

Draft Pending Adoption

Attachment A
Innovation, Cybersecurity, and Technology (H) Committee
11/16/23

Draft: 8/30/23

Innovation, Cybersecurity, and Technology (H) Committee
Seattle, Washington
August 13, 2023

The Innovation, Cybersecurity, and Technology (H) Committee met in Seattle, WA, Aug. 13, 2023. The following Committee members participated: Kathleen A. Birrane, Chair (MD); Michael Conway, Co-Vice Chair (CO); Doug Ommen, Co-Vice Chair (IA); Karima M. Woods (DC); John F. King (GA); Gordon I. Ito represented by Kathleen Nakasone (HI); Dana Popish Severinghaus represented by KC Stralka (IL); Chlora Lindley-Myers represented by Cynthia Amann (MO); Troy Downing (MT); Jon Godfread (ND); Adrienne A. Harris represented by John Finston (NY); Judith L. French (OH); Carter Lawrence represented by Stephanie Cope (TN); Kevin Gaffney (VT); and Mike Kreidler represented by Byron Welch (WA). Also participating were: Lori K. Wing-Heier (AK); Wanchin Chou (CT); Michael Humphreys (PA); and Katie Johnson (VA).

1. Adopted its 2023 Spring National Meeting Minutes

Executive Deputy Superintendent Finston made a motion, seconded by Commissioner King, to adopt the Committee's March 22 minutes (*see NAIC Proceedings – Spring 2023, Innovation, Cybersecurity, and Technology (H) Committee*). The motion passed unanimously.

2. Adopted the Reports of its Working Groups

A. Big Data and Artificial Intelligence (H) Working Group

Superintendent Dwyer said the Big Data and Artificial Intelligence (H) Working Group met the morning of Aug. 13 during the Summer National Meeting. Related to the Working Group's artificial intelligence (AI)/machine learning (ML) survey efforts, Superintendent Dwyer said the Working Group received a report from Commissioner Gaffney summarizing observations from the home insurance AI/ML survey. She also reported that the Working Group heard a presentation on generative AI from Casey Kacirek (Deloitte) and David Sherwood (Deloitte). The presentation addressed how generative AI currently works, the emerging capabilities of generative AI, how to measure and mitigate AI risk, insurance industry examples of the benefits of AI, and common AI terms and definitions.

B. Cybersecurity (H) Working Group

Amann stated that the Cybersecurity (H) Working Group met March 7 in lieu of the Spring National Meeting. Since then, the drafting group of state insurance regulators has been meeting to develop a Cybersecurity Event Response Plan (CERP), which will be a useful resource for regulators with less experience but who are charged with leading a department's response to cyber events at regulated entities. The Working Group requested input from the public and received input from trade associations, including the National Association of Mutual Insurance Companies (NAMIC), the American Council of Life Insurers (ACLI), and the American Land Title Association (ALTA). Amann also thanked the states of Connecticut, Kansas, Illinois, New York, North Dakota and Virginia for their contributions to the CERP drafting efforts. The Working Group will also continue monitoring federal and international developments. The Working Group anticipates a meeting in September based on the current progress of the CERP drafting.

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C. E-Commerce (H) Working Group

Director French reported that the E-Commerce (H) Working Group chairs have now met several times to discuss the Working Group's next steps and to give NAIC staff guidance on drafting a framework that would serve as a guide for states looking to modernize their regulatory requirements. NAIC staff are currently in the process of scheduling a meeting to present the draft framework for comment, and the Working Group anticipates it will take place in early September.

D. Innovation in Technology and Regulation (H) Working Group

Commissioner Conway reported that the Working Group plans to meet Aug. 29 to hear presentations from the Global Insurance Accelerator (GIA) and InsurTech NY about their programming in support of insurtechs and to discuss what state insurance regulators can do to support the insurtech community. The Working Group is also planning a regulator-only meeting in September to hear from states on how they are using technology to improve regulatory processes.

E. Privacy Protections (H) Working Group

Johnson reported that following the Spring National Meeting, there were several items of note. The Working Group adopted minutes from the four open meetings the Working Group has held since the Spring National Meeting, as well as the minutes from the Spring National Meeting. The Working Group also heard updates from NAIC staff on federal and state privacy legislation efforts. The Working Group also heard comments on specific topics including marketing issues, as well as opt-in and opt-out language related to certain processes discussed in the new *Insurance Consumer Privacy Protections Model Law* (#674). Lastly, the Working Group also discussed asking for additional time to complete the model law. The Working Group will stop taking comments for the time being and will work through the 40 comments received thus far, leading to the exposure of a new draft of the model law. Based on the comments received for the updated model law draft, the Working Group will understand how much additional time would be needed to complete the drafting process.

Welch made a motion, seconded by Executive Deputy Superintendent Finston, to adopt the reports of the Big Data and Artificial Intelligence (H) Working Group (Attachment One); the Cybersecurity (H) Working Group; the E-Commerce (H) Working Group; the Innovation in Technology and Regulation (H) Working Group, including its April 27 minutes (Attachment Two); and the Privacy Protections Working Group (Attachment Three). The motion passed unanimously.

3. Received Comments on the Model Bulletin Exposure Draft

Commissioner Birrane said that the model bulletin draft on the use of algorithms, predictive models and AI was first discussed at the 2022 Fall National Meeting. During that meeting, state insurance regulators discussed that the bulletin would establish a regulatory framework for the use of AI. The regulators chose the approach of a model interpretive bulletin because AI is already subject to regulatory standards and authority. They settled on a principles-based approach with a high-level of standards that would apply generally, focusing on governance. They also acknowledged the importance of validation as part of industry's practices but also recognized practical limitations that sometimes exist. Finally, the regulators settled on placing responsibility for third-party activities on licensees with the expectation that licensees would conduct appropriate due diligence when dealing with third-party data and model vendors.

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After deciding on a direction for the bulletin, the regulators convened into four drafting groups with 22 states participating in the drafting process supported by NAIC staff members, including the NAIC's general counsel.

Next, Commissioner Birrane provided a brief summary of the contents of the model bulletin. The bulletin was constructed as regulatory guidance and not as a model law or model regulation, as the regulators decided that existing state laws already apply to the decisions made by insurers using AI systems. The bulletin guides insurers on how to govern their development and use of AI systems that impact consumers, and it also offers guidance on what information and documentation insurers should provide to regulators.

Section 1 of the bulletin gives background and statutory authority in identifying the model laws that provide underlying authority. The regulators recognized that there is not complete uniformity in state laws, so they anticipate that states will adjust the text accordingly. The focus of the bulletin is also on market conduct evaluation and investigation and does not include financial standards for financial examination.

Section 2 identifies definitions for key terms used in the bulletin. The definitions were subject to robust discussion among drafting regulators. Commissioner Birrane specifically invited public comments on the definitions provided in the bulletin.

Section 3 sets the expectation that insurers will establish meaningful governance and risk management policies and procedures and that those policies and procedures will be commensurate with the insurer's AI use.

Section 4 reminds the public that insurers' decisions that are based on AI systems are like any other decisions and are, therefore, subject to review to ensure compliance with the law. The section also provides guidance on the types of information and requests a carrier might expect to see during regulatory reviews of insurer conduct.

With the introduction provided, Commissioner Birrane then opened the floor for discussion, inviting comments from speakers that specifically indicated interest before the meeting in addressing the contents of the model bulletin. Comments were heard from 10 speakers, and each speaker was given three minutes to provide their input.

Peter Kochenburger (Consumer Representative) said that the model bulletin does very little other than describe and expand on what was already expressed in the "NAIC Principles on Artificial Intelligence (AI)" (AI Principles) adopted three years ago. He said the model bulletin missed the opportunity to set guidance and documentation of what insurers need to do when using AI. Kochenburger noted that even for a model bulletin, the language is tentative in areas that it really should not be, such as when encouraging the development of a written automated indicator sharing (AIS) program, which Kochenburger said should be a minimum standard. He also suggested that testing should be required. That way, even in a principles-based approach, regulators can create guidance with teeth to it. Kochenburger also noted that the bulletin reminds insurers that they have to follow state law, but that is already expected as expressed in the AI Principles written three years ago. In some instances, he said the model bulletin represented a step back as well (e.g., when discussing the concept of proxy discrimination against protected classes). Kochenburger said he recognizes the importance of careful wording but after so many years, it is important for the regulators to agree on guidance on unintentional harm.

Dave Snyder (American Property Casualty Insurance Association—APCIA) said that during his years of participation at the NAIC, while there have always been issues and challenges, he did not recall an era where there was so much that was challenging and profoundly disturbing, and as seen with the catastrophe in Hawaii, even tragic. He said the moment calls on regulators and interested parties to work together for the benefit and support of the general

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public. Regarding the bulletin, Snyder expressed that the overall approach to the model bulletin was correct and that the APCIA appreciated the effort reflected in the draft. He also expressed appreciation for the proportionality and flexibility of the bulletin, as well as the priority that was placed on governance. He added that at first, the bulletin's scope appears to sweep in operations and data that are already adequately regulated and do not need additional regulation. Second, the bulletin's language reflects the current reality of the availability of data and the undesirability of obtaining certain types of data. The APCIA is concerned about any data collection that the public does not want insurers to gather or use. Regarding third-party vendors, the APCIA's smaller insurer members would have some difficulty with these provisions, and that difficulty may extend to larger insurers, as well, in a way that deprives insurers and ultimately the public of beneficial innovation. Fourth, regarding terminology, Snyder emphasized that the legislative standards mentioned in the bulletin should govern the terms used in the bulletin and should not be undermined or modified in favor of any unlegislated standard or terminology. Fifth, the APCIA is concerned about the danger of unnecessary costs. Unless resolved, these issues could impose burdens and ultimately harm, not help, the public. These harms could include increased cost, subpar service, and less technology and information that could help prevent and manage loss. The APCIA asked to continue forward on a bulletin that is appropriately limited in scope, that reflects the realistic status and issues with testing for demographics, helps address third-party vendor regulatory issues without closing off access to the expertise and innovation of other players, adheres in all ways to legislated standards, and results in the most cost-effective bulletin for regulators, insurers, and ultimately, the public.

Dave Sandberg (American Academy of Actuaries—Academy) said that the Academy applauded the bulletin's focus on a framework to document and govern decisions based on AI systems. A focal point of decisions would be essential to assess the depth and breadth of the necessary documentation of governance. Sandberg also drew a comparison of the structure and implementation of governance requirements to the previous effort to implement the Own Risk and Solvency Assessment (ORSA) requirements. He said that the ORSA requirements focus on documenting key risk management principles, measures, and the governance being used by a company. Sandberg further noted that the ORSA requirements were created and drafted over a relatively short period of time. In contrast, he noted that the principles-based reserving requirements were derived over a 20-year period. Therefore, the Academy asked if the framing and implementation requirements of the bulletins were meant to be the same as or different from those used for the ORSA requirements. Sandberg noted that much of the work being done at the Academy and the other actuarial professions is in parallel to this draft bulletin and will be of use to the NAIC and insurance organizations regarding the guardrails and adequate governance needed for AI systems. He said that work at the Academy included content and resources developed by Academy committees, as well as the professional standards for actuarial work that are maintained by the Academy. He stated current applicable standards, include modeling, assumptions setting, and risk classification. Sandberg closed with a reference to the upcoming Center for Insurance Policy and Research (CIPR) educational event during which Dorothy Andrews (Academy) would be sharing further details on projects of the Academy that would be of most interest and applicable to the discussions on the bulletin.

Andrew Pauley (NAMIC) said that NAMIC appreciates the time and effort put into the task of providing a framework and guardrails for insurer use of AI/ML and associated technology systems. Pauley implored the Committee to embrace the many positive aspects of AI/ML that can have important and transformational results for policyholders and consumers. He further stated that NAMIC and its members do not want any legitimate harm to come to consumers or policyholders. NAMIC believes the model bulletin provides a draft framework that can accomplish the Committee's goals while finding common ground with industry and stakeholders. Pauley noted that NAMIC will offer suggestions in the areas of statutory authority to act in these instances; clarification of some of the definitional aspects, such as bias or algorithm; enhanced protections for industry information; risk-based understanding; and needed clarification on some of the principles elucidated in the model bulletin, such as testing

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and third-party vendor responsibility. He said that NAMIC looks forward to working with the Committee to arrive at solutions that protect and stabilize the insurance marketplace while fostering growth and innovation that benefit all stakeholders.

Brian Bayerle (ACLI) applauded the Committee's leadership for addressing the critical issue of consumer protection. He said that life insurers are increasingly leveraging technology to improve interactions with consumers to make it easier and more convenient to get the financial protections that they need. This includes greater use of technologies that simplify underwriting processes. He said that a regulatory framework designed to eliminate unfair discrimination must be balanced with emerging technologies that help expand the coverage to underserved communities. Bayerle said the model bulletin would allow life insurers to use such technologies to meet consumer demands for an easier, less-intrusive underwriting process while advancing the objective to eliminate unfair discrimination of consumers. However, he said the ACLI has concerns about certain definitions and the imposition of impractical oversight and new contractual obligations on the use of third-party vendors, which will be challenging for smaller to mid-sized companies throughout the country.

Randi Chapman (Blue Cross Blue Shield Association—BCBSA) expressed appreciation for the Committee's work on the model bulletin. She said the BCBSA believes it is important to continue researching and developing best practices and standards for the use of AI tools across all industries. These best practices and standards should focus on emerging risk mitigation that is grounded in the National Institute of Standards and Technology (NIST) *Artificial Intelligence Risk Management Framework*, which includes accountability, security and safety, privacy and confidentiality, transparency and explainability, reliability, fairness, and bias mitigation. The BCBSA supports the development of a risk-based approach that measures the need for appropriate protections without stifling innovation, and it encourages the NAIC to coordinate with federal regulatory partners, like NIST, to promote consistency in AI governance best practices. The BCBSA believes that consistent and uniform standards that address algorithm documentation, testing, and auditing, as well as stakeholder education, will foster greater trust and accountability in AI tools.

Michael DeLong (Consumer Representative), on behalf of the Consumer Federation of America (CFA), said consumer groups have long been concerned about protected class unfair discrimination generated by insurer use of data that are racially biased, which indirectly cause unfair discrimination on the basis of race. DeLong added that with insurers' explosive growth in using new sources and the types and volumes of data and AI, state insurance regulators acknowledged the increased potential for racially biased data and algorithms to produce protected class unfair discrimination in 2020 with the adoption of the AI Principles. Shortly after the adoption of the AI Principles, the NAIC created the Special (EX) Committee on Race and Insurance, which is charged with determining if current practices exist in the insurance sector that potentially disadvantage minorities. DeLong said that while the NAIC has done much on diversity, equity, and inclusion (DE&I) among insurers and regulators, structural racism in insurance has not been addressed. He further stated that the model bulletin is not principles-based, but a prescriptive governance approach that does not expand on the AI Principles nor provide specific guidance, principles-based or otherwise, to NAIC committees, working groups, insurers, or regulators on how to implement the AI Principles. DeLong noted that it fails to provide essential definitions, does not define proxy discrimination, fails to address structural racism in insurance, and incorrectly tells insurers that testing for protected class bias may not be feasible.

Birny Birnbaum (Center for Economic Justice—CEJ) said that AI governance, risk management procedures, and documentation are necessary and important but not sufficient. Birnbaum stated the emphasis should be placed on testing consumer outcomes for fair and unfair discrimination during all phases of the insurance life cycle and in both model development and post-deployment. Birnbaum added that regulatory guidance is needed to

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generate this testing, including proxy discrimination defining, to establish at least one uniform testing methodology, reporting of testing results by insurers, and to establish thresholds for what constitutes proxy discrimination. Birnbaum said that for some issues such as for cybersecurity, it is necessary to rely on good hygiene or process guidance to try to prevent bad outcomes because there are not enough outcomes against which to apply predictive analytics. Insurers have and regulators can obtain the data and ability to ensure good market outcomes and compliance through testing of these outcomes for fair and unfair discrimination. Testing should be the central feature of governance. Meaningful guidance regarding the fairness prong of the AI Principles must include insurer data testing guidance. Testing for racial bias has been done for housing, employment, credit, and even insurance for five decades. There are well-accepted methods for such testing so that regulators do not have to invent their own methodology. Birnbaum gave an example of what would happen if a governance-only approach to financial solvency was enacted, but it would not make sense with metrics, such as risk-based capital (RBC), giving regulators the ability to quickly review and compare hundreds of insurers and their relative financial condition. He added that the same logic behind a standard methodology and standard metrics for RBC should apply to establishing standard metrics and testing methodology for insurer's use of AI.

Jim Hodges (National Alliance of Life Companies—NALC) said that the principal-based approach is the correct approach. However, he stated that the NALC wanted to raise several issues, with the first being the uneven negotiating power of small versus large companies. Vendors in smaller companies may not enjoy the same level of cooperation or abilities to modify terms and conditions that the larger companies have. The second issue involves better defining specific terms around AI to discern between newer technologies versus algorithms that have been around for decades. Hodges also noted that other federal and state regulators are wrestling with the same issues and encouraged regulators to collaborate to provide consistent definitions to spur innovation and ensure a more consistent approach for consumers, insurers, and regulators. Hodges stated the importance of engaging with technology companies to share the sensitivity points of regulators and to try to have those issues addressed. He said an ongoing dialogue will lead to better products that address regulatory concerns and regulatory mandates. Hodges noted the bulletin also references the federal Unfair Trade Practices Act and is concerned that utilization of new AI tools may be deemed appropriate in one state and an unfair trade practice in another, which will discourage the use of innovative tools. Where possible, companies and regulators should work together to advance the use of innovative tools on a consistent and uniform basis. The NALC also believes that pilot initiatives around new regulatory approaches should be undertaken to test both effectiveness and fairness.

J.P. Wieske (American InsurTech Council—AITC) expressed appreciation for the time regulators have taken to work with industry representatives on the continued development of the model bulletin. Wieske further said the AITC appreciates that the bulletin requires insurers to have the same standard across anything they use fundamentally in their insurance products and gives regulatory authority that makes sense, is consistent, and is time-tested. Wieske said the AITC acknowledged that many concerns have been raised on what AI is and raised that the definitions in the model bulletin may need to be revised. He also expressed that AI is simply another tool available to insurers that should be held to the same standards that insurers have to meet today. Wieske said that while he understands that there are concerns on the use of AI, those concerns are likely reflective of already existing concerns in the current marketplace. The AITC would like the NAIC to consider the process that exists in market conduct, which is more generally around self-audit and comprehensive self-audit, and is not mentioned in this bulletin. Wieske encouraged the NAIC to work with large, medium, and small companies privately to better understand how AI is being used in insurance.

Commissioner Birrane then opened the floor for discussion from Committee membership, other regulators, or interested parties.

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Commissioner Humphreys posed that a general question be issued to companies in order to incorporate feedback in written comments about the oversight of third-party groups regarding compliance with non-discrimination laws. He said he has heard from companies that do feel they have the power to require cooperation with insurance departments but is unsure if that would be true for companies of all sizes. Commissioner Humphreys has also heard from smaller companies that feel they have little to no power to negotiate such terms. He drew a comparison to pharmacy benefit managers and wondered about the possibility of licensing service providers similar to rating organizations where departments have to work with the service providers to get into compliance. Commissioner Humphreys asked for feedback on third-party oversight that would give companies comfort in knowing that the service providers are not discriminating.

Chou asked the Academy to elaborate on how effective ORSA is given that many companies treat the filing as a compliance exercise.

Sandberg responded to Chou that the value of ORSA is that it lays a foundation for productive conversations. Sandberg continued by noting that AI is emerging, and the ability to have a set of metrics will be a long process and will be a good foundation for having further productive conversations. He added the ORSA filings allow companies to engage with regulators about their controls and emerging risks. He drew a parallel to AI-related discussions, noting the process to develop a set of metrics that remain unchanged and are codified will require a foundation to be laid.

Commissioner Conway added to Commissioner Humphrey's commentary said on the third-party aspect of the bulletin. He noted that if the regulators are going to have an outcome-focused testing methodology, then third parties will necessarily need to be involved. Conway noted it is important for companies to address this testing, and if there is a problem with third-party agreements, he questioned how industries will respond if there is a problem with outcome-testing.

Commissioner Birrane then opened the floor to any others who did not sign up to speak ahead of the meeting. Brendan Bridgeland (Center for Insurance Research—CIR) pointed out one sentence in the bulletin that he found troubling, which he quoted: "Current limitations on the availability of reliable demographic data on consumers make it challenging for insurers and regulators to directly test these systems to determine whether the decisions made meet all applicable legal standards." Bridgeland stated this sentence should not be in the bulletin, as it undermines the power of regulatory authority, implying that regulators will not be able to deal with this in the future.

Director Wing-Heier said that the bulletin is a good working document. She said she appreciated the hours spent on it and acknowledged the bulletin has been a significant project and represents a good start.

Commissioner Birrane concluded by stating that when the Committee receives all the written public comments, the Working Group will meet in regulator-to-regulator session, and then it will present a second draft of the model bulletin at the end of September.

Having no further business, the Innovation, Cybersecurity, and Technology (H) Committee adjourned.

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