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Artificial Intelligence (EX) Working Group

Conference Call

June 3, 2020

The Artificial Intelligence (EX) Working Group of the Innovation and Technology (EX) Task Force met via conference call June 3, 2020. The following Working Group members participated: Jon Godfread, Chair, Chris Aufenthie, Chrystal Bartuska , John Arnold, Mike Andring and Renee Fabry (ND); Mark Afable, Vice Chair, Timothy Cornelius, Jody Ullman, Mark Prodoehl, Nathan Houdek, Barbara Belling and Mary Kay Rodriguez (WI); Tom Zuppan and Vanessa Darrah (AZ); Lucy Jabourian (CA); Peg Brown (CO); George Bradner (CT); Rebecca Smid and Nicole Altieri Crockett (FL); Doug Ommen and Travis Grassel (IA); Judy Mottar (IL); Jerry Ehlers (IN); Ron Coleman (MD); Phil Vigliaturo (MN); Cynthia Amann (MO); Kathy Shortt (NC); Christian Citarella and Emily Doherty (NH); Barbara D. Richardson (NV); Tynesia Dorsey (OH); Michael McKenney and Shannen Logue (PA); Rachel Jrade-Rice (TN); and Christina Rouleau (VT). Also participating were: Brenda Johnson and Tate Flott (KS); Troy Smith (MT); and Randall Currier (NJ).

1. Adopted its May 5 Minutes

The Working Group met May 5 and took the following action: 1) adopted its Feb. 19 minutes; 2) continued reviewing the draft Principles on Artificial Intelligence(Principles); and 3) reviewed a proposed timeline for adoption of the AI Principles*.*

Commissioner Richardson made a motion, seconded by Ms. Brown, to adopt the Working Group’s May 5 minutes (Attachment X). The motion passed unanimously.

1. Reviewed Draft Principles Version 4

Commissioner Godfread said the goal is to review the changes to version 4 of the Principlesdraft agreed to during the Working Group’s last meeting and go over a few other items. He said the document posted to the website represents the changes accepted by the Working Group based on the comments provided, but as noted in that document, there are a couple of outstanding questions and few things to discuss.

Commissioner Godfread said changes noted represent some clean-up done by North Dakota and Wisconsin staff working with Denise Matthews (NAIC). He said changes represent suggestions for cleaner or more correct language as suggested by the NAIC editors but do not represent substantive changes. He said they are intended to improve and make the language more consistent. He asked if anyone had any concerns about those changes. Hearing none, he said that paragraph (b) under the Accountable section seemed to more appropriately belong in the Transparent section, so that change was made as well. He asked if there are any corrections or concerns about version 4 of the draft artificial intelligence (AI) Principles as posted. Ms. Jabourian said “according to applicable law” under the Accountable section (a) is not needed, and “federal and state” is not needed under the Compliant section (a). She also said moving the paragraph to the Transparent section is appropriate.

Birny Birnbaum (Center for Economic Justice—CEJ) said one of the core consumer protection issues with AI is the increased potential for unfair discrimination caused by the use of data that reflect historical discrimination against protected classes or discrimination by proxy. He said simply avoiding intentional discrimination is not enough and suggested the principles are missing this key issue of responsibility for AI developers and users to identify and minimize proxy discrimination against protected classes. He suggested adding “to avoid proxy discrimination against protected classes” to the end of the first sentence in the Fair and Ethical section part (b) to address that concern.

Ms. Jabourian asked if it would be appropriate to add “including unfair discrimination” to the end of the last sentence in the Fair and Ethical section (b) to address Mr. Birnbaum’s concern. Mr. Birnbaum said the term “proxy discrimination” needs to be added because most in the industry think “unfair discrimination” means “intentional,” and in this case, if there is an intent to address unintentional discrimination, it needs to be specifically stated.

Commissioner Ommen said this is a complex and difficult issue, and he is concerned about using language that is not well understood or well developed in a guidance document. Mr. Birnbaum said Commissioner Ommen seems to be saying there is a legal system in place that does not identify proxy discrimination, and it is an undefined term. He said when he talks to regulators, they say they have the authority to take action if they find a factor that has a discriminatory effect. Therefore, it seems to be well understood. Commissioner Ommen said he does not think it is a good idea to use terms that are not uniformly understood in a guidance document.

Mr. Currier said he agrees with Ms. Jabourian’s suggestion as a way to address Mr. Birnbaum’s concern. Peter Kochenburger (University of Connecticut School of Law) said he prefers to have the “proxy discrimination” language in as well and that there are other terms in the document that could have different meanings in different states. Mr. Kochenburger suggested some language used in a Vatican document related to AI. Commissioner Godfread said he would be interested in seeing that language.

Scott Kosnoff (Faegre Drinker Biddle & Reath LLP—Faegre Drinker) said he agrees that these words sometimes are not well understood. He said he used to think unfair discrimination was broad enough to include proxies but now is not sure it is. He said the Big Data (D) Working Group asked NAIC staff to come up with a definition for unfair discrimination and what is prohibited in terms of rate making. He said the definition was focused on whether there are equitable differences in expected losses and expenses. He noted that in addition to unfair discrimination prohibitions, a number of states prohibit certain classifications from being considered. He said proxies for prohibited factors does not fit in with what is often thought to be unfair discrimination. Mr. Birnbaum asked if there is agreement that discriminating based on race is not permitted, then why would an algorithm that has the same effect be permitted. He said the only way to prevent that in an era of big data is to take a proactive approach to determine what can be done to recognize and minimize this type of unfair discrimination by proxy. He said there are two types of unfair discrimination, one based on prohibited factors and the other based on lack of a sound actuarial correlation, and the two types bleed into each other. He said that is why it is so important to recognize it in this AI document. Mr. Birnbaum said the words “and to avoid proxy discrimination against protected classes” should be added at the end of the first sentence in the Fair and Ethical section, item (b). He said the key message is to “proactively engage,” and it should be considered as an AI model is being developed.

Angela Gleason (American Property and Casualty Insurance Association—APCIA) said that consistent with what Commissioner Ommen said, this is guidance and for NAIC committees as the look at AI applications. She said that is where these conversations should take place, and they are not appropriate for this document. Commissioner Godfread said the argument to include something of this nature is persuasive. He said as has been pointed out, if proxy discrimination were to be discovered, we would expect to stamp it out and do our best to remove it. He added that this is a big concern with AI and something that has come up on every conference call. He said he would be inclined to include that language as a signal to the other groups that the bias brought about by these types of proxies will need to be addressed. Commissioner Afable agreed and said he would like to have an opportunity to look at this to see if there is a better definition of proxy discrimination. He said it does not necessarily lead to disparate impact but is a practice upon which regulators have consistently taken action. Mr. Bradner agreed there needs to be a statement in the Principles that guides regulators and Working Groups as they develop guidance and standards related to AI. Ms. Jabourian and Ms. Logue agreed. Commissioner Godfread said that if there are no objections from the Working Group, Mr. Birnbaum’s language would be taken under advisement and added for now as this issue continues to be considered. He said as these are aspirational principles, one of the larger aspirations would be missing if something is not included on this. Commissioner Ommen said he fully supports the exploration of this matter but because discrimination is systemic historically, even if there is correlation to risk, it is very difficult to determine what to do about it in insurance. William D. Latza (Lemonade) said he agrees with Mr. Birnbaum and that AI should not be a mechanism to perpetuate these problems. He said actuaries have a good idea of what unfair discrimination is, and there are laws that are fairly clear. He said AI can be a way to resolve this type of discrimination as well, and he would be willing to help to eliminate the noise related to this type of discrimination and work to try to develop language to resolve this very important issue.

Richard Bates (State Farm) agreed with Commissioner Ommen and said this needs to be studied more. He said the industry needs to be part of this discussion. He said there is a lot of litigation risk and not a lot of clarity. Mr. Bates said there may be a more appropriate time to discuss it, given current events, when cooler heads can prevail, and it can be done from a broader perspective. Commissioner Godfread said right now, it is just a placeholder for future discussion.

Commissioner Godfread asked the Working Group if there was any additional discussion on removing the “applicable law” and “state and federal” language previously brought up by Ms. Jabourian. He said hearing no objections, those words would be removed from the next version of the Principles.

Mr. Kochenburger said in the second line of the Transparent section related to consumers having a way to inquire about, review or seek resource for AI-driven insurance decisions, the word should be “and” as opposed to “or.” Commissioner Godfread said he agrees, and that change will be made.

Commissioner Godfread commented on the Accountable and the Compliant sections related to potential inadvertent or unforeseen impacts of AI, particularly when it is without negligence. He said he would not like to see use of AI stifled, especially in areas where it can benefit consumers and insurers, by potentially being punitive regarding unintended consequences. He said to that end, he suggests adding language to basically thread the needle between heavy-handed regulation and doing what is right for the consumer. He said he would like to add “However, absent negligence in the creation, implementation or monitoring of an AI system, theremedy of an impact that violates existing regulation should be correction of said impact” in the Accountable section right after the sentence ending in “human intervention.” He said he would also like to recommend, in the Compliant section, that the last sentence be: “Any decision by an AI actor that utilizes an AI system in its creation shall not be held in violation of existing regulation, if that same decision would have been rendered without the use of an AI system.” Commissioner Afable agreed with the suggested changes. Commissioner Godfread said that if an AI actor is a habitual violator of what is agreed to be inappropriate, other actions would be taken related, but if everything has been done appropriately and yet something adverse comes of it, the thought would be to take corrective action as the remedy. Commissioner Godfread said hearing no comments objecting to this language, it will be included in the next draft.

1. Discussed Comments Related to Introductory Language

Commissioner Godfread said for the discussion on the introductory language, he would draw everyone’s attention to a new document provided with the notice of the meeting and posted on the NAIC website regarding suggested language from the North Dakota Department of Insurance (DOI). He said the APCIA also offered language in its previously posted comments. He asked Mr. Aufenthie to present the North Dakota proposed language. Mr. Aufenthie said the language is intended to clarify that the Principles are intended to be guideposts and high-level guidance and do not necessarily carry the weight of law. Ms. Gleason said the APCIA offered some suggestions previously but would be happy to work with Mr. Aufenthie to make this language a little more robust as this is an important point. She said the APCIA will identify the objectives, to ensure consistency across the NAIC committees and to be clear these are only guidance and do not carry the weight of law. Mr. Latza asked where this document will live and who is actually giving these guidelines. Commissioner Godfread said it is the intention to send this to the Executive (EX) Committee and then to Plenary for adoption. Ms. Matthews confirmed that would be the process and said this will be treated like an NAIC guidance paper. Commissioner Godfread said this document would be within the purview of the Innovation and Technology (EX) Task Force and as innovation and technology projects are worked on by other NAIC committees, this would be something it would review as it starts working on other applications of AI. Mr. Birnbaum said the CEJ likes the North Dakota language and appreciates the APCIA’s comments about this pertaining to NAIC committees and that would be a positive contribution. However, he said the other APCIA comments seem to water down the Principles such that they do not have an affect, so the CEJ would be opposed to that language.

1. Discussed its Timeline and Next Steps

Commissioner Godfread said the Working Group has stated from the beginning that it would like to complete this work expeditiously. He said the goal is for the Principles to be adopted by the Working Group’s parent committee, the Innovation and Technology (EX) Task Force, at the NAIC Summer National Meeting, making it possible for the Principles to be adopted by the full membership by the Fall National Meeting. He reviewed a timeline that would make that possible, including:

* Posting version 5 of the Principles, based on this meeting, by June 15.
* Holding another conference call of the Working Group the week of June 29, with the intention of adopting the Principles.
* Posting the adopted version of the Principles by the end of that week.
* Providing an exposure and comment period.
* Task Force consider adoption of the Principles during the Summer National Meeting.

Having no further business, the Artificial Intelligence (EX) Working Group adjourned.

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