



Independent Insurance Agents
& Brokers of America.

July 24, 2023

Katie Johnson
Chair
Privacy Protections Working Group
National Association of Insurance Commissioners
1100 Walnut Street, Suite 1500
Kansas City, MO 64106-2197

Re: Draft Insurance Consumer Privacy Protections Model Law, Version 1.2

Dear Chair Johnson:

On behalf of the Independent Insurance Agents and Brokers of America (IIABA), the largest insurance agent and broker organization in the country, I write to offer our association's comments and concerns regarding the latest draft of the *Insurance Consumer Privacy Protections Model Law (Version 1.2)*. Our members are the industry constituency that would be most impacted by this proposal, and we appreciate having the opportunity to submit these comments.

Comments and Observations

IIABA is incredibly troubled by the proposal and would oppose legislation of this nature if ultimately introduced and considered by state policymakers. We recognize that modest revisions have been made in this second version, but those improvements are on the margins and fail to address a myriad of more significant threshold considerations and questions.

The latest draft remains inherently flawed and misses the mark. It would inappropriately restrict how and when data may be used and retained by licensees, impose unrealistic marketing restrictions, force small licensees to unreasonably police third-party service providers, expand privacy notice obligations in unnecessary ways, subject main street insurance agents to mandates that states have reserved only for large entities, and establish a range of other burdensome and unprecedented requirements. We cited numerous problems and suggested revisions in our April 3 correspondence and in numerous meetings, and those comments largely remain relevant vis-à-vis the updated draft.

The NAIC's Summer National Meeting will begin in less than three weeks, and we urge the working group and other regulators to use that time together to assess and discuss what the NAIC hopes to achieve with regard to privacy and what it can realistically accomplish. The

working group has elected to draft a new model law that would completely replace the existing privacy framework, but it is still unclear to most observers what problems and regulatory gaps the drafters see in the current privacy framework. It is similarly unclear why such a sweeping new proposal is necessary, beneficial, or likely to be adopted by state legislatures. There are other credible, helpful, and timely actions that the working group could pursue in lieu of a full-blown rewriting of privacy law, but we do not believe the current proposal is viable from a substantive or political perspective. The problems with the current approach are foundational and fundamental, and they cannot be cured with modest revisions or wordsmithing.

As the working group and other regulators consider how to move forward, we would also note the following:

- The working group has proposed a dramatic restructuring of privacy law that would uniquely target the insurance industry and create mandates more onerous and restrictive than those that apply to other industries, and it has done so without explaining its reasoning or examining the marketplace ramifications of such a proposal. This draft would create unwarranted burdens for the industry, hinder our ability to serve consumers, and have particularly adverse effects on small licensees and the independent agent system.
- Thirteen states, which represent over 41% of the country's population, have enacted comprehensive privacy measures or passed them through their legislatures, and the new draft directly conflicts with these recently adopted laws. This recent legislative activity offers insight into the current perspective of many state policymakers and highlights the fact that the NAIC proposal is unnecessary and out of the mainstream. It also suggests there is little interest in a model law that treats the insurance industry in uniquely and unduly restrictive ways. State legislators attending last week's National Council of Insurance Legislators meeting also commented publicly and suggested that the NAIC proposal would be poorly received by state legislatures.
- The working group has also not publicly discussed the manner in which the draft would considerably distort the marketplace and create an unlevel playing field among marketplace competitors. Certain federal laws, including the Fair Credit Reporting Act and the Gramm-Leach-Bliley Act, already impose privacy-related requirements on insurance and other financial services providers, and these laws affect and restrict the types of requirements states may impose. As a result of these existing federal statutes, the NAIC draft would create an uneven playing field, with some competitors being subject to its requirements and others being largely exempt from them as result of this preemption.
- Supreme Court decisions over the last dozen years have altered and expanded the manner in which commercial speech is protected by the First Amendment, and the draft has constitutional implications that have not been examined. The Supreme Court has indicated that the creation and dissemination of information is speech under the First Amendment and that marketing is a form of commercial speech. This means the proposed restrictions on the use and sharing of information would at least need to survive the intermediate level of First Amendment scrutiny, and these recent decisions also suggest that content-based and viewpoint-based restrictions on commercial speech could be subject to the higher strict scrutiny standard and almost certainly found unconstitutional.

Next Steps

IIABA, like other industry stakeholders and business groups, does not believe the complete displacement of the existing privacy framework and the development of an entirely new privacy regime are warranted, appropriate, or beneficial. Sweeping and disruptive changes in state insurance codes are not needed, and regulators should instead focus on addressing marketplace problems and regulatory gaps. Regulators should also consider whether there are helpful changes or new elements (i.e. a modified version of the provisions contained in Article IV of the proposal) that could be blended with the existing statutory framework.

We urge the working group, its parent committee, and commissioner-level regulators in the coming weeks (including during your time at the Summer National Meeting) to consider what the NAIC hopes to accomplish with regard to privacy regulation, to consider alternative approaches in its privacy work, and to identify reasonable objectives. Adopting a narrower and more reasonable focus is not only more appropriate, but it would also significantly increase the likelihood that any final work product would (1) be approved by the NAIC in the aggressive timeframe that has been proposed and (2) be considered and adopted by state legislatures. We will, of course, continue to participate in your model development process, if that is the path that the NAIC chooses to take, but it is our sincere hope that the working group will embrace a slight but meaningful change in direction.

Conclusion

IIABA appreciates having the opportunity to submit these comments. We are happy to assist the working group's consideration of these issues in any way it deems appropriate. Please feel free to contact me at 202-302-1607 or via email at wes.bissett@iiaba.net with any questions or if we can assist in any manner.

Very truly yours,



Wesley Bissett
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