



October 1, 2014

SENT VIA EMAIL TRANSMISSION

The Honorable Dave Jones  
California Department of Insurance  
300 Capitol Mall, 17th Floor  
Sacramento, CA 95814

Re: September 15, 2014 Hearing on Automated Vehicles and Auto Insurance

Dear Commissioner Jones:

Notwithstanding the public relations campaign mounted in Sacramento by Google and other high-tech firms to suggest that a driverless car system is just around the corner, there is no doubt that it will be decades, if ever, before fully autonomous, driverless vehicles replace the personal responsibility model, based on a driver at the wheel, that has governed our transportation system since the advent of the mass production automobile.

There are profound safety, legal and societal issues that must be addressed as vehicle automation increases, including significant insurance matters under the jurisdiction of the California Department of Insurance (CDI). Unfortunately, most of them garnered little attention at the September 15, 2014 “informational hearing” convened by the CDI. Rather, the hearing, as well as the “Background Paper” prepared by the Department, seemed to reflect the assumption that California is on the verge of conversion to fully autonomous vehicles, and focused on whether the consumer protections of the 1988 insurance reform Proposition 103 could or should be applicable.

Consumer Watchdog challenges both the assumption that autonomous vehicles are imminent and the suggestion that as technology progresses, Californians will no longer need the protections against auto insurance rating abuses that they enacted. We urge the Department to focus its limited resources on more immediate matters of concern to California consumers, including, as discussed below, the growing discriminatory use of technology, data collection by insurance firms in marketing and underwriting, and safety.

**Safety.** This should be the paramount concern of the insurance industry (as well as the Department), if for no other reason than flaws and failures in automated vehicle systems will pose a potentially catastrophic threat to public safety and lead to more, and more costly, insurance claims. Yet there was very little discussion at the hearing of the specific safety technologies and infrastructure that will be necessary to support a fully automated transportation system – which would presumably include not just cars but all forms of motorized transportation, and not just private vehicles but public transport as well.

Google boasts that “autonomous” cars are going to be ready to roll in 2015, but they are referring, of course, to a limited number of test vehicles. No manufacturer has announced that it will begin mass production of fully autonomous vehicles next year, or indeed at any particular date in the future. The National Highway Transportation Safety Administration (NHTSA), which is responsible for regulating the deployment of vehicular automation technologies, has only recently articulated a plan to *develop* standards for testing new automation technologies. While many efforts are underway to produce it, the technology that would allow cars to safely operate without a driver has yet to be proven, much less certified for use.

Moreover, the system of car-to-car, car-to-satellite, car-to-road sensor communications infrastructure that would facilitate *tens of millions of vehicles* simultaneously and securely operating without human intervention *does not exist*. We are aware of no consensus on how to construct such a system, nor of any plans to budget for its cost. After all, most municipalities these days are struggling to fill potholes.

In short, California is a long, long way from the so-called “autonomous vehicle.” Instead, most objective observers expect a step-by-step progression toward greater automation of vehicle functions – but with the driver always required ultimately to be in control. As exciting as the prospect of improved automated safety technologies may be, experience suggests that their development and application will take many years and that there may be finite limits to the degree of automation that will be acceptable.

Consider the one transportation sector in which automation is by far the most advanced and the concern for safety is arguably greater than in any other industry: air travel. The crash of Asiana Flight 214 at San Francisco airport last year killed two passengers and injured 181 others; investigators have determined that the pilots did not understand the highly automated flight systems and were unable to recover control of the plane when a crash was imminent.<sup>1</sup> An Air France jetliner disappeared into the Atlantic off the coast of South America in 2009, killing 216 passengers and a crew of twelve, including three pilots; again, the black box revealed that the pilots did not understand the plane’s automated functions, some of which had failed. Airline industry observers are increasingly questioning whether one hundred percent reliance on “fly-by-wire” technology will ever be safe.<sup>2</sup>

Meanwhile, a slew of recalls in the automotive industry itself – 22 million in 2013, and nearly 30 million by General Motors alone in 2014 – refutes any argument that error-free vehicle technology will soon be widely available. These recalls have revealed dangerous and often-fatal flaws in the far less sophisticated automotive technologies that are currently incorporated in many cars. Those technologies appear to have significantly raised the cost of car repairs<sup>3</sup> – and

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<sup>1</sup> M. Wald, “Pilots in Crash Were Confused About Control Systems, Experts Say,” New York Times, December 11, 2013.

<sup>2</sup> See W. Langewiesche, “The Human Factor,” Vanity Fair (October, 2014) (<http://www.vanityfair.com/business/2014/10/air-france-flight-447-crash>).

<sup>3</sup> See, e.g., L. Boyce, “Car Repairs Due To Faulty Electric Gadgets Jump 66% With Bentley, Porsche And Renault The Most Likely To Suffer Gremlins,” ThisIsMoney, March 18, 2014 (<http://www.thisismoney.co.uk/money/cars/article-2582638/Bentley-Porsche-Renault-cars-likely-suffer-electrical-problems.html - ixzz3Eusu872x>); N. Brown, “Conventional Car Repair Costs Increased, While

yet they are simple compared to the technologies that will be needed to even partly automate passenger vehicles. Further, these recalls reflect a dangerously cavalier attitude toward public safety on the part of auto manufacturers, as well as a systemic failure on the part of their regulator, NHTSA.<sup>4</sup> Last year, NHTSA itself concluded, “At this point, it is too soon to reach conclusions about the feasibility of producing a vehicle that can safely operate in a fully automated (or ‘driverless’) mode in all driving environments and traffic scenarios.”<sup>5</sup>

Insurance companies, with a continuous stream of incoming claims, are uniquely situated to detect and report patterns of safety failures. Yet industry-wide, insurers continue to maintain their historic disinterest in safety and loss prevention. Industry representatives at the hearing were emphatic about the need to obtain data, but said nothing about using their existing claims data to monitor vehicle defects today. We urge the Department to propose a regulation now that would require insurance companies to report such vehicle safety information to the Department (in the aggregate, so no personal data is disclosed). This is a safety measure that would have an immediate impact.

It is possible, perhaps even likely, that the technology needed to manufacture vehicles that operate “autonomously” with one hundred percent safety will eventually be perfected. But in the meantime, under any realistic scenario for the near or even distant future, human drivers will be responsible for maintaining control of their vehicle in order to prevent an accident, just as they must be now.

**Personal Responsibility and Insurance Regulation under Proposition 103.** So long as consumers are personally responsible for maintaining and operating their vehicles in order to prevent accidents, the Proposition 103 reforms enacted by California voters will be necessary to protect consumers. Proposition 103 was enacted by the voters twenty-six years ago to both hold rates to fair levels and ensure that each motorist’s premium is based on rating factors within their control – principally their driving safety record, the number of miles they drive annually and years of driving experience, along with optional rating factors adopted by the Commissioner by regulation that must be “substantially related to the risk of loss.” (Ins. Code § 1861.02.)

Under any system in which a motorist is or may be required to control the vehicle, the motorist’s individual responsibility, as reflected by their driving record, will remain of paramount importance, and thus properly the single most important determinant of their premium, as the statute specifies. Similarly, annual mileage and years of driving experience, along with several of the optional rating factors previously adopted by the Commissioner, reflect the motorist’s risk, without regard to whether the policyholder is driving a car equipped with

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Hybrids Saw a Decrease,” CleanTechnica.com, April 13, 2013 (<http://cleantechnica.com/2013/04/15/conventional-car-repair-costs-increased-while-hybrids-saw-a-decrease/>); S. Finlay, “More Technology in Cars Increases Repair Costs,” WardsAuto.com, September 17, 2013 (<http://wardsauto.com/dealerships/more-technology-cars-increases-repair-costs>).

<sup>4</sup> H. Stout and A. Kessler, “Senators Take Auto Agency to Task Over G.M. Recall,” New York Times, September 16, 2014.

<sup>5</sup> NHTSA, Preliminary Statement of Policy Concerning Automated Vehicles,” May 30, 2013, p. 3. (<http://www.nhtsa.gov/About+NHTSA/Press+Releases/U.S.+Department+of+Transportation+Releases+Policy+on+Automated+Vehicle+Development>).

automation technology. Similarly, cars equipped with improved technology will be rated, as they are today under Proposition 103, based on their repair or replacement cost for purposes of comprehensive (weather damage, fire and theft) and collision coverages. As noted above, this is just as likely to increase the cost of insurance coverage as it is to reduce it.

Just as it is today under our product liability laws, responsibility for an accident will be allocated to manufacturers of hardware or software whose defective product was responsible for an accident or injuries.

Insurance companies vehemently opposed Proposition 103 at the ballot box, and many have sought to evade its reforms thereafter. Thus it comes as no surprise that some auto insurance companies and their allies in academia suggest that Proposition 103's consumer protections are incompatible with automated cars. Some insurance companies tantalized by the prospect that the policy debate over vehicle automation can be somehow leveraged to override Proposition 103's regulation of rating factors. Indeed, Mr. Peterson, a frequent critic of Proposition 103 who directs the "Center for Insurance Law and Regulation," an industry-funded unit of the University of Santa Clara Law School, has implied<sup>6</sup> that automation technology might render the current "fault based" personal responsibility system obsolete—harkening to the "no fault" system that the insurance industry has long advocated but that has been discredited throughout the United States and twice rejected by California voters at the ballot box. In the face of the insurance industry's wishful-thinking, we urge you and your staff to remain vigilant in the defense and enforcement of current consumer protections.

**Privacy.** Another assumption seemingly widely shared by industry representatives at the hearing is that motorists will have to sacrifice their right to privacy in order to benefit from advanced automobile technologies – suggesting that when it comes to their cars, motorists will have to tolerate the practices pioneered by Google and other companies that specialize in collecting and monetizing data about consumers' online and offline activities.

Automated vehicles will certainly present a treasure trove of data. By definition, vehicles with automation technologies will be collecting, processing and communicating vast amounts of information. The recipients of the data stream will include, eventually, other vehicles and likely the government agencies that operate the transportation grid. But auto manufacturers, which already insert "black boxes" in cars, insurance companies (some of which already add their own monitoring technology to track drivers' habits), and companies like Google that manufacture the data communications software, are no doubt going to want to collect, utilize and market the data as well. Indeed, they will do so, unless their access is regulated by law.

Auto makers and software designers will want the data for monitoring purposes – but also for marketing, and in order to dispute their liability for accidents. Google and its personal data collecting colleagues will also want to enhance the digital dossiers they already compile for each American by including where motorists are going and what they're doing, so advertisers can target their products, and perhaps subject motorists to the distraction of continuous advertising.

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<sup>6</sup> R. Peterson, "New Technology--Old Law: Autonomous Vehicles And California's Insurance Framework," 52 Santa Clara Law Review 1341, 1342-1343, 1362.

Insurance companies will seek data from cars to determine who was at fault in an accident – but may also seek to use the data they collect to avoid marketing and sales to certain customers. Proposition 103 provides protections against unfair and discriminatory underwriting and marketing practices. The auto rating factor regulations bar insurance companies from collecting data about the location of an insured vehicle, except as part of an emergency road, theft, or map service. (10 CCR § 2632.5(c)(2)(F)(i)5.) But the Department must be particularly vigilant in this area as insurance companies increasingly depart from traditional actuarial standards to rely on Big Data.<sup>7</sup>

Barely a word about data privacy was heard from industry representatives at the hearing. Unlike the distant vision of driverless cars, privacy is an area of immediate consumer concern today. We urge the Department to investigate and restrict the growing use of private data by insurance companies. In every respect, sharing personal data should be a choice made affirmatively and voluntarily by the consumer.

Personal security is closely related to privacy. Tomorrow's motorists will face the threat that hackers will be able to assume control of their vehicles. Privacy and security must be hard-wired into automated technologies from the outset. Unfortunately, as the massive data breaches of recent years have demonstrated, there is little financial incentive to undertake the expensive hardening of technologies absent significant statutory liability for the failure of hardware and software manufacturers to prevent third-party data incursions. If anything, technology is increasingly deployed against the consumer. Lending institutions are adding remote kill switches to cars, enabling banks to disable the vehicle if a loan payment is overdue, as the New York Times reported this month.<sup>8</sup> Some industry advocates of autonomous vehicles have noted the desirability of being able to remotely activate a vehicle and move it out of harm's way: whether lenders and insurance companies will have the right to unilaterally move their valuable property out of a "dangerous neighborhood" or away from a "weather threat" has yet to be decided.

The Department does not have to wait until vehicles become driverless to take action; today's motorists need protection from today's threats. Now is the time to establish the privacy and security parameters that will safeguard consumers' privacy and security going forward.

**Another "Digital Divide"?** Consumer Watchdog strongly supports the development of new automotive technologies, particularly those that will prevent deaths and injuries (and reduce dependence on fossil fuels). Many of the safety technologies under development today, could, if affordable enough to be widely deployed, significantly reduce the frequency and cost of accidents.

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<sup>7</sup> Consumer Federation of America, "Insurance Commissioners Should Bar Industry Practice of Raising Rates on Customers Based on Shopping Habits," March 31, 2014 (<http://consumerfed.org/news/766-insurance-commissioners-should-bar-industry-practice-of-raising-rates-on-customers-based-on-shopping-habits>); B. Sullivan, "Twenty Years of Trying to Understand the Future," Auto Insurance Report, September 23, 2013, p.3.

<sup>8</sup> M. Corkery and J. Silver-Greenberg, "Miss a Payment? Good Luck Moving That Car," New York Times, September 14, 2014.

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However, in contrast to the hype, we see little evidence of public demand for automated vehicles. Even if it becomes technologically feasible and completely safe to manufacture one, we question whether such products will be widely embraced by consumers, at least in the marketplace as we know it today. Today's motorists view their vehicles as a means of personal freedom and personal expression. This is partly a function of the limited availability of mass transit, of course. But cars are an ingrained element of American culture. The notion of the "driver" as a passive passenger piloted around by a computer has entertained moviegoers and science fiction buffs, but no one is clamoring for such a vehicle at the moment.

Like the much-hyped Google Glass, automated cars may end up an expensive toy for those who can afford it, while the rest of us continue to rely on cars that we drive to take us to work, to family and for recreation. The Department must ensure that insurance companies do not unfairly discriminate against those who cannot afford, or choose not to utilize, automated technologies.

**Conclusion.** The September 15 informational hearing was one of only four hearings held by the agency on auto insurance policy matters over the last four years. We urge the Department to direct its limited resources to the enforcement of existing consumer protection laws and to issues such as consumer privacy and vehicle security that are of immediate concern to California consumers.

Sincerely,



Harvey Rosenfield



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John M. Simpson