



NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

Date: 11/19/21

Virtual Meeting

PRIVACY PROTECTIONS (D) WORKING GROUP

Monday, November 22, 2021

2:00 – 3:30 p.m. ET / 1:00 – 2:30 p.m. CT / 12:00 – 1:30 p.m. MT / 11:00 a.m. – 12:30 p.m. PT

ROLL CALL

Cynthia Amann, Chair	Missouri	Martin Swanson	Nebraska
Ron Kreiter, Vice Chair	Kentucky	Chris Aufenthie/ Johnny Palsgraaf	North Dakota
Damon Diederich	California	Teresa Green	Oklahoma
Erica Weyhenmeyer	Illinois	Raven Collins/Brian Fordham	Oregon
LeAnn Crow	Kansas	Gary Jones	Pennsylvania
T.J. Patton	Minnesota	Katie Johnson	Virginia
Molly Plummer	Montana		

NAIC Support Staff: Lois E. Alexander

AGENDA

1. Receive a Legislative Update from NAIC Staff—*Cynthia Amann (MO)*
2. Receive Comments on Segment Five (the Right to Data Portability) and Segment Six (the Right to Restrict the Use of Data) of the Privacy Policy Statement Exposure Draft—*Cynthia Amann (MO)*
 - Attachment A
 - Attachment B
 - Attachment C
3. Walk Through and Discuss Comments Received on the Exposure Draft of the Privacy Report (with the Privacy Policy Statement and the Right to Consumer Ownership of Data) to its parent Committee—*Cynthia Amann (MO)*
 - Attachment D
 - Attachment E
4. Discuss Any Other Matters Brought Before the Working Group—*Cynthia Amann (MO)*
5. Adjournment—*Cynthia Amann (MO)*

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November 1, 2021

NAIC Privacy Protections (D) Working Group
NAIC Central Office
1100 Walnut Street
Suite 1500
Kansas City, MO 64106

Attn: Lois Alexander, NAIC Market Regulation Manager
Via email: lalexander@naic.org

Dear Chair Amann, Vice Chair Kreiter and Members of the Privacy Protections Working Group:

Thank you very much for the continued opportunity to provide comments on your ongoing review of past and current consumer privacy frameworks. We very much appreciate the extensive work that the NAIC Privacy Protections Working Group is doing to develop their Privacy Policy Statement. ACLI appreciates this opportunity to participate in the process, as our members are deeply engaged.

As mentioned, we are proud that the insurance industry has long been a consumer privacy leader in adhering to clear obligations in the appropriate collection, use, and sharing of personal information. Keeping our policyholders' personal information private and protected is at the core of what we do. Life insurers believe it is important for consumers to have certain rights with respect to personal information that companies maintain about them. At the same time, companies need the ability to maintain and process such personal information to provide consumers with the products and services they request, as well as to ensure the accuracy and integrity of information they use and to comply with applicable laws and regulations.

We respectfully submit the following thoughts to the Working Group on the "Right of Data Portability" provisions of the Privacy Policy Statement.

Right of Data Portability

The Right of Data Portability is being addressed by emerging state comprehensive privacy laws. For instance, the Virginia Consumer Data Protection Act provides consumers the right to "obtain a copy of the consumer's personal data that the consumer previously provided to the controller in a portable and, to the extent technically feasible, readily usable format that allows the consumer to transmit the data to another controller without hindrance, where the processing is carried out by automated means." (59.1-573(A)(4)) The Colorado Privacy Act provides that "a consumer has the right to obtain the personal data in a portable and, to the extent technically feasible, readily usable format that allows the consumer to transmit the data to another entity without hindrance. A consumer may exercise this right no more than two times per calendar year. Nothing in this subsection (1)(e) requires

a controller to provide the data to the consumer in a manner that would disclose the controller's trade secrets." (6-1-1306(E))

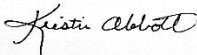
We support a consumer's right to request a copy of certain personally identifiable information insurers collect from him/her and to provide the requested information in a useable format requested by the consumer, if technically feasible. In our experience, the vast majority of life insurance applicants and customers who exercise their right to access specifically request their copy in hard copy format for ease of reading, copying, and safekeeping. For those seeking a copy in electronic format, Adobe PDF and Microsoft Word files are the most common formats requested. We know of little to no demand from consumers for data portability in the life insurance context, nor of any requests from customers to ask their insurer to transfer the customers' personal information in a machine-readable format directly to another insurer. This is mainly because most insurance products are underwritten, different insurers often have different acceptance criteria so the data one insurer requests from applicants or evaluates is not the same as the other insurer, and customers want to maintain control over and decide what information they want to provide to another insurer.

Given the lack of demand or any direct practical benefit to consumers, we are very concerned with the costs and significant security risks to try to implement or support a broad data portability right without certain exceptions. We recommend the Working Group take this into account if considering recommendations on the Right of Data Portability.


Conclusion

Thank you for your continued consideration of our comments. We look forward to continuing to collaborate with the Working Group as we move through this review process.

Sincerely,



Kristin Abbott
Counsel



Shelby Schoensee
Associate Counsel

Arbor Strategies, LLC

Chris Petersen
804-916-1728
cpetersen@arborstrategies.com

November 5, 2021

Ms. Cynthia Amann
Chair, NAIC Privacy Protections (D) Working Group
Missouri Department of Insurance
301 W High St Rm 530
Jefferson City, MO 65101

Dear Ms. Amann:

I am writing on behalf of a Coalition¹ of health insurers, who represent some of the country's largest major medical insurers and health maintenance organizations, to comment on the NAIC Privacy Protections (D) Working Group's ("Working Group") proposed FIRST WORKING GROUP EXPOSURE DRAFT OF PRIVACY POLICY STATEMENT dated August 30, 2021 ("Exposure Draft"). We offer the following comments regarding the right to portability of information.

Portability, as that term is used in the GDPR and the CCPA, means something quite different from its use in HIPAA and NAIC insurance reforms models², and is inappropriate for application to the United States health insurance industry. The way that term is used in the GDPR and the CCPA it is also quite different from how the term is defined the Exposure Draft. The Exposure Draft includes the following definition of "data portability"

'DEFINITION: Data portability, in common understanding, is the idea of having data stored in or created in a way that is easier to transport physically or electronically from one

¹ CVS Health/Aetna, Anthem, Cigna and UnitedHealthcare, who together provide health insurance and health maintenance organization coverage to more than 200 million members nationwide, are the members of this Coalition.

² In HIPAA and NAIC usage, portability is the ability to move from one health insurer to another without new preexisting condition limitations. Although popular, the term is not a privacy concept.

Arbor Strategies, LLC

November 5, 2021

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system to another or one place to another. *It facilitates the consumer's right to access their information.*³

The GDPR portability concept operates under the assumption that the individual consumers should be able to decide with whom they conduct business, whose services they want to use, and where their information resides. Implicit in the concept is that portability addresses the concern that individuals be prevented from moving to another service provider. This harm does not exist in the health insurance industry. Employers and individuals regularly switch insurers, and individuals have the right to authorize and direct that their information be provided to another health insurer for quotes and potentially to replace coverage within the context of open enrollment periods which preserve markets and consumer options.

The Exposure Draft incorrectly defines portability as a tool to facilitate access to information. In the EU, portability is something much larger, and more problematic, than simply accessing information. There, portability is the ability of individuals, who are data subjects, to receive the personal data they have provided to a "controller" and transmit it to another controller without hindrance from the controller that presently has the data. The first "controller" is then required to delete the individual's personal information and not save or store it. While this makes sense for internet service providers, for example, it does not make sense in the group or individual health insurance markets. While the concept might work in the technology space, where individuals are free to change internet service providers at any time, there are contractual and risk management concerns, as well as health care concerns, that make this concept unworkable for consumers and insurers in the context of its application to our health insurance system and industry.

As discussed previously, an unfettered right to "portability," where that concept includes the responsibility to delete the information transmitted, runs counter to many states' insurance laws. State laws require insurance companies to maintain information for a variety of purposes, including record retention, which have all been discussed previously during our debates on the rights to amend and delete. The claims process also necessitates that health carriers maintain information on policyholders and, in fact, good health policy mandates that health insurers and health provider maintain accurate records of their policyholders and patients.

In an earlier letter, we noted that the United States Department of Health and Human Services ("HHS") recently published comments that share our concerns regarding well-intentioned, but potentially ill-conceived privacy regulation. In the executive summary to its proposed modifications to the HIPAA privacy rule, the HHS specifically warns that when done improperly, privacy rules "could present barriers to coordinated care and case management-or impose other regulatory burdens without sufficiently compensating for, or offsetting, such burdens through

³ Working Paper at page 39. *Emphasis added*

Arbor Strategies, LLC

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privacy protections." HHS also warns that the unintended consequences of privacy rules that fail to consider all the nuances of our health care system could "impede the transformation of the health care system from a system that pays for procedures and services to a system of value-based health care that pays for quality care."

HHS raises these concerns, in part, because of the unique nature of health insurance, the regulation of health information and the interconnectivity of health insurance, health care providers and the health information that they share. HHS is properly concerned that otherwise well-intentioned regulation of health information could instead harm consumers by negatively impacting the coordination of care and case management. HHS' concerns regarding unintended consequences are quite appropriate when one carefully considers the possible ramifications of imposing this definition of portability on health insurers. As a result, the coalition strongly recommends that the Working Group reject the EU concept of data portability for health insurers.

Thank you for the opportunity to comment. If you have any questions, please feel free to reach out to me at either (202) 247-0316 or cpetersen@arborstrategies.com. We look forward to working with the Working Group as it discusses topics for possible inclusion in a white paper or possible revised NAIC privacy model.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Chris Petersen".

Chris Petersen
Arbor Strategies, LLC

cc: Lois Alexander



November 15, 2021

NAIC Privacy Protections (D) Working Group
NAIC Central Office
1100 Walnut Street
Suite 1500
Kansas City, MO 64106

Attn: Lois Alexander, NAIC Market Regulation Manager
Via email: lalexander@naic.org

Dear Chair Amann, Vice Chair Kreiter and Members of the Privacy Protections Working Group:

Thank you very much for the continued opportunity to provide comments on your ongoing review of past and current consumer privacy frameworks. We very much appreciate the extensive work that the NAIC Privacy Protections Working Group is doing to develop their Privacy Policy Statement. ACLI appreciates this opportunity to participate in the process, as our members are deeply engaged.

We respectfully submit the following thoughts to the Working Group on the “Right to Restrict the Use of Data” provisions of the Privacy Policy Statement.

Right to Restrict the Use of Personal Information

Similar to other financial services companies, life insurers are already subject to a complex array of federal and state laws and regulations that impose many limits on and conditions for their permissible collection, use, and sharing of personal information. They include transparency obligations by way of not one, but multiple privacy notices or disclosures that are required to be delivered to their customers and made available to consumers. These longstanding protections are working and remain consistent with the reasonable expectations of consumers about how and why their personal information is being collected and used. In addition to their regulatory obligations, life insurers also offer customers and consumers choices to tailor and easily update their communications, advertising, and online preferences and experiences.

We are proud that the insurance industry has long been a consumer privacy leader in adhering to its obligations in the appropriate collection and ethical use of personal information. While we believe it is important for consumers to continue to have certain rights with respect to their personal information, we are concerned about the introduction of another with the potential to cause friction and jeopardize existing customer relationships, and in some cases negatively impact consumers.

American Council of Life Insurers | 101 Constitution Ave, NW, Suite 700 | Washington, DC 20001-2133

The American Council of Life Insurers (ACLI) is the leading trade association driving public policy and advocacy on behalf of the life insurance industry. 90 million American families rely on the life insurance industry for financial protection and retirement security. ACLI's member companies are dedicated to protecting consumers' financial wellbeing through life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, and dental, vision and other supplemental benefits. ACLI's 280 member companies represent 94 percent of industry assets in the United States.

acli.com

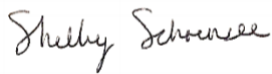
Life insurers need the continued ability under existing regulations to collect and process personal information to reach underserved communities, provide consumers with the financial products and services they have shown an interest in or requested, ensure the accuracy and integrity of the information insurers rely on, safeguard against fraud, security incidents, and illegal activity, perform risk management and other essential administrative activities, and to comply with applicable laws, regulations and legal proceedings.

Where the Working Group's draft Privacy Policy Statement did not include a specific recommendation, we hope you consider the unintended and disruptive consequences of offering consumers an indefinite, absolute right to restrict all uses of their personal information or only to certain uses specified by the consumer.

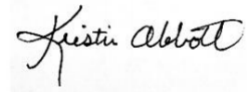
Conclusion

Thank you for your continued consideration of our comments. We look forward to continuing to collaborate with the Working Group as we move through this review process.

Sincerely,



Shelby Schoensee
Associate Counsel



Kristin Abbott
Counsel

**Privacy Protections (D) Working Group Report on
Consumer Data Privacy Protections**

Exposure Draft

November 18, 2021

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I. Introduction

The Privacy Protections (D) Working Group was appointed in 2019 to review state insurance privacy protections regarding the collection, use, and disclosure of information gathered in connection with insurance transactions and make recommended changes, as needed, to NAIC models addressing privacy protection. This includes an insurer's use of data collected from a consumer and data supplied to an insurer by a third-party vendor. Rather than focusing on revisions to NAIC models, the main deliverables for 2021 were to set forth a policy statement on the minimum consumer privacy protections that are appropriate for the business of insurance, after taking into consideration the consumer privacy protections that already exist under applicable state and federal laws.

The Working Group discussed how best to balance the rights of insurers to use data for legitimate business purposes with consumers' rights to control what data is used and how it is used. The following privacy protections for consumers were discussed: (1) the right to opt out of data sharing, (2) the right to limit data sharing unless the consumer opts in, (3) the right to correct information, (4) the right to delete information, (5) the right of data portability, (6) the right to restrict the use of data, (7) the right of data ownership, (8) the right of notice, and (9) the right of nondiscrimination / non-retaliation.

The Working Group received comments from the ACLI, AHIP, APCIA, BCBSA, the Coalition of Health Insurers, NAMIC, MLPA, and NAIC consumer representatives Birny Birnbaum, Brenda Cude, Karrol Kitt, and Harry Ting.

II. Overview of Issue

Consumer awareness and regulatory concerns about the use of consumer data by a variety of commercial, financial, and technology companies are increasing. This has led to adoption of the General Data Protection Regulation (GDPR) in the E.U. and the California Consumer Privacy Act (CCPA) and other state data privacy protection laws in the U.S. Though data privacy concerns extend beyond the insurance sector, the increasing use of data and the passage of these new laws is causing the insurance industry and consumer groups alike to pressure Congress to enact federal privacy legislation.

While federal legislative efforts are currently stalled due to other legislative priorities and differing perspectives from consumers and industry on the best path forward, it is likely that Congress will begin focusing on the issue again soon. The current pause provides state insurance regulators an opportunity to update state privacy protections consistent with the current insurance business environment and potentially forestall or mitigate the impacts of any preemptive federal legislation. State policymakers have also responded to the privacy debate with varying legislative proposals to provide consumers with greater transparency and control over the use of personal information, with California, Virginia, and Colorado being leading examples. These comprehensive state data privacy laws each have either entity-level or data-level exemptions for entities subject to or information collected pursuant to the federal Gramm-Leach-Bliley Act (GLBA) and/or the privacy regulations adopted under the Health Insurance Portability and Accountability Act (HIPAA).

III. Summary of Consumer Privacy Protections Provided by NAIC Model Laws

The NAIC has three model laws governing data privacy: *Health Information Privacy Model Act* (Model #55); *NAIC Insurance Information and Privacy Protection Model Act* (#670) and *Privacy of Consumer Financial and Health Information Regulation* (#672), each of which is based upon or influenced by federal privacy laws. The NAIC's Model #670 contains many of the consumer rights found in these comprehensive state laws, which can be traced back to the Fair Credit Reporting Act (FCRA). And Model #672 is based, in large part, on GLBA and the HIPAA regulations. Generally, insurers and other entities licensed by state departments of insurance are carved out of more comprehensive state laws of general applicability. Because of this, insurance regulators must be aware when new protections are

added to laws applicable to other businesses, especially when they address new technologies and ways consumer information is collected and shared, so that comparable protection can be added, as necessary, to the laws governing the insurance industry. Of note, GLBA and HIPAA each set a federal floor for the entities within their scope, from which states can build upon. This is what the NAIC did in drafting the *Health Information Privacy Model Act* (Model #55) and the *Privacy of Consumer Financial and Health Information Regulation* (#672). GLBA applies to the entire insurance industry HPAA applies to the health insurance sector.

A. NAIC Insurance Information and Privacy Protection Model Act (Model #670)

The NAIC adopted the *NAIC Insurance Information and Privacy Protection Model Act* (#670) in 1980 following federal enactment of the Fair Credit Reporting Act in 1970 and the Federal Privacy Act in 1974. This model act establishes standards for the collection, use and disclosure of information gathered in connection with insurance transactions by insurance companies, insurance producers and insurance support organizations.

A key aspect of this model is that it establishes a regulatory framework for consumers to (1) ascertain what information is being or has been collected about them in connection with insurance transactions; (2) obtain access to such information for the purpose of verifying or disputing its accuracy; (3) limit the disclosure of information collected in connection with insurance transactions; and (4) obtain the reasons for any adverse underwriting decision.

This regulatory framework is facilitated through a requirement that insurers or agents provide a written notice to all applicants and policyholders regarding the insurer's information practices. The notice must address the following: (1) whether personal information may be collected from persons other than the individual or individuals seeking insurance coverage; (2) the types of personal information that may be collected, the types of sources and investigative techniques that may be used to collect such information; (3) the types of disclosures allowed under the law; (4) a description of the rights established under the law; and (5) notice that information obtained from a report prepared by an insurance support organization may be retained by the insurance support organization and disclosed to other persons.

Of note, the model prohibits disclosure of any personal information about an individual collected or received in connection with an insurance transaction without the individual's written authorization, subject to limited exceptions. However, some categories of information may be disclosed for marketing purposes if the consumer "has been given an opportunity to indicate that he or she does not want personal information disclosed for marketing purposes and has given no indication that he or she does not want the information disclosed." It also provides consumers with the right to request that an insurer provide access to recorded personal information, disclose the identity of the third parties to whom the insurance company disclosed information (if recorded); disclose the source of collected information (if available); and provide procedures by which the consumer may request correction, amendment, or deletion of recorded personal information.

Seventeen states have adopted Model #670: AZ, CA, CT, GA, HI, IL, KS, MA, ME, MN, MT, NV, NJ, NC, OH, OR, and VA.

B. NAIC Health Information Privacy Model Act (Model #55)

The NAIC adopted the *Health Information Privacy Model Act* (Model #55) following federal adoption of the privacy regulations authorized by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

This model sets standards to protect health information from unauthorized collection, use and disclosure by requiring insurance companies to establish procedures for the treatment of all health information by all insurance carriers. The drafters of Model #55 believed it was important that the same rules apply to all lines of insurance, since health

insurance carriers are not the only ones that use health information to transact their business. For example, health information is necessary for life insurance underwriting, and often essential to property and casualty insurers in settling workers' compensation claims and personal injury liability claims. Reinsurers also use protected health information to write reinsurance.

The model requires carriers to develop and implement written policies, standards, and procedures for the management of health information, including to guard against the unauthorized collection, use or disclosure of protected health information. It provides consumers with the right to access their protected health information and amend any inaccuracies. The model also requires insurers to obtain written authorization ("opt-in") before collecting, using, or disclosing protected health information, except when performing limited activities.

Many of the provisions found in Model #55 were later incorporated into the *Privacy of Consumer Financial and Health Information Regulation* (Model #672).

The following 13 jurisdictions have adopted legislation related to Model #55: CA, CO, DE, KY, LA, ME, MO, ND, RI, SD, TX.

C. NAIC Privacy of Consumer Financial and Health Information Regulation (Model #672)

The NAIC adopted the *Privacy of Consumer Financial and Health Information Model Regulation (Model #672)* in 2000. The model regulation was drafted to implement the requirements set forth in Title V of GLBA. GLBA imposed privacy and security standards on financial institutions, defined to include insurers and other insurance licensees, and directed state insurance commissioners to adopt certain data privacy and data security regulations. The provisions governing protection of financial information are based on privacy regulations promulgated by federal banking agencies. The model also contains provisions governing protection of health information that were taken directly from Model #55 and from the HIPAA Privacy Rule promulgated by HHS.

The model regulation provides protection for financial and health information about consumers held by insurance companies, agents, and other entities engaged in insurance activities. In general, the model regulation requires insurers to: (1) notify consumers about their privacy policies; (2) give consumers the opportunity to prohibit the sharing of their protected financial information with non-affiliated third parties; and (3) obtain affirmative consent from consumers before sharing protected health information with any other parties, affiliates, and non-affiliates.

The key difference between the treatment of financial information and health information is that insurers must give consumers the right to "opt out" of the disclosure or sharing of their financial information but insurers must obtain explicit authorization from the consumer ("opt-in") before sharing health information. Every jurisdiction has a version of this model regulation, although nineteen jurisdictions have only adopted the provisions regarding financial information and not the provisions regarding health information. Some jurisdictions that have adopted Model # 670 have adopted additional provisions from Model # 672 by bulletin rather than regulation.

IV. Summary of Health Insurance Portability and Accountability Act (HIPAA)

In 1996, Congress passed the Health Insurance Portability and Accountability Act (HIPAA), which, among other things, authorized the U.S. Department of Health and Human Services to promulgate regulations governing consumer privacy protections. The HIPAA Privacy Rule was finalized in 2000. The rule applies to health plans and health care providers, restricting the permitted uses and disclosure of protected health information. HIPAA preempts state law

only to the extent that a covered entity or business associate would find it impossible to comply with both the state and federal requirements.

HIPAA provides individuals the right to access and amend their protected health information, the right to request the restriction of uses and disclosures of protected health information, and the right to receive an accounting of disclosures made to other entities.

A covered entity must obtain the individual's written authorization for any use or disclosure of protected health information that is not for treatment, payment or health care operations or otherwise permitted or required by the law. A covered entity is also required to provide notice of its privacy practices.

V. Summary of General Data Protection Regulation (GDPR)

The GDPR became effective in May 2018 and applies to U.S. companies if they collect data from citizens of the E.U. over the internet. It requires companies (data "controllers") to obtain explicit consent from consumers to collect their data ("opt in") with an explanation of how the data will be used. It also contains standards for safeguarding the data collected. Under the GDPR, a consumer has the following rights: (1) to receive information about the processing of personal data; (2) to obtain access to the personal data; (3) to request that incorrect, inaccurate or incomplete personal data be corrected; (4) to request that personal data be erased when it is no longer needed or if processing it is unlawful; (5) to object to the processing of personal data for marketing purposes or on grounds relating to a consumer's particular situation; (6) to request the restriction of the processing of personal data in specific cases; (7) to receive personal data in a machine-readable format and the ability to send it to another controller ("data portability"); and (8) to request that decisions based on automated processing concerning the consumer or significantly affecting the consumer and based on consumer's personal data, are made by human beings.

VI. Summary of Recently Adopted Consumer Privacy Protection Laws

A. California Consumer Privacy Act (CCPA) and California Privacy Rights Act (CPRA)

In 2018, California became the first U.S. state to adopt a comprehensive privacy law, imposing broad obligations on businesses to provide consumers with transparency and control of their personal data. The California Consumer Privacy Act (CCPA) became effective in 2020. Since it was adopted, it was amended by the California Privacy Rights Act (CPRA), which becomes effective Jan. 1, 2023. Additionally, the California Attorney General promulgated implementing regulations in 2020.

Scope

The CCPA, as amended by the CPRA (California law) applies to companies doing business in California that collect or process consumers' personal information and meet one of the following thresholds: (1) has annual gross revenue in excess of \$25,000,000 in the preceding calendar year; (2) annually buys, sells, or shares the personal information of 100,000 or more consumers or households; or (3) derives 50% or more of its annual revenue from selling or sharing consumers' personal information.

Exemptions

The law does not apply to personal information collected, processed, sold, or disclosed pursuant to the federal Gramm-Leach-Bliley Act (GLBA), and its implementing regulations. It also does not apply to protected health information that is governed by the privacy, security, and breach notification rules issued by the U.S. Department of Health and Human Services (HHS). Furthermore, this law contains an entity-level exemption for HIPAA-covered entities or business associates governed by the privacy, security, and breach notification rules issued by HHS.

Consumer Rights

California law provides consumers with the following rights : (1) to request deletion of any personal information;¹ (2) to correct inaccurate personal information, taking into account the nature of the personal information and the purposes of the processing of the information; (3) to know about and access the personal information being collected by requesting that the business disclose: the categories and specific pieces of personal information collected, the categories of sources the information was collected from, the business purpose for collecting the information, the categories of third parties with whom the information is shared, and the specific pieces of personal information that was shared; (4) to request the personal information provided by the consumer in a format that is easily understandable, and to the extent technically feasible, in a structured, commonly used, machine-readable format that may also be transmitted to another entity at the consumer’s request without hindrance; (5) to know what personal information is sold or shared and to whom; (6) to opt out of the sale or sharing of personal information; (7) to limit the use and disclosure of sensitive personal information; and (7) to not be retaliated against for requesting to opt out or exercise other rights under the law.

Business Obligations

The law imposes the following obligations on all covered businesses: (1) prohibits retaining a consumer’s personal information for longer than reasonably necessary for the disclosed purpose; (2) requires implementing reasonable security procedures and practices; (3) requires notice of the following: collection of personal information, including sensitive personal information, retention of information, right to opt out of sale and sharing, and financial incentives; (4) prohibits using sensitive personal information when a consumer has requested not to use or disclose such data.

Enforcement

The CPRA amends the CCPA by placing administrative enforcement authority with the California Privacy Protection Agency, a new state agency created by the CPRA. Under the CPRA, the attorney general retains authority for seeking injunctions and civil penalties. Additionally, if personal information is breached, the consumer can pursue a private civil action against the company.

B. Colorado Privacy Act (CPA)

Scope

The Colorado Privacy Act (CPA) takes effect on July 1, 2023. It applies to entities that conduct business in Colorado or produce or deliver commercial products or services intentionally targeted to residents of Colorado and satisfy one of the following thresholds: (1) controls or processes the personal data of 100,000 or more consumers in a year; or (2) derives revenue or receives a discount on the price of goods or services from the sale of personal data and processes or controls the personal data of 25,000 or more consumers. The law defines “controllers” as those that “determine the purposes for and means of processing personal data” and defines “processors” as those that “process data on behalf of a controller.”

Exemptions

The law contains data-based exemptions (rather than entity-level exemptions) for protected health information collected, processed, or stored by HIPAA-covered entities and their business associates, and information and

¹ And even when information is “deleted,” the CCPA right to deletion allows the business to “maintain a confidential record of deletion requests solely for the purpose of preventing the personal information of a consumer who has submitted a deletion request from being sold, for compliance with laws or for other purposes.”

documents created by a HIPAA-covered entity for purposes of complying with HIPAA and its implementing regulations. Additionally, the law contains an exemption for any personal data collected, processed, sold, or disclosed pursuant to the Gramm-Leach-Bliley Act (GLBA), and implementing regulations, if such collection, processing, sale, or disclosure is in compliance with that law.

Consumer Rights

The CPA provides consumers with the following rights: (1) to opt out of targeted advertising, sale of personal data, and profiling; (2) to confirm whether a controller is processing the consumer's personal data and the right to access such data; (3) to correct inaccuracies in personal data; (4) to delete personal data; and (5) to obtain the personal data in a portable and readily usable format that allows the consumer to transmit the data to another entity.

Business Obligations

The CPA imposes affirmative obligations on controllers, including the following: (1) provide consumers with an accessible, clear, and meaningful privacy notice; (2) specify the express purposes for which personal data are collected and processed; (3) collection of personal data must be adequate, relevant and limited to what is reasonably necessary in relation to the specified purposes; (4) not process personal data for purposes that are not reasonably necessary to or compatible with the specified purposes, without obtaining consent from the consumer; (5) take reasonable measures to secure personal data; (6) not process personal data in violation of any law that prohibits unlawful discrimination; and (7) not process a consumer's sensitive data without first obtaining the consumer's consent. Additionally, controllers are required to enter into contracts with data processors, referencing the responsibilities under the CPA and controllers must conduct a data protection assessment prior to any processing activities that have a heightened risk of harm to consumers.

Enforcement

The CPA does not contain a private right of action but provides the state attorney general and district attorneys authority to take action against entities for violations.

C. Virginia Consumer Data Protection Act (CDPA)

Scope

The Virginia Consumer Data Protection Act (CDPA) becomes effective Jan. 1, 2023. It applies to entities that conduct business in Virginia or produce products or services targeted to Virginia residents when they control or process personal data of at least 100,000 consumers or control or process personal data of at least 25,000 consumers and also derive over 50% of gross revenue from the sale of personal data.

Exemptions

The law contains entity-level exemptions for those subject to GLBA and HIPAA. It specifically exempts financial institutions and data subject to GLBA, and covered entities or business associates governed by the privacy, security, and breach notification rules issued by the U.S. Department of Health and Human Services. It also exempts protected health information under HIPAA.

Consumer Rights

The CDPA provides consumers with the following rights: (1) to confirm whether or not a controller is processing the consumer's personal data and if so, to provide the right to access such personal data; (2) to correct inaccuracies in the consumer's personal data, taking into account the nature of the personal data and the purposes of processing of the

consumer's personal data; (3) to delete personal data provided by or obtained about the consumer; (4) to obtain a copy of the consumer's personal data in a portable and readily usable format that allows the consumer to transmit the data to another controller; and (5) to opt out of the processing of the personal data for purposes of targeted advertising, sale of personal data, and profiling.

Business Obligations

Under the law, controllers have the responsibility to do the following: (1) limit the collection of personal data to what is adequate, relevant, and reasonably necessary in relation to the purposes for which such data is processed; (2) not process personal data without consumer consent for purposes that are neither reasonably necessary to nor compatible with the disclosed purposes for which such personal data is processed; (3) establish, implement, and maintain reasonable data security practices to protect personal data; (4) not process personal data in violation of any laws that prohibit unlawful discrimination against consumers and not discriminate against consumers exercising their rights under this law; and (5) not process sensitive data concerning a consumer without obtaining the consumer's consent. In addition, controllers must provide consumers with a reasonably accessible, clear, and meaningful privacy notice. Processing activities undertaken by a processor on behalf of a controller must be governed by a data processing agreement. Controllers also must conduct data protection assessments that evaluate the risks associated with processing activities.

Enforcement

Similar to the Colorado law, the law does not contain a private right of action but provides the state attorney general authority to pursue action against entities for violations.

VII. Summary of Working Group Discussions of Selected Key Points

The working group began discussions Dec. 8, 2019, during the Fall National Meeting with the following minimum consumer privacy protections being considered as appropriate for the business of insurance. These rights were based on the Working Group's proposed 2020 charges and are included in the Working Group's initial 2019 Work Plan:

1. the right to receive notice of an insurer's privacy policies and practices;
2. the right to limit an insurer's disclosure of personal data;
3. the right to have access to personal data used by an insurer;
4. the right to request the correction or amendment of personal data used by an insurer;
5. the right of data ownership; and
6. the right of data portability.

The Work Plan also said that the Working Group discussions would focus on data privacy (rather than data security) and identify areas within NAIC models and state requirement where consumer data privacy protections might need to be enhanced due to changes in technology. In her Dec. 8 presentation, Jennifer McAdam (NAIC) outlined existing privacy provisions in NAIC models and state insurance laws. She said the difference between data privacy and data security is that data privacy is about how data is being collected and used by businesses; while data security is about how data that a business has already collected and has in its possession) is stored and protected from unauthorized access. She said the two are often conflated and there are some laws that address both – like GDPR, for example. Furthermore, as many comments have noted, the two issues overlap because a breach of security often results in a loss of privacy. Ms. McAdam said the CCPA is an example of a data privacy law that governs how businesses collect and use consumer data; the rights consumers have to know how that data is being used; the rights consumers have to challenge the accuracy of the data; and how it is being used. Data privacy laws are focused on legal protections for data and consumer rights: In comparison, data security laws, such as the NAIC's Insurance Data Security Model Law

(#668), require operational and technological protections sufficient to ensure that the legal protections are meaningful. Ms. McAdam explained that Model #668 governs how businesses protect the data once it has been collected as well as what businesses need to do if those protections fail as the result of a data breach or other cybersecurity event.

State insurance regulators were concerned about the consumer data that insurers were already presenting in rate filings that had ballooned up to thousands of pages of different data points being gathered by insurers on consumers. They have also seen an increased reliance on third-party risk scores that aggregate consumer information in order to make determinations and conclusions about that information. Regulators noted that insurers have a responsibility to ensure that the third parties used are following state laws and complying with the state's standards for accuracy and fairness. In addition to providing disclosure of the third parties used by insurers when consumers request it, insurers are required to report how the information was gathered; where it was drawn from (e.g., web traffic, geolocation data, social media, etc.); and why the company thinks it needs to use those particular data points as the possibilities available to insurers are endless.

Industry asked the Working Group to consider: 1) Workability by allowing for various exemptions for operational and other reasons that acknowledge vital business purposes for insurers to collect, use, and disclose information. For example, Article IV of the NAIC Model #672 was developed to implement the GLBA, and the exceptions embedded into Section 13 of Model #672 are instructive as to the types of operational functions that need to be preserved and facilitated; 2) Exclusivity by avoiding dual regulation, so insurers are not simultaneously subject to potentially inconsistent or conflicting interpretations by more than one regulator; 3) Clarity by asking that care be taken to consider how best to dovetail with existing models/ laws/regulations; consulting other resources and educating legislators on how privacy bill language impacts the insurance industry, including the legal requirements to retain and use certain data, as well as data mandates; 4) an effective date that allows advance time (like the two to five years that was afforded under the GDPR) for insurers to be ready for implementation, to avoid having piecemeal revisions like the CCPA and the GDPR, as well as a roll-out period with different dates for different provisions within that time frame as a more measured approach to undertake such a significant endeavor.

Consumer Representatives asked the Working Group to consider that: 1) Data vendors are scraping personal consumer information from public sources to produce consumer profiles, scores, and other tools for insurers. The data vendor products, while assembled from public information, raise concerns over consumers' digital rights and privacy; 2) Many data vendors and many types of personal consumer information are not subject to FCRA consumer protections. In turn, many of the types of data and algorithms used by insurers are not subject to either FCRA consumer protections (even though they are the functional equivalent of a consumer report) or the NAIC model law/regulation protections; 3) It is unclear whether the NAIC models cover the new types of data being generated by consumers as part of, or related to, insurance transactions. For example, consumers are producing large volumes of data through telematics programs from devices collecting personal consumer data in the vehicle or home or through wearable devices; 4) There are a lots of organizations working on consumer digital rights (such as the Center for Digital Democracy, the Electronic Privacy Information Center, the Electronic Frontier Foundation, the Public Knowledge-Privacy Rights Clearinghouse, the Public Citizen, the U.S. Public Interest Research Group, and the World Privacy Forum) from whom input and presentations at Working Group meetings should be solicited; and 5) If consumer disclosures are to be used, that the disclosure should be a compliance or enforcement tool that would be created using consumer focus testing and established best practices for the creation of such consumer disclosures.

The COVID-19 pandemic slowed down the Working Group's discussions in 2020; however, discussions continued through seven virtual meetings and two regulator-only meetings of subject matter experts as areas of concentration were being narrowed leading to the Working Group requesting additional guidance from its parent committee.

In April 2021, the Working Group's discussions were redirected to six consumer data privacy rights or types of consumer data privacy protections based on the specific examples identified in item 1.c. of the NAIC Member Adopted Strategy for Consumer Data Privacy Protections received through its parent Committee, the Market Regulation and Consumer Affairs (D) Committee. The Working Group's task was to comment on the following consumer privacy rights concerning consumers' personal information as a basis for a privacy protection framework for the insurance industry (not just health insurance):

1. Right to opt out of data sharing;
2. Right to limit data sharing unless the consumer opts in;
3. Right to correct information;
4. Right to delete information;
5. Right to data portability;
6. Right to restrict the use of data.

Consequently, the Working Group was also tasked with analyzing or determining how insurers were protecting these rights – either to comply with state or federal statutory or regulatory requirements, or on their own initiative or through the adoption of voluntary standards. In 2021, the Working Group met ten times and the regulator only subject matter experts met nine times.

Prior to the 2021 Summer National Meeting, Working Group discussions focused on discussion of, and input on, the following key points from regulators, industry, and consumers for each of the six consumer privacy data rights noted above: definition; examples; consumer risk/impact; current state and federal laws/rules; insurer/licensee impact; actions necessary/insurer obligations to minimize consumer harm; and recommendations. Suggestions that separate privacy requirements be established for each line of business were discussed, but there was consensus that they did not seem to be feasible, as different consumer data privacy requirements across lines of business would limit both consumer protections and understanding.

It was noted during Working Group discussions that insurers utilize third party vendors as sources of data collection and that such vendors may not be subject to regulation by state insurance departments. Regulators stated that the insurers they regulate bear the responsibility for compliance with state insurance privacy requirements. Insurers felt they could not be held responsible because they did not know how such vendors collected or used consumer data and had no way to control the vendors' business activities. Regulators and consumer representatives expressed different opinions indicating that insurers' contracts with such vendors could and should be written to require vendors and insurers maintain compliance with insurance regulations regarding consumer data privacy.

During the 2021 Summer National Meeting, NAIC members further recommended that the Working Group's discussion be expanded to include the issue of consumer data ownership.

Working Group discussions revealed that state insurance regulators and consumer representatives believe consumers own the data that is collected and used by the insurance industry to market, sell, and issue insurance policies. It was felt that the type of data collected (name, age, date of birth, height, weight, income, physical condition, personal habits, etc.) describes who a person is and distinguishes one person from another by its very nature. When a consumer shares their data with an insurance company, it is with the understanding that the consumer is letting the company borrow it for a time to determine what insurance rates and insurance coverage the consumer needs. The consumer is not giving up their data to an insurer so it can be sold or given to other organizations from whom the consumer is not seeking insurance coverage, or any other product. Consumer representatives indicated that this practice had happened when they did an online search for insurance rates on health plans. As a result, the consumer representative received hundreds of cold calls from companies selling products other than insurance. When the consumer representative asked with whom the insurance company shared his data, the company sent him a list of 1,700 companies – none of which sold insurance.

The privacy policy statement in Appendix A is designed to be the foundation for the minimum consumer data privacy protections that are appropriate for the business of insurance to be applied to NAIC model #672 as revisions. It is intended to kick start the next step in creating revisions by defining the parameters of the existing consumer data privacy rights; by suggesting definitions and by showing examples of consumer risks. Further discussion is necessary, however, to clarify consumer data privacy rights that may not be fully protected in federal laws or fully covered under NAIC Model laws, and to decide how to provide appropriate protections.

VIII. Conclusion and Recommendations

Months of detailed discussions with regulator, industry, and consumer stakeholders, and the comments they have submitted, have led the Working Group to determine that the *NAIC Insurance Information and Privacy Protection Model Act (Model #670)* and the *Privacy of Consumer Financial and Health Information Regulation (Model #672)* have in the past provided an effective regulatory framework for consumer privacy protections to oversee and enforce consumer data privacy as required by state and federal statutes and regulation. However, these models were adopted by the NAIC 20 and 40 years ago, respectively; with only 17 jurisdictions adopting Model #670.

In consideration of the many changes that have occurred in recent years, as well as the rate of increase in the use of new technologies (AI, machine learning, accelerated underwriting, rating algorithms, etc.), and big data by insurers, the Working Group recommends that models 670 and 672 be amended to ensure that regulators can continue to provide consumer data privacy protections essential to meet the consumer data privacy challenges presented by the public use of technology and data by insurers in today's business environment.

The Working Group also recommends the NAIC's Market Regulation Handbook be updated, as necessary, to provide guidance to state insurance regulators so they can verify insurers' compliance the regulatory framework for consumer privacy protections.

Appendix A

National Association of Insurance Commissioners Policy Statement on Consumer Data Privacy Protections

Because the business operations of insurance companies are dependent upon the collection and use of personal information and data, state insurance regulators have long understood the need to balance an insurance company's need to collect consumer information and data with the consumer's right to limit the collection and use of data.

The NAIC adopted the *Insurance Information and Privacy Protection Model Act* (Model #670) in 1980 to establish standards for the collection, use and disclosure of information gathered in connection with insurance transactions. A key aspect of this model is that it establishes a regulatory framework for consumers to (1) ascertain what information is being or has been collected about them in connection with insurance transactions; (2) obtain access to such information for the purpose of verifying or disputing its accuracy; (3) limit the disclosure of information collected in connection with insurance transactions; and (4) obtain the reasons for any adverse underwriting decision. This regulatory framework is facilitated through a requirement that insurers or agents provide a written notice to all applicants and policyholders regarding the insurer's information practices.

The NAIC adopted the *Privacy of Consumer Financial and Health Information Model Regulation* (Model #672) in 2000. The model regulation was drafted to implement the requirements set forth in Title V of the federal *Gramm-Leach-Bliley Act* (P.L. 106-102) of 1999 (GLBA). GLBA imposed privacy and security standards on financial institutions and directed state insurance commissioners to adopt certain data privacy and data security regulations. The model also contains provisions governing protection of health information that were taken directly from the Health Insurance Portability and Accountability Act Privacy Rule promulgated by HHS. The NAIC model regulation requires insurers to: (1) notify consumers about their privacy policies; (2) give consumers the opportunity to prohibit the sharing of their protected financial information with non-affiliated third parties; and (3) obtain affirmative consent from consumers before sharing protected health information with any other parties, affiliates, and non-affiliates. The key difference between the treatment of financial information and health information is that insurers must give consumers the right (with limited exceptions) to "opt out" of the disclosure or sharing of their financial information, but insurers must get explicit authorization ("opt in") before sharing health information.

This policy statement is based on the consumer protections set forth in these two models and serves the purpose of informing licensed insurance entities, consumers, and the other state and federal regulatory agencies on what the NAIC currently supports as the minimum consumer data privacy protections that are appropriate for the business of insurance. The policy statement is not intended to modify any existing NAIC models and does not carry the weight of law or impose any legal obligations in states that have adopted those models.

The policy statement addresses consumer data privacy protections of (1) transparency; (2) consumer control; (3) consumer access; (4) data accuracy; and (5) data ownership and portability. The policy statement intentionally excludes standards for data security and standards for the investigation and notification to an insurance commissioner of a licensed insurance entity's cybersecurity event, which are the subject of separate model laws and interpretive guidance.

The following definitions are used for the purposes of this policy statement.

- A. "Adverse Decision" means declination of insurance coverage, termination of insurance coverage, charging a higher rate for insurance coverage, or denying a claim.
- B. "Consumer" means an individual who is seeking to obtain, obtaining, or have obtained a product or service from

an insurer. For example, an individual who has submitted an application for insurance is a consumer of the company to which he or she has applied, as is an individual whose policy with the company has expired.

- C. “Customer” means a consumer with whom an insurer has an on-going relationship.
- D. “Licensee” means any insurer, producer, or other person licensed or required to be licensed, or authorized or required to be authorized, or registered or required to be registered pursuant to a state insurance law.
- E. "Personal Information" means any individually identifiable information or data gathered in connection with an insurance transaction from which judgments can be made about an individual’s character, habits, avocations, finances, occupation, general reputation, credit, health, or any other personal characteristics. Personal information includes:
 - 1. “Non-Public Personal Information,” which means information that a consumer provides to a licensee to obtain an insurance product or service (like income, credit history, name and address); information about a consumer a licensee has as a result of a transaction involving an insurance product or service (like premium payment history, how much a life insurance policy is worth, and the value of personal property insured); and all other information about a consumer that a licensee uses in connection with providing a product or service to a consumer.
 - 2. “Non-public personal health information,” which means any information that identifies a consumer in some way, and includes information about a consumer’s health, including past and present physical and mental health, details about health care, and payment for health care.

I. Transparency

A licensee should provide a clear and conspicuous notice to consumers that accurately reflects its privacy policies and practices when it first requests personal information about the consumer from the consumer or a third party.

A licensee should also provide a periodic notice of its privacy policies and practices to customers not less than annually during the continuation of the customer relationship.

If a licensee makes an adverse decision based on information/data that was not supplied by the consumer, the licensee should provide the consumer with the specific reasons for the adverse decision.

II. Consumer Control

Licensees should, at a minimum, provide consumers the opportunity to prohibit the sharing of their non-public personal information with third parties, except for specific purposes required or specifically permitted by law. (Opt-Out)

Licensees should obtain affirmative consent from consumers before sharing non-public personal health information with any other entity, including its affiliates and non-affiliates. (Opt-In)

III. Consumer Access

Any consumer should have the right to submit a request to a licensee to obtain access to his/her personal information used by the licensee in its operations. Upon request, the licensee should within 30 business days provide a copy of the consumer’s personal information, an explanation on how the personal information was used (i.e., rating, underwriting, claims), and provide the source of the personal information. If personal information is in coded form, the licensee should provide an accurate translation in plain language.

IV. Data Accuracy

Within 30 business days after receiving a request from a consumer to correct, amend, or delete personal information used by the licensee in its operations, the licensee should either make the requested correction, amendment, or deletion or notify the consumer of its refusal to do so, the reasons for the refusal, and the consumer's right to file a statement of dispute setting forth what the consumer thinks is the correct information and the reasons for disagreeing with the licensee.

If the licensee corrects, amends, or deletes personal information, the licensee should notify any person or entity that has received the prior personal information within the last 7 years. If the licensee does not correct, amend, or delete the disputed personal information, the licensee should notify any person or entity that has received the prior personal information within the last 7 years of the consumer's statement of dispute.

V. Data Ownership and Portability

A customer should have the right to request a copy of his/her personal information that he/she has provided to the licensee for use in the licensee's operations. A licensee should provide a customer a copy of his/her personal information within 30 business days of the request. Examples of this type of personal information include telematics data and "Internet of Things" ("IoT") data.

November 16, 2021

NAIC Privacy Protections (D) Working Group
NAIC Central Office
1100 Walnut Street, Suite 1500
Kansas City, MO 64106
Attn: Lois Alexander, NAIC Market Regulation Manager

Via email: lalexander@naic.org

Dear Lois:

I hope this submission is not too late to be considered by the Privacy Protections Work Group on its November 22nd call. I am simply suggesting it does not make sense to try to determine who “owns” personal data held by insurance companies. My reasoning is explained below.

Ownership of personal data is a controversial subject that has not been directly addressed by laws and regulations in the U.S. or abroad. Jurcys et. al. wrote in the Harvard Journal of Law & Technology “data protection laws currently do not allocate ownership of personal data to any subject. There is also no other legal principle or theory that would per se justify the allocation of exclusive property rights over data.”¹

In the absence of such ownership rights, the relevant issue for the Privacy Protection Work Group revolves around access. Whoever holds data in question has access and can use it and give access to others. Thus issues regarding ownership of personal information held by insurers should revolve around the following questions individually:

- What data should they collect? – data minimization
- How should they use it? – prohibited or discriminatory uses
- How long should they keep it?– data retention, consumer requests to delete
- How should they keep it accurate and up-to-date? – consumer challenges to accuracy
- Who can they share it with? – consumer access, sharing or selling to third parties
- Data security – protecting it from illegal access.

Most of these issues have been or will be discussed during Work Group calls. I suggest that we focus on them and forgo a discussion of “ownership” of personal information.

Best regards,



Harold Ting, PhD
NAIC Consumer Representative

¹ Paul Jurcys, Chris Donewald, Jure Globocnik, Markus Lampinen, “My Data, My Terms: A Proposal for Data Use Licenses”, Harvard Journal of Law & Technology, Vol. 30, Digest Spring 2020, p.5.