American Property Casualty Insurance Association
INSURING AMERICA apci.org

November 11, 2020

Commissioner Andrew Mais, Co-Chair
Commissioner Vicki Schmidt, Co-Chair
Special (EX) Committee on Race & Insurance
Workstream 3 – P &C Issues
National Association of Insurance Commissioners
1100 Walnut Street
Suite 1500
Kansas City, MO 64106

Via Electronic Mail: abrandenberg@naic.org

Re: Initial List of Potential Issues for Workstream Three to Consider

Dear Commissioner Mais and Commissioner Schmidt:

The American Property and Casualty Insurance Association (APCIA) appreciates the opportunity to provide feedback on the Special (EX) Committee on Race and Insurance (Special Committee) Workstream Three's initial list of potential issues for consideration (Issues List). The Issues List is an important start in identifying a roadmap for the Special Committee's end-of-the-year report that will serve as a foundation for the National Association of Insurance Commissioners' (NAIC) work in this area for years to come. As drafted, the Issues List is written in a way that presupposes that each of the bulleted items identifies an area with an existing problem. This may not necessarily be the case. APCIA would instead suggest that the Issues List may well identify areas that are working as the Special Committee would hope. Accordingly, we look forward to robust discussions as further detailed analysis evolves. Some of our suggested edits are also intended to take a positive look at where industry and regulators can proactively engage in educational efforts to empower consumer choice and leverage our risk mitigation and management expertise.

As we have emphasized in the past, meaningful and lasting change will require deliberate, thoughtful, and honest conversations among community leaders, regulators, and companies, with a commitment to long-term solutions. APCIA is committed to thoughtfully and proactively engaging in these conversations and identifying solutions.

One threshold issue that the group may consider, is defining what is meant by "disadvantaged groups." This term is used throughout the document and having a basic understanding of the term may help ensure everyone has the same point of reference. We note "underserved" is a term that has also been used in Special Committee discussions and documents, so creating alignment in terminology would be helpful.

Affordability and Availability

In terms of prioritization, APCIA notes that consideration of past studies and continued development of a historical compilation by CIPR is an important first step in leveraging the work that has already taken place as it relates to affordability and availability. This process will help the Special Committee better assess what, if any, additional work is needed to examine availability and affordability.

Significantly, the Issues List is missing a reference to studying the underlying cost-drivers for insurance. Sustainable long-term solutions demand a holistic approach that leverages community partnerships and the insurance industry's expertise in managing and mitigating risks to reduce the challenges of underserved communities. Further, a beneficial bi-product of risk-based pricing is that insurance can drive behavior adjustments. Provided with education about consequences and likely outcomes, insurance can encourage individuals and businesses to engage in beneficial behaviors.

APCIA respectfully recommends the following **addition** to the "Affordability and Availability" section of the Issues List: **"Assess and study insurance cost drivers and how the insurance industry can use our unique expertise in risk mitigation, risk management, and loss prevention to address affordability issues."**

Access

The issues for consideration under access are comprehensive; however, there is some redundancy in the second bullet point, "determine which insurers are or are not writing minority populations and businesses." The first bullet point, "evaluate access to insurance among disadvantaged groups," is broad enough to capture whether there are communities that are or are not being offered insurance. Significantly, the second bullet point is also a very narrow consideration of a complex issue. A narrow view of a company's book of business focused solely through the lens of race and diversity does not take into account the numerous reasons, related to risk and concentration, that go into developing a book of business. A concentration of risk, for example, could cause solvency concerns. Respectfully, the second bullet point is unnecessary and will not elicit the type of analysis that APCIA believes the Special Committee is looking for. For these reasons, APCIA urges the group to **eliminate bullet point two**.

The "Access" category suggests consideration of marketing issues. Marketing issues may be a low priority issue since direct channels via telephone, electronic commerce, and the internet have created an insurance marketplace available almost everywhere at all times. If marketing remains a key issue of consideration, regulators should establish the expectations or concerns that they are trying to address.

Consistent with our comments related to "Producer Issues" and "Economic Empowerment," education is another key component of increasing access and partnering with community organizations to help inform consumers of the role insurance plays in economic stability.

Use of Data

Bullet point one discusses third-party vendor data and whether additional oversight is needed. This bullet point needs additional clarification if inclusion at all. Are regulators suggesting that they should have more oversight of organizations such as NOAA or satellite image companies? APCIA believes this should be a lower priority issue and only addressed after regulators review whether they even have the authority to engage in additional advisory organization oversight.

The second bullet point includes a sentence suggesting the AI principles need to be translated. One of the many consumer benefits of artificial intelligence (AI) is that it can be used to counter unconscious bias in human decision making. APCIA recommends replacing that last sentence, or adding a **new bullet point**, that states the following: "**Consider the opportunities for leveraging objective criteria and data in AI to remove unconscious bias in human decision making**."

Unfair Discrimination

The first bullet point mentions evaluating socio-economic factors in premium setting, but should this read, "factors in rate making?"

There is a clear delineation between underwriting guidelines and rating factors and the explainability necessitated by each. Typically, detailed data requirements are left to rate filings. Many underwriting guidelines are self-explanatory and do not require a complex filing identifying every reason for every decision. If something is not self-evident, the regulator always has the ability to ask questions and seek additional information. Further, different business models, by definition, will lead to different underwriting guidelines and some insurers are going to write niche specialty markets, so the explanation may be misleading as it relates to discrimination assessments. Relatedly, carriers may not have the appetite to write in markets where they do not have the expertise to do so. Additionally, some states already require the filing of underwriting guidelines. As such, the second bullet point considering expanding the filing of underwriting criteria should be a lower priority issue.

Territorial Rating

APCIA respectfully urges the working group to **amend** the territorial rating bullet point to state: "**Does territorial rating ~~have unfair impact on~~ unfairly discriminate against certain populations?**" When considering territorial rating it should be assessed consistent with the current statutory requirements, which factor in the balanced risk-based considerations. Using terms like "unfair impact" begins to build in uncertainty and potentially unintended consequences.

Disparate Impact

The "Unfair Discrimination" category lists the following: "can disparate impact be evaluated/considered alongside unfair discrimination." There is 55 years of jurisprudence and statutory law to provide guidance on this question. APCIA submitted the attached letter to the National Council of Insurance Legislators (NCOIL), which we believe will be helpful in this context as well.

Producer Issues

One of the priority issues that regulators may be able to advance in a more rapid manner is making exams available in additional languages. Industry can promote diversity by ensuring their partnerships reflect their diversity values. Further, advancing this effort in partnership with industry not only increases the applicant pool of diverse candidates but also help insurers reach underserved communities. APCIA believes this is a common sense and workable effort that could begin today.

As the Special Committee looks at the location of producers by geographic region, APCIA encourages regulators to consider more than just the quantitative numbers. Advancements in technology, particularly in the remote environment necessitated by the Covid-19 pandemic, make the physical location of producers significantly less important. Additionally, not all insurers use producers or independent agents. APCIA recognizes the desire to review this issue, but cautions against viewing the results narrowly and

recommends focusing on the educational opportunities to identify for underserved communities how they can access insurance. The Special Committee should **consider adding the following bullet point**: "**Are there sufficient/adequate industry partnerships with community groups and agencies to help underserved communities to increase access to insurance and awareness of risk mitigation tools/planning**." This is another area where regulators and industry can partner.

Economic Empowerment

Consistent with the educational opportunities in the "Producer Issues" and "Access" section, APCIA believes there is a glaring gap in this Issues List. Providing expanded resources that better explain insurance products and the benefits insurance offers allows consumers to take ownership of their insurance choices and promotes overall economic stability. These educational opportunities also create a partnership between the consumer and the insurer leading to overall consumer satisfaction. APCIA recommends the Issues List **add a category for "Economic Empowerment" that includes the following bullet point: "Research and assess the current educational tools to empower consumer insurance choices."**

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Thank you for the opportunity to comment. The Issues List identifies many complex issues that will take considerable time, deliberation and collaboration to fashion holistic insurance and non-insurance solutions for effective, lasting, and beneficial change for everyone. APCIA looks forward to working with the Special Committee to achieve these goals.

Respectfully,

Angela Gleason
Senior Director, Cybersecurity & Counsel

American Property Casualty Insurance Association
INSURING AMERICA apci.org

VIA ELECTRONIC MAIL

November 5, 2020

The Honorable Neil Breslin
c/o Mr. William Melofchik
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NCOIL National Office
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RE: The Role of "Proxy Theory" in the Unlawful Discrimination Landscape

Senator Breslin:

We write on behalf of the American Property Casualty Insurance Association (APCIA) as a follow-up to our October 22nd letter addressed to Mr. Tom Considine on the topic proxy discrimination. We understand the National Council of Insurance Legislators (NCOIL) is engaged in an effort to define that term and we hope what follows provides additional information that will be useful in the NCOIL effort.

Unlawful discrimination

"Unlawful discrimination" based on protected class characteristics has been the law for the 55 years since Congress enacted the Civil Rights Act in 1964. The definition of unlawful discrimination and the standard by which a defendant's policies or practices are judged have been worked out over that time largely in the employment context.[1] Regardless of context, the definition and the standard for imposing protected class liability on defendants have remained consistent. As for the business of insurance, statutory and regulatory rating standards universally prohibit rates that are "excessive, inadequate or unfairly discriminatory" and define "unfairly discriminatory" as treating policyholders or consumers with similar risk profiles differently. Most state insurance laws also make clear that failure to account for differences in expected losses constitutes prohibited "unfair discrimination."[2]

Protected class liability theories

There are various types of protected class liability theories. The two theories most applicable in the insurer/policyholder or consumer context are as follows:

1) *Intentional discrimination* in which "intent" is the sole focus and
2) *Disparate impact discrimination* where "intent" *plays no role at all*.

Disparate treatment discrimination, including proxy theory

Title VII of the Civil Rights Act of 1964 prohibits intentional discrimination and disparate treatment is a form of intentional discrimination.[3] In the insurer/policyholder or consumer context, disparate treatment occurs when a defendant insurer treats a policyholder or consumer less favorably than others *because of* the individual's membership in a protected class.[4] "Proxy theory" was adopted by the courts as an element of disparate treatment discrimination to recognize a policy should not be allowed to use a technically neutral classification as a proxy to evade Title VII's prohibition against intentional discrimination.[5] Because "intent" is a primary focus in disparate treatment cases, when relying on proxy theory, plaintiff must demonstrate that defendant *was motivated by a discriminatory purpose* in choosing the proxy about which plaintiff complains.[6]

As a form of intentional discrimination, disparate treatment challenges (including those that rely on proxy theory), ask one question – Has plaintiff put on sufficient evidence to establish that defendant either intended to discriminate against a protected class or was motivated by a discriminatory purpose in choosing the challenged proxy.[7] If the answer is "yes" then the challenged policy must be eliminated. Because defendant's bad act (either defendant's discriminatory intent or discriminatory motive in choosing the proxy) is an essential element of every disparate treatment challenge, plaintiff is entitled to equitable relief, attorneys fees, and monetary damages in the form of compensatory and punitive damages depending upon the underlying facts of the case.[8]

Disparate impact discrimination

Disparate impact discrimination did not exist until 1971 when the United States Supreme Court determined it constituted unlawful discrimination after which disparate impact discrimination became a basis for unlawful discrimination claims most frequently in the employment context.[9] Disparate impact discrimination was not codified into federal law until the Civil Rights Act of 1991 was enacted.[10] Disparate impact claims challenge practices that are not intended to discriminate, but in fact have a disproportionately adverse effect on a protected class and which are otherwise unjustified by a legitimate rationale.[11]

As a result, courts in disparate impact challenges ask a series of three questions consistent with the history of disparate impact jurisprudence in claims based on Title VII. They begin by asking: Does the challenged policy or practice have an adverse effect on a protected class? If the answer is "yes", then courts ask a second question: "Is there a valid interest served by the challenged policy?" And, if the answer is "yes", then the final question asked is whether there's an alternative policy or practice that serves the same valid interest with less disparate impact and less cost. If no such alternative policy exists, then the challenged policy stands, and the claim fails.[12] Because intent plays no role in disparate impact claims and proxy theory is associated exclusively with disparate treatment discrimination, courts may award equitable relief and attorneys' fees to successful plaintiffs but not compensatory or punitive damages.[13]

Disparate Treatment Discrimination	**Disparate Impact Discrimination**
• Intent is the focus[14]	• Intent plays no role
• Proxy theory applies	• Proxy theory never applies
• A finding of intent (or discriminatory purpose in choosing the proxy) ends the inquiry	• A finding of adverse effect on a protected class does not end the inquiry • The inquiry continues with the question whether there is a valid interest served by the challenged policy or practice • The inquiry continues further with the question whether there is an equally effective alternative with less adverse effect on plaintiff and cost to defendant
• If the requisite intent or discriminatory purpose is found, depending upon the facts, plaintiff is entitled to – Equitable relief, – Attorneys' fees, – Compensatory damages and – Punitive damages	• If no valid interest exists or there is an equally effective alternative, the challenged policy or practice is enjoined and only attorneys' fees may be awarded • If a valid interest exits and there is no equally effective alternative, the challenged policy or practice stands, and the claim fails
• The goal is to eliminate the challenged policy or practice	• The goal is to mitigate the adverse effect of the challenged policy or practice where a valid interest is served

Summary

To define and apply "proxy theory" in the disparate impact context is to impose a legal concept on a body of law where it has been not applied to date either by the courts or legislatures.[15] Doing so would unsettle the 55 years of jurisprudence and statutory law governing discrimination cases brought predominately under the Civil Rights Act, the Age Discrimination in Employment Act, the Rehabilitation Act, the Americans with Disabilities Act and the Fair Housing Act. Further, applying proxy theory to disparate impact claims is wholly inconsistent with the balancing of valid interests with equally effective alternatives and the mitigation goal of disparate impact jurisprudence generally.[16] Equally important is that application of proxy theory to disparate impact claims in the context of property and casualty insurance would conflict with current state law and regulations governing pricing and underwriting and would likely require an overhaul of both. This is true particularly as it relates to complying with state mandates prohibiting rates that are "excessive, inadequate or unfairly discriminatory".[17]

Proposed definition of the term "proxy" in the context of unlawful discrimination

A proxy is a policy, practice, factor, or equivalent that is technically neutral, but is otherwise used to evade statutory prohibitions against intentional discrimination regarding individuals or prohibitions against disparate treatment regarding a category of individuals because of their membership in a protected class. Unlawful discrimination by way of proxy (as defined herein) arises when a challenged policy, practice, factor or equivalent is directed at a category of individuals predominately composed of individuals in a protected class for the purpose of excluding or otherwise depriving them of a benefit available to others or where such is a motivating factor in choosing the proxy.

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[1] The law in the area of unlawful discrimination has developed primarily in the employment context, including litigation arising out of the Civil Rights Act (1964), the Age Discrimination in Employment Act (1967), the Rehabilitation Act (1973), and the Americans with Disabilities Act (1990). Albeit fewer, unlawful discrimination has been the subject of claims brought under the Fair Housing Act (1968). *See*, *Community Services, Inc. v. Wind Gap Municipal Authority*, 421 F3d 170 (3d Cir. 2005) (a disparate treatment case) and more recently in *Texas Department of Housing and Community Affairs, et al. v. The Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (a disparate impact case).

[2] For example, Utah law provides that "[a] rate is unfairly discriminatory if price differentials fail to equitably reflect the differences in expected losses and expenses after allowing for practical limitations." UTAH CODE ANN. § 31A-19a-201(4)(a); *see also, e.g.*, ARIZ. REV. STAT. ANN. § 20-383(D); COLO. REV. STAT. § 10-4-403(1)(c); MICH. COMP. LAWS ANN. § 500.2403(1)(d); MINN. STAT. ANN. § 70A.04(4); MO. ANN. STAT. § 379.318(4); NEV. REV. STAT. ANN. § 686B.050(4); N.H. REV. STAT. ANN. § 412:15(I)(d); N.M. STAT. ANN. § 59A-17-6(E); N.C. GEN. STAT. ANN. § 58-40- 20(e); TENN. CODE ANN. § 56-5-103(a) and (d), among other states.

[3] *McWright v. Alexander*, 982 F.2d 222, 227-228 (7th Cir. 1992).

[4] *Ricci et al. v. DeStefano, et al*, 557 U.S. 557, 577 (2009) quoting *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986 (1988). See also, *Community Services, Inc. v. Wind Gap Municipal Authority*, 421 F.3d 170, 178 (3d Cir. 2005).

[5] *McWright*, 982 F.2d at 228. Affirmed in *Community Services*, 421 F.3d 170 (3d Cir. 2005) and *Bowers v. National Collegiate Athletic Association*, 563 F. Supp. 2d 508 (D.N.J. 2008).

[6] "A disparate-treatment plaintiff must establish that the defendant had a discriminatory intent or motive [for taking adverse action against plaintiff]". *Watson*, 487 U.S. at 986.

[7] *Community Services*, 421 F.3d at 177.

[8] U.S. Equal Employment Opportunity Commission, "Remedies for Employment Discrimination" at https://www.eeoc.gov/remedies-employment-discrimination as of November 3, 2020.

[9] *Griggs v. Duke Power Co*., 401 U.S. 424 (1971).

[10] *Ricci*, 557 U.S. at 578.

[11] *Inclusive Communities*, 576 U.S. at 524-525. See also *Rizzo*, 557 U.S. at 577. When reviewing disparate impact claims under the Fair Housing Act (FAA) and Fair Housing Act as Amended (FHAA), courts have borrowed from the framework of Title VII of the Civil Rights Act of 1964. See, e.g., *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565 (2d Cir.2003) and *Lapid–Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442 (3d Cir.2002).

[12] See the burden-shifting framework in *Inclusive Communities*, 576 U.S. 519 (2015).

[13] *Supra*, endnote 8.

[14] In addition to intentional discrimination (including disparate treatment) and disparate impact discrimination, other discrimination claims in the Title VII context include pattern or practice, cat's paw, failure to accommodate, harassment, retaliation, and negligence. Except for disparate impact and negligence claims, all other listed claims require "intent" or discrimination as "a motivating factor".

[15] This fact is acknowledged by advocates who argue in support of "making law" by applying proxy theory in the disparate impact context and, thereby, extending it beyond its long-standing and exclusive role in disparate treatment discrimination, a form of intentional discrimination . See, Anya E.R. Prince and Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. R. 1257, 1269-1270 (2020).

[16] *Supra*, endnotes 1 and 12.

[17] State insurance law affirmatively permits (and most require) risk-based pricing and underwriting in order to comply with the "excessive, inadequate, or unfairly discriminatory" rating standard. See examples, *supra*, endnote 2. As explained in the Casualty Actuarial Society Statement of Ratemaking Principles, "[a] rate is reasonable and not excessive, inadequate, or unfairly discriminatory if it is an actuarially sound estimate of the expected value of all future costs associated with an individual risk transfer." For purposes of state insurance law, rates are "unfairly discriminatory" if "premium differences . . . do not correspond to expected losses and average expenses or if there are expected average cost differences that are not reflected in the premium differences." *See*, Casualty Actuarial Society, *Statement of Principles Regarding Property and Casualty Insurance Ratemaking*, Principle 4 (May 1988), https://www.casact.org/professionalism/standards/princip/sppcrate.pdf.

Respectfully submitted,

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION

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