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Artificial Intelligence (EX) Working Group
Conference Call
June 30, 2020
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The Artificial Intelligence (EX) Working Group of the Innovation and Technology (EX) Task Force met via conference call June 30, 2020. The following Working Group members participated: Jon Godfread, Chair, Chris Aufenthie, Chrystal Bartuska and John Arnold (ND); Mark Afable, Vice Chair, Timothy Cornelius, Jody Ullman, Mark Prodoehl, Nathan Houdek, Barbara Belling, and Mary Kay Rodriguez (WI); Jerry Workman and Gina Hunt (AL); Erin Klug, Vanessa Darrah and Tom Zuppan (AZ); Lucy Jabourian and Pam O'Connell (CA); Michael Conway, Jason Lapham and Peg Brown (CO); Andrew N. Mais and George Bradner (CT); David Altmaier, Rebecca Smid, and Nicole Altieri Crockett (FL); Doug Ommen and Travis Grassel (IA); Bruce Sartain, Jeff Varga, CJ Metcalf and Vincent Tsang (IL); Amy Beard and Karl Knable (IN); Rich Piazza and Tom Travis (LA); Kathleen A. Birrane, Ron Coleman and Robert Baron (MD); Grace Arnold, Tammy Lohmann and Phil Vigliaturo (MN); Chlora Lindley-Myers and Cynthia Amann (MO); Kathy Shortt (NC); Christian Citarella (NH); Barbara D. Richardson (NV); Ron Kreiter (OK); Jessica K. Altman, Michael McKenney and Shannen Logue (PA); Alison May and Rachel Jrade-Rice (TN); and Christina Rouleau (VT). Also participating were: Dean L. Cameron and Jo McGill (ID); Brenda Johnson and Tate Flott (KS); Robert Wake and Sandra Darby (ME); Troy Smith (MT); Randall Currier (NJ); Mark McLeod (NY); Elizabeth Kelleher Dwyer (RI); Raymond G. Farmer and Michael Wise (SC); Mike Boerner (TX); and David Hippen (WA).

1.  <u>Adopted its June 3 Minutes</u>

The Working Group met June 3 and took the following action: 1) adopted its May 5 minutes; 2) continued reviewing the draft Principles on Artificial Intelligence (Principles); and 3) reviewed a proposed timeline for adoption of the AI Principles.

Commissioner Ommen made a motion, seconded by Commissioner Afable, to adopt the Working Group's June 3 minutes (Attachment X). The motion passed unanimously.

2.  <u>Reviewed Draft AI Principles Version 5</u>

Commissioner Godfread reviewed the process for adopting the Principles once they have been adopted by the Working Group. He said the changes in Version 5 of the AI Principles, posted to the Working Group's webpage since June 15, should reflect the discussion on the Working Group's June 3 conference call. He reviewed those changes.

3.  <u>Discussed Comments Related to Introductory Language, Legal Liability and Proxy Discrimination</u>

Commissioner Godfread said the North Dakota Department of Insurance (DOI) offered some introductory language for discussion based on comments from interested parties. He said that was discussed during the June 3 conference call, and Angela Gleason (American Property Casualty Insurance Association—APCIA) indicated that she would work with the North Dakota language and offer suggested language based on it for discussion on this call. Ms. Gleason said it is important that the language sets out the scope and parameters for the document to ensure that everyone is comfortable with the direction. She said the goal is to get companies to think about and implement the Principles, guide the committee structure, and ensure consistency in terms of interpretation. She then reviewed the APCIA proposed changes (Attachment 1). She said it is important for the Principles to be risk-focused; keep in mind this is an evolving issue and the goal is to promote innovation in ways that benefit consumers.

Commissioner Godfread said the APCIA recommended changes get us to a point where we are speaking consistently regarding what the Principles are intended to be; i.e., an internal, aspirational, guiding document for the NAIC. He said the language offered by the APCIA clarifies and adds weight to that purpose.

Ms. Jabourian asked why the word "aspire" is included. She said the entire document is aspirational. She said the word weakens the overall concept. Ms. Gleason said these are high level guiding principles, and that is why the word "aspire" was included. Ms. Jabourian said if the word was removed, it would not change that intent. Ms. Gleason said removing it would be agreeable if the rest of the language remains. Mr. McKenney said he would support removing the word "aspire" as well because the previous version recommends that AI actors "adhere" to the AI Principles, and changing that to the word "aspire" does seem to weaken the intent.

William D. Latza (Lemonade) asked if the word "aspire" is anywhere else in the Principles and whether anything else characterizes the Principles as aspirational if the word "aspire" is removed from the introductory language. Commissioner Godfread said he does not believe so but adding the word "aspire" does not change that this is aspirational; therefore, it is not necessary. Ms. Jabourian added that these are high level guiding principles, and they do not carry the weight of law or any legal liability. She said including the word "aspire" is simply not needed, and if included, it weakens the intent. Ms. Gleason asked if the minutes could reflect that the intent of the document is to be "aspirational." Commissioner Godfread said yes, the minutes can reflect that point.

Birny Birnbaum (Center for Economic Justice—CEJ) said the CEJ submitted a comment that directly addresses this issue. He said the CEJ has some concerns with the APCIA language specific to so many references to compliance with legal requirements. He said it is the CEJ's view that people do not need to be reminded that they must comply with the law. He said it is not an "aspirational" thing to comply with the law; this is an emerging area, and current legal requirements do not address everything. He said the CEJ suggested the addition of language that calls on AI actors to not simply seek to comply with legal requirements but to act according to the AI Principles in the absence of specific legal requirements and go beyond mere compliance when such actions would better meet the Principles. He said this gets to the aspirational part and drives home the point that the whole area of AI is uncharted ground for a lot of regulatory insurer actions. He said the CEJ has a real concern with the "level of regulatory oversight" language proposed by the APCIA, stating that the level of regulatory oversight will vary based on the risk and impact to the consumer. He said the Principles should be interpreted and applied in a manner that accommodates the nature and pace of change in the use of AI by the insurance industry and promotes innovation, while protecting the consumer from harm. He said this language introduces a lot of new terms that would be open to interpretation and could lead to stakeholders interpreting them to mean whatever they want, and the language does not really add anything useful.

Commissioner Mais said he agrees with deleting the word "aspire," but regarding the "level of regulatory oversight" language, that just brings out the idea of proportionality that is fundamental to regulation. Commissioner Godfread said he agrees, noting that the entirety of this process is an attempt to get to balance in what is uncharted areas, while acknowledging and avoiding inherent risks. He said he believes this language does that and sets the right tone for other committees that will continue to have discussions about the level of regulatory oversight in the area of AI going forward.

Mr. Citarella said the word "will" in that sentence might be changed to "should" or "ought" to be more suggestive and not tie the hands of the state insurance regulator. Commissioner Mais suggested changing the word to "may." Commissioner Afable and Commissioner Birrane agreed that it is a good change. Commissioner Ommen agreed that the document is intended to be guiding principles, and it does not have to be specific in all areas. He said he agrees with what is proposed.

Commissioner Godfread said the word "aspire" would be removed and the word "will" would be changed to "may" in the sentence about the level of regulatory oversight being based on the risk and impact to the consumer. Commissioner Richardson made a motion, seconded by Commissioner Altman, to adopt the APCIA language with the two suggested changes. The motion passed unanimously.

Commissioner Godfread asked the Working Group to turn its attention to the language under the Fair and Ethical section that says "AI actors should proactively engage in responsible stewardship of trustworthy AI in pursuit of beneficial outcomes for consumers and to avoid proxy discrimination against protected classes." He said on a recent member call, this language was discussed and had overwhelming support. He said the risk of embedded bias in the use and creation of an algorithm is a recognized issue, and the members are committed to not allowing it. He said this has been front of mind since the creation of this Working Group, and this language is not only warranted but necessary at this point. He said a work product that does not address proxy discrimination would leave a gaping hole in terms of our intentions. Commissioner Godfread said we must aspire to do better and acknowledge the risks that come with new technology. He asked Mr. Aufenthie to talk about the North Dakota DOI's suggested language. Mr. Aufenthie said a minor edit for clarification was offered. He said it was not the intent to make it confusing or equate the use of proxy variables with proxy discrimination, but quite the opposite. He said the feedback on the Version 5 language was that it could be interpreted to mean that proxy variables would never be allowed, but the proposed language is intended to say they would not be allowed to be used to unfairly or unlawfully discriminate against protected classes. He added that AI actors should proactively avoid AI systems that use variables or bad data that would make discrimination somehow legal, but at the same time, use of proxy variables would be allowed if there is a legitimate and acceptable business purpose.

Commissioner Ommen said he continues to have concerns about phrases such as "proxy variables" that are not well understood. He said discrimination in terms of education and employment is not unfair discrimination in the business of insurance. Commissioner Mais said he does think proxy discrimination has to be in the document, and disparate impact is a recognized

term. He said the proxy variable is a separate thing and having the two together does tend to unnecessarily confuse the issue. Commissioner Afable said he agrees that the North Dakota language helps clarify the points we are trying to make and gives direction to AI actors. He said it may not be perfect, but it is directionally correct. Ms. Lohmann said Minnesota would be in favor of the proxy discrimination language over the proxy variable, which seems directional, but the purpose of the proxy discrimination language is to capture the unintentional. Therefore, to Commissioner Ommen's point, Ms. Lohmann said this is aspirational, and considering all things that might proxy a prohibited variable should be included. Commissioner Conway said the proxy discrimination language is needed. He asked whether it is necessary to call this out specifically in this document if there are truly legitimate business purposes in play that do not lead to proxy discrimination. He did say this is directionally headed in the right way. Commissioner Altman said the inclusion of the proxy discrimination language is critical in terms of thinking about this as an aspirational document and recognizing the risk.

J. Bruce Ferguson (American Council of Life Insurers—ACLI) said the ACLI believes that racial discrimination in any form, direct or indirect, is wrong; therefore, the ACLI would support the goal of the AI Principles and the Working Group's desire to move forward with them. He said the ACLI would agree to including, at this point, a reference to proxy discrimination. He said the concept of proxy discrimination is somewhat new, and it was just introduced into the guiding Principles on June 3. He said that in looking at a number of comment letters, and as Commissioner Ommen pointed out, they all seem to differ somewhat regarding what is meant by the concept of proxy discrimination. He said that for the ACLI and within the life insurance context, it really means that AI should not be used to make underwriting decisions that would otherwise be prohibited by life insurance unfair trade practices laws as unfair discrimination. He said these guiding Principles are really intended to inform the work of other NAIC initiatives and for that matter individual state actions, so it is important to reach a common understanding among all the stakeholders as to what proxy discrimination means. He said he thinks this can be accomplished without delaying the progress made on the Principles.

Commissioner Godfread said he has reviewed many AI Principles documents, and this document is one of the most balanced in terms of recognizing that there will be some challenges as we move into utilizing this technology, but not having perfect definitions is expected, as this is an evolving space. He said this is a directional document for the NAIC, and there will need to be discussions regarding what is acceptable and what is unacceptable; that may need to happen at the different committees as these issues come forward. He said it is important to keep moving forward. Mr. Latza expressed support for Mr. Birnbaum's concept regarding proxy discrimination, but the reason we are having the debate is because of failing to differentiate between these concepts. He said rather than wed the AI Principles to a particular legal construct, the Working Group should focus on the goal that insurance decisions should not be made solely on the basis of constitutionally protected classes, which is not to say there cannot be discrimination on an actuarial basis. He said if this principle is phrased in such a way so as to get away from the means and what we are trying to achieve, we can come up with something better.

Commissioner Ommen said the ACLI perspective is helpful. He said one must understand causation. He said one of the most emotional subjects is law enforcement, and data clearly supports the idea that there has been discrimination in a number of different ways that is clearly racially connected. He said you must be able to separate out what is flawed and what is good, actuarially supported data. He said it appears that a lot of the information being used is flawed because it unfairly selects based on race. He said he values this AI Principles document as a guidance, and the Working Group needs to have honest conversations about variables that are being used, but it cannot use unintentional disparate impact to conclude that something is wrong with the insurance model. He said using the term proxy discrimination may draw some people to conclude that we are talking about disparate impact, and he does not believe that we should.

Commissioner Conway said he is not so sure that it should just be accepted that societal problems and issues is a part of our insurance regulatory system. He said we need robust conversation about that, and he is not convinced that this should not be part of the discussion at this time. Commissioner Ommen said he agrees, and a lot of things are unequal and unjust; some of those factors are part of a rate making system. He said our eyes must be open as we discuss this because you cannot automatically conclude that the ratemaking process is improper. He said there are inequities that have been in our country for a long time that are being addressed and should be in the discussion. Commissioner Conway said the insurance industry should not be perpetuating those problems, and we should be discussing how to stop those activities. Commissioner Godfread said the current version of the Principles has language about absent negligence saying that if something is wrong, it simply needs to be corrected and does not call for punitive penalties. He said this is a balancing act.

Mr. Birnbaum said characterizing proxy discrimination as something vague and just a legal term is quite depressing. He said state insurance regulators have been looking for proxy discrimination forever, and when rating factors are filed that do not make sense, state insurance regulators have always looked to see if it is some kind of proxy for something else. He said the idea that the concept is untested or unknown is wrong, as it has been around as a legal concept in the fair housing act for over

40 years and in insurance for decades. He said the language in the proposal is clear, and it does not need any embellishment by adding the term "proxy variables." He said the high-level Principles are there to say insurers should be proactive because of the much greater risk of discrimination with AI algorithms. He said the language is sufficient, and discussion regarding proxy variables should be part of the model law development.

Ms. Gleason said this is an important conversation. She said the term "proxy discrimination" raises concerns, and she would recommend replacing it with "prohibited discrimination." She said that would keep the conversation moving.

Andrew R. Pauley (National Association of Mutual Insurance Companies—NAMIC) said NAMIC cannot support the proxy discrimination language, as it is not defined in the document. He said it goes against the high-level aspirations of the document by including a very nuanced legal determination concerning these issues. He said NAMIC does not support unfair discrimination or any type of intentional discrimination; however, any attempt to remove rating factors that are actuarially justified and improve the predictive value of rating plans would be a move away from risk-based pricing, and NAMIC supports risk-based pricing. He said NAMIC has significant concerns, and it cannot be said that this is just an internal document, as the NAIC is a standard-setting body by its own definition, so when this document is created with this terminology without definition or understanding of what we are talking about, it is going to create confusion, litigation risk and new duties out in the public once it is released. He said the lack of a definition is not going to provide any guidance to future work streams, and it can do more harm than good. He said NAMIC applauds the work of the Working Group and understands the intention, but this has been a rushed process and forcing the issue in this manner is disconcerting to say the least. Commissioner Godfread said he takes exception to characterizing this as having been rushed. He said documents about the use of ethical algorithms or AI generally have a section denoting ethical and fairness, including proxy discrimination, and to somehow assume the term is not understood is not factual and he could not agree to that. He said there is a firm understanding of what it is, and it will be further developed as state insurance regulations are flushed out. He said many insurer chief executive officers (CEOs) have made statements over the last six weeks about doing better and being a part of the solution. He said on the NAIC member call, Director Farmer said we are going to take proactive steps to address some of these top of mind issues.

Richard L. Bates (State Farm) said he has read a lot of the documents that talk about proxy discrimination and disparate impact, and one of the articles says that for underwriting purposes, geography would be considered a proxy for race. He asked if that would carry over to the rating variable because geography is an acceptable rating factor. He said State Farm is opposed to unfair discrimination, but it is waiting to see the legislation that says geography cannot be used as a rating factor based on the idea that it would be considered a proxy for a prohibited characteristic.

4.  Adopted the AI Principles

Ms. Jabourian made a motion, seconded by Commissioner Conway, to adopt the NAIC Principles on Artificial Intelligence Version 5 with the addition of the introductory language proposed by the APCIA, as amended. Commissioner Godfread asked for a roll call vote. California, Colorado, Connecticut, Florida, Illinois, Indiana, Maryland, Minnesota, Missouri, New Hampshire, North Dakota, Pennsylvania, Tennessee, Vermont and Wisconsin voted in favor. Iowa abstained. The motion passed.

5.  Discussed its Timeline and Next Steps

Commissioner Godfread said the adopted version of the Principles will be distributed, posted on the Working Group's webpage, and forwarded to the Innovation and Technology (EX) Task Force for consideration. He said comments will be accepted until July 20 and discussed on the Task Force call on July 23. He said comments and changes could continue to be discussed with the possibility of adoption during the Task Force's meeting the week of Aug. 3.

Having no further business, the Artificial Intelligence (EX) Working Group adjourned.

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