

Brenda Cude (NAIC Consumer Representatives) Comments for the Privacy Protections Working Group

August 30, 2021

Comments on First Working Group Exposure Draft of Privacy Policy Statement, August 30, 2021

The Right to Opt-Out of Data Sharing

Key Points:

Consumers rarely understand the implications of the opt-out and opt-in options. Thus, they lack the information to make an informed choice.

An issue with consumers exercising a right to opt-out of data sharing is that they rarely understand the implications of their choices. What are the company affiliates with whom the company would still share information? Who are the third parties with whom the company would not share the information? What are the costs and benefits to consumers of sharing or not sharing? We usually don't know and don't know how to find that information. And, even if we know which companies are involved, we likely don't know the costs and benefits to us of our options. So, my guess (as there is no research to answer this question) is that most consumers have a default position – either they always opt-out based on principle or they don't opt-out, perhaps because they don't know how opting out would limit their opportunities to work with a company.

The second example on page 6 highlights how a lack of information limits consumers' ability to make an informed choice. How can a consumer know if they want to opt-out if they don't know who the third party is and what the benefits to them might be if they allow their information to be sold?

Question: In the first example (page 6), what types of features on a website might a consumer decline?

Comment: Also on page 6, a more accurate description of cookies would read – "...as well for a company not to track, personalize, and save information about a user's website session via cookies."

For Discussion: Could the HIPAA language be used to create a parallel for other insurance? That might be a useful approach for consumers, who don't necessarily see why there should be a distinction between health insurance and other types of insurance in terms of privacy.

Harmonization with HIPAA practice might be an approach that would facilitate consumer understanding.

HIPAA's default is that consumers opt out of data sharing for any purpose not linked to treatment, payment or health care operations or as otherwise required by law. Perhaps a parallel for other types of insurance might be that consumers opt-out of data sharing for any purpose not linked to *[Insert appropriate purposes such as underwriting and/or claims]* or as otherwise required by law, with specific opt-in options for other purposes *[perhaps marketing, sale of specific types of information, and disclosure of information obtained from third parties.]*

Comment: I am not persuaded by industry arguments that it would be "too difficult" to implement an opt-out standard. Obviously, the health insurance sector has figured this out. The consumer reporting industry has developed protocols that perhaps could be transferred to insurance (for example, verifying the identity of an individual making a request about their credit report). And, while there would be costs to the insurance industry of implementing an opt-out approach, those costs could well be offset by

improved consumer trust and confidence in the insurance industry. Kiviat's recent research (Kiviat, B. (2021). Which data fairly differentiate? American views on the use of personal data in two market settings. *Sociological Science*. doi:10.15195/v8.a2) indicates that consumers judge fairness of data use in part based on whether they think the data are logically related to the predicted outcome. An opt-out approach allows consumers to make that judgment for themselves.

Consumer Notices

It's unlikely NAIC can change the privacy notices but any changes must be guided by consumer research as the development of the original notices were.

The Privacy Notices were created based on research, guided by professionals with expertise in communicating with consumers who implemented an iterative research process in which the proposed notices were modified using input from consumers. Any modifications to the notices should follow the same process. And, although it is likely that the notices *should* be reviewed for updates given the passage of time, I agree that it is not likely that NAIC has the legal authority to do that.

The sample clauses as in Model 672 would seem to a useful model for follow, as would be any other sample language. Not only might this help insurers initially, but to the extent that sample language is adopted widely, it provides consistency in consumer communication that benefits consumers. In addition, as noted above, the Federal Model Privacy Form was created by experts using consumer research and anything that supplements or replaces it should be created using the same process.

Information about companies' privacy practices, including how consumers can choose what personal information is shared about them, should be available to all consumers electronically, not just policyholders. However, policyholders should have the option to receive information via methods other than electronically.

The Working Group should take into consideration consumers' increased use (sometimes exclusively) of electronic sources, such as websites, emails, and texts. I agree with the comment that notices delivered (likely electronically) "just-in-time" may be among the most meaningful to consumers.

However, we also must remember that not all consumers have the option to receive information electronically and some prefer to receive information in other forms. The implication is a requirement to allow consumer choice to continue to receive paper copies. In addition, there seems to be no reason that such information should be available electronically to consumers only *after* they become policyholders. Information can and should be posted to company websites to be available for consumers to consider as they select an insurance company.

Consumer Right to Delete Information

Is there a distinction between a requirement that an insurer must retain information for regulatory reasons and the insurer's right to use that retained information for other purposes?

I freely admit that I'm not knowledgeable about state laws requiring insurance companies to retain information. But, isn't there a distinction between a requirement to maintain information and a company's ability to sell or share that information? If the data are protected from data breaches, it seems the harm to consumers is minimized if the data are retained but not used in any way. Perhaps in

the insurance context, this isn't a right to delete information but to "de-activate" the use of the information for specific purposes, especially marketing.

What does the right to delete information mean in the insurance context? I agree that any right to delete information *to be used for underwriting or claims* likely would be restricted to information that is inaccurate. And, I also agree with the comment that consumers may evaluate "inaccurate" subjectively, equating it with, for example, unfair. That implies the need for a third party to verify whether the information is truly inaccurate and the credit reporting model provides a protocol to do that.

But shouldn't I have the right to have *any* information deleted if the intended use is for marketing?

Portability

What does portability mean in the insurance context? I agree with the comments that it may require more thought to define portability in the context of insurance.