

Draft: 12/21/21

Privacy Protections (D) Working Group
San Diego, California
December 11, 2021

The Privacy Protections (D) Working Group of the Market Regulation and Consumer Affairs (D) Committee met in San Diego, CA, Dec. 11, 2021. The following Working Group members participated: Cynthia Amann, Chair (MO); Ron Kreiter, Vice Chair (KY); Damon Diederich (CA); Erica Weyhenmeyer (IL); LeAnn Crow (KS); T.J. Patton (MN); Molly Plummer (MT); Jon Godfread, Chris Aufenthie, and Johnny Palsgraaf (ND); Martin Swanson (NE); Teresa Green (OK); Raven Collins (OR); Gary Jones (PA); and Don Beatty (VA). Also participating were Lori K. Wing-Heier (AK); Doug Ommen (IA); Robert Wake (ME); Chlora Lindley-Myers (MO); and Barbara D. Richardson (NV).

1. Adopted its Nov. 22, Oct. 25, and Oct. 11 Minutes

Ms. Amann said the Working Group met Nov. 22, Oct. 25, and Oct. 11.

During its Nov. 22 meeting, the Working Group took the following action: 1) heard an update on state privacy legislation; 2) received comments on the right to data portability and the right to restrict the use of data in the privacy policy statement exposure draft; 3) walked through the final exposure draft of the privacy report to the Market Regulation and Consumer Affairs (D) Committee on the privacy policy statement and the right to consumer ownership of data; and 4) discussed comments on the right to restrict the use of data; the right of portability; and the right of consumer data ownership from the Coalition of Health Insurers, America's Health Insurance Plans (AHIP), the Blue Cross Blue Shield Association (BCBSA), the Independent Insurance Agents & Brokers Association (IIABA), the National Association of Mutual Insurance Companies (NAMIC), the American Council of Life Insurers (ACLI), and NAIC consumer representatives: Birny Birnbaum (Center for Economic Justice—CEJ), Harry Ting (Healthcare Consumer Advocate), Karrol Kitt (University of Texas at Austin), Bonnie Burns (California Health Advocates), and Erica Eversman (Automotive Education & Policy Institute—AEPI).

During its Oct. 25 meeting, the Working Group took the following action: 1) reviewed an update to the Abbreviated Data Privacy Legislation Chart and the State Privacy Law Comparison Chart; and 2) received comments on the right to delete information from the ACLI, Ms. Kitt, and the Coalition of Health Insurers.

The Working Group also met Oct. 11 and took the following action: 1) adopted its Aug. 30, Sept. 13, and Sept. 25 minutes; 2) heard an update on State Privacy Legislation; and 3) received comments on the right to correct information from the ACLI, Dr. Ting, and the Coalition of Health Insurers.

Mr. Kreiter made a motion, seconded by Mr. Diederich, to adopt the Working Group's Nov. 22 (Attachment 1), Oct. 25 (Attachment 2), and Oct. 11 (Attachment 3) minutes. The motion passed unanimously.

2. Received Comments on the Final Exposure Draft of its Report on Consumer Data Privacy Protections

Ms. Amann said the Working Group received written comments and suggested edits from the ACLI; AHIP; the American Property Casualty Insurance Association (APCIA); the BCBSA; the IIABA; the Medical Professional Liability Association (MPLA); NAMIC; the Non-Health (Life and Property/Casualty [P/C]) Joint Trades; the Coalition of Health Insurers; and NAIC consumer representatives: Brenda J. Cude (University of Georgia), Ms. Kitt, and Dr. Ting. Ms. Amann said each organization will have two minutes to summarize their additional comments, as these issues have already been discussed during one of the 10 Working Group meetings this year. However, to clear up any continued confusion about the duties and activities of this Working Group, she said she and the vice chair would like to take a few minutes to give their comments (Attachment 4) and submit Appendix B as a new attachment (Attachment 15) first. She said the Working Group's 2021 adopted charges are 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 certain NAIC models, such as the *NAIC Insurance Information and Privacy Protection Model Act* (#670) and the *Privacy of Consumer Financial and Health Information Regulation* (#672).

Ms. Amann said the Working Group was given the following clarification by the Market Regulation and Consumer Affairs (D) Committee on behalf of NAIC members (which was discussed by the Working Group at that time and many times in subsequent meetings and has been posted to the Working Group's webpage since March 29).

NAIC Member-Adopted Strategy for Consumer Data Privacy Protections:

1. Charge the Market Regulation and Consumer Affairs (D) Committee with:
 - a. Summarizing consumer data privacy protections found in existing NAIC models: *Health Information Privacy Model Act* (#55), *NAIC Insurance Information and Privacy Protection Model Act* (#670), *Privacy of Consumer Financial and Health Information Regulation* (#672).
 - b. Identifying notice requirements of states, the European Union's (EU's) General Data Protection Regulation (GDPR), and the California Consumer Privacy Act (CCPA) and how insurers may be subject to these requirements.
 - c. Identifying corresponding consumer rights that attach to notice requirements, such as:
 - The right to opt-out of data sharing.
 - The right to correct or delete information.
 - The right of data portability.
 - The right to restrict the use of data.
 - How insurers may be subject to these requirements.
 - d. Setting forth a policy statement on the minimum consumer data privacy protections that are appropriate for the business of insurance.
 - e. Delivering a report on items a. – d. above by the 2021 NAIC Fall National Meeting.
2. In 2022, engage with State Attorneys General (AGs), the U.S. (Congress), and federal regulatory agencies on state and federal data privacy laws to minimize preemption provisions and maximize state insurance regulatory authority.
3. Reappoint the Privacy Protections (D) Working Group to revise NAIC models, as necessary, to incorporate minimum consumer data privacy protections that are appropriate for the business of insurance. Complete by the NAIC 2022 Fall National Meeting.

Ms. Amann said the Working Group has been transparent about its actions, discussing any issues brought before it, indicating that regulator-only subject matter experts (SMEs) were meeting periodically (eight times) to determine format and processing issues, as necessary, while the Working Group was holding its discussions during a series of 10 open meetings in 2021. She said there has been a lot of discussion about whether the word "right" should be used when discussing consumer privacy issues; however, that is the term used by NAIC membership to the Market Regulation and Consumer Affairs (D) Committee in its privacy strategy to the Working Group. She said the Working Group clarified that it would not be interpreted to be an absolute right, but it should be a functional right that would serve to help protect consumers' privacy and the protection of consumer data as it is used within insurance markets. She said companies have expressed concerns that the term "privacy policy statement" appeared suddenly, and they had no opportunity to review or comment on it or on the report to the Market Regulation and Consumer Affairs (D) Committee; however, the term "privacy policy statement" has been used since the Working Group's first meeting this year in March. She said exposure documents using the name "privacy policy statement" have been posted to the Working Group's web page multiple times and remain there to this day. She said each of the exposure documents had been discussed in detail, as evidenced in the minutes of these meetings. She said the format may have changed, but the content has not, other than to be tweaked as further discussions are warranted. She said the latest version of the privacy policy statement is included in the Working Group's report to its parent committee.

Ms. Amann said the draft of the privacy report to the Market Regulation and Consumer Affairs (D) Committee was exposed Nov. 18 for a two-week public comment period that ended Dec. 2. She said an extended exposure period was not necessary because the Working Group had already discussed these issues previously. She said the exposure draft report does not recommend copying the GDPR, nor any existing state law; however, it does include the federal, state, and international legislative issues discussed and key discussion points that were selected to give those reading it from a much higher viewpoint an idea of the breadth of the discussions because to include all of them would have made the report unmanageable at over 100 pages. She asked those present to note that the report also includes the right to consumer data ownership added by NAIC members at the NAIC Summer National Meeting in Columbus, OH; Appendix A – the privacy policy statement with "NAIC" removed from the title and the title changed to Working Group Report; and Appendix B – a list of meetings and resources reviewed by the Working Group this year. She said the Working Group would like to leave those present with the fact that the exposure draft before them is simply a report of a working group to its parent committee of its activities and work on its charges

throughout the year. She said the report is not a model act or law, a white paper, or a bulletin or legal recommendation of any sort; but it is a recommendation by a Working Group that revisions are needed to Model #670 and Model #672, as they are outdated and need to be revised to accommodate the existing technology used in insurance solicitation and implementation today. She said the Working Group would not know its fate for 2022, as charges have not yet been adopted by the two possible committees that might do privacy protections. Mr. Kreiter said he agrees with everything the chair said, and he wanted to emphasize that the Working Group is transparent about its meetings, including those of regulator-only SMEs who discussed format, procedures, and processes to move the Working Group forward. He said neither the Working Group nor the SMEs had any secret meetings.

Chris Petersen (Arbor Strategies LLC), speaking on behalf of the Coalition of Health Insurers, said some suggested guidelines for future changes to NAIC privacy models would be to focus on revising Model #672 because most states have adopted it, whereas most states have not adopted Model #670 and the wording in it is outdated. He recommended continued use of opt-in for health with no caveat to prevent sharing “under law” (e.g., in fraud detection, prevention, and enforcement situations) because market conduct examinations would require authorization. He said this language already exists in Model #672 due to the opt-out requirements of the Gramm-Leach-Bliley Act (GLBA), so that would be a good place to start.

Ms. Kitt said industry has lots of new products and it is past time to modernize NAIC privacy models. She said consumer representatives support opt-in for all lines of insurance rather than opt-out, as the responsibility for ensuring the privacy of consumer data should be on the companies rather than the consumer, who has little to no understanding of insurance products, let alone the collection and use of their data during the marketing, sales, underwriting, and claims process. She said the amount of data and personal information collected by insurers and their third-party affiliates has expanded greatly, so it is now a monumental task to reign its use and the degree of sharing that occurs without the consumer’s knowledge, consent, or approval. She said insurers must be held accountable for the data received from third-party affiliates and how it is to be used. She said she is disappointed that the Working Group is using the report and NAIC models as a basement statement. She said there needs to be a balance of the insurer’s use with the consumer’s need, and the consumer needs to be given a greater amount of leverage. She said the last paragraph of the report discusses the ongoing relationship of insurer and consumer to mean that such a relationship exists for as long as the consumer has a policy. She wondered if that would still be true if the consumer does not take a policy or cancels that policy after a time. She said specific reasons should be given to consumers for adverse selection; rather than an insurer saying the consumer’s credit score is too low, the insurer should say the consumer’s score of 585 does not meet the acceptable score of 650 set by the insurer. She said new products in the market today warrant new privacy rules. Mr. Birnbaum said the term “rights” needs to be replaced with the phrase “need for fairness” throughout the report, as it would be a more accurate description of the intent of revisions to consumer privacy notice and disclosure requirements.

Bob Ridgeway (AHIP) said the NAIC will move forward with revisions to Model #672 as recommended by the Working Group, and AHIP members support this approach. He agreed that the nine categories rather than rights need to be part of the discussion as the models are revised in the future. Wesley Bissett (IIABA) said the NAIC was ahead of the curve in privacy in the past because it used principle-based requirements that were not technology specific. He said revisions should be considered only where there are gaps or potential for consumer harm using a cost/benefit analysis, and everyone should understand that this report is a high-level overview or the big picture, if you will, of the consumer data privacy discussion. Kristin Abbott (ACLI) and Shelby Schoensee (ACLI) said they agree with their colleagues representing the other industry trades; however, they reiterated that the current models had sufficient consumer privacy requirements already, given that no consumer complaints have been received about data privacy.

Ms. Amann said Dr. Ting was unable to present to the Working Group due to a conflict with another meeting, but said she wants to invite those assembled to see and hear his presentation on consumer privacy during the NAIC/Consumer Liaison Committee meeting on Dec. 13.

3. Adopted the Final Exposure Draft of its Report on Consumer Data Privacy Protections

Ms. Amann said the Working Group would ensure that protection standards articulated in the NAIC *Market Regulation Examination Standard Handbook* would be addressed by the Working Group in its discussions going forward should the Working Group be reestablished by the Innovation, Cybersecurity, and Technology (H) Committee or the Market Regulation and Consumer Affairs (D) Committee in 2022. Mr. Diederich said he supports the Working Group report, especially in the current environment where pocket computers are tracking consumer data digitally and the pandemic has changed how we live such that nothing is surprising nor earth shattering any more. Mr. Wake said Model #672 is the vehicle that should be used,

and it is outdated, including the opt-in for health insurance with its exceptions to broad principles. Ms. Amann said the Working Group would keep and use the comments received when reviewing models in the future, as well as 2021 business practices.

Mr. Diederich made a motion, seconded by Mr. Kreiter, to adopt the final exposure draft of the Privacy Protections (D) Working Group Report on Consumer Data Privacy Protections with edits agreed to by Working Group members, interested state insurance regulators, and interested parties (Attachment 4). The motion passed by a majority with one abstention. The report is adopted and will be presented to the Market Regulation and Consumer Affairs (D) Committee for its acceptance during its Dec. 15 meeting.

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

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