Commissioner Jon Godfread
North Dakota Insurance Department
Chair, NAIC Artificial Intelligence (EX) Working Group
Via email to dmatthews@naic.org

June 25, 2020

Re: ACLI Comments on NAIC Artificial Intelligence (EX) Working Group Draft Principles

The American Council of Life Insurers (ACLI)[1] welcomes the opportunity to again comment on the NAIC draft Artificial Intelligence (AI) Principles. ACLI continues to strongly support the development of the AI Principles to guide regulators and industry as companies and producers increase their use of technology in servicing their customers.

The ongoing COVID-19 crisis has underscored technology's critical role in helping insurers and producers safely interact with customers. ACLI's hope is that the insurance industry and regulators can build on this progress to offer a "touch-less" insurance environment that will greatly benefit consumers.

Consumers are demanding services that are not based on face-to-face interactions. This is not likely to change in the foreseeable future. Life insurers are responding to this demand, which began even before the COVID-19 pandemic, with a greater reliance on underwriting processes that are more data driven and less invasive to the consumer. Advanced technology is key to these processes.

Actuarially-based risk classification and advanced technology have helped make life insurance products more available and more affordable than ever before. But life insurers recognize that more needs to be done to bring financial protection and retirement security to more Americans. The NAIC work on this project, strongly supported by ACLI, is one part of this effort. If insurers cannot underwrite based upon actuarial risks, then life insurance will become more expensive (due to moral hazard and adverse selection) and ultimately less available for everyone. This result will be especially problematic for those who need it most, such as lower income customers who will be less likely to afford coverage to protect their families.

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[1] The ACLI advocates on behalf of 280 member companies dedicated to providing products and services that promote consumers' financial and retirement security. 90 million American families depend on our members for life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, dental and vision and other supplemental benefits. ACLI represents member companies in state, federal and international forums for public policy that supports the industry marketplace and the families that rely on life insurers' products for peace of mind. ACLI members represent 95 percent of industry assets in the United States.

Discrimination does exist in our society, as has been vividly demonstrated over the past several weeks. This societal problem should not be addressed, however, by adopting a sweeping principle that has the potential to do more harm than good.

In considering these issues, this Working Group should not adopt the novel idea of "proxy discrimination" in the AI Principles. The term is ill-defined in the insurance context and is fraught with potentially unintended consequences. It would likely create confusion in both interpretation and implementation, not only for the industry, but also for regulators, lawmakers and consumers. The use of the term might also call into question the legality of risk-based underwriting.

Removing "proxy discrimination" will return the AI Principles to its original purpose. They were never intended to make new law, nor was the purpose to reinterpret existing law. The purpose is to lay out high-level guideposts for the benefit of committees and groups addressing issues associated with artificial intelligence. Specific policy decisions will be made by these committees and groups with the AI Principles serving as a useful resource. If the regulation and oversight of underwriting standards need to be reviewed or changed there are appropriate policy groups within the NAIC to perform that work.

We also are concerned about the suggested use of the term "disparate impact." Disparate impact is a narrow legal doctrine that does not apply to the insurance industry, and with good reason. Life insurers, by law and necessity, group risks based on sound actuarial experience. Countless factors can be involved in grouping these risks, and life insurers are legally required to use only risk factors that are actuarially supported. For many conditions, however, actuarially sound risk factors may affect various subsets of the general population differently. This is not proof of discrimination, intentional or unintentional. Examining every risk factor through a proxy discrimination prism has the potential to upend the entire structure of life insurance underwriting.

Adoption of this new principle of "proxy discrimination," no matter how well intended, could transform the long-standing principle of correlation between factors and risk into a causality principle. This new relationship between factors and risk exists outside of established actuarial science, and may ultimately lead to less selective underwriting and higher costs to consumers and less protection for people who need it the most.

Industry's commitment to treating every customer fairly has never been stronger. In fact, where there are clear means to expand coverage and lower costs for all Americans, we want to implement them. Artificial intelligence, the use of big data in underwriting, and the issues presented in the new "post-COVID" world are complicated and deserving of careful thought. ACLI member companies welcome the opportunity discuss all of these issues.

ACLI supports the language immediately below to reinforce the commitment to harness technology for the betterment of civil society:

> "AI actors should proactively engage in responsible stewardship of trustworthy AI in pursuit of beneficial outcomes for consumers and to avoid discrimination."

We believe language can be modified to reinforce the NAIC's commitment to equitable treatment without doing unintentional harm to consumers who rely on the financial protection products and services this industry provides. Thank you for the opportunity to offer these comments and we look forward to continuing our dialogue with the Working Group.

Attached are additional comments to the current version 5 draft of the Artificial Intelligence Principles.

Sincerely,

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National Association of Insurance Commissioners (NAIC) Principles on Artificial Intelligence (AI)

RECOMMENDS that insurance companies and all persons or entities facilitating the business of insurance that play an active role in the AI system lifecycle, including third parties such as rating and advisory organizations (hereafter referred to as "AI actors") adhere to these fundamental principles

CALLS ON all AI actors to promote, , consider, and monitor, and implement, according to their respective roles, the following principles for responsible stewardship of trustworthy AI, according to their respective roles.

UNDERLINES that the following principles are complementary and should be considered as a whole.

Fair and Ethical

a.   AI actors should respect the rule of law throughout the AI lifecycle. This includes, but is not limited to, insurance laws and regulations, including such as those relating to trade practices, unfair discrimination, access to insurance, underwriting, privacy, consumer protection and eligibility practices, ratemaking standards, advertising decisions, claims practices and solvency.

b.   AI actors should proactively engage in responsible stewardship of trustworthy AI in pursuit of beneficial outcomes for consumers and to avoid proxy discrimination against protected classes., such as augmenting human capabilities while continuing to respect legal norms where they operate. AI systems should not be designed to harm or deceive people and should be implemented in a manner that minimizes negative outcomes for consumersavoids harmful or unintended consequences.

Accountable

a.   AI actors should be accountable for ensuring that AI systems operate in compliance with these principles consistent with the actors' roles, within the risk-based situationalappropriate context, and evolving technologies. Any AI system should be compliant with laws and regulationslegal requirements governing its use of data and algorithms during its phase of the insurance lifecycle. Data supporting the final outcome of an AI application should be retained and be able to be produced in accordance with applicable insurance laws and regulations in each jurisdiction. AI actors should be responsible for the creation, implementation and impacts of any AI system, even if the impacts are unintended, according to applicable law. AI actors should implement mechanisms and safeguards appropriateconsistent with the degree and nature of the risks posed by AI to ensureing all applicable relevant laws and regulations rules are followed, including ongoing risk-based (human or otherwise) monitoring, and when appropriate, human intervention. However, absent negligence in the creation, implementation or monitoring of an AI

system the remedy of an impact that violates existing regulation should be correction of said impact.

a. ~~Consistent with applicable current requirementslaws and regulations, stakeholders (which includes regulators and consumers) should have a way to inquire about, review or seek recourse for AI-driven insurance decisions. This information should be plain, easy-to-understand and describe the factors that lead to the prediction, recommendation, or decision. This information may be presented differently and should be appropriate to the applicable stakeholder.~~

Compliant

a. AI ~~a~~Actors must have the knowledge and resources in place to ~~ensure~~ compl~~iance~~y with all applicable ~~federal and state~~ insurance laws and regulations. AI actors must recognize that insurance is primarily regulated by the individual states and territories of the United States as well as by the federal government, and that AI systems must comply with the insurance laws and regulations within each individual jurisdiction. Compliance is required whether the violation is intentional or unintentional. Compliance with ~~state and federal laws or regulations~~legal requirements is an ongoing process~~.~~ ~~t~~Thus any AI system that is deployed must ~~show~~be consistent ~~risk-based monitoring for compliance~~ with applicable laws and safeguards against outcomes that are either unfairly discriminatory or otherwise violate legal standards, including privacy and data security laws and regulations. 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.

> **Commented [CA2]:** is "federal and state" needed?

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Transparent

a. For the purpose of improving the public's confidence in AI, AI ~~A~~actors ~~must be transparent about how they use these systems. AI Actors~~ should commit to transparency and responsible disclosures regarding AI systems to relevant stakeholders, including consumers. ~~AI A~~actors ~~while maintaining~~must have the ability to protect confidentiality ~~of proprietary algorithms and adherence to individual state law and regulations in all states where AI is deployed. Among T~~these proactive disclosures include revealing the kind of data being used, the purpose of the data in the AI system and consequences for all stakeholders.

> **Commented [GG3]:** ACLI suggests removing this comment as adherence to state law and regulations was well established under the Compliant section.

b. Consistent with applicable laws and regulations, stakeholders (which includes regulators and consumers) should have a way to inquire about, review and~~or~~ seek recourse for AI-driven insurance decisions. This information should be ~~plain~~, easy-to-understand and describe the factors that lead to the prediction, recommendation~~,~~ or decision. This information may be presented differently and should be appropriate for applicable stakeholders.

Secure, Safe and Robust

a. AI systems should be robust, secure, and safe throughout the entire life cycle so that, in conditions of normal or reasonably foreseeable use, or adverse conditions, the~~y~~ ~~AI system~~

can function in compliance with applicable existing laws and regulations. To this end, AI actors should ensure a reasonable level of traceability in relation to datasets, processes, and decisions made during the AI system lifecycle. AI actors should enable analysis of the AI system's outcomes, responses, and other insurance related inquiries, as appropriate in keeping with applicable current industry best practices and legal requirements.

a. AI actors should, based on their roles, the situational context, and their ability to act, apply a systematic risk management approach to each phase of the AI system lifecycle on a continuous basis to address risks related to AI systems, including privacy, digital security, and unfair discrimination. as defined by applicable laws and regulations.

b.   AI actors should proactively engage in responsible stewardship of trustworthy AI in pursuit of beneficial outcomes for consumers~~-~~. AI systems should not be designed to harm or deceive people, and should be implemented in a manner that avoids ~~harmful or unintended adverse~~ unlawful consequences, including ~~and avoids~~ unlawful ~~or actuarially unfair~~ discrimination.