

Draft: 8/26/21

E-Commerce (EX) Working Group  
Virtual Meeting  
June 30, 2021

The E-Commerce (EX) Working Group of the Innovation and Technology (EX) Task Force met June 30, 2021. The following Working Group members participated: Kathleen A. Birrane and Robert Baron, Chairs (MD); Jully Pae (CA); Heather Droge (KS); Tom Travis (LA); Cynthia Amann (MO); Martin Swanson (NE); Chris Aufenthie (ND); Lori Barron (OH); John Lacey (PA); Elizabeth Kelleher Dwyer (RI); and Bryce Carlen (WA).

1. Heard an Introduction to the Working Group, Establishment, and Background

Commissioner Birrane stated that the first item on the agenda is to provide an introduction to the Working Group, explain what led up to the establishment of the Working Group, and explain some additional background information. She then called on Denise Matthews (NAIC) to provide background information.

Ms. Matthews recalled that the Innovation and Technology (EX) Task Force in 2020 set a request for information to interested parties asking for information related to specific regulatory relief or accommodations offered by the states because of the COVID-19 pandemic that interested parties would recommend being made permanent as they relate to innovation and technology. She stated that this request is consistent with the Task Force's charge of monitoring technology developments to develop regulatory guidance, as appropriate, to ensure that regulation does not impede or create obstacles to necessary and beneficial consumer innovations. The request also asked if there is some type of regulatory relief or accommodation offered, or if there continue to be laws, regulatory guidance, or established practices in place that prohibit or limit insurers or producers from implementing or using newer technologies. The request further asked if there are also data methods or processes that are now necessary to continue to serve customers and maintain operations, especially in this remote work environment and social distancing situation.

Ms. Matthews explained that those responses were compiled into a summary document, which was presented to the Task Force at the 2020 Fall National Meeting and was included in the materials for this meeting. Nine responses were received, and the comments were grouped into four categories, including: 1) electronic commerce; 2) regulatory capabilities; 3) claims facilitation; and 4) surplus lines. Included among these responses was a recommendation and draft bulletin provided by the American Council on Life Insurers (ACLI). After reviewing these responses and finalizing the Working Group's 2021 charges, it was decided that more information was needed for the Working Group to take specific action.

Ms. Matthews said a second request for information was sent to those who responded to the initial request, and a summary of those responses was prepared as well. A consumer representative also provided a comment, and more specific information was requested regarding whether the issues identified are more interpretive or signal a lack of uniform interpretation versus an actual legislative issue where the legislative language needs to be reviewed. The request also went on to request suggestions regarding the prioritization of these issues, and the summary of these responses were also included as materials for this meeting.

Ms. Matthews explained that the second request responses indicated a preference to prioritize e-commerce and digitalization in general, including allowing for e-signatures, e-delivery of documentation, and information regarding e-notarization. The responses also included discussions of changing the paradigm from what is mostly an opt-in scenario for consumers to an opt-out where exchanging information digitally or electronically would become the default, with consumers having the ability to opt-out of that option.

Regarding specific action items, Ms. Matthews said the ACLI and the American Property Casualty Insurance Association (ACPIA) suggested forming a working group to survey states about Uniform Electronic Transactions Act (UETA) exceptions, and to begin work on laws and regulations that might need to be changed to accommodate e-commerce or digitalization, as well as interpretive guidance where legislative changes are not needed.

Ms. Matthews said the second category of survey responses represents regulatory capabilities and covers the list of items related to allowing online education and training for continuing education (CE) for producers, allowing electronic filings for regulatory filings, and eliminating wet signature requirements. There were no specific action suggestions for this category, and the Task Force agreed to defer the education and training item to the Producer Licensing (D) Task Force.

Claims facilitation was a category of responses from the first request for information, and Ms. Matthews explained that Commissioner Godfreed had noted that this was not included in the responses to the second request for information. He also noted that it was not clear if this was just an oversight since not all of those who responded to the first request for information responded to the second, or if it means this category does not seem to command prioritization at this time. Ms. Matthews said there may not be obstacles related to this area at this time, but it might still be something for the Working Group to consider.

Ms. Matthews said the last category of responses was specific to surplus lines, and some of the respondents noted that the Surplus Lines (C) Task Force is currently working to amend the *Nonadmitted Insurance Model Act* (#870), so it may be appropriate to defer this item to the Task Force, which has in fact occurred. She noted that the Task Force requested a modification to any Request for NAIC Model Law Development that previously focused solely on Model #870, and that request was approved to address broader amendments to the model that would include additional references to the other modernization amendments. She said these particular issues summarized in the request for information documents will be handled in that workstream under the Task Force.

Ms. Matthews said other comment letters provided examples of specific states, where either the interpretation or the law prohibits doing business digitally, and three respondents, including the ACLI, the ACPIA, and the National Association of Professional Insurance Agents (PIA) indicated support for drafting a model bulletin to cover some of the non-legislative issues.

Following the review and summary of the request for information responses, Ms. Matthews said the Innovation and Technology (EX) Task Force discussed them during the Spring National Meeting, agreed to the referrals previously discussed, and stated that it would turn its focus to the other identified issues. The Task Force also decided to form this new Working Group to develop a workplan and determine appropriate deliverables to address these issues. Ms. Matthews then asked Superintendent Dwyer for her comments.

Superintendent Dwyer said there is low hanging fruit here that drives industry crazy, costs money that does not need to be spent and is not there for consumer protection. She said if the Working Group can identify those issues and assist in getting the states on the same page, it can reduce the costs for everybody and pave the way for innovation, so that is what the Working Group is looking at doing. She noted that when getting down to a statute, it gets very difficult, as Working Group members all must individually go to their legislators, which does not mean those issues are off the table, it is just that the issues that are not statutory are easier. She said the Working Group needs continuous input from the people who are doing this and trying to comply with the states in order to understand where it should go, so she asked for that input from people who are in the know by letting the Working Group know where it should focus.

Commissioner Birrane agreed with Superintendent Dwyer's comments, and she said the focus of this work is infinite practicality. She also said what we are really dealing with here are the things that drive companies and others who are trying to work in this space crazy because they do not make any sense and they serve no valuable regulatory or consumer protection purpose, but instead slow things down, impede business for everybody, and are often harmful to consumers. She also discussed antiquated paper processes and delivery processes and stated that while individuals were at home, they were often unable to get to their office to get their mail because it had to be sent via mail. Then, when people were able to get things electronically, mail was sent both ways because that is what must be done statutorily, so we must find ways to innovate.

## 2. Discussed its Charges

Commissioner Birrane then introduced the Working Group's charges and asked for input from members of the Working Group and other interested state insurance regulators. No comments were received.

Commissioner Birrane then asked for comments from interested parties. Birny Birnbaum from the Center for Economic Justice (CEJ) said digitalization is not simply converting paper to digital bytes, and visualization can facilitate transactions, consumer understanding, and consumer empowerment while also potentially accomplishing the opposite. Mr. Birnbaum said while the Working Group considers facilitating e-commerce transactions, it should keep in mind a specific consumer protection issue called "dark patterns." He explained that Colorado law defines "dark patterns" as a user interface designed or manipulated with the substantial effect, severity or impairing user autonomy, decision making, or choice. He stated that "dark patterns" tend to discourage deliberate decision making for users. He said while there are things that can be done with digital disclosures in terms of manipulation that simply cannot be done with paper disclosure, the CEJ is not saying that digital transformation should not occur, but the issue of "dark patterns" be kept in mind as the Working Group approaches a task.

### 3. Discussed its Workplan and Efforts Moving Forward

Commissioner Birrane said the Working Group's first step is to understand the legal landscape and identify key legislation, so the Working Group is focused primarily on the UETA. She said Maryland is a good example of a state that has additional legislation in its code specific to property/casualty (P/C) insurance that addresses electronic communications with regard to certain matters. She said some states have adopted the UETA while others have not, and there are various other laws out there as well. Therefore, she said the Working Group believes the most appropriate thing to do is to understand the framework and have a really solid understand. Commissioner Birrane said while the NAIC has done some amount of survey work, it has not done anything to that extent, and she asked what the most efficient way to move this forward is. She also stated that the Working Group has to think about time frames, what it would be able to survey from its individual states, what the states would be able to tell the Working Group, and what the time frames are. She asked if the NAIC should draft a survey for each of the states asking them to identify the relevant laws as a starting point while also keeping in mind interpretation and application. She then asked for comments from members of the Working Group.

Mr. Swanson stated that Nebraska is actually going through this exercise right now internally. He stated that Director Eric Dunning (NE) decided to look back at what Nebraska did during the emergency order when it was declared by its governor, including suspending certain requirements, certain signatures, wet signatures, and things like that. Mr. Swanson said Nebraska has gone through its statutory scheme, noting that it can waive certain things. He noted that some states have passed electronic notary laws, which is less of a burden for some filers. He suggested that one step the Working Group may consider is to ask the states through a survey what they learned through the emergency declarations and what they can apply now in addition to whatever laws they may have.

Ms. Amann said Missouri did something similar government wide and within its department of insurance (DOI), and she said Missouri would be glad to share its results.

Mr. Aufenthie said the NAIC had a list of bulletins that were issued because of the pandemic, and he suggested going back to the states and asking whether they still have those bulletins in effect. He said when the Working Group asks a state if they did or did not keep a bulletin to explain why, as that would give the Working Group good insight into what it is trying to accomplish.

Commissioner Birrane then asked for comments from other interested state insurance regulators. No comments were received.

Commissioner Birrane then asked for comments from interested parties. Patrick C. Reeder (ACLI) stated that ACLI members have spent a lot of time thinking about the UETA, and not just the state implications, as there are also federal implications with the e-sign legislation and how those two pieces of legislation interact. He said one thing the ACLI could do is to put together a briefing explaining what the UETA is, what states have adopted it, what e-sign is, and how it all intersects. He suggested that this may assist the NAIC in framing up some potential survey questions. He also said some ACLI members may be able to share some information and its experiences in this touchless society, noting that the regulatory community made some amazing and very fast accommodations that were critical for its members to stay in this touchless society. He stated that ACLI members want them to be a resource for the Working Group.

Jason Berkowitz (Insured Retirement Institute—IRI) said this is a very important effort for its members. He explained that the IRI operates primarily in the annuity space, and the IRI membership includes all of the major insurance companies that manufacture those products, as well as the distribution arms, including broker dealers and other distributors and asset managers that work behind the scenes on some of these products. He also said the IRI has a very robust internal operations and technology group, and the IRI would be happy to be available to share some of the operations and technology challenges it has been encountering.

Angela Gleason (APCIA) offered that this is very important to its members, and they are willing to assist the Working Group.

Mr. Birnbaum said the CEJ is often part of a coalition with other organizations whose work focuses on consumer's digital rights and privacy and electronic issues. He suggested that the NAIC contact the Electronic Frontier Foundation and the Center for Digital Democracy (CDD), both of which have worked on these issues and can provide insight that the Working Group may not get from industry.

Following the comments, Commissioner Birrane said this gives the Working Group enough to begin putting together a draft of its initial approach in terms of data, and she should circulate to the Working Group the takeaways from the meeting, as well as a timeframe.

Commissioner Birrane then said the Working Group should begin thinking about what its deliverable will look like. She said in this context, the deliverable may not need to be a model, but the Working Group could discuss something along the lines of a bulletin or a white paper.

Superintendent Dwyer suggested a white paper might possibly be a good deliverable, but a bulletin might be even better. She said in her experience, the states do not really realize they are doing it. As an example, she said hard copy jurat pages come into her office, and she sees the hard copies and wonders why they are getting all of them. She said short of seeing these documents, one might even know it is happening. Therefore, a bulletin might be something that informs the entire department or a part of the department that knows they are getting paper documents or requiring something. She also said as the Working Group goes along, there may be other deliverables as well.

Mr. Swanson said one of his immediate thoughts when thinking about these issues is to draft a white paper, but when the Working Group digs into this issue more and get results back from all of the information it gathers, whether it drafts a bulletin or white paper, there should be recommendations to the letter committees saying the Working Group found some places where it can do better through electronic methods.

Commissioner Birrane said it is too early to ask members to subscribe to a drafting group because the Working Group needs to get further along in terms of where it is going to end up. She said the most important thing for the Working Group to focus on is what the query process is, how the Working Group is going to gather the categories of information that have been discussed, and what form and format the Working Group wants it in.

#### 4. Discussed Other Matters

Commissioner Birrane asked whether the Working Group would like to meet virtually in conjunction with the Summer National Meeting. She said holding a meeting might be helpful because by that time, her hope is that the Working Group would have had the opportunity to put some of the query frameworks together, circulate them, and have a brief discussion. There were no objections to holding another meeting, so she said she would work to get that scheduled.

Having no further business, the E-Commerce (EX) Working Group adjourned.

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