who have custody and control of a customer's vehicle shall allow and shall not refuse to allow an appraiser representing the insurer, access by appointment, to the damaged vehicle, so that the appraiser representing the insurer may make an appraisal. No appraiser who has been assigned to representing the insurer shall refuse to conduct an appraisal at a repair shop that has custody and control of a customer's vehicle.**

Amended as requested. I added this language to address an issue raised by the Insurance Federation. I amended their submittal to make the language apply to both the insurer and repair shop, in order to eliminate any anti-competitive language.

(2) Temporary Licensing. **The Board shall vote to authorize the Chairman of the Board or his/her designee to grant a temporary license up to 60 days to any qualified individual to alleviate a catastrophic or emergency situation as long as the following conditions are met: (1) the applicant is licensed as a motor vehicle damage appraiser in another state and provides a copy of that license to the Chairman of the Board or his/her designee; (2) is in good standing in the other state and the applicant provides consent to the Chairman of the Board or his/her designee to verify the applicant's licensing status through the insurance licensing database maintained by the National Association of Insurance Commissioners, its affiliates or subsidiaries; (3) the applicant has not been found guilty of fraud, deceit, gross negligence, incompetence, misconduct or conflict of interest in the preparation or completion of any motor vehicle damage report; (4) the applicant does not have criminal felony charges pending against him/her in any state; (5) the applicant properly fills out the application; and (6) pays the applicable license fee.**

Copies of all such applications and temporary licenses issued by the Chairman of the Board or his/her designee shall be submitted to the Board at its next scheduled meeting for review by the Board. After review, the Board may revoke any such temporary license that was issued if the Board finds such applicant does not conform to the six listed conditions, or the Board finds that a person who was

212 CMR: AUTO DAMAGE APPRAISERS LICENSING BOARD
issued a temporary license is not qualified to hold such license.

I added Board Counsel's language here, with one change. It addresses the concerns submitted by several insurance companies. My only change was to leave the authority with the Board while allowing the chair to designate someone of their choosing.

2.05: Penalties

(H) Violations of M.G.L. c. 26, § 8G, and 212 CMR 2.00 may result in penalties including administrative costs, revocation or suspension of license or both. All administrative costs are subject to the discretion of the Board. The administrative costs may be assessed against the appraiser, the appraiser's employer, the insurer, or the repair shop.

An alleged violation of 212 CMR 2.00 by an ~~licensed~~ appraiser at the direction of an insurer may be reported to the Division of Insurance which may impose applicable penalties against such an insurer.

I amended this language to align with the new definitions.

2.06: Severability

If any provision of 212 CMR 2.00 or its application to any person or circumstances is held invalid, such invalidity shall not affect the validity of other provisions or applications of 212 CMR 2.00

REGULATORY AUTHORITY

212 CMR 2.00: M.G.L. c. 26, § 8G.

Discussion among the Board about the proposed amendments:

A discussion was held about these proposed amendments submitted by Board Member Starbard who explained that he adopted the amendments suggested by Board Member Coyne, the one suggested by Legal Counsel Powers about temporary or emergency licenses. He also drafted suggested amendments that had been submitted by interested parties such as the Massachusetts Insurance Federation, added some additional substantive ones, and cleaned-up the regulation to make it consistent with the “Definitions” section of the regulation. Legal Counsel Powers suggested that the Board discuss Mr. Starbard’s proposed amendments to the regulation, by taking each one of the recommendations, discussing each among the Members of the Board, and the Board could then agree to various changes. Thereafter, the changes that the Board could agree upon would be approved with the modifications added to the document created by Board Member Starbard. At a following meeting, the Board would conduct a vote on each proposed amendment to the Board’s Regulation. The Members of the Board agreed to proceed with this approach.

Board Member Coyne began the discussion by raising an issue of out of state companies unlicensed in Massachusetts but conducting appraisals, thereby violating the Board’s regulation and he requested the board address the issue in the proposed amendments. He was informed by Board Member Johnson that an amendment addressed that issue.

Board Member Starbard pointed out that the amended regulation addressed all of the issues which have been discussed at previous meetings of the Board. For example, the amendment requiring an appraisal for motor vehicle damaged be increased from 1,500 to \$2,500 was inserted. The definition of repair shop appraisal was aligned with the new definition. As for defining “core charges” Mr. Starbard stated that the issue had been left for Lyle Pare to review and draft language that he deemed necessary. Board Member Pare replied he reviewed the language as submitted by Mr. Starbard and could not come up with any better language.

Board Member Johnson opined that the CMRs (Code of Massachusetts regulations) must be in conformity with the Massachusetts general laws and the requirement that an appraisal be conducted within five business days conflicts with the General Law (Chapter 26, § 8G) which requires a supplementary appraisal be conducted in two business days.

Board Member Coyne asserted there are other things contained in Chapter 26, § 8G that are mandated by the enabling legislation, such as the removal of an inspection sticker when the damage to a motor vehicle will affect its safe operation, but body shops aren’t requiring the removal of inspections stickers.

Board Member Johnson retorted that we don’t need to mirror the enabling statute, the point is that the Board can’t make a regulation which conflicts with the statute.

Board Member Starbard reported that one of the biggest changes in the proposed amendments is the “tear-down language.” If the appraiser writing the appraisal will improve the accuracy of the appraisal, with the approval of the claimant, he or she can conduct the tear-down of the damaged motor vehicle.

Board Member Coyne asserted that he disagreed with the change in language for reducing the times for conducting appraisals in various circumstances, because as a practical business reality the reduction of the time-frames are impossible to keep, especially reducing the time-frame in which the supplemental appraisals must be completed.

Board Member Starbard retorted that the current regulation calls for the insurance company's appraisers to write the appraisal within five days and the expedited appraisal within three days.

Mr. Starbard then read from the draft language contained in 212 CMR 2.04(e) "Determination of damage and costs of repairs." Mr. Starbard read the changes from those that had been proposed before the last board meeting and the ones that were recommended at the Board meeting held on May 25, 2016.

Chairman Cox suggested that any Board Members who believe that certain wording should be changed in Mr. Starbard's recent proposal should be discussed among the Board members and he would accept a motion to accept those changes for the draft language which would be presented for the final vote to amend the regulation.

Board Member Coyne elaborated that the standard private passenger automobile insurance policy in Massachusetts requires the insured to cooperate with the insurance company. If the auto body shop intervenes between the insurance company and the insured by conducting a tear-down without the insurance company's approval then the claimant is risking not be paid by the insurance company.

Mr. Pare opined that based upon the length of the amended regulation the Board would not be complying with the Governor's Executive Order which requires agencies and boards to reduce the bureaucratic red-tape and make the regulation more efficient for businesses and consumers.

Chairman Cox suggested a provision stating that no appraiser or auto body shop shall tear-down a car without the insurance company's knowledge.

Board Member Johnson interjected that he did not have a problem with removing the "tear-down" language from the proposed amendment. He only drafted the language in response to Mr. Pare's complaint about auto body shops conducting tear-downs without first notifying insurance companies. Mr. Pare responded that he was only looking for a definition.

Board Member Johnson retorted that the consumer has the right to authorize the auto body shop to conduct a tear-down of the motor vehicle.

Chairman Cox observed that the consensus of the Board appears to be that they are satisfied with the current language contained in the regulation. Consequently, he advised that the drafted amendment for the tear-down language should be eliminated.

Board Member Pare concluded by stating he would rather have the existing language and deal with any problems as they arise. Under the current state of affairs, if an auto body shop tears-down a

motor vehicle without an insurance company's approval then one can proceed to litigation against the auto body shop.

Board Member Johnson pointed out that if the language goes back to the current language then insurance companies are back to the beginning. When he drafted the proposed amendment about "tear-downs" he was only attempting to address a problem that had been raised by insurance companies.

Chairman Cox directed Board Member Starbard to remove the proposed language and return to the existing language for purposes of discussing proposed amendments.

Board Member Coyne raised concerns about the proposed language of:

Delays in repair cycle time shall be considered when sourcing parts and materials. The appraiser shall itemize the cost of all parts, labor **times, hourly rate**, materials, and necessary procedures required to restore the vehicle to pre-accident condition and shall total such items. The rental cost of frame/unibody fixtures necessary to effectively repair a damaged vehicle shall be shown on the appraisal and shall not be considered overhead costs of the repair shop. **Costs associated with the shipping and handling of parts including cores, shall not be considered overhead costs of the repair shop either and shall be listed on the appraisal and negotiated.** With respect **specifically** to paint, paint materials, body materials and related materials, if the formula of dollars times hours is not accepted by **an registered repair shop or licensed appraiser representing the repair shop or by an appraiser representing the insurer, then a published database manual or other documentation from a list approved by the Board and selected by the repair shop, shall be used.**

Board Member Coyne declared by adopting this proposed language the Board will get into setting an hourly labor rate, something that is not within the Board's jurisdiction.

Board Member Johnson opined that an appraiser is allowed to appraise several items when writing an appraisal for damage to a motor vehicle but an appraiser is not allowed to itemize the costs to repair for the labor rates.

Board Member Coyne advised that the labor rates are set by insurance companies based upon geographical boundaries.

Board Member Johnson declared that we are admitting that insurance companies set the labor rates.

Board Member Pare asserted that an insurance company can chose what the labor rates are in a particular area by going down the street and checking at another auto body shop on the same street in a given area.

Board Member Coyne asserted that hourly rates should not be included in the proposed amendment to the regulation.

Board Member Pare said that he didn't agree with any of the proposed language.

Board Member Starbard interjected that the existing language refers to labor rates.

Board Member Coyne responded that by adopting this proposed language the Board is not simplifying anything.

Board Member Coyne requested to make a motion to remove the proposed language about hourly rates and revert back to previous language about labor rates and Board Member Johnson made the motion and the motion was seconded by Board Member Starbard. The motion passed by a vote of: 3-2 with Board Members Johnson and Starbard voting against.

Board Member Starbard then addressed the proposed language pertaining to the use of used parts for repairing damage to the suspensions system of a motor vehicle which he said was consistent with the Advisory Ruling issued the previous year by the Board. A second issue arises when parts that don't fit have to be returned, insurance companies will only pay for the costs of repacking the parts and will not pay for the labor that is involved. Mr. Starbard noted that the Board seemed to be in agreement about the language regarding used parts for damage to a motor vehicle suspension system, and the Board should address the proposed language that states the following:

Determination of parts shall comply with 211CMR 133.00 and 212 CMR 2.00, the appraiser shall recognize that certain parts, including but not limited to; used suspension and steering parts that contain wearable components may affect the operational safety of the vehicle. If both parties agree that a specified part is unfit and must be replaced, the insurer is responsible for paying the retail price cost for all parts indicated on an appraisal, including but not limited to, parts ordered and subsequently returned based on the criteria set in 211 CMR 133. The insurer is responsible for returning the parts to the supplier and recovering their costs from the supplier. insurer agrees to pay all costs, including but not limited to freight, handling and administrative costs, associated with such return. As to such costs, nothing in 212 CMR 2.00 shall preclude an insurer from exercising any available rights of recovery against the supplier. Delays in repair cycle time shall be considered when sourcing parts and materials. The appraiser shall itemize the cost of all parts, labor times, hourly rate, materials, and necessary procedures required to restore the vehicle to pre-accident condition and shall total such items. The rental cost of frame/unibody fixtures necessary to effectively repair a damaged vehicle shall be shown on the appraisal and shall not be considered overhead costs of the repair shop. Costs associated with the shipping and handling of parts including cores, shall not be considered overhead costs of the repair shop either and shall be listed on the appraisal and negotiated.

Mr. Starbard asserted that 211 CMR 133.00 states that the insurer is responsible for paying these costs and Board Member Johnson agreed, stating that all parties are required to follow 211 CMR 133.00.

Mr. Starbard asserted that this does not solve the problem because some insurance companies hold the auto body shop responsible for ordering parts even though the regulation states that the insurer can recover its costs from the supplier.

Board Member Johnson then made a motion to approve the language of this section as proposed by Board Member Starbard and a second was made by Mr. Starbard but removes the language pertaining to “labor rate.” The motion was passed by a vote of 3-2, Board Members Coyne and Pare voted against.

Chairman Cox declared that we are only voting on proposed language for amendments which will be voted on at the next Board meeting, and Mr. Starbard would make the changes and provide the proposed language as discussed by the Board.

Mr. Starbard then addressed the following language:

With respect **specifically** to paint, paint materials, body materials and related materials, if the formula of dollars times hours is not accepted by **an registered repair shop or licensed appraiser representing the repair shop or by an appraiser representing the insurer, then a published database manual or other documentation from a list approved by the Board and selected by the repair shop, shall be used.**

Chairman Cox asked whether this language essentially eliminates the negotiations of dollars times hourly rates and substitutes the manuals for determining these amounts.

Board Member Starbard asserted that this language addresses a situation wherein an appraiser for the consumer estimates these costs and the insurance company responds that we’re not accepting that offer.

Board Member Coyne opined that an appraiser must attempt to negotiate, this is the standard.

Chairman Cox questioned Mr. Starbard by querying, what you are saying by inserting this proposed language is that you’re removing the requirement that appraisers negotiate and requires that they go to published manuals or data bases.

Mr. Starbard agreed and asserted that there are several manuals that can be used by appraisers.

Board Member Johnson reflected that negotiation means to reach an agreement.

Chairman Cox asked Mr. Starbard what is the original language contained in the regulation, 212 CMR 2.04, and Mr. Starbard read the current language of the regulation for that section.

Board Member Johnson declared that we all are using manuals or Crash Guides for parts and everyone agrees on the use of them.

Chairman Cox called on a motion to approve the language as proposed by Mr. Starbard, the motion was made by Board Member Johnson and seconded by Chairman Cox, the motion passed by a vote of: 3-2 with Board Member Coyne and Board Member Pare opposed.

John Murphy, Executive Director of the Massachusetts Insurance Federation, was recognized by Chairman Cox and invited to speak. Mr. Murphy asserted that the Governor has raised an issue about Boards in Massachusetts potentially violating federal Anti-Trust laws based on a recent U.S. Supreme Court holding that boards can be held liable for such violations. Because of this recent U.S. Supreme Court decision, the Governor proposed a bill that would protect boards including the ADALB by placing them under the Division of Professional Licensure and its supervision.

Board Member Starbard responded that he didn't see the U.S. Supreme Court's decision in the dental case [*North Carolina Board of Dental Examiners v. Federal Trade Commission*, 135 U. S. Ct. 1101 (2016)] as grounds for establishing anything that the Board is doing that is violating the law.

Peter D'Agostino, representative of AASP, asked permission to respond and Chairman Cox allowed him to speak. Mr. D'Agostino asserted that he disagreed with Mr. Murphy's position and pointed out that Legal Counsel Powers had outlined at previous Board meetings the oversight role played by the government in this regulatory amendment process. In short, everything the Board does when amending the regulation will be reviewed by the state.

Board Member Johnson reflected that Mr. Murphy and his organization opposed the Governor's proposal to place the ADALB under the Division of Professional Licensure and in fact testified against it when the hearing on the bill was held at the statehouse by asserting that the ADALB belonged within the Division of Insurance because of the Division's expertise in insurance laws on the Division's oversight of the ADALB.

Mr. Murphy concluded his presentation by noting that he had submitted a letter outlining the Massachusetts Insurance Federation's position about the proposed amendments (the letter appears at the end of these minutes).

The Board was provided with a letter from MetLife relating to Complaint 2016-6 acknowledging that MetLife does not permit a person who is not a licensed appraiser by the ADALB to conduct appraisals by themselves in Massachusetts, and "Unlicensed persons may not in any respect hold themselves out as being an "appraiser" in Massachusetts."

Attorney Owen Gallagher requested a continuance because he had just been retained to represent the appraiser in 2016-8, and the Board approved the continuance of that matter to the next Board meeting.

The Board concluded this portion of its agenda and set the next Board meeting for August 3, 2016 at 9:30 AM.

The next item on the agenda was the Executive session for review and discussion of: Complaints 2016-4, 2016-5, 2016-7, 2016-9, 2016-10, and 2016-11 filed against motor vehicle damage appraisers licensed by the Auto Damage Appraiser Licensing Board. Such discussions during the executive session are allowed for under M.G.L. c. 30A, §21 (a)(1) and in accordance with the Office of the Attorney General's Open Meeting Law (OML) decisions such as *Board of Registration in Pharmacy Matter*, OML 2013-58, and *Department of Public Safety Board of Appeals Matter*, OML 2013-104. Section 21 (a) states "A public body may meet in executive session only for the following purposes:

(1) To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. The individual to be discussed in such executive session shall be notified in writing by the public body at least 48 hours prior to the proposed executive session; provided, however, that notification may be waived upon written agreement of the parties. A public body shall hold an open session if the individual involved requests that the session be open. If an executive session is held, such individual shall have the following rights:

- i. to be present at such executive session during deliberations which involve that individual;
- ii. to have counsel or a representative of his own choosing present and attending for the purpose of advising the individual and not for the purpose of active participation in the executive session;
- iii. to speak on his own behalf; and
- iv. to cause an independent record to be created of said executive session by audio-recording or transcription, at the individual's expense.

The rights of an individual set forth in this paragraph are in addition to the rights that he may have from any other source, including, but not limited to, rights under any laws or collective bargaining agreements and the exercise or non-exercise of the individual rights under this section shall not be construed as a waiver of any rights of the individual.

Chairman Cox announced that the Board would enter the executive session by stating the following:

Under Massachusetts law, Chapter 30A, §§ 18-25, the Open Meeting Law, requires specific reasons that allow a public body to enter an Executive Session.

Today we have several matters on our agenda that are allowed by law to be heard in the executive session. Some of the reasons are covered in G.L. c. 30A, § 21(a) are to "discuss the reputation, character, physical condition or mental health, rather than the professional competence, of an individual or to discuss the discipline or dismissal of complaints or charges brought against, a public officer, employee, staff member or

individual.” We have several complaints filed against licensed appraisers, Complaints 2016-4, 2016-5, 2016-7, 2016-9, 2016-10 and 2016-11. All have requested that the matters be heard in the executive session.

Motion to enter the executive session:

Chairman Cox announced that the law requires a roll call vote by the Chairman before the Board can enter an executive session. Chairman Cox called for a motion to enter the executive session, indicating the Board would not return to the public session. Board Member Joseph Coyne made the motion and it was seconded by Board Member Lyle Pare.

Roll Call on vote to enter the executive session:

Chairman Cox called for a roll call vote of each member of the Board present, Yea or Nay: Mr. Coyne, Mr. Starbard, Mr. Johnson, and Mr. Pare answered yea. Chairman Cox abstained and the vote passed by a vote of: 4-0 with Chairman Cox abstaining.

Complaint 2016-4

The licensed appraisers appeared before the Board with Attorney Owen Gallagher. Attorney Gallagher asserted that this complaint had been filed against the appraiser and his supervisor.

Board Member Johnson asked if Attorney Gallagher would be willing to attempt mediation by a member of the Board. Attorney Gallagher and the appraisers assented. Board Member Pare volunteered to contact the auto body appraiser and ascertain if he were willing to mediate the matter and would then contact Attorney Gallagher and Mr. Pare would report the outcome at the next Board meeting on August 3, 2016. Chairman Cox asked for a motion to table Complaint 2016-4 and Board Member Coyne made the motion seconded by Board Member Starbard. The motion passed by a vote of: 4-0 with Chairman Cox abstaining.

Complaint 2016-5

The licensed appraiser was represented by Attorney Owen Gallagher after a discussion with Members of the Board, Board Member Johnson offered to mediate and Attorney Gallagher and the appraisers agreed. Board Member Johnson informed the licensed appraiser and Attorney Gallagher that he would contact the appraiser filing the complaint to determine if he were willing to settle the matter by mediation and report back to Attorney Gallagher. Board Member Johnson would report the outcome at the next Board meeting.

Chairman Cox asked for a motion to table Complaint 2016-5 and Board Member Pare made the motion seconded by Board Member Coyne. The motion passed by a vote of: 4-0 with Chairman Cox abstaining.

Complaint 2016-7

Attorney Owen Gallagher entered the executive session with his client to discuss this matter before the Board. Attorney Gallagher handed out pictures of the damaged motor vehicle to the Board and he insisted that the pictures supported the licensed appraiser determination that the damage was less than \$1,500 and, therefore, did not require a personal inspection of the damage as provided for under the ADALB’s regulation.

He asserted that the complaint was filed by an attorney in a third party lawsuit who hired an independent appraiser to appraise the damage and he assessed the damage as over \$1,500. Liberty Mutual Insurance Company sent out an appraiser to personally inspect the damage and the damage was under \$1,500. Attorney Gallagher declared that the appraisal conducted by Liberty Mutual's appraiser was conducted in good faith and this claim did not involve Liberty Mutual's insured but rather a claim made against the insured in a third party type of case.

Board Member Pare made a motion to dismiss, and the motion was seconded by Board Member Coyne. The motion passed by a vote of: 3-1 with Board Member Starbard opposed and Chairman Cox abstaining.

Complaint 2016-9

Attorney Peter L. Bosse, a highly regarded insurance law advocate, entered the executive session with his client and immediately informed the Board that his client only submitted the supplementary appraisal which are the third and fourth appraisals contained in the documents filed with the complaint.

Board Member Starbard informed the Board that he reviewed the complaint but did not have enough information provided in the materials attached to the complaint to make a determination that the licensed appraiser complained against violated the Board's regulation.

Chairman Cox called for a motion, and a motion was made by Board Member Joseph Coyne to dismiss the complaint and a second was made by Board Member Pare. The motion passed by a vote of: 3-0 with Board Member Johnson not participating and Chairman Cox abstaining.

Complaint 2016-10

Attorney Peter Bosse also represented the appraiser in this matter. Attorney Bosse asserted that the appraiser was never told that there was a problem with the appraisal. The appraiser was at the shop for three hours talking with the appraiser. The appraiser may have made the calculations incorrectly but his conduct was not done in bad faith or with a malicious intent.

Board Member Pare opined that Allstate Insurance Company should stop using the Excel Sheet Data base.

Board Member Coyne observed that the estimate has a negative finish rate and is unfair.

Board Member Starbard declared that this company has a problem and should go back to the auto body shop and pay the proper rate.

Attorney Bosse agreed to return to the client and discuss the issue of the use of different calculation spread sheets.

Board Member Starbard asserted that Allstate Insurance Company cannot use a tool to change a data base, this would violate the Board's regulation. The appraiser can rectify the problem with the auto body shop.

Attorney Bosse and the appraiser agreed to attempt to mediate the dispute and Board Member Starbard offered to participate as a mediator. Board Member Starbard would contact the complainant to ascertain whether he would participate at a mediation of the matter and would report back whether the parties agreed to mediate at the following Board meeting.

Chairman Cox called for a motion, and a motion was made by Board Member Joseph Coyne to table the matter with a second made by Board Member Pare. The motion passed by a vote of: 3-0 with Board Member Johnson not participating and Chairman Cox abstaining.

Board Member Pare exited the meeting.

Complaint 2016-11

Board Member Starbard informed the Board that he was called upon by the complainant to review the damage to the motor vehicle that is the subject of this complaint. Chairman Cox called for a motion to recuse Board Member Starbard from participating on this matter and Board Member Johnson made the motion which was seconded by Board Member Coyne and the motion passed by a vote of: 3-0 with Board Member Starbard not voting and Board Member Pare not participating.

Attorney Samantha R. Freedman, Legislative Attorney, for Geico Insurance Company entered the executive session with the appraiser. She asserted that the allegation of the complaint is that the appraiser knowingly itemized damage that he knew did not exist. This allegation can't be established by the evidence. The appraiser estimated the damage of the motor vehicle which totaled the car.

Board Member Coyne noted that under 211 CMR 133.00 the appraiser is required to use three criteria to ascertain the actual cash value of the motor vehicle. Based upon Mr. Coyne's review of the documents that have been provided with the complaint, the appraiser did not do what was required before he declared the motor vehicle a total loss.

Attorney Freedman responded that the appraiser did not intentionally violate the regulation.

Board Member Coyne observed that there was no betterment taken for any of the damaged parts itemized in the appraisal.

Attorney Freedman replied that the appraiser was trying to use his best judgment to appraise the damage and concluded that the damage was about \$5,000 for salvage value of a 2003 car looked very high. There was a preliminary estimate on January 15, 2016, by Mr. Haddad. Attorney Freedman declared that she was not claiming mistakes were not made by the appraiser, who has only been licensed for 1 ½ years, and if mistakes were made they were not made in bad faith.

A motion was made by Board Member Johnson to issue a notice of pre-hearing conference which was seconded by Board Member Coyne and the motion passed by a vote of: 3-0.

Motion to adjourn the business of the Board:

Chairman Cox called for a motion to adjourn the meeting and Board Member Johnson made a motion to adjourn which was seconded by Board Member Coyne. The motion passed by a vote of: 3-0 with Chairman Cox abstaining.

Whereupon, the Board's business was concluded.

The form of these minutes comports with the requirements of M.G.L. c. 30A, §22(a).



Mass Insurance Federation

Two Center Plaza, 8th Floor • Boston, MA 02108 • 617.557.5538

June 21, 2016

Gilbert W. Cox, Jr., Esq,
Chairman
Auto Damage Appraiser Licensing Board
1000 Washington Street, Suite 810
Boston, MA 02118-6200

Re: Preliminary Comments on Proposed Changes in ADALB Regulations

Dear Chairman Cox:

I am writing to express the vehement opposition the Massachusetts Insurance Federation (the “Federation”) to most of the changes in the regulations of the Auto Damage Appraiser Licensing Board (the “ADALB”), 212 CMR 2.00 *et seq.* that are up for consideration at the meeting of the Board on June 22, 2016. As indicated in our previous communications, Federation members write more than 80% of the auto insurance in the state and therefore have a significant interest in this matter. Please note that these comments only represent our preliminary views because of the short notice of the proposed changes that has been provided, and they do not necessarily contain all our concerns about these proposed changes.

Overall, the proposed changes in the ADALB regulations contained in the agenda for the June 22, 2016 meeting: (1) exceed the Board’s authority in a number of respects; (2) conflict with Division of Insurance (the “Division”) regulations; (3) will increase overall repair costs; (4) will lead to conflict and perhaps litigation in some areas between insurers and their customers and claimants, and between and among insurers, claimants and repair shops; and (5) in at least one instance, will interfere with insurers’ anti-fraud investigations and efforts. Further, in light of the increased costs and greater regulatory burdens that the proposed changes will impose, we consider them to be in direct conflict with the goals, principles, objectives and requirements of Governor Baker’s Executive Order No. 562. We strongly urge the Board not to move forward with this overall package of proposed changes.

Preliminary Observations

Before addressing our substantive concerns about the proposed changes, we have some preliminary comments and observations in two areas:



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Potential Anti-trust Exposure for Board Members. As we are certain the Board is aware, members of state licensing boards such as the ADALB face increased exposure for personal liability under the federal anti-trust laws under a 2015 U.S. Supreme Court decision. In the case of *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015), the Court held that in order for there to be state action antitrust immunity for a state regulatory board on which a controlling number of decision makers are active market participants in the occupation regulated there must be “active supervision” of the board by state officials. It was to address the inadequacies of many Massachusetts licensing board statutes and regulatory oversight of them (including the ADALB) under this decision that Governor Baker filed House Bill No. 4188 to provide the necessary “active state supervision” for the ADALB and other state licensing boards. In light of the *North Carolina State Board of Dental Examiners* decision, we strongly suggest that the Board proceed very cautiously before adopting the kinds of regulatory changes now being considered until House 4188 or some version of it is enacted by the Legislature.

Comments about the Process. We applaud the Board for the process it started at its May 4, 2016 meeting at which it invited all interested parties to submit comments and/or suggested changes in the ADALB regulations. The Federation and the Alliance of Automotive Service Providers (“AASP”) took advantage of this invitation, and each submitted a number of proposed changes in the regulations. Unfortunately, that open process disappeared after that meeting.

At the May 25, 2016 meeting, the Board took up and considered for most of the meeting a proposal to make a number of significant changes in the regulations by Board member Starbard (the “Starbard Proposal”) that had apparently only been circulated to most Board members two days before the meeting. Several Board members clearly had not had the opportunity to review the Starbard Proposal at length before the meeting and were doing so in the course of the discussion on it. More problematic was the fact that the Starbard Proposal was not posted with the meeting notice and was generally not available to the public at large or to most interested parties before the meeting. During the May 25th meeting, the Board did not take up or consider either the proposal submitted by the Federation at the May 4th meeting or the one submitted by the AASP, except to the extent any elements of either proposal were arbitrarily selected for inclusion in the Starbard Proposal. It is notable in this regard that the Starbard Proposal does include most of the substantive suggested changes included in the AASP submission, but not any of the significant proposed changes from the Federation’s proposal. The result is that the Board has given the appearance that it has allowed the open process initiated at the May 4th meeting to be brought to an end.



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Other Changes that Should be Considered

In its May 4, 2016 submission to the Board, the Federation urged the adoption of two changes in the ADALB regulations in particular: (1) an increase in the dollar threshold at which an appraiser must be assigned in 212 CMR 204(1)(a) from its current level of \$1,500.00 to \$5,000.00; and (2) formal re-recognition of the permissibility of the use of video and/or digital images as had been done in Advisory Ruling 2014-01.

The proposed increase in the dollar threshold from \$1,500 to \$2,500 represents a small positive step, but it is offset by the proposed elimination of the clause “less any applicable deductible.” The net, practical effect of the proposed change is a very minor increase in the dollar threshold. We urge the Board to further raise the threshold above the proposed \$2,500 level and restore the clause “less any applicable deductible.”

The Federation also urged in its May 4th submission that the Board formally re-recognize the permissibility of the use of video and/or digital images as had been done in 2014. At its May 25, 2016 the Board summarily and regrettably refused to consider this issue. As you are aware, the Division’s then-General Counsel determined in a letter addressed to you dated January 21, 2013, that a company could use video and/or digital images in ways that are consistent with the requirement for “personal inspection” under the ADALB statute and regulation. While that opinion was written in the context of reviewing complaints about a company’s approved Direct Payment Plan Division, we see no reason that the analysis and conclusions should not also apply to a company that does not have a similar Direct Payment Plan. Accordingly, the Board’s refusal to take up the issue and incorporate the Federation’s suggested changes in the regulations may make no legal difference as to whether a company may proceed to use such technology consistent with the analysis by the Division’s former General Counsel.

Substantive Concerns about Proposed Changes

The Federation has the following preliminary, substantive objections to the proposed changes in the ADALB regulations:

Proposed Changes Beyond Scope of Board’s Authority. A number of the proposed changes in the ADALB regulations are beyond the scope of the Board’s statutory authority, impermissibly affect automobile insurance matters within the exclusive jurisdiction of the Commissioner of Insurance (the “Commissioner”), and/or conflict with the direct payment and referral shop regulations and plans approved by the Commissioner pursuant to 211 CMR 123.00. Under G.L. c. 26, § 8G, the Board has been granted the authority “to license individuals to appraise damage to all motor vehicles



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arising out of motor vehicle damage claims” and to “adopt rules and regulations governing licenses under this section in order to promote the public welfare and safety.” (Emphasis added.) As the statutory language makes clear, the Board’s authority is limited to licensing appraisers, and it has no authority to regulate automobile insurance claims payment. Despite the limitation in the Board’s authority, several of the proposed changes will exceed that authority.

Examples of these problems with the proposed changes include the following:

- 212 CMR 2.04(1)(c) Contact with Claimant and Selection of Repair Shop
Removal of Recognition of Direct Payment Plans as Exception to Prohibition Against Referral to a Specific Shop. The ADALB statute is clear about consumers right to select the shop of their choice to make repairs. In addition, the Direct Payment Plan regulation is also very clear on this point. 211 CMR 123.06(1) provides as follows: “Consumer's Choice of Shop: No direct payment plan approved under 211 CMR 123.000, and no insurer in implementing such plan, shall require a claimant to have repairs made at any specific repair shop.” Consumers are clearly required to be informed of these rights and there is no indication that they are not being so informed. The proposed elimination of the reference to Direct Payment Plans in this regulation will do nothing to further enhance disclosure to consumers and claimants. Instead, it is likely to lead to conflict with the Division of Insurance regarding its regulation of Direct Payment Plans, which have separate statutory and regulatory authorization.
- 212 CMR 2.04(1)(e) Determination of Damage and Cost of Repairs – Tear Downs. This proposed change would allow the claimant to approve teardowns based on the determination by the repair shop’s appraiser that such work is needed. This change will lead to conflicts between insurers and their insureds or claimants where the resulting total cost of repairs exceeds the amount the insurer considers reasonable under the policy.
- 212 CMR 2.04(1)(e) Determination of Damage and Cost of Repairs – Insurers to Pay Retail Price of Parts and Costs of Shipping Returned Parts, Etc. The proposed changes would require insurers to pay the retail cost of all parts indicated on an appraisal, would make insurers responsible for returning parts to the supplier, and would require insurers to pay freight, handling and administrative costs if the repair shop returns parts to the supplier. The proposed changes would also prescribe that costs of shipping and handling of parts are not to be considered overhead costs of the repair shop and are required to be listed on the appraisal “and negotiated.” The Board clearly has no authority to dictate that insurers will pay the retail costs of parts on an appraisal. Likewise, the Board has no authority to direct that insurance carriers bear the cost of what, in any other repair industry, would be considered part of the repairer’s operational overhead. Furthermore, Division of Insurance regulation 211 CMR 133.04(2) addresses



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the issue of responsibility for costs of returning parts purchased in the secondary market which are determined to be unfit, as follows: ‘If both parties agree that a specified part is unfit and must be replaced, the insurer shall be responsible for replacement costs such as freight and handling unless the repair shop is responsible for the part(s) being unfit, or unless the insurer and repairer otherwise agree.’ Because the Division’s regulation already specifically addresses the issue with respect to aftermarket parts, the proposed change will lead to conflict between the regulatory regimes.

Increase in Repair Costs. A number of the proposed changes contained in the June 22nd meeting notice will significantly increase repair costs. Among the specific proposed changes that will lead to an increase in repair costs are: 212 CMR 2.04(1)(e) Determination of Damage and Cost of Repairs – Tear Downs; 212 CMR 2.04(1)(e) Determination of Damage and Cost of Repairs – Insurers to Pay Retail Price of Parts and Costs of Shipping Returned Parts, Etc.; and the proposed changes in timeframes for supplemental appraisals and expedited supplemental appraisals when combined with the punitive effect of the repair shop being authorized to proceed with the supplement in the event the insurer does not respond in the reduced time periods.

Proposed Change Interfering with Fraud Inquiries. 212 CMR 2.04(1)(e) Determination of Damage and Cost of Repairs – Tear Downs. This proposed change would allow the claimant to approve teardowns based on the determination by the repair shop’s appraiser that such work is needed. Besides leading to likely creating conflict and litigation between insurers and claimants, the proposed change will also interfere with insurance company fraud investigations because critical evidence will have been compromised if the repair shops can proceed with tear downs without insurers being able to inspect and appraise the vehicles.

Proposed Changes in Timeframes for Appraisals and Supplements. The Board asked for Federation input on three proposed changes in the timeframes for appraisals and supplements, as follows: 212 CMR 2.04(1)(e) Determination of Damage and Cost of Repairs - reducing the time frame for submitting the completed appraisal from 5 days to 3 days; 212 CMR 2.04(1)(h) Supplemental Appraisals - reducing the time for a personal inspection when a supplement is requested from three days to two days; and 212 CMR 2.04(1)(i) Expedited Supplemental Appraisals - reducing the time period for the insurer's appraiser to submit a decision on the requested supplement from two days to the end of the next business day. The Federation cannot agree to these changes for a number of reasons. First, these proposed changes cannot be viewed or evaluated in isolation, but must be considered in light of the other proposed changes in the regulations that are incorporated in the meeting agenda. In light of the significantly adverse effects on the repair process and repair costs that a number of those proposed changes will have, the



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Federation considers the proposed reduction in timeframes to be counterproductive and unwarranted.

Furthermore, with respect the proposed reduction from 3 days to 2 days for supplemental appraisals in 212 CMR 2.04(1)(h) specifically, this suggested change must be evaluated along with the other proposed changes in that provision, specifically the proposal to give the repair shop the right to use the supplement written by the repair shop's appraiser if the personal inspection does not occur within the reduced time frame. The combination of the reduced time frame for personal inspection where a supplement has been request and the punitive result (*i.e.*, allowing the shop to use its own supplement without the insurer's input or involvement) permitted if the supplemental inspection does not occur within the two-day period is wholly unreasonable. These changes would give repair shops virtually unfettered freedom to use their own supplements, regardless of whether insurers agree to them or not. The changes also would undermine the detailed precautions built into the Expedited Supplemental Appraisal process in 212 CMR 204(1)(i). Perhaps most significantly, these proposed changes will most certainly lead to higher overall repair costs. The proposed reduction in the time frame from three days to one day is wholly unrealistic. An appraiser's schedule is often set up days in advance, and it is simply untenable for a shop to call requesting a supplement and to expect an appraiser to be available within 24 hours.

We also oppose the proposed reduction in the time frame in 212 CMR 2.04(1)(i) Expedited Supplemental Appraisals. The reduction in this time frame is wholly unrealistic. Of even greater concern is the fact that the failure of the insurer to meet this unrealistic time frame can trigger the ability of the shop to go ahead without the insurer's approval with the repair shop's supplement request because of the interrelationship between 212 CMR 204(1)(i) and 212 CMR 2.04(1)(h).

Conclusion

For the reasons discussed above, we strongly urge that the Board not proceed with the proposed changes described in the agenda for the June 22, 2016 meeting.

Sincerely yours,

John P. Murphy
Executive Director



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cc: ADALB Members

Michael Powers, Esq., Counsel to the ADALB

Daniel Judson, Commissioner of Insurance

Rachel Davison, Division of Insurance General Counsel