The Privacy Protections (D) Working Group of the Market Regulation and Consumer Affairs (D) Committee met Sept. 13, 2021. The following Working Group members participated: Cynthia Amann, Chair (MO); Ron Kreiter, Vice Chair (KY); Damon Diederich (CA); and Chris Aufenthie (ND). Also participating was: Robert Wake (ME).

1. **Announced a Format Change to the Privacy Policy Statement Exposure Draft**

On behalf of Ms. Amann, Lois E. Alexander (NAIC) announced a format change to the privacy policy statement exposure draft. She said the first exposure draft incorporated all comments received into one large document. Since all materials have been vetted by the Working Group in prior meetings, Ms. Alexander said the Working Group would separate comments into appendices to make the exposure document more manageable for discussion in future meetings.

2. **Received Comments on Segment One of the Exposure Draft**

Ms. Amann said comments were received on Segment One from the American Council of Life Insurers (ACLI); the Coalition of Health Carriers; and NAIC consumer representatives, Karrol Kitt (University of Texas at Austin) and Brenda J. Cude (University of Georgia). She said comments received by the deadline are posted to the Working Group’s web page. She extended the Working Group’s apologies to Ms. Kitt because her comments were received by the deadline but had not yet been posted. She said comments received after the deadline would be posted soon. She said all comments received would be considered by the Working Group for incorporation into the exposure draft as the Working Group goes through the segments to complete its charges. She said the discussion at this meeting would be on comments received on Segment One – the right to opt out of data sharing, as addressed in Pages 5–29.

Chris Petersen (Arbor Strategies LLC), speaking on behalf of the Coalition of Health Carriers, said the definition used for the opting out of data sharing should be defined in a way that industry, state insurance regulators, and consumers can have a serious discussion on it. He said the definition in the exposure draft simply says that individuals should be able to control their data, which would mean that the definition would apply to several of the possible potential rights in the document. He recommended that the Working Group use the very specific definition of “opt out” that is used in the *Privacy of Consumer Financial and Health Information Regulation* (#672), which is based on the Gramm-Leach-Bliley Act (GLBA) and is the most recent privacy model that has been adopted in most states. He said if that definition is used, it will help guide the rest of the discussion as the Working Group goes into more detail regarding what that right is as well as how it is used. He said when consumers receive an opt-out notice now, it is referring to the right as set forth in Model #672, so that is the definition that should be used if the Working Group is going to talk about whether it should be changed, modified, or eliminated. He said the recommendation is overly broad in that it says consumers should be afforded a comprehensive right to control the use of all their personal information for purposes related or unrelated to the insurance transaction, which goes beyond the GLBA because it recommends an unfettered right to controlling one’s own information. He said in Model #672, there are restrictions, exceptions, and disclosures in nonpublic personal information for service providers, servicing agreements and marketing agreements. He said companies must comply with state record retention requirements and other laws indicating how companies can use and disclose information. He said consumers would not be notified, nor would they have any way of knowing if a law enforcement agency demanded their information. He said if an insurance department requires consumer information, companies have their operations and the rights in the Health Insurance Portability and Accountability Act of 1996 (HIPPA), which includes the right to request, but federal law still gives companies the ability to say yes or no if we must disclose the information. Therefore, he said this recommendation would be contrary to, and would probably be preempted by, HIPPA. He said the recommendation must be much more. He said HIPAA should not be disrupted because we do not want to get preempted by federal law. He said health care insurers should have a HIPAA safe harbor that is currently in Model #672, and that should be retained because something that might work for a technology company would not necessarily work for a health insurer. He said the health insurance industry must maintain records for future claims, issues, and future health care operations, so the Working Group cannot confuse technology with health care.

Mr. Diederich said the exposure draft reflects several of the concerns that have just been identified because it has a discussion that the right to opt out should not be construed to interfere with the transaction for which the information has been gathered.
i.e., it should not hinder legal compliance. He said the Working Group is very much in agreement on those points about a HIPAA exemption, as existing HIPAA regulations basically permit regulation that is not in conflict with HIPAA. He said there is no requirement that any privacy right’s regimen necessarily follow all the contours of HIPAA, so long as it is not in conflict with them. HIPAA would allow a model, which affords additional privacy rights beyond HIPAA, so long as it does not conflict with existing mandates. Mr. Petersen said that is correct, and it would also be wise to allow additional protections, so long as one could operate the HIPAA privacy rule. He said if an individual had the unfettered right to say, “you cannot share my information with anyone,” which is sort of what the recommendation suggests that it would hamper the implementation of the HIPAA privacy rule, because health insurers have things they are mandated to do under that rule, and this would contradict those. He said he believes that is why we must be careful that it works within the confines of HIPAA. Mr. Diederich said he is very much in agreement with that.

Ms. Kitt said the Working Group cannot do the opt-out because it is so important, but for the last 15 years, it has had opt-in with health’ and she knows opt-in is the next topic. However, with all these problems, if they just did an opt-in, they would not have all these opt-out issues. Companies would not be able to sell a consumer’s data, but the amount of revenue that brings in for companies is not known. Ms. Kitt said interested parties said consumers benefit from opt-in as well as from opt-out, but she does not see a benefit for consumers that currently have the opt-out, because consumers must do extra work to protect themselves and why should they have to protect themselves from a cost. She said to begin with, opting in for a benefit that makes sense, but not having to opt out for one because it is sort of two negatives does not make sense. She said speaking as a consumer, privacy is very important, and she does not know what insurance personnel do if consumers opt out. She said consumers let their information be shared, but so much of the sharing of information is not appropriate. She asked why life insurance or health insurance need to know about her homeowners’ coverage, or auto coverage, yet they get all this access. Ms. Kitt said her comments are mostly negative stating again that my support is for the opt-in and to forget about this opt-out.

Kristin Abbott (American Council of Life Insurers—ACLI) asked if the Working Group could include in the privacy policy statement the initial thoughts on the opt-out provisions that it submitted last week. She said the ACLI intended to provide further feedback throughout the process. She said the ACLI supports a balanced opt-out approach, taking into consideration consumer rights and companies’ needs to collect and share information for normal business practices.

Randi Chapman (Blue Cross Blue Shield Association—BCBSA) said the BCBSA’s comments were submitted with the Coalition of Health Insurers. She said Mr. Petersen’s status covered several points that they have in common, but she wanted to reiterate the BCBSA’s request that the Working Group consider preserving the HIPAA compliance exemption because the carve out established in Model #672 and the federal laws alike have created consistency in terms of compliance with consumers and industry knowing what to expect, and there are robust requirements under HIPAA.

Birny Birnbaum (Center for Economic Justice—CEJ) said the CEJ hopes that the activities under the Working Group will, in fact, go beyond current law. He said current law is truly outdated in terms of a privacy framework to protect consumers in an era of surveillance capitalism to go beyond both opting in and an opting out approach. He said it assumes certain things i.e., that consumers will have disclosure of the information that is being collected about them and what that means in an understandable way. Therefore, instead of presenting the types of information that may be collected, it would include how the information is being used and how it might be used as opposed to similar general concepts that do not mean much to the consumer. Mr. Birnbaum wanted to emphasize the whole aspect that now it assumes consumers have enough knowledge to make informed and rational decisions, and that may have been a reasonable assumption 20 years ago. He said a passive reasonable assumption today is to give consumers the amount of data that is collected, with and without consumers’ consent. For example, there may be a lot of information that insurers get from public sources to speed the underwriting process, which they then combine with information they had gotten from the consumer or through their insurance process. Then something is done to combine information based on some opt-in the consumer has made about their personal information, thinking that it is going to be dealt with in insurance practices.

Harry Ting (Health Consumer Advocate) said when he spoke last week about his nine principals for the privacy of consumer data regarding the transactions that consumers have with insurance companies, the insurance company should only collect the data that it needs. He said for that transaction, there's no reason for companies to collect other data; and if we do that, then, the opt-in to opt-out discussion becomes somewhat unnecessary if companies only collect what they need, of course, they would need to prove that that is the data they need. However, Dr. Ting said that is the approach that should be taken, and there is no reason for them to collect other data. He said that is what he would like to suggest. When talking about the six categories, he said these primarily put the burden on the consumer to take measures to protect the privacy of their data, while it seems that the companies themselves have much more information and understanding of what is being collected and how it is being used.
He said there should be greater emphasis on putting requirements on companies, as opposed to putting so much burden on the consumers. He said the document he sent to be shared with the Working Group members talks about data privacy engineering, and it explains in their research that most companies collect much more data than they need. He said it is something that has developed because memory costs are so low that companies collect whatever they can, so many of the companies are collecting much more than they need.

Mr. Wake said he would agree that more precision is needed but being precise includes talking about it. The definitions of “opt out” and “opt in” are very simple, and they are not going to change over time. Mr. Wake said opt out means what the company has the right to do. He said we this can be made a little more precise, but the definition of opt out is something that the company has the right to do. He said unless the consumer explicitly gets permission and what needs to be worked on is not those definitions, except perhaps phrasing them a little more elegantly, what needs to be worked on is what things should be subject to an opt-in regime, what should not be subject to an opt-out ratio, and what things the consumer should have no control over.

Mr. Diederich said this understanding is consistent with what a lot of the Working Group understands those terms to mean as well. Mr. Petersen said that is not how the document defines it though.

Ms. Amann said during the next call on Sept. 27, the Working Group will discuss comments received by Sept. 20 on Segment Two – the right to opt-in to data sharing, as addressed in Pages 29–32. She said comments received by Oct. 4 on Segment Three – the right to correct information, as addressed in Pages 32–36, would be discussed at the Oct. 11 meeting; comments received by Oct. 18 on Segment Four – the right to delete information, as addressed in Pages 36–39, would be discussed at the Oct. 25 meeting; comments received by Nov. 1 on Segment Five – the right of data portability, as addressed in Pages 39–46, would be discussed at the Nov. 8 meeting; and comments received by Nov. 15 on Segment Six – the right to restrict the use of data, as addressed in Pages 46–50, would be discussed at the Nov. 22 meeting. She said this schedule has been posted to the web page.

Ms. Amann said the next Working Group meeting is scheduled for Sept. 27.

Having no further business, the Privacy Protections (D) Working Group adjourned.