



Comments of the Center for Economic Justice

To the NAIC Accelerated Underwriting (A) Working Group

Regarding Draft Referral to the Market Conduct Exam Guidelines Working Group

March 24, 2023

The Center for Economic Justice offers the following comments on the proposed referral the Accelerated Underwriting (“AU”) Working Group to the Market Conduct Examination Guidelines Working Group (“MCEG WG”)

CEJ greatly appreciates the efforts of the AU WG to identify consumer protection issues associated with life insurers’ use of big data and AI – generally referred to as AU. We also appreciate the AU WG’s decision to make a referral to the MCEG WG to begin to move from AI principles to actual guidance for insurers and regulators.

We have two recommendations to the AU WG regarding the draft referral. First, we suggest the AU WG first finalize the regulatory guidance paper before finalizing the referral. The referral seeks action by the MCEG WG to implement the guidance provided by the AU WG and, consequently, the referral should follow from the final regulatory guidance developed by the AU WG.

Second, we suggest the referral provide more specifics about the authorities that examiners should rely upon and particular issues of concern examiners should address. As presented in the draft referral, the areas identified – fair, transparent and secure – repeat the NAIC’s AI principles from three years ago and the consumer protection concerns identified at least six years ago concerning insurers’ use of big data and AI -- with no greater detail or specificity to AU. Presumably, some of that detail will be found in the regulatory guidance document, but that argues for waiting to finalize the guidance document before making the referral.

Taking the three main categories addressed in the referral one by one – it is unclear what additional guidance or examination procedures the AU WG is contemplating for AU-related data security. Are there data security concerns for AU-related data that are different from other types of personal consumer information for which data security requirements and examination guidelines have already been established?

Turning to the transparent section, one of the requests to MCEG WG is to determine if the insurer discloses the data used by the insurer for AU and how those data are used. If the AU-related data is subject to the Fair Credit Reporting Act – data provided by a consumer reporting agency – there is a requirement for disclosure and consent. What is the authority regulators should be relying for non-FCRA data in terms of the stated disclosure requirements?

The above points to a more general concern with the proposed referral—a lack of reference to specific regulatory authorities. The draft referral states:

Existing regulations apply to accelerated underwriting programs in the same way as traditional underwriting programs. DOIs have broad authority to examine the processes and procedures of life insurers to determine if their accelerated underwriting programs comply with the statutes and regulations of the department, in particular the state equivalent to the *Unfair Trade Practices Act* (#880)¹, to ensure that these accelerated underwriting programs are not unfairly discriminatory.

The normal approach taken by the MCEG WG is to work from a specific authority – a NAIC model law or guideline that sets out the regulatory authorities and responsibilities. The above paragraph, on one hand, says existing authorities apply to AU in the same way as to traditional underwriting. If this is correct, what additional guidance is needed for AU that doesn't already exist in the Market Regulation Handbook? What is different for examiners about AU in terms of fair, transparent and secure examination protocols?

This leads to our discussion of fair and the absence of AU-specific issues for the MCEG WG to consider. The following are just a few examples of issues that should be included in the regulatory guidance as well as in the referral:

- Definition of (un)fairness to include both intentional and unintentional discrimination against protected classes, as well as practices that do not have actuarial justification. This requires a discussion of proxy discrimination and disparate impact.
- Scrutiny of biometric data-based algorithms for bias, given the large body of research demonstrating racial bias in facial recognition and the unreliability of other biometric scores – such as video-based age or health analysis. Absent t Review of credit-based AU tools;

¹ See Section 4G(1) Unfair Discrimination. Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any life insurance policy or annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such policy.

- Scrutiny of credit-based algorithms for use of prohibited factors, like medical debt, as well as for proxy discrimination and disparate impact on the basis of race.

These are examples of AU-specific issues for which new examiner guidance is needed.

We close by again thanking the AU WG for your work and ask that the referral to MCEG WG be held until the regulatory guidance document is finalized and that the referral provide more specific authorities and issues of concern requiring new examination guidance.