Comments of Consumer Watchdog, Consumer Federation of America, and Consumer Federation of California

California Department of Insurance Pre-Notice Public Discussions on Mitigation in Rating Plans and Wildfire Risk Models and 10/11/21 Draft Text of Regulation

REG-2020-00015

November 10, 2021

Consumer Watchdog, Consumer Federation of America, and Consumer Federation of California appreciate the opportunity to provide the following comments in response to the revised draft text of regulation and the pre-notice public discussions noticed by the California Department of Insurance (the "Department" or "CDI") on October 11, 2021, regarding mitigation in rating plans and wildfire risk models. We support mandating premium discounts for homeowners who take steps to reduce their wildfire risk and requiring transparency in how companies use models to determine that risk. However, it's not enough to require pricing to reflect mitigation efforts. To effectively protect homeowners who are reducing fire risk, any regulation must also apply to insurers' decisions about whether to sell and renew coverage.

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Key to reducing wildfire risk is taking community-level and individual property-level steps to protect properties, but currently there's no financial incentive to take on these expensive property upgrades. For far too long, many insurers have failed to recognize the significant expenditures that homeowners, business owners, and communities undertake to protect their properties against wildfires, and instead have continued to overcharge, deny, or nonrenew coverage without considering the risk reduction of policyholders' mitigation measures, often using privately generated, unregulated algorithms and models to "score" homeowners without their knowledge. As a result, millions of homeowners are arbitrarily denied coverage, nonrenewed, or are facing unfair premium overcharges, which in turn has destabilized California's homeowners insurance market.

The revised draft regulation ("October 11 draft text") is aimed at requiring insurers to provide premium discounts to property owners who undertake mitigation efforts to lower their risk of wildfire losses, such as by modernizing roofing and building materials, installing sprinklers, and clearing brush around their properties. The October 11 draft text also provides clear standards to enforce Proposition 103's requirements that insurance companies file a complete rate application and publicly disclose all information submitted to the Commissioner, including the models they use to assess wildfire risk and related documentation, which insurers often seek to keep confidential. While these steps further Proposition 103's goals of making insurance fairer and more affordable, some additional amendments are needed to provide enforceable regulatory standards and to prevent insurance companies from unfairly denying or nonrenewing coverage to property owners who have lowered their wildfire risk through mitigation.

As discussed further below, we urge the CDI to strengthen the October 11 draft text in order to meet the CDI's stated goals of (a) further reducing the risk of loss posed by wildfires by incentivizing mitigation efforts, (b) improving the *availability* <u>and</u> affordability of property-casualty insurance for properties and communities that implement such mitigation efforts, (c) reducing unfair discrimination by enhancing consistency and accuracy in insurers' wildfire rating and/or risk scoring practices, and (d) increasing transparency in, and consumer awareness of, insurers' rating and/or scoring of wildfire risk. Our proposed amendments are aimed at furthering those goals by:

- Strengthening the mandatory mitigation factor standards with clearer terminology;
- Requiring that all provisions—including use of mandatory mitigation factors, public filing and disclosure of models, and the notice and appeals process—also apply to wildfire risk models and scores used to determine <u>eligibility and nonrenewal criteria</u>;
- Clarifying in explicit terms that wildfire risk models <u>are not allowed</u> to be used to project losses for determining overall rates under section 2644.1 et seq.;
- Ensuring that any wildfire risk models used by insurers are based on the best available scientific information and conform to actuarial standards of practice and applicable statutes and regulations; and
- Cleaning up and strengthening the wildfire score notice and appeal requirements.

Each of these issues is discussed further below, and the attached table provides our comments and proposed revisions to specific provisions of the proposed regulation. (See Attachment A.) Insurance companies have argued you do not have the authority to adopt several of these consumer protections and have threatened to sue to block any regulations they do not like. Their desire to evade stronger regulation is unsurprising, but their legal arguments are incorrect. The voters accorded the Insurance Commissioner with all the legal authority necessary to require insurance companies to implement these consumer protections to ensure the availability and affordability of homeowners insurance. We urge you to exercise that authority on behalf of the people of California.

1) Mitigation Discounts Are Necessary to Prevent Unfair Rate Discrimination, and the Regulations Should Be Amended to Provide Clear, Enforceable Standards.

Consumer Watchdog, Consumer Federation of America, and Consumer Federation of California strongly support requiring insurance companies to lower the insurance premiums of property owners who undertake mitigation efforts to protect their homes and other structures against wildfire. We also support the proposed regulation's requirements that the reduced risk resulting from community mitigation investments be included in premium calculations. These discounts would incentivize homeowners and communities to take steps to make their homes and communities safer. Numerous studies demonstrate that loss mitigation works to lower the risk of wildfire losses at the property and community level. For example:

- A recent NAIC study found "structural modifications can reduce wildfire risk up to 40%, and structural and vegetation modifications combined can reduce wildfire risk up to 75%."[1]

- Fifty-eight percent of the new homes in Paradise, built to meet California's 2008 fire-resistant building codes, survived the Camp Fire, while just nine percent of older homes did.[2]

- A 2019 CalFire analysis of the relationship between defensible space compliance (as assessed through its defensible space inspection program) and destruction of

[1] Center for Insurance Policy Research, NAIC, et al., *Application of Wildfire Mitigation to Insured Property Exposure*, Nov. 15, 2020, at https://content.naic.org/sites/default/files/cipr_report_wildfire_mitigation.pdf.
[2] Jeffrey Mize, "Grim Lessons Learned and Warnings from California Fire Stories," Government Technology, Sept.18, 2019, at https://www.govtech.com/em/preparedness/grim-lessons-learned-and-warnings-from-california-fire-stories-.html.

structures during the seven largest fires that occurred in California in 2017 and 2018 concluded that the risk of a structure being destroyed by wildfire was five times lower for homes with compliant defensible space.[3]

- The National Institute of Building Sciences recently found that adopting the 2015 edition of the International Code Council's International Wildland Urban Interface Code (IWUIC) in 10,000 census blocks across the country would generate $4 in wildfire mitigation savings for every $1 invested and retrofitting 2.5 million homes to the 2018 IWUIC could provide a nationwide benefit-cost ratio as high as $8 to $1. These are "benefits that represent avoided casualties, property damage, business interruptions, and insurance costs and are enjoyed by all building stakeholders including developers, title-holders, lenders, tenants and communities."[4]

- Voluntary "Firewise" programs in California and throughout the United States have developed community-based programs that have substantially reduced wildfire risk.[5]

Despite these documented savings from mitigation efforts and Proposition 103's clear mandate that rates cannot be excessive or unfairly discriminatory, many insurance companies continue to overcharge homeowners who have lowered their risk of wildfire loss by making costly home hardening upgrades, sometimes costing them thousands of dollars. Moreover, companies are not taking mitigation efforts into account when determining whether to insure or renew a policy based on wildfire risk. As a result, homeowners are not incentivized to spend money on costly mitigation efforts. These insurance companies are treating such conscientious homeowners as if they pose the same risk as property owners who have done nothing to limit the risk. An insurance company's failure to discount premiums for less risky properties penalizes those homeowners and forces them to subsidize homeowners who have not taken similar measures to mitigate potential wildfire losses. The failure to differentiate between policyholders who have hardened their homes against wildfire and those who have not done so results in "unfairly discriminatory" rates under Proposition 103. (Ins. Code §1861.05(a).)

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[3] Legislative Analyst Office, *Reducing the Destructiveness of Wildfires: Promoting Defensible Space in California*, Sept. 2021, at https://lao.ca.gov/reports/2021/4457/defensible-space-093021.pdf.
[4] Ruben Grijalva, "How Better Building Codes Can Mitigate Wildfires' Devastation," *Governing*, Oct. 22, 2020, at https://www.governing.com/community/how-better-building-codes-can-mitigate-wildfires-devastation.html.
[5] See https://www.nfpa.org/Public-Education/Fire-causes-and-risks/Wildfire/Firewise-USA.

To ensure compliance by insurance companies, we propose amending subdivision (d) to tighten the language with clearer terminology. Terms like “take into account” and “reflect” as used in proposed subdivision (d), for example, will encourage insurers to evade the requirement that “risk” and “mitigation efforts” be accurately reflected in the rates and premiums that people pay. Stated differently, the insurance companies will argue that if these factors merely need to be “taken into account,” they are not obligated to charge premiums that fully account for the reduced wildfire risk and will continue to overcharge property owners who have undertaken mitigation efforts at significant expense. Without clear and objective standards, the Commissioner and the courts will be unable to enforce the regulation as intended to require mandatory mitigation discounts when the data shows a corresponding reduction in wildfire risk.

2) Wildfire Models, Rating Plans, and Risk Scores Used for <u>Eligibility and Nonrenewal</u> Must Be Subject to the Same Standards as Those Used for Determining Premiums.

In addition to determining premiums, most insurance companies also use the same or similar wildfire risk models or “scores” for determining eligibility for and nonrenewal of homeowners coverage, even when applicants, policyholders, or their local officials have taken substantial steps to mitigate against wildfire damage at the property or community level.

The current draft regulation does not appear to apply to insurance companies’ eligibility and underwriting actions, even though you have the legal authority to adopt such protections.[6] Unless the CDI clearly makes the regulation’s requirements applicable to all wildfire risk models used to develop or determine eligibility and nonrenewal guidelines, insurers may choose to simply deny or nonrenew coverage in high-risk areas, rather than give the mitigation discounts. These determinations to deny or nonrenew coverage can in turn impact future overall loss projections and rates, as the Department’s General Counsel confirmed in his August 10, 2018 Legal Opinion:

> Because underwriting rules determine the types of risks to be insured and the coverages to be offered, underwriting rules must be analyzed in connection with the rate review process to evaluate the reasonableness of a proposed rate in relation to the specific risks to be insured and coverages to be offered to

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[6] See Attachment B: Consumer Watchdog, Consumer Federation of America, Consumer Federation of California, and United Policyholders, Memorandum re *The Commissioner Has the Legal Authority to Protect California Consumers and the Economy Against Unfair and Discriminatory Practices in the Homeowners Insurance Marketplace*, May 26, 2021.

> determine whether such rates are excessive, inadequate or unfairly discriminatory. (Ins. Code §1861.05(a).)

(Opinion of the General Counsel of the California Department of Insurance, "Confidentiality of Underwriting Rules Filed with Rate Applications Pursuant to California Insurance Code section 1861.05(b)," Aug. 10, 2018, at 2.)

Current regulations delineate the connection between "eligibility guidelines" and "rates." "Eligibility Guidelines" are defined as "specific, objective factors, or categories of specific, objective factors, which are selected and/or defined by an insurer, and which have a substantial relationship to an insured's loss exposure." (10 CCR § 2360.0(b), emphasis added.) When an insurer performs a rate analysis, the overall rate level takes into account the aggregate projected expected losses across its relevant entire book of business. If those projected expected losses included in the rate calculation turn out to be lower than the actual losses that emerge, the insurance company's rate may not be adequate, and the insurance company may seek a rate increase under section 1861.05(a). Similarly, if the projected losses exceed the actual losses, a rate decrease may be warranted.

Recognizing that the use of wildfire risk scores generated from computer models to deny or nonrenew coverage in turn directly impacts losses and rates, and that eligibility guidelines must be objective and have a substantial relationship to loss exposure, the Commissioner must amend the proposed regulation to make clear that models used for those determinations are also subject to the regulation's same requirements. This would include requiring wildfire risk models that are used for denying or nonrenewing coverage to accurately reflect the reduced risk of wildfire losses resulting from mitigation efforts (subd. (d)), to be publicly filed with the Commissioner (subds. (b) and (f)), and for any wildfire risk scores used to determine eligibility or renewal to be subject to the regulation's notice and appeals process provisions (subds. (h)–(*l*)).

3) Wildfire Risk Models and Related Documentation Must Be Filed with Complete Rate Applications and Made Publicly Available Pursuant to Section 1861.07.

The draft regulation makes clear that all computer-based models used to classify the wildfire risk of properties and estimate corresponding losses, and any related documentation, must be submitted to the Commissioner as part of each insurer's complete rate applications and made publicly available as required by Proposition 103 (Ins. Code § 1861.07). Although the statute is clear, often in rate proceedings initiated by Consumer Watchdog and other consumer groups, insurers will try to keep details of the models secret by claiming they are proprietary trade secrets of a third-party vendor. This thwarts the rate review process and leads to substantial expenditure of resources by the Department and intervenors seeking to enforce section 1861.07 with respect to the black box models.

We support the filing and public disclosure requirements of proposed subdivisions (b) and (f), which are necessary to ensure that property owners are not charged unfairly discriminatory premiums and that the Commissioner and consumers can appropriately scrutinize the accuracy and reliability of loss projections generated by any wildfire risk models. These same requirements should apply to wildfire risk models used for eligibility and nonrenewal determinations.

4) The Regulation Should Clarify that Wildfire Risk Models Are Not Allowed for Projecting Losses Under Sections 2644.4 and 2644.5.

It is our understanding that the Department intends the proposed regulation to only apply to wildfire risk models that are used to classify properties for purposes of determining individual premiums, and not to allow insurance companies to use models in the development of overall rates. Section 2644.4 of the Department's regulations already bars the use of models for rate-setting, with two narrow exceptions. To make clear that proposed section 2644.9 does not in any way allow the use of wildfire risk models for projecting losses to determine overall rates, a provision should be added to subdivision (a) stating that this section is not modifying section 2644.4, which only allows catastrophe models to be used for the earthquake line and fire following earthquake exposure in other lines. Insurance companies have made it clear in previous workshops that they want to use models to set overall rates; an unequivocal statement as we propose is necessary to deter any such action.

5) The Regulation Should Provide a Clear Reliability Standard for Wildfire Risk Models.

The regulation's definition of "wildfire risk model" would allow insurance companies to use "any tool, instrumentality, means or product, including but not limited to a map-based tool, a computer-based tool or a simulation," to assess wildfire risks for individual structures, but provides no substantive standard to ensure that any such model is reliable and accurate. We have proposed such a standard in the attached table of proposed revisions to subdivision (c) of the

October 11 draft text, similar to the standard applicable to catastrophe models for projecting overall losses under section 2644.4(e). (Attachment A.)

6) The Regulation's Wildfire Risk Score Notice and Appeal Process Requirements Should Be Strengthened.

Most Californians are unaware that insurance companies "score" their homes for wildfire risk when determining eligibility for a policy, or pricing. There is no uniform system for these risk scores, which are based on models. The Department has yet to issue regulations to regulate the wildfire scoring system in order to protect Californians against arbitrary homeowners scores. However, the proposed regulation requires insurance companies to disclose the scores it assigns to applicants and policyholders and allows them to appeal wildfire risk scores assigned to their properties (subds. (h)–(*l*)). These provisions must be strengthened to clearly mandate a meaningful process for consumers to challenge the assigned scores and be informed of mitigation steps they can take to reduce their risk classification so they can lower their premiums or avoid being denied coverage or nonrenewed.

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Consumer Watchdog, Consumer Federation of America, and Consumer Federation of California ask the CDI to carefully consider and adopt our proposed amendments to the October 11 draft text as set forth in the attached table (Attachment A). With these amendments, we urge the CDI to move forward swiftly with noticing a rulemaking hearing and adopting a final regulation so that homeowners and communities can realize the savings they deserve from their wildfire mitigation efforts.

ATTACHMENT A

Attachment A

CDI 10/11/21 Draft Regulation Text	Comments on CDI 10/11/21 Draft Regulation Text	Proposed Edit to CDI 10/11/21 Draft Regulation Text
Section 2644.9. Consideration of Mitigation Factors; Wildfire Risk Models. (a) An insurer shall not use a rate that is developed with, determined by or relies upon, in whole or in part, a rating plan or wildfire risk model that does not comply with this Section 2644.9. If a rate that is developed with, determined by or relies upon a rating plan or wildfire risk model that complies with this section is approved, in whole or in part, and thereafter such rating plan or wildfire risk model is replaced, or modified in any manner, including but not limited to, the inclusion of new factors, or different criteria or algorithms, the insurer shall, prior to implementing the new or modified rating plan or wildfire risk model, file a new rate application, which shall include the new or modified rating plan or wildfire risk model. No new or modified rating plan or risk model shall be used unless and until the new rate application is approved. Nothing in this section shall be construed to require the use of a wildfire risk model.	• A provision should be added to subdivision (a) to make clear that this regulation does not allow use of catastrophe models for overall rates, which is governed by section 2644.4. • The regulation should also apply to underwriting guidelines, eligibility and non-renewal rules, developed with, determined by, or relying upon wildfire risk models since insurers also use wildfire risk models for eligibility and non-renewal determinations. Such models should be subject to the same requirements to reflect mitigation efforts, file and publicly disclose with a rate application, and to provide notice and an appeal process. This change should be made consistently in other subdivisions below.	**Section 2644.9. Consideration of Mitigation Factors; Wildfire Risk Models.** (a) An insurer shall not use any rating~~e~~ factor, premium discount or surcharge, or eligibility or nonrenwal criteria that is developed with, determined by or relies upon, in whole or in part, a rating plan or wildfire risk model that does not comply with this Section 2644.9. If an application containing any rat~~e~~ing factor, premium discount or surcharge, or eligibility or nonrenewal criteria that is developed with, determined by or relies upon a rating plan or wildfire risk model that complies with this section is approved, in whole or in part, and thereafter such rating plan or wildfire risk model is replaced, or modified in any manner, including but not limited to, the inclusion of new factors, or different criteria or algorithms, the insurer shall, prior to implementing the new or modified rating plan or wildfire risk model, file a new rate application, which shall include the new or modified rating plan or wildfire risk model. No new or modified rating plan or risk model shall be used unless and until the new rate application is approved. Nothing in this section shall be construed to require the use of a wildfire risk model. Nothing in this section is intended to modify the requirements of section 2644.4(e)

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		governing the use of complex catastrophe models for projected losses and defense cost and containment expenses as permitted only for the earthquake line of business and for the fire following earthquake exposure in other lines.
(b) Pursuant to Insurance Code section 1861.05, subdivision (b), any wildfire risk model, as defined in subdivision (c) of this section, that is used, in whole or in part, in an insurer's rating plan shall be provided to the Commissioner as part of an insurer's complete rate application.	• The regulation should also apply to underwriting guidelines, eligibility rules, and non-renewal criteria, developed with, determined by, or relying upon wildfire risk models since insurers also use wildfire risk models and scores to deny and nonrenew coverage. Such models and scores used to determine eligibility and renewal should be subject to the same requirements to reflect lower risk of loss due to mitigation efforts, to file and publicly disclose with a rate application, and to provide notice and an appeal process. This change should be made in subdivision (b) and consistently in other subdivisions below.	(b) Pursuant to Insurance Code section 1861.05, subdivision (b), any wildfire risk model, as defined in subdivision (c) of this section, that is used, in whole or in part, to develop or determine any rate, premium discount or surcharge, or eligibility or nonrenwal criteria ~~in an insurer's rating plan~~ shall be provided to the Commissioner as part of an insurer's complete rate application.
(c) As used in this section, the term "wildfire risk model": (1) Means any tool, instrumentality, means or product, including but not limited to a map-based tool, a computer-based tool or a simulation, that is used by an insurer, in whole or in part, to measure or assess the wildfire risk	• This definition of "models" would allow insurance companies to use any conceivable technique or technology to discriminate among homeowners in setting rates and premiums without clear standards as to their reliability or accuracy. A standard for reliability of the model should be specified similar to the one required for models used to project	(c) ~~As used in~~ For purposes of this section~~, the term "wildfire risk model"~~: (1) "wildfire risk model" ~~M~~means any tool, instrumentality, means or product, including but not limited to a map-based tool, a computer-based tool or a simulation, that is used by an insurer, in whole or in part, to measure or assess the

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associated with a residential or commercial structure for purposes of (A) classifying individual structures according to their wildfire risk, or (B) estimating losses corresponding to such wildfire risk classifications; and (2) Does not include models used for purposes of projecting aggregate losses under Section 2644.4 or 2644.5.	aggregate losses under section 2644.4 so that the model must be based on the best available scientific information to assess wildfire risk and conform to actuarial standards of practice. • Subdivision (c)(2), as drafted, does not make explicitly clear that this regulation is not intended to expand the use of models to projecting aggregate losses under section 2644.4. We have proposed language to be added to subdivision (a) that does make this clear. Subdivision (c)(2) could also be misinterpreted to mean that such models used for projecting aggregate losses under section 2644.4 do not have to be filed with a rate application or publicly disclosed.	wildfire risk associated with a residential or commercial structure for purposes of (A) classifying individual structures according to their wildfire risk, or (B) estimating losses corresponding to such wildfire risk classifications; and (2) ~~Does not include models used for purposes of projecting aggregate losses under Section 2644.4 or 2644.5.~~ The use of such models shall conform to the standards of practice as set forth by the Actuarial Standards Board and the insurer shall have the burden of proving, by a preponderance of the evidence, that the model is based upon the best available scientific information, and that any rating or underwriting criteria derived from the model meets all applicable statutory and regulatory standards.
(d) Use of Mandatory Factors. (1) No insurer shall use a rating plan or wildfire risk model that does not take into account and reflect the following mandatory factors: (A) Community-level mitigation efforts: The rating plan, or any wildfire risk model's output, shall reflect, and the rate offered to the applicant or insured shall be based in part on, the reduced wildfire risk resulting from community-level	(d)(1): • Mitigation efforts should also be required to be incorporated into any wildfire risk models used for underwriting, eligibility, and non-renewal determinations; otherwise insurers could deny or nonrenew coverage for property owners that have taken significant steps to fortify their homes and other structures against wildfire risk to avoid giving them mitigation discounts.	(d) Use of Mandatory Factors. (1) No insurer shall use a rating plan or wildfire risk model ~~that does not take into account and reflect~~ to develop or determine any rating factor, premium discount or surcharge, or eligibility or nonrenwal criteria unless the rating plan, or any wildfire risk model and its output, and the rate or premium offered to the applicant or insured fully accounts for the reduced wildfire risk resulting from the following mandatory factors:

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mitigation efforts. Specifically, the rating plan and any wildfire risk model shall take into account: 1. Whether a particular community has a Fire Safe Council, participates in or is certified by another nonprofit fire safety organization, or employs a defensible space program including, but not limited to, a program developed by the Office of the State Fire Marshal. 2. Whether and the extent to which the community uses firebreaks, fire-watch efforts or other measures that may reduce individual exposure to wildfire loss. 3. Whether and the extent to which any community-wide wildfire mitigation standards issued by the State of California have been implemented by the community in question. 4. Whether and the extent to which building codes implement wildfire mitigation measures in wildfire-prone areas, and the extent to which there is widespread adherence to such building codes in the community in question.	• Terms like "take into account" and "reflect" will allow insurers to evade the requirement that "risk" and "mitigation efforts" be reflected in the rates and premiums that people pay. Put another way, this section imposes no objective requirements that can be enforced by the commissioner or a court. Insurance companies will be able to ignore the rest of this regulation and overcharge consumers. • The industry has repeatedly ignored these factors when nonrenewing. If they merely need to be "taken into account," their use is not required, and cannot be enforced.	(A) Community-level mitigation efforts, including, at a minimum~~:~~ ~~The rating plan, or any wildfire risk model's output, shall reflect, and the rate offered to the applicant or insured shall be based in part on, the reduced wildfire risk resulting from community-level mitigation efforts. Specifically, the rating plan and any wildfire risk model shall take into account~~: 1. Whether a particular community has a Fire Safe Council, participates in or is certified by another nonprofit fire safety organization, or employs a defensible space program including, but not limited to, a program developed by the Office of the State Fire Marshal. 2. Whether and the extent to which the community uses firebreaks, fire-watch efforts or other measures that may reduce individual exposure to wildfire loss. 3. Whether and the extent to which any community-wide wildfire mitigation standards issued by the State of California have been implemented by the community in question.

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(B) Property-level mitigation efforts: The rating plan, or wildfire risk model's output, shall reflect, and the rate offered to the applicant or insured shall be based in part on, the reduced wildfire risk resulting from property-level wildfire risk mitigation efforts undertaken with respect to an individual property being assessed for risk. Individual property risk mitigation efforts include, at a minimum: 1. Defensible space measures, including but not limited to brush clearance; 2. Implementation of building standards recommended by the Office of the State Fire Marshal; and 3. Other building or structure fortification and construction measures intended to suppress fire, including but not limited to retrofits that provide for comprehensive site and structure fire risk reduction to protect structures from fires spreading from adjacent structures or vegetation and to protect vegetation from fires spreading from adjacent structures. (2) A rating plan and, if applicable, a wildfire risk model shall satisfy the requirements of subdivision (d)(1) of this Section 2644.9 if and only if the rating plan	(d)(2): • The addition of this subdivision including the terms "takes into account and reflects" doesn't provide a clear standard and subdivision (d)(1) already requires that	4. Whether and the extent to which building codes implement wildfire mitigation measures in wildfire-prone, and the extent to which there is widespread adherence to such building codes in the community in question. (B) Property-level mitigation efforts~~: The rating plan, or wildfire risk model's output, shall reflect, and the rate offered to the applicant or insured shall be based in part on, the reduced wildfire risk resulting from property-level wildfire risk mitigation efforts~~ undertaken with respect to an individual property being assessed for risk. Individual property risk mitigation efforts include, at a minimum: 1. Defensible space measures, including but not limited to brush clearance; 2. Implementation of building standards recommended by the Office of the State Fire Marshal; and 3. Other building or structure fortification and construction measures intended to suppress fire, including but not limited to retrofits that provide for comprehensive site and structure fire risk reduction to protect

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taken as a whole, including the operation of any wildfire risk models that may be incorporated into the rating plan, takes into account and reflects the factors described in subdivisions (d)(1)(A) and (d)(1)(B) of this section. (3) No later than one hundred eighty days following the date this section is filed with the Secretary of State, each insurer shall file a rate application that incorporates a wildfire risk model that directly incorporates, or rating plan that includes, the factors described in subdivision (d)(1) of this section.	any wildfire risk model or rating plan must include the mandatory factors. (d)(3): • The filing requirement of including mandatory mitigation factors should apply to the rate application without reference to incorporating a model, since as worded it sounds like it is requiring use of a model. Subdivision (d)(1) already requires that any wildfire risk model or rating plan must include the mandatory factors.	structures from fires spreading from adjacent structures or vegetation and to protect vegetation from fires spreading from adjacent structures. (2) A rating plan and, if applicable, a wildfire risk model shall satisfy the requirements of subdivision (d)(1) of this Section 2644.9 if and only if the rating plan, and ~~taken as a whole, including the operation of~~ any wildfire risk model~~s that may be incorporated into the rating plan, takes into account and~~ ~~reflects~~ and its output, and the rate or premium offered to the applicant or insured fully accounts for the reduced wildfire risk resulting from the factors described in subdivisions (d)(1)(A) and (d)(1)(B) of this section. (3) No later than one hundred eighty days following the date this section is filed with the Secretary of State, each residential and commercial property insurer shall file a rate application ~~that incorporates~~ to update any ~~a~~ wildfire risk model ~~that directly incorporates,~~ or rating plan ~~that~~ to include~~s,~~ the factors ~~described~~ set forth in subdivision (d)(1) of this section.
(e) An insurer may use a rating plan or wildfire risk model which incorporates other factors that the insurer demonstrates are substantially related to risk of wildfire loss, and do not result in rates that are excessive, inadequate or unfairly discriminatory. These optional factors may include, but are not limited to:	• This subdivision (e) (and subdivisions (h)-(k) below) adopt and permits, for the first time via a regulation, the current status quo of allowing insurance companies to use a system of wildfire risk "scores" and associated relativities (premium discounts/surcharges) using FireLine or other wildfire risk models. The current	(e) An insurer may use a rating plan or wildfire risk model which incorporates other factors that the insurer demonstrates are substantially related to risk of wildfire loss, and do not result in rates that are excessive, inadequate or unfairly discriminatory. These optional factors may include, but are not limited to:

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(1) Fuel: This factor shall take into account the various types of combustible materials, and the density of those materials, in the vicinity of the structure in question, including the location of trees, grass, brush, and other vegetation relative to the structure. The fuel factor shall take into account the fact that different fuels burn at different rates and intensities, resulting in different levels of wildfire risk. If used, this factor shall reflect the historic and estimated impact on losses related to fuel, as described in this subdivision (e)(1). (2) Slope: This factor shall take into account the position of the structure in question on a slope relative to potential sources of ignition, and the steepness of the slope between those potential sources of ignition and the structure. If used, this factor shall reflect the historic and estimated impact on losses related to slope, as described in this subdivision (e)(2). (3) Access: Access reflects the ease or difficulty with which firefighting personnel and equipment can reach structures at risk of wildfire. The access factor shall include consideration of the presence of dead end roads, road width, shoulders, and availability of multiple access points with respect to the structure in question. If used, this factor shall reflect the historic and estimated impact	regulations are silent on this practice, so there is wide variation in what has been allowed. Some insurers use these factors and some use others to develop wildfire risk "scores" that they use to surcharge, refuse to write, or non-renew homeowners, but as drafted the text would do nothing to improve current insurance company practices or incentivize homeowners to pursue mitigation to lower their wildfire risk scores. • Terms "take into account" "reflect" "accord consideration" and "include consideration" are used inconsistently. Need to use one term/phrase consistently throughout.	(1) Fuel: ~~This factor shall take into account~~ the various types of combustible materials, and the density of those materials, in the vicinity of the structure in question, including the location of trees, grass, brush, and other vegetation relative to the structure. The fuel factor shall <u>reflect</u> ~~take into account~~ the fact that different fuels burn at different rates and intensities, resulting in different levels of wildfire risk. If used, this factor shall reflect the historic and estimated impact on losses related to fuel, as described in this subdivision (e)(1). (2) Slope: ~~This factor shall take into account~~ the position of the structure in question on a slope relative to potential sources of ignition, and the steepness of the slope between those potential sources of ignition and the structure. If used, this factor shall reflect the historic and estimated impact on losses related to slope, as described in this subdivision (e)(2). (3) Access: ~~Access reflects~~ the ease or difficulty with which firefighting personnel and equipment can reach properties at risk of wildfire. The access factor shall include consideration of the presence of dead end roads, road width, shoulders, and availability of multiple access points with respect to the structure in question. If used, this factor shall

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on losses related to access, as described in this subdivision (e)(3). (4) Distance to other high risk areas: When the structure is not in a high risk area, the model may take into account the distance to the nearest high risk area, which can increase or decrease a property's exposure to wildfire. If used, this factor shall reflect the historic and estimated impact on losses related to distance to other high risk areas, as described in this subdivision (e)(4). (5) Aspect: The aspect factor shall reflect the direction the slope upon which the structure in question is located faces. If used, this factor shall reflect the historic and estimated impact on losses related to aspect, as described in this subdivision (e)(5). (6) Structural characteristics: The structural characteristics factor shall reflect the materials used in the construction, and may reflect such items as the design, of the structure in question. If used, this factor shall reflect the historic and estimated impact on losses related to structural characteristics, as described in this subdivision (e)(6). (7) Wind: The wind factor shall take into account the degree to which wind speed and direction in the vicinity of the structure in question may impact a wildfire's progression. If used, the wind factor shall reflect the historic and	(e)(4): • This provision allows insurance companies to continue to decide what a "high risk area" is. This is a critical issue since insurance companies have pegged large swaths of California as "high risk" and insisted they be paid far higher insurance premiums on threat of refusing to sell in those neighborhoods. The Commissioner should define "high risk area" in the regulation in a manner that is consistent with other state officials by specifying a description of relevant risk components that clearly present a high risk as compared to the range of risk of each of those components.	reflect the historic and estimated impact on losses related to access, as described in this subdivision (e)(3). (4) Distance to other high risk areas: ~~When the structure is not in a high risk area, the model may take into account~~ the distance to the nearest high risk area, which can increase or decrease a property's exposure to wildfire. If used, this factor shall reflect the historic and estimated impact on losses related to distance to other high risk areas, as described in this subdivision (e)(4). (5) Aspect: ~~The aspect factor shall reflect~~ the direction the slope upon which the structure in question is located faces. If used, this factor shall reflect the historic and estimated impact on losses related to aspect, as described in this subdivision (e)(5). (6) Structure characteristics: ~~The structural characteristics factor shall reflect~~ the materials used in the construction, and may reflect such items as the design, of the structure in question. If used, this factor shall reflect the historic and estimated impact on losses related to structural characteristics, as described in this subdivision (e)(6). (7) Wind: ~~The wind factor shall take into account~~ the degree to which wind speed and direction in the vicinity of the structure in question may impact a

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estimated impact on losses related to wind, as described in subdivision (e)(7). (8) Other community-level or property-level mitigation efforts not specified in subdivision (d) of this section as recommended by a state or local fire safety agency or organization as reducing wildfire risk.		wildfire's progression. If used, the wind factor shall reflect the historic and estimated impact on losses related to wind, as described in subdivision (e)(7). (8) Other community-level or property-level mitigation efforts not specified in subdivision (d) as recommended by a state or local fire safety agency or organization as reducing wildfire risk.
(f) Any rating plan, or wildfire risk model submitted to the Commissioner in connection with a complete rate application pursuant to subdivision (b), or any additional documentation relating to such rating plan or model as may be requested by the Commissioner during the review of any such application, including any records, data, algorithms, computer programs, or any other information used in connection with the rating plan or wildfire risk model used by the insurer which is provided to the Commissioner, shall be available for public inspection pursuant to Insurance Code sections 1861.05, subdivision (b), and 1861.07, regardless of the source of such information, or whether the insurer or the developer of the rating plan or wildfire risk model claim the rating plan or wildfire risk model is confidential, proprietary, or trade secret. Pursuant to Insurance Code section 1855.5, subdivision (a), a wildfire risk model as	• Section 1861.07 of Proposition 103 requires full public disclosure of information necessary for the Commissioner to determine whether rates are justified or if the insurance company is otherwise in violation of the law. This is a core transparency requirement mandated by the voters. Insurance companies have sought to avoid or narrow this requirement for decades in the courts and unsuccessfully sponsored legislation in 2020 to do so. This provision as revised in the 10/11/21 draft text properly requires wildfire risk models submitted with a complete rate application and any additional information as the Commissioner may request during the review of the application to be made publicly available.	No proposed edits

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defined in subdivision (c) of this section that is made available by an advisory organization to its members for use in California shall be filed with the Commissioner and made available for public inspection.		
(g) The initial rate or rate change application that utilizes a wildfire risk model as authorized in this section and/or rating plan shall incorporate the insurer's own California wildfire loss data to the extent that it is credible to support each segment, rating differential, or surcharge being requested. To the extent the insurer's own California data is not fully credible, the insurer shall credibility-weight its data with an appropriate complement of credibility to support each segment, rating differential, or premium surcharge. If the Commissioner aggregates California premium-and-loss data by wildfire risk to create a wildfire-exposure-risk manual, an insurer may rely on the then-current version of the manual as support for each segment, rating differential, or surcharge being requested, either directly or as a complement of credibility to the insurer's own California wildfire loss data.	• The terms "segment" and "rating differential" are undefined, and could be misinterpreted to mean determination of overall rates applied to a subset of policyholders. • Rather than using optional "if" language, this provision should require the Commissioner to collect and aggregate industry loss data that insurance companies can use if their own data is not fully credible.	(g) ~~The initial~~ Any rate or rule ~~rate change~~ application that utilizes a wildfire risk model ~~and/~~or rating plan as authorized in this section shall ~~incorporate~~ use the insurer's own California wildfire loss data to the extent that it is credible to support each proposed rating factor, premium discount or surcharge, or eligibility or nonrenewal criteria~~segment, rating differential, or surcharge being requested~~. To the extent the insurer's own California data is not fully credible, the insurer shall credibility-weight its data with an appropriate complement of credibility to support each proposed rating factor, premium discount or surcharge, or eligibility or nonrenewal criteria ~~segment, rating differential, or premium surcharge~~. ~~If~~ Not later than **[DATE]**, the Commissioner shall aggregate~~s~~ California premium-and-loss data by wildfire risk to create a wildfire-exposure-risk manual. ~~, a~~ An insurer may rely on the then-current version of the manual as support for each proposed rating factor, premium discount or surcharge, or eligibility or nonrenewal criteria ~~segment, rating differential, or surcharge being requested~~, either directly or as a complement of credibility to the

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		insurer's own California wildfire loss data.
(h) An insurer utilizing a wildfire risk model, or specific rating factor, to segment, create a rate differential, or surcharge the premium based upon the policyholder or applicant's wildfire risk shall, within 180 days after the date this section is filed with the Secretary of State, implement a written procedure to provide, in writing, to each such policyholder or applicant for property insurance no later than fifteen days following the submission to the insurer of the applicant's completed application, at least forty-five days prior to each renewal, and at any other time upon request, the specific wildfire risk model score or other specific factor used by the insurer to segment, create a rate differential, or surcharge the premium based upon the policyholder or applicant's wildfire risk.	• As drafted, this provision requires insurers to "implement a procedure" for providing applicants and policyholders with their wildfire risk score and related information, but does not clearly mandate the procedure. The CDI should mandate a standard procedure. • The regulation should also require insurers to provide notice to applicants and policyholders of wildfire risk scores and related information used for underwriting, eligibility, and nonrenewal.	(h) An insurer utilizing a wildfire risk model, or ~~specific~~rating plan ~~factor~~, to develop or determine any rating factor, premium discount or surcharge, or eligibility or nonrenewal criteria~~segment, create a rate differential, or surcharge the premium~~ based upon the policyholder or applicant's wildfire risk shall, within 180 days after the date this section is filed with the Secretary of State, ~~implement a written procedure to~~ provide, in writing, to each such policyholder or applicant for property insurance no later than fifteen days following the submission to the insurer of the applicant's completed application, at least forty-five days prior to each renewal, and at any other time upon request, the specific wildfire risk model score or other specific numeric or qualitative factor used by the insurer to determine the rating factor, premium discount or surcharge, or eligibility or nonrenewal criteria~~segment, create a rate differential, or surcharge the premium~~ applied to the policyholder or applicant based upon the policyholder or applicant's wildfire risk and all of the information specified in subdivision (k). The insurer shall also provide the policyholder or applicant with the Department of Insurance toll-free consumer hotline and website address of the Department's Consumer Complaint Center.

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		No application or renewal shall be declined or nonrenewed until and unless an insurer complies with this subdivision (h) and subdivision (k).
(i) The procedure described in subdivision (h) of this section shall permit a policyholder under, or applicant for, a policy of property insurance who disagrees with the assignment of a wildfire risk score, or other wildfire risk factor, used by the insurer in its wildfire risk model or rating plan, the right to appeal orally or in writing that assignment directly to the insurer. The insurer shall notify the policy holder or applicant in writing of this right to appeal the wildfire risk model score or other wildfire risk factor, whenever such score or factor is provided to the policyholder or applicant, in the manner set forth in subdivision (h) of this section. If a policyholder or applicant appeals a wildfire risk score or other wildfire risk factor, the insurer shall acknowledge receipt of the appeal in writing within ten calendar days of receipt of the appeal. The insurer shall respond to the appeal in writing with a reconsideration and decision within 30 calendar days after receiving the appeal. In the event that an appeal is denied, the insurer shall forward a copy of the appeal, and the insurer's response, to the Department.	• The "appeal" process places the burden on the consumer to know how rates are determined, how wildfire risk scores work, and what a rating factor is, and to have to time and ability to challenge the insurer, in writing. • Insurance companies have no obligation other than to "reconsider" and respond within thirty days, at which point the consumer is free to contact the CDI's complaint hotline, where they will be told that the commissioner "approved" as "reasonable" the scoring system. • A nearly identical process requiring consumers to bring complaints to their insurance company was enacted in 1947 (see former §§ 1858 – 1859.1) and amended by the Legislature in 1987 to permit complaints directly to the Commissioner. It proved useless for consumers, which is why Prop 103 changed the law to allow consumers to challenge insurance company practices in court – a right the insurance industry is now challenging in court.	(i) ~~The procedure described in subdivision (h) of this section shall permit a~~ A policyholder under, or applicant for, a policy of property insurance who disagrees with the assignment of a wildfire risk score, or other wildfire risk factor~~, used by the insurer in its wildfire risk model or rating plan,~~ shall have the right to appeal orally or in writing that assignment directly to the insurer. The insurer shall notify the applicant or policyholder in writing of this right to appeal the wildfire risk model score or other wildfire risk factor, whenever such score or factor is provided to the policyholder or applicant, in the manner set forth in subdivision (h) of this section. If a policyholder or applicant appeals a wildfire risk score or other wildfire risk factor, the insurer shall acknowledge receipt of the appeal in writing within ten calendar days of receipt of the appeal. The insurer shall respond to the appeal in writing with a reconsideration and decision within 30 calendar days after receiving the appeal. In the event that an appeal is denied, the insurer shall forward a copy of the appeal, and the insurer's response, to the Department.

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(j) If the policyholder or applicant is represented by a broker, or the insurer is represented by an insurance agent with respect to the policyholder's policy or the applicant's application, the policyholder or applicant may appeal orally or in writing to the agent or broker the assignment of wildfire risk model score or other wildfire risk factor, who shall then forward that appeal to the insurer no later than five calendar days after receiving the appeal from the policyholder or applicant. The insurer shall acknowledge receipt of the appeal in writing to the policyholder or applicant and the agent or broker no later than five calendar days after receipt of the appeal from the broker or agent. The insurer shall respond to the appeal to the policyholder or applicant and the agent or broker with a written reconsideration and decision of the appeal within 30 calendar days after receiving the appeal from the broker or agent. In the event that an appeal is denied, the insurer shall forward a copy of the appeal, and the insurer's response, to the Department.	• While the policyholder or applicant many choose to appeal to their agent or broker, the obligation to notify a policyholder or applicant of their wildfire risk score should remain with the insurer, not the agent or broker.	(j) In addition to an insurer's obligation to notify a policyholder or applicant under subdivision (h) and the policyholder or applicant's right to appeal under subdivision (i), ~~I~~if the policyholder or applicant is represented by a broker, or the insurer is represented by an insurance agent with respect to the policyholder's policy or the applicant's application, the policyholder or applicant may appeal orally or in writing to the agent or broker the assignment of wildfire risk model score or other wildfire risk factor, who shall then forward that appeal to the insurer no later than five calendar days after receiving the appeal from the policyholder or applicant. The insurer shall acknowledge receipt of the appeal in writing to the policyholder or applicant and to the agent or broker no later than five calendar days after receipt of the appeal from the broker or agent. The insurer shall respond to the appeal to the policyholder or applicant and the agent or broker with a written reconsideration and decision of the appeal within 30 calendar days after receiving the appeal from the broker or agent. In the event that an appeal is denied, the insurer shall forward a copy of the appeal, and the insurer's response, to the Department.
(k) Whenever a wildfire risk factor score, or other factor used by the insurer to segment, create a risk differential or	• Consumers should have the same rights of notice and right to appeal wildfire risk scores that are used for eligibility and	(k) Whenever a wildfire risk factor score, or other wildfire risk factor used by the insurer to determine any rating factor,

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surcharge the premium for a particular policy holder or applicant, is identified or provided to the policy holder or applicant pursuant to subdivision (h) or (j) of this section, the insurer shall also provide in writing: (1) The range of such scores or factors that could possibly be assigned to any policy holder or applicant; (2) The relative position of the score or factor assigned to the policy holder or applicant in question within that range of possible scores or factors, and the impact of the score or factor on the rate or premium; and (3) A detailed written explanation of why the policy holder or applicant received the assigned score or factor; the explanation shall make specific reference to the features of the property in question that influenced the assignment of the score or factor. The insurer shall provide, in addition, the following information: (A) Which mitigation measure or measures can be taken by the policyholder or applicant to lower the wildfire risk score or factor, and (B) The amount of premium reduction the policyholder or applicant would realize as a result of performing each such measure under the insurer's rating plan that is in effect at the time.	nonrenewal criteria.	premium discount or surcharge, or eligibility or nonrenewal criteria ~~segment, create a risk differential or surcharge, the premium for~~ applied to a particular policy-holder or applicant, is identified or provided to the policy holder or applicant pursuant to subdivision (h) or (j) of this section, the insurer, broker, or agent shall also provide in writing: (1) The range of such scores or factors that could possibly be assigned to any policy holder or applicant; (2) The relative position of the score or factor assigned to the policy-holder or applicant in question within that range of possible scores or factors, and the impact of the score or factor on the policyholder's or applicant's rate or premium; ~~and~~ (3) A detailed written explanation of why the policyholder or applicant received the assigned score or factor; the explanation shall make specific reference to the features of the property in question that influenced the assignment of the score or factor~~.~~; ~~The insurer shall provide, in addition, the following information:~~ ~~(A)~~(4) Which mitigation measure or measures can be taken by the policyholder or applicant to lower the wildfire risk score or factor~~,~~; and ~~(B)~~(5) The amount of premium reduction the policyholder or applicant would realize

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		as a result of performing each such measure under the insurer's rating plan that is in effect at the time.
(*l*) When an insurer responds to the applicant or policyholder in connection with an appeal pursuant to subdivision (j) of this section, it shall also notify the policyholder or applicant in writing that the policyholder or applicant may contact the Department of Insurance for assistance if the policyholder or applicant disagrees with the insurer's written reconsideration and decision. In any event, the insurer shall provide the policyholder or applicant with the Department of Insurance toll-free consumer hotline and web address of the Department's Consumer Complaint Center.	• Contacting the Department of Insurance has also proven to be an ineffective remedy for many consumers over the last fifty years, which is why we recommend that insurers notify insureds of their right to seek independent legal assistance.	(*l*) When an insurer responds to the applicant or policyholder in connection with an appeal pursuant to subdivision (j) of this section, it shall also notify the policyholder or applicant in writing that the policyholder or applicant may contact the Department of Insurance for assistance if the applicant or policyholder disagrees with the insurer's written reconsideration and decision <u>or seek the assistance of a private attorney</u>. ~~In any event, t~~<u>T</u>he insurer shall provide the policyholder or applicant with the Department of Insurance toll-free consumer hotline and web address of the Department's Consumer Complaint Center.
(m) Nothing in this section shall be construed to limit the right of an applicant or insured to complain directly to the Commissioner at any time or to pursue any other remedy or other action allowed under California or federal law.	• As revised, this provision appropriately provides that applicants and insureds are not limited to pursuing the remedies in this section, but may pursue any other remedy or action allowed under California or federal law.	No proposed edit
(n) This section shall not apply to a commercial policy insuring multiple locations, none of whose wildfire risk is considered in rating the policy.		No proposed edit

ATTACHMENT B

The Commissioner Has the Legal Authority to Protect California Consumers and the Economy Against Unfair and Discriminatory Practices in the Homeowners Insurance Marketplace

Many insurance companies are refusing to sell or renew policies in areas that the company considers prone to wildfire. The targeted areas and the conditions under which consumers are denied coverage vary widely from company to company and are based on secret "scores" that consumers do not understand and cannot challenge; complicating matters, each company has its own scoring system that may or may not be the product of historic data or a third-party model. Most insurance companies make eligibility decisions and/or charge premiums that do not reflect the substantial investments homeowners make in reducing the risk of wildfire to their homes and property, treating policyholders who actively mitigate their risks the same as policyholders who do not.

A. The Depublished *AIA* Case Does Not Bar the Commissioner from Exercising His Authority to Address Wildfire Eligibility/Underwriting Problems

The California Insurance Commissioner has an affirmative duty under state law—Insurance Code section 12921—to ensure that residential property insurance is marketed fairly and remains affordable and available to all residents of California. To meet that responsibility, the Commissioner is considering regulations aimed at making homeowners insurance more available and affordable by requiring insurance companies to reduce premiums when homeowners take actions to protect their homes and property against the growing incidence of climate-related wildfires, and by mandating greater transparency in the rate and premium setting process.

The insurance industry says the Commissioner has no legal authority to do so. This memo explains why the industry is wrong, and why those who are urging the Commissioner to embrace the industry's narrow and self-serving view of his authority are undermining public confidence in the office.

In opposing regulations that address homeowners insurance underwriting, the insurers primarily rely on a *depublished* Court of Appeal decision that ordered the Department not to enforce an emergency regulation regarding the use of past loss claims for adverse underwriting and rating determinations by homeowners insurers. In reaching this conclusion, the Court of Appeal stated: "[T]he Insurance Code does not give the Commissioner authority to regulate underwriting for homeowners insurance." (*Am. Ins. Ass'n v. Garamendi* ("*AIA*") (2005) 24 Cal.Rptr.3d 905, 918, ordered not published, Oct. 12, 2005.) However, the California Supreme Court, the final arbiter of California law, ordered that decision to be depublished—removed from the official volumes of decisions. As the insurance companies are well aware, a statement from a depublished appellate case cannot be relied on as precedential legal authority:

> A depublished opinion "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Court, rule 8.1115(a).) It is well-established that, under this rule, nonpublished opinions have no precedential value. (Citations omitted.)
>
> Without precedential value, ***a depublished opinion is no longer part of the law and thus ceases to exist***.

(*Farmers Ins. Exch. v. Super. Ct.* (2013) 218 Cal.App.4th 96, 109, emphasis added.) While the decision may have collateral estoppel effect on the Commissioner and the Department, its binding effect is limited to the proposed regulation at issue in the *AIA* case. Its reasoning and holding does not bar the agency from exercising its authority to promulgate any and all regulations related to homeowners insurance and would not be binding in future litigation over a different regulation. (See *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 852 [for collateral estoppel doctrine to apply, the issues and facts to be determined in the second matter must be *identical* to those determined in the first judgment]; cf. *Los Angeles Police Protective League v. City of Los Angeles* (2002) 102 Cal.App.4th 85, 91 ["Collateral estoppel precludes a party from relitigating in a second proceeding the matters litigated and determined in a prior proceeding. The requirements for invoking collateral estoppel are the following: (1) the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated; (2) the previous proceeding terminated with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding. [Citation.]"].)

More fundamentally, the statement in the depublished *AIA* case is inconsistent with California Supreme Court opinions and in direct conflict with the California Insurance Code, as discussed below.

B. Proposition 103 Gives the Commissioner the Authority to Adopt Regulations to Require Insurance Companies to Provide Mitigation Discounts When Justified

In 1988, California voters fundamentally rewrote the insurance laws of this state. Rejecting an $80 million campaign by the insurance industry that was designed to maintain the deregulated status quo that insurers had enjoyed for 40 years, the voters enacted Proposition 103. Finding that "[t]he existing laws inadequately protect consumers and allow insurance companies to charge excessive, unjustified and *arbitrary* rates," (Historical and Statutory Notes, 42B West's Ann. Ins. Code (2005 ed.) § 1861.01, p. 258, Proposition 103, Section 1 ["Findings"], emphasis added), the voters rejected the limited regulatory authority provided to the Commissioner and the public by the McBride-Grunsky Insurance Regulatory Act of 1947 ("McBride-Grunsky"). A key purpose of Proposition 103 "is to protect consumers from *arbitrary* insurance rates and practices . . . and to ensure that insurance is *fair*, available, and affordable for all Californians.'" (*Id.* at 259, Proposition 103, Section 2 ["Purpose"], emphasis added.) Enforcement of the many reforms enacted by the Proposition 103 voters was entrusted to the elected Insurance Commissioner (Ins. Code § 12900) as supplemented by consumers acting as private attorneys general (Ins. Code § 1861.10(a); see also *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968.)

Section 1861.05(a), enacted by Proposition 103, is the centerpiece of the stringent regulation that the voters imposed upon the insurance industry. Combined with section 1861.01(c), section 1861.05(a) establishes the requirement that the Commissioner review and approve of applications for rate increases or decreases before they take effect. Section 1861.05(a) states:

> No rate shall be approved or remain in effect which is excessive, inadequate, *unfairly discriminatory* or otherwise in violation of this chapter. In considering whether a rate is excessive, inadequate or unfairly discriminatory, no consideration shall be given to the degree of competition and the commissioner shall consider whether the rate mathematically reflects the insurance company's investment income.

(Ins. Code § 1861.05, emphasis added.)

This provision applies to all forms of property-casualty insurance, including homeowners (Ins. Code § 1861.13). Thus, the Code itself regulates homeowners insurance, establishing legal standards that the voters expressly accorded the Commissioner the responsibility to enforce.

It has been noted that California's Insurance Code does not contain a definition of "unfairly discriminatory." (*King v. Meese* (1987) 43 Cal.3d 1217, 1222.) However, the plain language of section 1861.05(a) and the larger context of Proposition 103 within which section 1861.05(a) resides confirm that it forbids an insurer from treating applicants and insureds with similar risk in a dissimilar fashion. In the context of the insurance industry's current disruptive behavior in the homeowners insurance marketplace—arbitrarily surcharging, cancelling, or non-renewing policyholders, neighborhoods, and communities throughout the state, *without considering efforts homeowners have undertaken to mitigate wildfire risk*—such practices are properly characterized as "unfairly discriminatory."

The "excessive, inadequate and unfairly discriminatory" standard was widely adopted decades ago. As our Supreme Court has noted, the language "echoes similar language in the law of most states, as well as former section 1852 which it replaces." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 822; see also *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1257–1258.) However, as the Supreme Court has frequently observed, Proposition 103 altered the scope and application of the phrase as part of the voters' comprehensive revision of the Insurance Code. Requiring a straightforward interpretation of the plain language of Proposition 103, the California Supreme Court has emphasized that "fairness" is one of Proposition 103's explicit concerns. Citing Proposition 103's purpose of "ensur[ing] that insurance is fair," the Court stated: "[A]rticle 10 is not limited in scope to rate regulation. *It also addresses the underlying factors that may impermissibly affect rates charged by insurers and lead to insurance that is unfair, unavailable, and unaffordable*." (*State Farm Mutual Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029 at 1041–1042, emphasis added.)

Other provisions of Proposition 103 confirm that the arbitrary classification of insureds in underwriting and rating without considering the reduction in risk due to property-level and community-level mitigation measures is "unfairly discriminatory." Section 1861.03(a), enacted by Proposition 103, references and incorporates the Unruh Civil Rights Act to establish that the use of the underwriting classifications forbidden under that law, such as race or gender, would constitute "unfair discrimination" for purposes of section 1861.05(a). And section 1861.02(a)(4) instructs that improper classification of insureds—motorists, in that statutory context—constitutes "unfair discrimination."

Reference to other authorities confirms that the plain meaning of the "unfairly discriminatory" prohibition is to target the misclassification of risks. For example, the Actuarial Standards Board, Actuarial Standard of Practice (ASOP) No. 12, Section 3.2.1 states:

> Rates within a risk classification system would be considered equitable if differences in rates reflect material differences in expected cost for risk characteristics. In the context of rates, the word fair is often used in place of the word equitable.

This general formulation can be found in cases discussing the cognate provisions of the pre-Proposition 103 Insurance Code. (See, e.g., *King v. Meese* (1987) 43 Cal.3d 1217, 1241–1242 (Broussard, concurring) ["One can argue that it is unfairly discriminatory to use classifications which result in charging good drivers in some areas much more than bad drivers in others [*sic*] parts of the state . . . ."].)

C. The Supreme Court Has Affirmed the Commissioner's Broad Authority to Adopt Regulations to Enforce Proposition 103 and Other Provisions of the Insurance Code

Insurers have argued that the Commissioner's authority over homeowners insurance does not extend to underwriting practices (either determining premiums or eligibility) because the statute does not refer to homeowner insurance rating factors, unlike the auto rating factor system and good driver discount policy provisions set forth in Section 1861.02.

Their argument has no support in the law.

The California Supreme Court has explicitly and emphatically affirmed on many occasions the Commissioner's broad authority to adopt regulations to implement Proposition 103. In *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, the Court addressed the industry's challenge to regulations promulgated by the Commissioner for the implementation of both the rate rollback provision (section 1861.01) and the prior approval process (section 1861.05), which apply to *all lines of insurance*, including homeowners. Responding to the observation that Proposition 103 did not expressly authorize the Commissioner to promulgate such regulations, the Court stated:

> It scarcely needs mention that the regulation of the insurance industry is squarely within the state's police power. "What [has been] said about the police power–that it 'extends to all the great public needs' and may be utilized in aid of what the legislative judgment deems necessary to the public welfare, [citation]–is peculiarly apt when the business of insurance is involved–a business to which the government has long had a 'special relation.'"

(*Id*. at 240, citation omitted.)

> Such authority as the commissioner may have under the initiative to promulgate regulations of this sort is implied and not express.

(*Id*. at 273.)

In *20th Century*, the Court was simply confirming what it had stated in the context of the facial challenge to Proposition 103 five years previous—that the Commissioner has the authority he needs to implement and enforce the statutes:

> [The Commissioner's] powers are not limited to those expressly conferred by statute; "rather, '[i]t is well settled in this state that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers.'"

(*Calfarm Ins. Co. v. Deukmejian*, *supra*, 48 Cal.3d at 824, citation omitted.)

The Court explained that, under Proposition 103,

> Much is necessarily left to the Insurance Commissioner, who has broad discretion to adopt rules and regulations as necessary to promote the public welfare. [Citations omitted] No provision bars the commissioner from consolidating cases or *issuing regulations of general applicability*. Thus, there is nothing here which prevents the commissioner from taking whatever steps are necessary to reduce the job to manageable size. It "is to be presumed that the [administrative agency] will exercise its power in conformity with the requirements of the Constitution; and if it does act unfairly, the fault lies with the [agency] and not the statute."

(*Ibid*., citations omitted, emphasis added.)

The California Supreme Court has reiterated this point on multiple occasions. For example, in 2004, the Court affirmed the authority of the Commissioner to promulgate regulations needed to ensure that the insurers' premium setting practices "do not unfairly discriminate against poor and ethnic communities." (*State Farm Mutual Auto. Ins. Co. v. Garamendi*, *supra*, 32 Cal.4th at 1039; see also *Ass'n of Cal. Ins. Cos. v. Jones* ("*ACIC*") (2017)

2 Cal.5th 376, 392 [holding that Insurance Commissioner's regulation covering replacement cost estimates for homeowners insurance was authorized by Unfair Insurance Practices Act, Ins. Code § 790 et seq. (UIPA)]; *PacifiCare Life & Health Ins. Co. v. Jones* (2018) 27 Cal.App.5th 391, 417 [finding "the Commissioner's broad mandate to administer the UIPA provides him with authority to interpret [the] undefined terms in the context of the act."]) In upholding the homeowners regulations at issue in *ACIC*, the Court recognized the well-established principle that "[w]here, as here, the Legislature uses open-ended language that implicates policy choices of the sort the agency is empowered to make, a court may find the Legislature delegated the task of interpreting or elaborating on the statutory text to the administrative agency." (*ACIC*, *supra*, 2 Cal.5th at 393.)

D. By Enacting Specific Rules Governing *Auto* Insurance Premiums, the Voters Did Not Deprive the Commissioner of the Power to Regulate *Homeowners* Insurance Premiums

The fact that the voters did not enact a "rating factor" system for homeowners insurance while doing so for auto insurance is irrelevant. The California Court of Appeal rejected this insurance industry argument in a lawsuit the industry brought against Commissioner Poizner:

> An administrative agency is not limited to the exact provisions of a statute in adopting regulations to enforce its mandate. '[T]he absence of any specific [statutory] provisions regarding the regulation of [an issue] does not mean that such a regulation exceeds statutory authority....' [Citations.] The agency is authorized to 'fill up the details' of the statutory scheme. The absence of any specific provisions … does not mean that regulations as to such issues exceed statutory authority, but only that the electorate did not itself choose to determine the issue and instead deferred to and relied upon the expertise of the Commissioner and the Department.

(*Ass'n of Cal. Ins. Cos. v. Poizner* (2009) 180 Cal.App.4th 1029, 1047, citations omitted.)

That is exactly the situation here. The voters chose to mandate a specific approach to the weighting of auto insurance rating factors but left it to the Insurance Commissioner to determine what measures would be necessary to regulate homeowners insurance. Nothing in Proposition 103 can be read to suggest otherwise.

Under California law, a regulation must meet only two requirements to be valid: it must be (1) "consistent and not in conflict with the statute" and (2) "reasonably necessary to effectuate the purpose of the statute." (Gov. Code § 11342.2; *Ass'n of Cal. Ins. Cos. v. Poizner*, *supra*, 180 Cal.App.4th at 1044.)

As numerous courts have found, the Commissioner's authority to regulate underwriting rules and practices is grounded in numerous provisions of the Insurance Code and powers that may fairly be implied by the statutes. Section 1861.05(a) broadly authorizes the Commissioner to adopt regulations to ensure that rates are not "excessive, inadequate, unfairly discriminatory, or otherwise in violation of this Chapter." This provision clearly contemplates that the Commissioner may disapprove a rate application submitted by a company that is violating *any provision* of Chapter 9 of the Insurance Code, and regulations promulgated thereto, including the vestigial McBride-Grunsky provisions, not just the provisions that govern excessive or inadequate rates.

An insurer's underwriting rules are integrally related to rates. When determining *whether* to insure an applicant or the *amount* of premium to charge an individual insured's premium, insurers typically consult internal manuals often referred to as "underwriting rules," "underwriting guidelines," or "eligibility guidelines."[1] "Underwriting" has a dual meaning, which has been explained as follows:

> "Underwriting" is a label commonly applied to the process, fundamental to the concept of insurance, of deciding which risks to insure and which to reject in order to spread losses over risks in an economically feasible way. (*Group Life & Health Ins. Co. v. Royal Drug Co.* (1979) 440 U.S. 205, 211–213, 99 S.Ct. 1067, 1073–1074, 59 L.Ed.2d 261; *Wilson v. Fair Employment & Housing Com.* (1996) 46 Cal.App.4th 1213, 1226, 54 Cal.Rptr.2d 419 (Bamattre Manoukian, J., dissenting); cf. also 1 Couch, Insurance (3d ed.1995) § 1.9, p. 116.)…[A]n underwriting rule is properly characterized as a rule followed or adopted by an insurer or a rating organization which either (1) limits the conditions under which a policy will be issued or (2) impacts the rates that will be charged for that policy.

(*Smith v. State Farm Mut. Auto. Ins. Co.* (2001) 93 Cal.App.4th 700, 726.)

Pursuant to his authority under section 1861.10(b), the Commissioner presently requires these underwriting rules to be submitted with rate and class plan applications to the Department for inspection in order to ensure that an overall rate for homeowners or other line of insurance is

[1] Some insurers have been known to describe these rules as "marketing strategies."

not unfairly discriminatory or otherwise in violation of Proposition 103 or other California laws. (See 10 CCR § 2648.4; 10 CCR § 2632.11(b).)

As the Department's General Counsel confirmed in his August 10, 2018 Legal Opinion:

> Because underwriting rules determine the types of risks to be insured and the coverages to be offered, underwriting rules must be analyzed in connection with the rate review process to evaluate the reasonableness of a proposed rate in relation to the specific risks to be insured and coverages to be offered to determine whether such rates are excessive, inadequate or unfairly discriminatory. (Ins. Code §1861.05(a).)

(Opinion of the General Counsel of the California Department of Insurance, "Confidentiality of Underwriting Rules Filed with Rate Applications Pursuant to California Insurance Code section 1861.05(b)," Aug. 10, 2018, at 2.)

10 CCR section 2360.0 delineates the connection between "eligibility guidelines" and "rates." Subdivision (b) defines "Eligibility Guidelines" as "specific, objective factors, or categories of specific, objective factors, which are selected and/or defined by an insurer, and which have a *substantial relationship to an insured's loss exposure.*" (10 CCR § 2360.0(b), emphasis added.) When an insurer performs a rate analysis, the overall rate level takes into account the aggregate projected expected losses across its relevant entire book of business. If those projected expected losses included in the rate calculation turn out to be lower than the actual losses that emerge, the insurance company's rate may not be adequate, and the insurance company may seek a rate increase under section 1861.05(a). Similarly, if the projected losses exceed the actual losses, a rate decrease may be warranted.

The aggregate projected expected losses included in a rate analysis is conceptionally the sum of the projected expected losses for each of the policyholders in the future rate period. If an insurance company institutes underwriting standards that impact the number, type, distribution, and coverage of policyholders in the future rate period, then that impacts the aggregate expected losses in the rate period. Underwriting standards that exclude or limit higher-risk policyholders or lower the coverage provided can result in a decrease in the projected expected losses. If that situation is not taken into account, it could result in an inflated value for the projected expected losses with the result being an excessive rate level on an overall level, as well as unfairly discriminatory rates between groups of insureds used in the rate classification process. Therefore, in order to make a proper analysis of the overall rate needed for a future rate period, as well as for determining if rates are unfairly discriminatory, information regarding the underwriting standards and criteria, and how they have changed over time, is needed.

Actuarial standards issued by professional associations recognize the relationship between underwriting and rating and the need to take changes in underwriting into account in ratemaking. For example, ASOP No. 12, Section 1.2 states, "Risk classification can affect and be affected by many actuarial activities, such as the setting of rates, contributions, reserves, benefits, dividends, or experience refunds; the analysis or projection of quantitative or qualitative experience or results; ***underwriting actions***; and developing assumptions, for example, for pension valuations or optional forms of benefits." (Emphasis added.)

The Casualty Actuary Society Statement of Principles Regarding Property and Casualty Insurance Ratemaking states, "Operational Changes—Consideration should be given to operational changes such as changes in the ***underwriting process***, claim handling, case reserving and marketing practices that affect the continuity of the experience." And "[b]y interacting with professionals from various fields including ***underwriting***, marketing, law, claims, and finance, the actuary has a key role in the ratemaking process." (Emphasis added.)

The NAIC Property and Casualty Model Rating Law recognizes the relationship between underwriting and rating, and the commissioner's authority to require the submission of underwriting guidelines as part of a rate filing. It defines "supplementary rating information" required to be submitted with a rate filing as including "any manual or plan of rates, classification, rating schedule, minimum premium, policy fee, rating rule, underwriting rule, and any other similar information needed to determine the applicable rate in effect or to be in effect." (NAIC Model Laws, Regs., Guidelines & Other Resources, Prop. & Cas. Model Rating Law (Prior Approval Version, July 2009), at 1780-3.)

Numerous California cases confirm that underwriting rules affect rates and that the Commissioner has authority over those practices.

As noted previously, the California Supreme Court rebuffed an effort by State Farm to constrain the Commissioner's authority through a miserly reading of the statute. The Court noted that Proposition 103 "addresses the *underlying factors that may impermissibly affect rates* charged by insurers and lead to insurance that is unfair, unavailable, and unaffordable." (*State Farm Mut. Auto. Ins. Co. v. Garamendi*, *supra*, 32 Cal.4th at 1041–1042.)

In *Wilson v. Fair Employment and Housing* (1996) 46 Cal.App.4th 1213 ("*Wilson*"), the Court of Appeal addressed a claim of age discrimination in the sale of a liability insurance policy. The Court held that the Commissioner had the authority[2] "to decide issues presented by persons allegedly aggrieved by any 'underwriting rule.'" (*Wilson, supra*, 46 Cal.App.4th at 1221.) Citing section 1861.05, the Court stated that the Commissioner "clearly possesses the expertise to evaluate and resolve issues regarding actuarial risks and allegedly discriminatory underwriting practices." (*Id*. at 1222.)

A previous effort by Farmers to evade judicial accountability for illegal underwriting practices led to a California Supreme Court decision holding that unlawful underwriting practices violate the "unfairly discriminatory" prong of section 1861.05(a). In that case, *Farmers Ins. Exch. v. Super. Ct.* (1992) 2 Cal.4th 377, the Court addressed a suit brought by the Attorney General against Farmers for improper underwriting practices, including "unfairly discriminating in eligibility and rates for insurance for persons who qualify under the statutory criteria for a Good Driver Discount policy." (*Id.* at 382.) The Court noted, "In order to decide whether petitioners have violated section 1861.05, it must be determined whether they employed an 'unfairly discriminatory' rate." (*Id.* at 398.)

Similarly, the Second District Court of Appeal in *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968 discussed the regulatory process in detail, quoting with approval from an amicus brief filed by the Department of Insurance that explained that the Department examines underwriting practices as part of its review to determine whether an insurance company's "rate" is "excessive, inadequate or unfairly discriminatory." (*Id.* at 992.)

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[2] The *Wilson* court mistakenly described this authority as "exclusive." (See *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968.)

E. Vestigial Provisions of Pre-103 Laws, Incorporated in Proposition 103, Confirm the Commissioner's Authority to Regulate Underwriting Practices

Further support for the Commissioner's authority to regulate how insurers apply their underwriting rules lies within the remnants of the McBride-Grunsky Insurance Regulatory Act of 1947 that Proposition 103 retained within its new regulatory structure. The first clause of section 1861.10(a), added by Proposition 103, states that "[a]ny person may initiate or intervene in any proceeding permitted or established pursuant to this chapter." "This Chapter" refers to Chapter 9 (of Part 2 of Division 1 of the Insurance Code), which includes both the remaining provisions of McBride-Grunsky (relevant here are sections 1857, et seq.) and Proposition 103.

Section 1858, et seq., contemplates administrative enforcement actions, initiated either by an aggrieved consumer (section 1858(a)), or by the Commissioner (section 1858.1), extended by and as a complement to the administrative and civil litigation rights established by the voters for "any person" through Section 1861.10(a). Section 1858(a) specifically includes "rating plan, rating system or *underwriting rule*" among the items that a consumer or the Commissioner may challenge. Section 1858.1 authorizes the Commissioner to issue a notice of non-compliance in response to a complaint under section 1858(a) and/or when he determines that an insurer has not complied "with the requirements and standards of this chapter," which, again, includes Proposition 103. Thus, Proposition 103 contemplated that section 1858 proceedings—which are "permitted or established" by Chapter 9—would be available as an option for the enforcement of all of Proposition 103's provisions, which are applicable to all property-casualty insurers, including homeowners.

Taken together, these provisions establish a regulatory scheme in which "unfairly discriminatory" rates resulting from underwriting practices are closely regulated (Ins. Code § 1861.05) and subject to administrative complaints by consumers (Ins. Code § 1858(a)) and/or non-compliance proceedings (Ins. Code § 1858.1). The Commissioner is duty bound to require insurers' full compliance with every provision of the Insurance Code. (Ins. Code § 12926.) Insurers' argument that the Commissioner cannot regulate underwriting practices would subvert that coherent and comprehensive regulatory scheme. It would make little sense if the

Commissioner could bring section 1858 enforcement actions challenging underwriting rules and review them for compliance with Prop 103 in rate proceedings, but could not adopt regulations of general application to regulate those same practices.

Other provisions of McBride-Grunsky retained and strengthened by Proposition 103's strict system of prior approval and other provisions of the Insurance Code support the Commissioner's authority over underwriting rules:

- Insurance Code section 1857 requires the maintenance of records related to "rates, rating plans, rating systems [and] underwriting rules" such that the Commissioner may determine "every rate, rating plan, and rating system made or used" by an insurer complies with the requirements set forth in McBride-Grunsky and Proposition 103. Clearly, section 1857 provides the Commissioner with regulatory authority over underwriting rules. Section 1857(i) gives the Commissioner specific, express authority to promulgate regulations to make specific the requirements of section 1857 as those requirements relate to "underwriting rules."
- Section 1857.9 authorizes the Commissioner to designate the contents of reports insurance companies must submit to the Commissioner. Section 1857.9(h) gives the Commissioner specific, express authority to promulgate regulations to implement that authority. There is no exception carved out for the reporting underwriting related data.

F. The Insurance Code Incorporates Additional Anti-Discrimination Protections that the Commissioner May Enforce Through Regulation

Insurance Code section 679.70 et seq. bars discriminatory practices in the homeowners insurance marketplace. Section 679.71 provides that an insurer may not refuse to accept an application for, issue, or cancel a policy of residential property insurance "under conditions less favorable" to the potential insured than to other comparable potential insureds. Further, the "conditions less favorable" include the imposition of higher rates or premiums.

G. California Courts Grant Broad Deference to the Commissioner's Interpretation of the Statutes He Regulates

The many judicial decisions over the last 30 years confirming the Commissioner's authority under Proposition 103 stand for an important principle: that the courts will defer to the

Commissioner's view of the authority conferred upon him by the voters. With a few errant exceptions, such as the Court of Appeal in the depublished *AIA* case, most California courts do so—most recently the California Supreme Court, which in a March ruling in a case vigorously contested by the insurance industry emphasized the importance of deference to the Insurance Commissioner's longstanding views on the laws he administers. (*Villanueva v. Fidelity Nat. Title Ins. Co.* (2021) 11 Cal.5th 104, 276 Cal.Rptr.3d 209, 212.)

In a previous challenge to the Commissioner's authority to regulate homeowners insurance, the Supreme Court said:

> The Regulation, like any agency action, comes to the court with a presumption of validity. [] The Association contends the Regulation falls outside the lawmaking authority delegated by the Legislature to the Commissioner, and conflicts with the UIPA. … In exercising our ultimate responsibility to construe the statutory scheme, however, we " ' "accord[ ] great weight and respect" ' " to the administrative agency's construction. []
>
> How *much* weight to accord the agency's construction depends on the context, a term encompassing both the nature of the statutory issue and characteristics of the agency. [] Among the factors bearing on the value of the administrative interpretation, two broad categories emerge: factors relating to the agency's technical knowledge and expertise, which tend to suggest the agency has a comparative interpretive advantage over a court; and factors relating to the care with which the interpretation was promulgated, which tend to suggest the agency's interpretation is likely to be correct. [] Bearing these factors in mind, we retain the ultimate responsibility to decide whether the Regulation falls within the Commissioner's " 'broad discretion to adopt rules and regulations as necessary to promote the public welfare.' "

(*ACIC*, *supra*, 2 Cal.5th 376, 390, citations omitted.)

Lower courts are following the Supreme Court's lead. Quoting from *ACIC*, the Court of Appeal in 2019 upheld an historic fine against Mercury Insurance Company for overcharging consumers in violation of Prop 103:

> In reviewing whether an agency has properly interpreted a statute, although we make the final determination of its construction, we give " ' "great weight and respect to the administrative construction." ' " (*Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 397, 212 Cal.Rptr.3d 395, 386 P.3d 1188 (*Assn.*).) In determining how much weight we give to the agency's interpretation we consider "factors relating to the agency's technical knowledge and expertise, which tend to suggest the agency has a comparative interpretive advantage over a court[,] and factors relating to the care with which the interpretation was

> promulgated, which tend to suggest the agency's interpretation is likely to be correct." (*Id.* at p. 390, 212 Cal.Rptr.3d 395, 386 P.3d 1188.) We also give deference to the Commissioner's rulings and bulletins (defining agent fees/broker fees) because, although not controlling on us, they " 'do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 14, 78 Cal.Rptr.2d 1, 960 P.2d 1031 (*Yamaha*).) This is especially true when the agency here has "technical knowledge and expertise" (*Assn.*, at p. 390, 212 Cal.Rptr.3d 395, 386 P.3d 1188) and has "thoroughly considered the issue and reached a reasonable conclusion in harmony with the [statute], long-standing administrative construction, and public policy considerations" (*Ohio Casualty Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64, 79, 39 Cal.Rptr.3d 758).

(*Mercury Ins. Co. v. Lara* (2019) 35 Cal.App.5th 82, 100.)

Just last month, in a tentative decision rejecting yet another industry challenge to the Commissioner's authority over homeowners insurance, the Los Angeles Superior Court relied on the Supreme Court's decisions to give significant deference to the Commissioner's decision to address destabilizing insurer practices in the homeowner insurance marketplace by ordering the FAIR Plan to expand its coverage.

> When an agency is not exercising a discretionary rulemaking power but merely construing a controlling statute, " '[t]he appropriate mode of review ... is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction.'" How much weight to accord an agency's construction is "situational," and greater weight may be appropriate when an agency has a " 'comparative interpretive advantage over the courts,' " as when " 'the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion.' " Moreover, a court may find that "the Legislature has *delegated* the task of interpreting or elaborating on a statute to an administrative agency," for example, when the Legislature "employs open-ended statutory language that an agency is authorized to apply or 'when an issue of interpretation is heavily freighted with policy choices which the agency is empowered to make.' " …In other words, the delegation of legislative authority to an administrative agency sometimes "includes the power to elaborate the meaning of key statutory terms." (Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 800, 85 Cal.Rptr.2d 844, 978 P.2d 2.)

(Tentative Decision on Petition for Writ of Mandate, *Cal. Fair Plan Ass'n v. Lara*, No. 19STCP05434 (Los Angeles Super. Ct., Apr. 27, 2021), at 17, citing *Am. Coatings Ass'n v. South Coast Air Quality Mgmt. Dist.* (2012) 54 Cal.4th 446, 461-462.)

Conclusion

The Insurance Commissioner has the legal authority to require insurance companies to set rates and premiums that reflect a homeowner's risk of loss and to prevent insurance companies from arbitrarily withdrawing from neighborhoods and communities across the state. Contrary to the insurers' arguments, there is no requirement that an enabling statute expressly authorizes the Commissioner to promulgate regulations needed to enforce the laws. So long as the Commissioner has the authority to prevent unfair rate discrimination and to regulate the underlying factors that may lead to insurance that is unfair, unavailable, and unaffordable, he is empowered to issue the regulations needed to do so.