Comments from the Center for Economic Justice

To the NAIC (EX) Committee on Race and Insurance

April 10, 2021

The Center for Economic Justice (CEJ) submits the following comments on the 2021 Proposed Charges for the Special (EX) Committee on Race and Insurance ("SCoRI") released on April 7, 2021. Our comments reference our March 23, 2021 comments to the SCoRI and our April 8, 2021 Consumer Liaison Committee presentation, both attached.

CEJ greatly appreciates the efforts of the SCoRI and the NAIC to fully engage and examine the insurance impacts of systemic racism on communities of color. The proposed charges reflect a serious and sustained commitment by the members of the NAIC to identify and eliminate racism in insurance and to improve diversity, equity and inclusion among regulators and insurers.

Our review of the proposed charges suggests that the charges can be significantly improved for clarity, coordination, reducing overlapping activities and, most importantly, a more systematic approach to the issue. We see the following problems with the charges.

- The charges seem to be more of a wish list of activities than a systematic approach to examining and addressing issues of race and insurance.
- The charges range from specific tasks to broad investigations with no distinction about the breadth of the activity.
- There charges largely fail to specify deliverables or time frames for delivery.
- The charges create structures through SCoRI work streams that duplicate lettered Committee responsibilities and that make coordination unnecessarily difficult.
- The charges reflect an initial cut at identifying insurer policies and practices that may result in disparate impact or proxy discrimination, but contain no provision for a comprehensive examination by the subject-matter committees.
- The charges do not include key components of a comprehensive and systematic approach to examining race in insurance, including identification of public policies that unfairly disadvantage communities of color or improving diversity and inclusion by consumer stakeholders, generally, and communities of color, particularly in regulatory processes.

Our comments of March 23, 2021 to the SCoRI discuss the need for and components of a comprehensive and systematic approach by the NAIC to examine the impacts of systemic racism in insurance. We have summarized our review of the proposed charges suggested revisions into the chart below. The chart shows the major strategic components, the specific charges for specific NAIC committees, the specific deliverables and the time frame for deliverables.

We also recommend significant streamlining of the many SCoRI work streams into one working group for the DE&I efforts and the remaining activities either at the SCoRI committee level or in a SCoRI Legal and Regulatory Guidance working group combined with assignments to other NAIC Committees. This streamlining will reduce unnecessary duplication, facilitate coordination, better engage subject-matter experts within the lettered committees and better allow consumer stakeholder participation. It is much more difficult to consumer stakeholder to meaningfully participate when the relevant activities are spread over so many different work streams and committees because of the much more limited resources of consumer stakeholders compared to industry stakeholders.

We suggest a comprehensive and systematic approach by the NAIC to addressing race in insurance has five major components. Please see the chart for a summary.

1. **Diversity, Equity and Inclusion ("DE&I") among insurers, regulators and consumer stakeholders in NAIC and regulatory processes.** The proposed SCoRI charges C, D and E address the first two groups, but there is no charge for DE&I for communities of color in regulatory processes. We suggest the SCoRI efforts for DE&I be combined into a single working group of the SCoRI and that the Consumer Liaison Committee be charged with developing recommendations for improving DE&I within regulatory processes.

2. **Analyze, affirm and develop, as necessary, the legal and policy framework for addressing race and insurance.** This set of activities is the foundation for identifying and addressing the structural and systemic causes of racial disparities in insurance. The main deliverable is definitions of disparate impact and proxy discrimination. These definitions will reflect the intent of regulators and will provide the guiding principles for the remaining activities. This work should be the responsibility of the SCoRI.

3. **Develop the legal and regulatory guidance for implementing the policy framework for race and insurance and for implementing the Principles for AI.** This component of the overall strategy includes:

   a. Guidance for insurers to test for disparate impact and proxy discrimination;

   b. Guidance for insurers to report test results and actions taken in response to test results

   c. Guidance for safe harbors for insurers who follow regulatory guidance

   d. Guidance insurers to implement the NAIC Principles for AI

   Charges a, b and c should be assigned to SCoRI, while charge d should be assigned to the Big Data / AI working group.

4. **Develop tools and resources for regulatory oversight.** This is the component of the overall strategy that ensures that regulators have the resources, tools, data and skills to effectively implement the regulatory guidance. Key tasks within this component are:

    a. Develop market regulation data collection sufficient to monitor consumer market outcomes by prohibited class characteristics; and

    b. Identify gaps in regulatory skills and resources necessary analysis of disparate impact and proxy discrimination.

    We suggest that these charges be assigned to the Market Regulation (D) Committee for several reasons. First, the proposed charges have this activity assigned to three work streams (in proposed charge G), creating repetitive efforts. This should be a unified activity because the types of data and analysis necessary to examine accelerated underwriting in life insurance for disparate impact and proxy discrimination are the same as those necessary to examine health insurance delivery outcomes or personal auto claim settlements or homeowners pricing or marketing for small business owners insurance. Second, the Market Regulation (D) Committee is already where consumer market outcome data collection efforts are housed. Third, it is the market regulators who will likely be carrying the bulk of responsibility for analyzing policies and practices for disparate impact and proxy discrimination. While we have great respect for the actuaries who review rate filings, it is not actuarial expertise that is relevant for examining disparate impact and proxy discrimination

5. **Identify industry practices and public policies that may produce disparate impact and proxy discrimination.** The proposed charges include many specific inquiries for work streams 3, 4 and 5 for the CIPR. It is unclear how this list of issues of concern was developed or what equity framework was used to prioritize the listed items. Further, the list fails to distinguish between industry practices (subject to regulatory oversight) versus public policies (outside of regulatory oversight) that may lead to disparate impact and proxy discrimination. This is a critical distinction and both lines of inquiry are essential to address systemic racism in insurance.

    For example, let's look at uninsured motorist issues. Standard industry practice is to develop sub-state rating territories for uninsured motorist coverage rates. But, we know that the uninsured motorist rate is higher in communities of color for a variety of reasons tied to historic racial discrimination. By using sub-state rating territories for UM rates, consumers in communities of color who purchase UM are penalized because there is a higher percentage of community members unable to afford insurance. This is essentially a penalty for living in a community of color. Regulators currently have authority to identify such rating practices as unfairly discriminatory – an example of an industry practice that may result in disparate impact or proxy discrimination.

For an example of public policy that likely creates disparate impact, the Property / Casualty C Committee could look at states' efforts to enforce financial responsibility laws and identify and punish uninsured drivers. If these increasingly intensive and data-driven monitoring and enforce efforts disproportionately punish members of communities of color, insurance regulators should provide analysis and insight to policymakers to address the uninsured motorist problem without creating a debtors' prison for communities of color.

We suggest that instead of assigning this effort to SCoRI work streams, the assignment to identify and examine practices and policies that may disadvantage communities of color be assigned to the subject matter committees. It makes no sense to have a SCoRI work stream look at these issues for property/casualty insurance when the NAIC has a property/casualty committee. Moreover, assigning just the proposed charges to the three work streams produces both major gaps and duplication. It produces gaps because there is no work stream that tracks the work of the Market Regulation D or Financial Condition E Committees.

Our attached March 23, 2021 comments to the SCoRI and attached April 8, 2021 presentation to the Consumer Liaison Committee show that insurer practices for marketing, claims settlement and antifraud raise as much or more concern regarding potential racial disparities and exclusion than pricing. Most of these non-pricing industry practices are part of the D Committee's portfolio and, consequently, the D Committee should be just as much a "work stream" for the effort to examine racial disparities as the major lines of business – and that work should be done at the lettered committee and not in a parallel and duplicative "work stream" of SCoRI.

We also recommend that the charge to identify industry practices and public policies that produce disparate impact and proxy discrimination be given to the Financial Condition E Committee. It is vital that regulators and insurers examine their investment practices to identify investments that encourage or support environmental racism or abusive racial practices. For example, if regulators and insurers are committed to addressing systemic racism in insurance, then insurers should not be investing in predatory lenders or other businesses that systematically rob

In closing, we look forward to constructive engagement with other stakeholders and NAIC members to achieve concrete outcomes that match the anti-racism statements of industry and regulators. We also urge the SCoRI to provide a two-week comment period following your April 12, 2021 meeting for comments by interested parties, followed by a public meeting of the SCoRI by the end for April or beginning of May to fully consider stakeholder comments and finalize the 2021 work plan and charges..

CEJ Proposed 2021 Strategy and Charges for NAIC Special Committee on Race and Insurance

Major Strategic Activity	Specific Activity	Responsible Committee	Deliverable	Time Frame
Promote Diversity, Equity and Inclusion in Insurance	Within Insurers, Producers and Suppliers	Race and Insurance DE&I Working Group	Analysis of Current DE&I, Tools for Ongoing Measurement, Best Practices to Improve DE&I	Draft by Summer 2021 National Meeting, Final by Fall 2021 National Meeting
	Within Regulators	Race and Insurance DE&I Working Group	Analysis of Current DE&I, Tools for Ongoing Measurement, Best Practices to Improve DE&I	Draft by Summer 2021 National Meeting, Final by Fall 2021 National Meeting
	Within Regulatory Processes	Consumer Liaison Committee	Analysis of Current DE&I, Tools for Ongoing Measurement, Best Practices to Improve DE&I	Draft by Summer 2021 National Meeting, Final by Fall 2021 National Meeting
Affirm the Legal and Policy Framework for Addressing Race and Insurance	Define Disparate Impact and Proxy Discrimination	Race and Insurance	Definitions	Draft by 7/15/2021, Final by Fall National Meeting
Develop Legal and Regulatory Guidance for Implementing Policy Framework for Race and Insurance and for Implementing Principles for AI	Guidance for Insurer to Test for Disparate Impact and Proxy Discrimination	Race and Insurance	Guidance (Model Law, Model Guideline, Bulletin, Other as Needed)	Draft by Summer 2021 National Meeting, Final by Fall 2021 National Meeting
	Guidance for Insurers to Respond to Test Results	Race and Insurance	Guidance	Draft by Summer 2021 National Meeting, Final by Fall 2021 National Meeting
	Guidance for Insurers to Report Test Results and Actions Taken in Response to Test Results	Race and Insurance	Guidance	Draft by Summer 2021 National Meeting, Final by Fall 2021 National Meeting
	Guidance for Safe Harbors for Insurers to Follow Guidance	Race and Insurance	Guidance	Draft by Summer 2021 National Meeting, Final by Fall 2021 National Meeting
	Guidance for Insurers to Implement NAIC Principles for AI	Big Data / AI	Guidance	Draft by Fall 2021 National Meeting, Final by Spring 2022 National Meeting
Develop Tools and Resources for Regulatory Oversight	Develop Market Regulation Data Collection Sufficient to Monitor Consumer Outcomes by Prohibited Class Characteristics	Market Regulation D	Proposed Statistical Plan and Data Reporting Infrastructure	Draft by Summer 2021 National Meeting, Final by Fall 2021 National Meeting
	Identify Gaps in Regulatory Skills and Resources Necessary for Analysis of Disparate Impact and Proxy Discrimination	Market Regulation D	Assessment of Current and Needed Regulatory Skills and Resources	Fall 2021 National Meeting
Identify Industry Practices and Public Policies That May Produce Disparate Impact and Proxy Discrimination, Including Low-Value Products That Target Communities of Color	Add Charge for A, B, C, D, E Committees	Life A, Health B, Property/Casualty C, Market Regulation D, Financial Condition E. D Committee to focus on insurer marketing, claims settlement and antifraud. E Committee to focus on insurer investments that promote or discourage environmental racism, predatory lending and other business practices that disadvantage	Reports to Committee on Race of Committee Investigation Results	Each National Meeting from Summer 2021 through Fall 2022.

Regulatory Modernization to

Address Systemic Racism in Insurance

Presentation to NAIC Consumer Liaison Committee

April 8, 2021

Birny Birnbaum
Center for Economic Justice

The Center for Economic Justice

CEJ is a non-profit consumer advocacy organization dedicated to representing the interests of low-income and minority consumers as a class on economic justice issues. Most of our work is before administrative agencies on insurance, financial services and utility issues.

On the Web: www.cej-online.org

About Birny Birnbaum

Birny Birnbaum is the Director of the Center for Economic Justice, a non-profit organization whose mission is to advocate on behalf of low-income consumers on issues of availability, affordability, accessibility of basic goods and services, such as utilities, credit and insurance.

Birny, an economist and former insurance regulator, has worked on racial justice issues for 30 years. He performed the first insurance redlining studies in Texas in 1991 and since then has conducted numerous studies and analyses of racial bias in insurance for consumer and public organizations. He has served for many years as a designated Consumer Representative at the National Association of Insurance Commissioners and is a member of the U.S. Department of Treasury's Federal Advisory Committee on Insurance, where he co-chairs the subcommittee on insurance availability. Birny is also a member of the U.S. Federal Reserve Board's Insurance Policy Advisory Committee.

Birny served as Associate Commissioner for Policy and Research and the Chief Economist at the Texas Department of Insurance. At the Department, Birny developed and implemented a robust data collection program for market monitoring and surveillance.

Birny was educated at Bowdoin College and the Massachusetts Institute of Technology. He holds Master's Degrees from MIT in Management and in Urban Planning with concentrations is finance and applied economics. He holds the AMCM certification.

Why CEJ Works on Insurance Issues

Insurance Products Are Financial Security Tools Essential for Individual and Community Economic Development:

CEJ works to ensure **fair access** and **fair treatment** for insurance consumers, particularly for low- and moderate-income consumers.

Insurance is the Primary Institution to Promote Loss Prevention and Mitigation, Resiliency and Sustainability:

CEJ works to ensure insurance institutions maximize their role in efforts to reduce loss of life and property from catastrophic events and to ***promote resiliency and sustainability*** of individuals, businesses and communities.

What Information Does This Map of Omaha Nebraska Present?

a.   Concentration of Minority Population?

b.   Concentration of Flood Risk?

c.   Concentration of Policing Activities?

d.   Concentration of Rates of COVID Infections and Deaths?

e.   Concentration of Home Ownership Rates?

f.   Concentration of Family Wealth?

g.   Federal Home Loan Eligibility 1930's to 1960's?

MAP OF
OMAHA
AND VICINITY

SCALE IN MILES

—LEGEND—
RAILROADS
STREET CAR LINES
SCHOOLS
BOULEVARDS — PARKS
CITY LIMITS

MISSOURI RIVER

COUNCIL BLUFFS
IOWA

BUSINESS DISTRICT

BUSINESS

INDEX TO STREETS
NORTH FROM DODGE STREET
NUMERICAL ORDER

SOUTH OF DODGE STREET
NUMERICAL ORDER

LEGEND
Best
Still Desirable
Definitely Declining
Hazardous

Systemic Racism[1]

 "Structural racism is the policies and practices that normalize and legalize racism in a way that creates differential access to goods, services, and opportunities based on race," the report says. "Environmental racism refers to policies, practices, or directives that result in advantages or disadvantages to individuals or communities based on race." Furthermore, environmental racism includes harm caused by infrastructures that determine access and quality of resources and services.

"To understand environmental racism in the United States, we must discuss the nation's history of housing policies and the ways they have impacted Black people," the report says. Those policies include zoning ordinances, restrictive covenants, blockbusting, steer ring and redlining. It defines redlining as a practice used by the Federal Housing Administration to outline Black neighborhoods with red, making them ineligible for federally insured loans, according to the rating system used by the Home Owners' Loan Corporation.

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[1] https://new.finalcall.com/2021/03/09/death-by-zip-code-housing-discrimination-neighborhood-contamination-and-black-life/

How Can Systemic Racism Manifest Itself in Insurance – Whether for Marketing, Pricing or Claims Settlement?

1. Intentional Use of Race – Disparate Intent

2. Disproportionate Outcomes Tied to Historic Discrimination and Embedded in Insurance Outcomes – Disparate Impact

3. Disproportionate Outcomes Tied to Use of Proxies for Race, Not to Outcomes – Proxy Discrimination

The Evolution of Insurers' Analytics:
Univariate to Multivariate Analysis

In the past 30 years, insurers have moved away from univariate analysis to multivariate analysis – from analyzing the effects of one risk characteristic at a time to simultaneous analysis of many risk characteristics.

What the problem with univariate analysis?

If I analyze the relationship of age, gender and credit score – each individually – to the likelihood of a claim, the individual results for each risk characteristic are likely capturing some of the effects of the other risk characteristics – **because age, gender and credit score (or other risk classifications) may be correlated to each other** as well as to the outcome variable.

How does multi-variate analysis address this problem?

Testing for Disparate Impact and Proxy Discrimination:

A Natural Extension of Typical Insurer Practices

Here's a simple illustration of a multivariate model. Let's create a simple model to predict the likelihood of an auto claim:

$$b_0 + b_1X_1 + b_2X_2 + b_3X_3 + e = y$$

$X_1, X_2 + X_3$ are the predictive variables trying to predict y.

Say that $X_1, X_2 + X_3$ are age, gender and credit score and we are trying to predict y – the likelihood of an auto insurance claim

Let's assume that all three Xs are statistically significant predictors of the likelihood of a claim and the b values are how much each X contributes to the explanation of claim. The b values can be tested for statistical significance – how reliable are these estimates of the contribution of each X?

By analyzing these predictive variable simultaneously, the model removes the correlation among the predictive variables.

Use of Control Variables in Multivariate Insurance Models

Suppose an insurer want to control for certain factors that might distort the analysis? For example, an insurer developing a national pricing model would might want to control for different state effects like different age distributions, different occupation mixes, different frequencies of accidents or differences in jurisprudence. An insurer would add one or more <u>control variables.</u>

$$b_0 + b_1X_1 + b_2X_2 + b_3X_3 + \textcolor{red}{b_4C_1} + e = y$$

C_1 is a control variable – let's say for State. By including State as a control variable, the correlation of the Xs to State is statistically removed and the new b values are now the contribution of the Xs, independent of their correlation to State, to explaining the likelihood of a claim. When the insurer deploys the model, it still only uses the X variables, but now with more accurate b values.

Disparate Impact as Both a Standard and a Methodology

Let's go back to multi-variate model, but now use Race as a control variable:

$$b_0 + b_1X_1 + b_2X_2 + b_3X_3 + \textcolor{red}{b_4R_1} + e = y$$

R_1 is a control variable – by including race in the model development, the correlation of the Xs to race is statistically removed and the new b values are now the contribution of the Xs, independent of their correlation to race, to explaining the likelihood of a claim

What if X1 is a perfect proxy for Race?

Then once we add the control variable for Race, X1 no longer has any predictive value because all it was doing was predicting race, not the outcome y.

What if X1 is both predictive of mortality and correlated to Race? Then, the model still shows X1's (now different) predictive value, but shorn of its correlation to Race, leaving the unique contribution of X1 to explaining mortality.

How Do We Interpret the Disparate Impact Analysis?

$$b_0 + b_1X_1 + b_2X_2 + b_3X_3 + \textcolor{red}{b_4R_1} + e = y$$

Result: No Proxy Discrimination or Disparate Impact

Outcome	Interpretation	Indicated Action
R is not statistically significant and there is little change to b1, b2 and b3.	There is little correlation between X1, X2 and X3 and race, little or no disparate impact or proxy discrimination	None, utilize the model.

How Do We Interpret the Disparate Impact Analysis?

$$b_0 + b_1X_1 + b_2X_2 + b_3X_3 + \textcolor{red}{b_4R_1} + e = y$$

Result: Proxy Discrimination

Outcome	Interpretation	Indicated Action
R is statistically significant and b1 has lost its statistical significance	X1 was largely a proxy for race and the original predictive value of X1 was spurious. **This is an example of proxy discrimination**	Remove X1 from the marketing, pricing, claims settlement or anti-fraud model.

How Do We Interpret the Disparate Impact Analysis?

$$b_0 + b_1X_1 + b_2X_2 + b_3X_3 + \textcolor{red}{b_4R_1} + e = y$$

Result: Disparate Impact

Outcome	Interpretation	Indicated Action
R is statistically significant and has a large impact on the outcome, but b1, b2 and b3 remain largely unchanged and statistically significant	This is an example of disparate impact.	Are X1, X2 or X3 essential for the insurer's business purposes? Are there less discriminatory approaches available? Would eliminating a predictive variable significantly reduce the disparate impact but not materially affect the efficiency or productiveness of the model?

How Do We Interpret the Disparate Impact Analysis?

$$b_0 + b_1X_1 + b_2X_2 + b_3X_3 + \textcolor{red}{b_4R_1} + e = y$$

Result: Some Proxy Discrimination, Some Disparate Impact

Outcome	Interpretation	Indicated Action
R is statistically significant, but b1, b2 and b3 remain statistically significant with different values from the original.	X1, X2 and X3 are correlated to race, but also predictive of the outcome, even after removing the variables' correlation to race. **This is an example of some proxy discrimination and some disparate impact.**	Depending on the significance of the racial impact, **utilize the model with the revised predictive variable coefficients, consider prohibiting a variable on the basis of equity or both.**

Disparate Impact Analysis Improves Cost-Based Pricing

There is a long history and many approaches to identifying and minimizing disparate impact in employment, credit and insurance. But, the general principle is to identify and remove the correlations between the protected class characteristic and the predictive variables.

$$b_0 + b_1X_1 + b_2X_2 + b_3X_3 + \textcolor{red}{b_4R_1} + e = y$$

What if X1, X2 and X3 are not perfect proxies for Race, but still have high correlation? Then, the disparate impact analysis – and our simple model – removes that correlation and the remaining values for b1, b2 and b3 are the unique contributions of each predictive variable to explaining the outcome. The result is more – not less – accurate cost-based or risk-based analysis.

Why is it Reasonable and Necessary to Recognize Disparate Impact as Unfair Discrimination in Insurance?

1. It makes no sense to permit insurers to do indirectly what they are prohibited from doing directly. If we don't want insurers to discriminate on the basis of race, why would we ignore practices that have the same effect?

2. It improves risk-based and cost-based practices.

3. In an era of Big Data, systemic racism means that there are no "facially-neutral" factors.

What Did We Learn from the *Coded Bias* Movie?

Advocates of algorithmic techniques like data mining argue that they eliminate human biases from the decision-making process. **But an algorithm is only as good as the data it works with.** *Data mining can inherit the prejudices of prior decision-makers or reflect the widespread biases that persist in society at large.* **Often, the "patterns" it discovers are simply preexisting societal patterns of inequality and exclusion. Unthinking reliance on data mining can deny members of vulnerable groups full participation in society.**[2]

The fact that an insurer doesn't use race in an algorithm does not logically or factually result in no discrimination on the basis of race.

In fact, the only way to identify and eliminate the impacts of structural racism in insurance is to measure that impact by explicit consideration of race and other protected class factors.

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[2] Barocas and Selbst

Defining Disparate Impact and Proxy Discrimination in Insurance

Disparate Impact: Use of a non-prohibited factor that causes disproportionate outcomes on the basis of prohibited class membership and that such disproportionate outcomes cannot be eliminated or reduced without compromising the risk-based framework of insurance.

Proxy Discrimination: Use of a non-prohibited factor that, due in whole or in part to a significant correlation with a prohibited class characteristic, causes **unnecessary,** disproportionate outcomes on the basis of prohibited class membership.

How Should These Definitions Be Implemented?

1. Require Insurers to Test for Disparate Impact and Proxy Discrimination, Eliminate Proxy Discrimination, Minimize Disparate Impact and Report Test Results to Regulators and the Public.

2. Create a Safe Harbor for Insurers Who Do This Using Methods Accepted by Regulators.

3. Establish Equity Standards for Minimizing Disparate Impact:

   a. Seek approaches that reduce disparate impact without compromising efficiency of the algorithm; and

   b. Establish an equity/efficiency trade off of 20 to 1: For example, reduce algorithmic efficiency by 2% if disparate impact can be reduced by 40% or more.

The Murder of George Floyd Raised Awareness of Systemic Racism
How Did Insurer CEOs React?

"In the coming days, I encourage each of us to step outside of our comfort zones, seek to understand, engage in productive conversations and hold ourselves accountable for being part of the solution. We must forever stamp out racism and discrimination." Those are the words of Kirt Walker, Chief Executive Officer of Nationwide.

Floyd's death in Minneapolis is the latest example of "a broken society, fueled by a variety of factors but all connected by inherent bias and systemic racism. Society must take action on multiple levels and in new ways. It also requires people of privilege—white people—to stand up for and stand with our communities like we never have before," Those are the words of Jack Salzwedel, the CEO of American Family.

How Have the Insurer Trades – Particularly NAMIC and APCIA – Responded to the Insurer CEOs' Calls?

- Opposed the inclusion of "Consistent with the risk-based foundation of insurance, AI actors should proactively . . . avoid proxy discrimination against protected classes."

- Have opposed the application of disparate impact liability under the federal Fair Housing Act to home insurance.

- Supported the gutting of the U.S. Housing and Urban Development's disparate impact rule – despite pleas from several insurers to leave the rule alone in the aftermath of the murder of Black Americans at the hands of police.

- Pushed NCOIL to adopt a resolution opposing the CASTF White Paper because it suggested that regulators could ask insurers to show a rational relationship between new data sources and insurance outcomes.

How Have the Insurer Trades – Particularly NAMIC and APCIA – Responded to the Insurer CEOs' Calls? (con't)

- Opposed state bills to limit the impacts of credit-based insurance scores during a pandemic, citing insurers' need for "risk-based pricing," while supporting efforts to permit such deviations when insurers find it convenient – price optimization, consumer lifetime value.

- Pushed NCOIL to adopt a definition of proxy discrimination that would block any efforts to identify and address disparate impact and proxy discrimination and shield insurers from any accountability for their practices.

NCOIL's "Definition" of Proxy Discrimination Must Be Rejected

At the urging of the P/C Trades, NCOIL recently adopted the following:

> For purposes of this Act, as well as for the purpose of any regulatory material adopted by this State, or incorporated by reference into the laws or regulations of this State, or regulatory guidance documents used by any official in or of this State, "Proxy Discrimination" means the **intentional** substitution of a neutral factor for a factor based on race, color, creed, national origin, or sexual orientation **for the purpose of discriminating** against a consumer **to prevent that consumer from obtaining insurance or obtaining a preferred or more advantageous rate due to that consumer's race, color, creed, national origin, or sexual orientation.**

At best, this action represents a profound misunderstanding of how systemic racism affects insurance. At worst, it is a conscious act of stopping insurance regulators and states from even attempting to address racial justice. The language memorializes insurer practices that indirectly discriminate on the basis of race, discourages insurers from examining such racial impact and restricts current regulatory efforts.

Addressing Systemic Racism in Insurance –
A Comprehensive Approach Needed

CEJ applauds the efforts of the NAIC, individual states, insurance trades and individual insurers to examine, measure and improve racial diversity in leadership and throughout their organizations. While improving diversity is an important goal and strategy to address systemic racism in insurance, it is not nearly sufficient to address the structures that have caused insurer practices to reflect and perpetuate historic discrimination.

Concrete steps within a comprehensive framework are needed:

1   Explicit recognition of disparate impact and/ proxy discrimination against protected classes as unfair discrimination in insurance.

2   Develop guidance to require insurers to test for and minimize disparate impact in all aspects of their consumer-facing operations – marketing, underwriting, pricing, claims settlement, antifraud, payment plan eligibility, investments

3   Develop guidance for regulators and insurers for acceptable methods of testing and reporting results of testing for disparate impact to regulators and the public

4   Develop a data reporting framework to permit meaningful and timely analysis of availability and affordability of insurance, generally, and in communities of color.

5   Add a charge to all committees, task forces and working groups to examine their subject area for insurer and regulatory practices that may reflect and perpetuate historic racial discrimination.

6   Add a charge to relevant committees to identify public or regulatory policies that unfairly discriminate on the basis of race, including identification of low-value products targeted at communities of color.

7   Commit to significantly more consumer participation, generally, and consumers from communities of color, specifically, in NAIC proceedings and events. Efforts to improve consumer stakeholder participation should be measured with a concrete target of equal time with industry stakeholders.

8   Direct committees, task forces and working groups to be guided by and to implement the NAIC's Principles on Artificial Intelligence. The massive increase in insurers' use of big data and AI has increased the potential for proxy discrimination and disparate impact. Efforts to address systemic racism in insurance are inseparable from more effective oversight of insurers' use of big data and AI.

9   Update model laws regarding advisory organization.   Any effort to implement the NAIC's AI principles and the address systemic racism in insurance must modernize and expand the reach of state advisory organization laws.

Why Test for Disparate Impact and Proxy Discrimination in All Aspects of Insurers' Operations?

Among the various parts of the insurance life-cycle – marketing, underwriting, pricing, claims settlement, antifraud – new data sources and complex algorithms for pricing currently get the most attention from regulators because in most states most insurers file personal lines rates. Data and algorithms used for marketing, in contrast, get little or no attention. ***Yet, it is the marketing function – and the new data sources and algorithms used in micro-targeting consumers – that has become the true gatekeeper for access to insurance.***

Consider the following quotes from 2005 to present. In 2005, in a meeting with investment analysts, the CEO of a major publicly-traded insurer was effusive about the benefits of the then relatively new use of consumer credit information – referred to as tiered pricing.

Tiered pricing helps us attract higher lifetime value customers who buy more products and stay with us for a longer period of time. That's Nirvana for an insurance company.

This year, we've expanded from 7 basic price levels to 384 potential price levels in our auto business.

Tiered pricing has several very good, very positive effects on our business. It enables us to attract really high quality customers to our book of business.

The key, of course, is if 23% or 20% of the American public shops, some will shop every six months in order to save a buck on a six-month auto policy. ***That's not exactly the kind of customer that we want.*** So, the key is to use our drawing mechanisms and our tiered pricing to find out of that 20% or 23%, to find those *that are unhappy with their current carrier, are* likely to stay with us longer, likely to buy multiple products and that's where tiered pricing and a good advertising campaign comes in.

Now fast forward to 2017, when the new CEO of that insurer told investment analysts:

> The insurer's "universal consumer view" keeps track of information on 125 million households, or 300 million-plus people, Wilson said.
>
> "When you call now they'll know you and know you in some ways that they will surprise you, and give them the ability to provide more value added, so we call it the trusted adviser initiative"

And just recently, the telematics subsidiary of this insurer pitched its ability to identify the most valuable customers in real time:

Attract the most profitable drivers with telematics-based targeting

Traditionally, insurance marketing has relied on demographic and behavioral data to target potential customers. While useful at a high level, these proxies fall short when it comes to considering customer value and retention. Now, you can reach the most profitable customers from the outset using the nation's first telematics-based marketing platform. . . . .

Company intelligently layers driving score onto insurer campaign targeting criteria to purchase the ideal audience based on quartiles of driving risk. [The] Scored user receives a targeted offer via awareness and performance channels

Not to be outdone, another telematics data vendor announced a partnership with an auto manufacturer

> Insurers can harness the power of connected Hyundai vehicles as a new marketing channel to support the profitable growth of their behavior- or mileage-based programs. Discount Alert allows insurers to deploy personalized marketing offers directly to drivers through Hyundai's online owner portal and contains robust tools to anonymously segment ideal risk targets—ensuring your offers are only sent to qualified leads.

All of this begs the questions, what about consumers and businesses who don't have the wealth to provide the value sought by insurers? How do these strategies line up with public policies against discrimination on the basis of race and promoting widespread availability of insurance?

Comments from the Center for Economic Justice

To the NAIC Committee on Race and Insurance

March 23, 2021

CEJ writes to supplement our prior comments to the Committee of November 10, 2020 and December 16, 2020.

Our comments today focus on the following:

1. Specific descriptions and definitions of unfair discrimination on the basis of race – disparate treatment, disparate impact and proxy discrimination – and the legislative and regulatory response to each type of unfair discrimination.

2. Rejection of the recent NCOIL action to define proxy discrimination only as intentional use of a proxy for a prohibited factor with the intent to discriminate on the basis of the prohibited factor.

3. The need for concrete actions to address the legislative and regulatory policies that permit structural racism to unfairly impact insurance consumers of color.

Unfair Insurance Discrimination on the Basis of Race

CEJ suggests that there are three types of unfair discrimination on the basis of race. The first is intentional discrimination on the basis of race – disparate treatment. While many states prohibit such explicit discrimination, such prohibitions are not universal across all states and all lines of insurance.[1]

Recommended NAIC Action: Catalog state laws regarding unfair discrimination on the basis of race and other prohibited classes and encourage uniform application to all insurers and all lines of business and all aspects of insurers' operations – marketing, sales, underwriting, pricing, claims settlement and anti-fraud.

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[1] See Avraham, Logue and Schwrcz, "Understanding Insurance Anti-Discrimination Laws." The authors find "contrary to the conventional wisdom, state insurance antidiscrimination laws vary a great deal: in substance and in the intensity of regulation, across lines of insurance, across policyholder characteristics, and across states."
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2135800

The second and third types of unfair insurance discrimination on the basis of race relate to the impacts of structural racism on insurers' algorithms, products and processes – disparate impact and proxy discrimination.

For purposes of the NAIC's efforts to address structural racism in insurance, CEJ identifies <u>disparate impact at disproportionate outcomes tied to historic discrimination and embedded in insurance outcomes.</u> One example is the disproportionate presence of certain health problems or shorter life expectancies in communities of color. Because the impacts of historic discrimination are embedded in insurance outcomes, it is a policy decision – and not a technical issue – to protect the groups experiencing the disproportionately poor insurance outcomes. As a policy issue, policymakers have addressed these outcomes prohibiting discrimination on the basis of certain facially-neutral factors in underwriting and pricing. So, regardless of actuarial indications, insurers cannot discriminate on the basis of race in health and life insurance.

For purposes of the NAIC's efforts to address structural racism in insurance, CEJ identifies <u>proxy discrimination as disproportionate outcomes tied to the use of proxies for the prohibited characteristic and not to the outcomes.</u> We've previously described one such situation when insurers were using age and value of the home as underwriting factors for home insurance – with the result that communities of color were systematically denied home insurance because these communities were characterized by older, lower-value homes – a results directly tied to historic discrimination in housing and lending. When challenged, the insurers discovered that the factors they were using – age and value of the home – were more correlated with race than with insurance outcomes. As a result of the disparate impact challenge, the insurers moved to more relevant risk factors – such as the condition of the home and its systems – with the result that insurance became more available in communities of color as the insurers reduced the correlation between their risk classifications and race.

This second type of disparate impact involves intentional <u>or unintentional</u> unnecessary discrimination on the basis of race. It is unnecessary because the facially-neutral factor that is purportedly associated with the insurance outcome is, in whole or in part, a proxy for the protected class characteristic and predictive of that protective class characteristic. Stated differently, the facially-neutral factor has a spurious correlation to the insurance outcome and is really correlated to the protected class characteristic. Attached is a presentation I will be giving at the Casualty Actuarial Society's Ratemaking and Product Management Seminar that provides a more technical explanation of these concepts.

<u>It is this second type of disproportionate outcome on the basis of protected class membership that proxy discrimination analysis is intended to identify and minimize.</u> It is this type of unnecessary racial discrimination that has been the concern of insurance regulators.

Recommended Actions: Develop regulatory guidance that defines disparate impact and proxy discrimination in insurance.

For disparate impact, the definition should track that promulgated by the U.S. Department of Housing and Urban Development in 2013 and reaffirmed in 2016 (attached). The HUD rule defines "discriminatory effect" (i.e. disparate impact) as

> ''discriminatory effect'' occurs where a facially neutral practice actually or predictably results in a discriminatory effect on a group of persons protected by the Act (that is, has a disparate impact), or on the community as a whole on the basis of a protected characteristic (perpetuation of segregation). Any facially neutral action, e.g., laws, rules, decisions, standards, policies, practices, or procedures, including those that allow for discretion or the use of subjective criteria, may result in a discriminatory effect actionable under the Fair Housing Act and this rule.

> The rule establishes a burden-shifting approach to establish disparate impact liability:

> Under § 100.500(c), the charging party or plaintiff first bears the burden of proving its prima facie case: that is, that a practice caused, causes, or predictable will cause a discriminatory effect on a group of persons or a community on the basis of race, color, religion, sex, disability, familial status, or national origin. Once the charging party or the plaintiff has made its prima facie case, the burden of proof shifts to the respondent or defendant to prove that the practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant. If the respondent or defendant satisfies its burden, the charging party or plaintiff may still establish liability by proving that these substantial, legitimate, nondiscriminatory interests could be served by another practice that has a less discriminatory effect.

For proxy discrimination, CEJ suggests the following definition:

> Proxy discrimination is the use of a non-prohibited factor that, due in whole or in part to a significant correlation with a prohibited class characteristic, causes unnecessary, disproportionate outcomes on the basis of prohibited class membership.

Coupled with this definition should be the regulatory guidance for insurers to test for and minimize proxy discrimination in all aspects of their consumer-facing operations – marketing, underwriting, pricing, claims settlement, antifraud, payment plan eligibility, investments – and to report the results of such testing to insurance regulators and the public.

In addition, the Committee on Race should develop regulatory guidance for insurers and regulators regarding acceptable methods of testing, sources of proxies for racial characteristics and methods of reporting results.

In prior comments and presentations, CEJ has explained the basic concept of proxy discrimination – where a facially-neutral factor is actually predicting race (or other prohibited class characteristic) instead of the insurance outcome. The general methodology to test for proxy discrimination is to use a multi-variate analysis to remove the correlation between race and other predictive factors.

A multi-variate analysis simply means analyzing multiple predictive variables simultaneously. By analyzing the predictive variable simultaneously, the correlation among the predictive variables is removed and the unique contribution of any particular predictive variable to explaining the outcome is better isolated. Using this general approach, we include a predictive variable for race in our multi-variate analysis, like so:

$$b0 + b1X1 + b2X2 + b3X3 + \textcolor{red}{r4R1} + e = y$$

X1, X2 + X3 are the predictive variables trying to predict y. The coefficients b1, b2 and b3 describe each of the predictive variable contribution to explaining y   Say that X1, X2 + X3 are age, gender and credit score and we are trying to predict y – likelihood of an auto claim.
.
Let's assume that all three Xs are statistically significant predictors of the likelihood of a claim and the b values are how much each X contributes to the explanation of claim. The b values can be tested for statistical significance – how reliable are these estimates of the contribution of each X?

When we add a predictive variable for race – R1 – as a control variable in the model development, the correlation of the Xs to race is statistically removed and the new b values are now the contribution of the Xs, independent of the predictive variables correlation to race.

What might the results of such an analysis and resulting regulatory response be? The table below describes outcomes, interpretation of those outcomes and the indicated action.

Outcome	Interpretation	Indicated Action
R is not statistically significant and there is little change to b1, b2 and b3.	There is little correlation between X1, X2 and X3 and race, little or no disparate impact or proxy discrimination	None, utilize the model.
R is statistically significant and b1 has lost its statistical significance	X1 was largely a proxy for race and the original predictive value of X1 was spurious. This is an example of proxy discrimination	Remove X1 from the marketing, pricing, claims settlement or anti-fraud model.
R is statistically significant, but b1, b2 and b3 remain statistically significant with different values from the original.	X1, X2 and X3 are correlated to race, but also predictive of the outcome, even after removing the variables' correlation to race. This is an example of some proxy discrimination and some disparate impact.	Depending on the significance of the racial impact, utilize the model with the revised predictive variable coefficients, consider prohibiting a variable on the basis of equity or both.
R is statistically significant and has a large impact on the outcome, but b1, b2 and b3 remain largely unchanged and statistically significant	This is an example of disparate impact.	Are X1, X2 or X3 essential for the insurer's business purposes? Are there less discriminatory approaches available? Would eliminating a predictive variable significantly reduce the disparate impact but not materially affect the efficiency or productiveness of the model?

Reject NCOIL's Recent Action to Define Proxy Discrimination

NCOIL has recently adopted a change to its property/casualty modernization model act by defining and prohibiting proxy discrimination. Here is the adopted definition of proxy discrimination, with key parts highlighted, is:

> For purposes of this Act, as well as for the purpose of any regulatory material adopted by this State, or incorporated by reference into the laws or regulations of this State, or regulatory guidance documents used by any official in or of this State, "Proxy Discrimination" means the **intentional** substitution of a neutral factor for a factor based on race, color, creed, national origin, or sexual orientation **for the purpose of discriminating** against a consumer **to prevent that consumer from obtaining insurance or obtaining a preferred or more advantageous rate due to that consumer's race, color, creed, national origin, or sexual orientation.**

This action by NCOIL, at the urging of the property/casualty trade associations, reflects a profound misunderstanding of how systemic racism affects insurance. By defining proxy discrimination only as intentional use of a proxy characteristic for a protected class characteristic, the revisions, if adopted, would memorialize insurer practices that discriminate indirectly on the basis of race, discourage insurers from examining the racial impact of their practices and would restrict current regulatory efforts to address such unfair discrimination.

Further, by the industry's own admission, the proposed revision do not enhance current regulatory authority. Rather, as industry is surely aware, the proposed revisions would hand cuff regulatory efforts to address proxy discrimination. The proposed revisions reflect such a misunderstanding of proxy discrimination and disparate impact that NCOIL will be inviting federal civil rights legislation aimed at insurance if the proposed revisions are adopted.

This definition misunderstands how systemic racism impacts society in general and insurance operations, specifically. Systemic racism involves institutional and personal biases that reflect and perpetuate historic discrimination. As Justice Kennedy wrote in the *Inclusive Communities* decision upholding disparate impact as unfair discrimination under the Fair Housing Act (which covers home insurance):

> Recognition of disparate-impact claims is also consistent with the central purpose of the FHA, which, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of the Nation's economy.

> Recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.

The proposed revisions would undermine the effort to address systemic racism in two ways. First, by defining proxy discrimination only as intentional use of a proxy for a prohibited class characteristic, the revisions set an impossible bar. Even if an insurer were using a perfect proxy for race, under the proposed NCOIL revisions, the regulator could take no action without proving an intent to discriminate and substitute on the basis of race. Were this requirement in effect, state regulators could never have taken action in the past on race-based pricing in life insurance.

Second, the requirement to prove intent reflects a profound misunderstanding of how systemic racism is reflected in and perpetuated by unconscious institutional, cultural and personal biases. The purpose of a proxy discrimination standard and methodology to address unnecessary disproportionate outcomes on the basis of race and other protected classes is to reveal the unnecessary and unintentional bias through rigorous and objective analysis. The proposed revisions move in the opposite direction by focusing on intent instead of on outcomes.

Concrete and Measurable Actions to Address Systemic Racism in Insurance

CEJ applauds the efforts of the NAIC, individual states, insurance trades and individual insurers to examine, measure and improve racial diversity in leadership and throughout their organizations. While improving diversity is an important goal and strategy to address systemic racism in insurance, it is not nearly sufficient to address the structures that have caused insurer practices to reflect and perpetuate historic discrimination.

Our comment letter of December 16, 2020 provides more detail, but we urge the following actions by the NAIC.

1. Explicit recognition of disparate impact and/ proxy discrimination against protected classes as unfair discrimination in insurance.

2. Develop guidance to require insurers to test for and minimize disparate impact in all aspects of their consumer-facing operations – marketing, underwriting, pricing, claims settlement, antifraud, payment plan eligibility, investments

3. Develop guidance for regulators and insurers for acceptable methods of testing and reporting results of testing for disparate impact to regulators and the public

4. Develop a data reporting framework to permit meaningful and timely analysis of availability and affordability of insurance, generally, and in communities of color, specifically – sales data showing products sold with price by specific type by granular geography area.

5 Add a charge to all committees, task forces and working groups to examine their subject area for insurer and regulatory practices that may reflect and perpetuate historic racial discrimination. Adding such charges is vitally important because many working groups have refused such analysis, arguing that other groups at the NAIC are looking at these issues. While there is certainly a role for the Committee on Race to provide broad guidance, it is essential that the subject matter experts – whether financial, producer licensing, antifraud, market regulation or lettered committees – examine these issues based on their in-depth knowledge of the particular subject area.

6 Add a charge to relevant committees – particularly the Life A, Health B, Property Casualty C and Market Regulation D Committees – to identify public or regulatory policies that unfairly discriminate on the basis of race, including identification of low-value products targeted at communities of color.

7 Commit to significantly more consumer participation, generally, and consumers from communities of color, specifically, in NAIC proceedings and events. Even following the NAIC's stated commitment to address systemic racism in insurance last year, several NAIC events had minimal or no consumer participation. As we have noted in prior correspondence, it is the relative absence of consumer stakeholders from communities of color that has led to broad adoption of insurer trade association priorities that have, at best, ignored, systemic racism in insurance and, at worst, exacerbated the problem. Efforts to improve consumer stakeholder participation should be measured with a concrete target of equal time with industry stakeholders.

8 Direct committees, task forces and working groups to be guided by and to implement the NAIC's Principles on Artificial Intelligence. The massive increase in insurers' use of big data and AI has increased the potential for proxy discrimination and disparate impact. Efforts to address systemic racism in insurance are inseparable from more effective oversight of insurers' use of big data and AI.

9 Update model laws regarding advisory organization. The purpose of advisory organization provisions in NAIC model laws and individual state laws is to provide necessary regulatory oversight of collaborative efforts by industry within the limited anti-trust carve-out of the McCarran Ferguson Act. It is only with oversight of advisory organizations that insurers are able to utilize an advisory organization for industry standard policy forms or rating assistance, like loss cost filings for overall loss trends and risk classification relativities. Yet, today, while a few organizations that have been licensed as advisory organizations for decades continue to maintain such license and, consequently, remain subject to regulatory oversight, many more organizations are engaged in the same type of collaborative or collusive activities but remain unlicensed as advisory organizations. Any effort to implement the NAIC's AI principles and the address systemic racism in insurance must modernize and expand the reach of state advisory organization laws.

Comments of the Center for Economic Justice to the

NAIC Committee on Race and Insurance

December 16, 2020

CEJ submits these comments to the Committee on Race and Insurance to provide a comprehensive set of recommendations addressing all of the work streams. Our recommendations are most detailed for the line of business and regulatory diversity work streams. We have limited comments on the insurance industry diversity work stream.

As mentioned in earlier comments and presentations, it is relevant and necessary to determine why, despite CEJ or other consumer and civil rights advocates raising issues of racial discrimination in insurance for decades, it took the murder of George Floyd for the NAIC and industry to acknowledge the problem and commit to actions to address systemic racism in insurance.

We offered our analysis of the structural impediments to regulatory action to address systemic racism in insurance in the past in our August 14, 2020 presentation, attached:

- Lack of Minority Voices and Experience in Insurer and Regulator Leadership

- Imbalance Between Consumer and Insurer/Producer Access to Critical Regulatory and Legislative Processes

- Trade Associations Fighting to Protect Practices that Reflect and Perpetuate Systemic Racism in Insurance

- Regulatory Authorities and Infrastructure Failing to Keep Up With Seismic Changes in Insurer Practices.

We all know that the lack of diversity among insurers and regulators is a problem. But, what has led to this lack of minority participation? Improving diversity is a strategy and not the goal. It is a strategy to cause insurers and regulators to better consider the impacts of their practices on communities of color by having people making decisions better reflecting the people who are affected by those decisions. The goal is racial justice and improved diversity is one part of the strategy to attain that goal.

Our recommendations are informed by our 30 years of working on racial and economic justice in insurance at the NAIC, in the states and before Congress and the lessons we've learned about what's necessary to create the changes to lead to racial justice.

Our recommendations are presented as follows:

- Recommendations Common to All Line of Business Work Streams
  - Recommendations for Actions by the Committee on Race and Insurance
  - Recommendations for Actions by Other NAIC Committees, Task Forces and Working Groups
- Recommendations for Improving Regulatory Diversity
- Recommendations for Improving Insurer and Producer Diversity

Recommendations Common to All Line of Business Work Streams

Recommendations for Committee on Race and Insurance

1   Explicit recognition of disparate impact / proxy discrimination against protected classes as unfair discrimination in insurance

2   Develop guidance to require insurers to test for and minimize disparate impact in all aspects of their consumer-facing operations – marketing, underwriting, pricing, claims settlement, antifraud, payment plan eligibility, investments

3   Develop guidance for regulators and insurers for acceptable methods of testing and reporting results of testing for disparate impact to regulators and the public

4   Develop a data reporting framework to permit meaningful and timely analysis of availability and affordability of insurance, generally, and in communities of color, specifically – sales data showing products sold with price by specific type by granular geography area.

Discussion

1   Explicit recognition of disparate impact / proxy discrimination against protected classes as unfair discrimination in insurance

Regulators have made clear in a variety of discussions that you believe you have authority to stop proxy discrimination against protected classes or disparate impact as unfair discrimination in insurance. You memorialized this in the principles for Artificial Intelligence which included a requirement for insurers to pro-actively avoid proxy discrimination against protected classes.

Yet, industry has fought and continues to oppose the proposition that unfair discrimination on the basis of race means anything other than intentional discrimination. Industry has reiterated this position several times including most recently at the NCOIL annual conference in which they argued against and opposed any regulatory authority or insurer responsibility to address unintentional, unneeded proxy discrimination on the basis of race.

Clearly, any serious effort to address systemic racism in insurance must address practices that intentionally or unintentionally, reflect and perpetuate historic discrimination against protected classes. If the NAIC is to make any progress, it must avoid endless debates with industry about legislative intent or regulatory authority and start with the proposition that, whatever one thinks the current legislative intent or regulatory authority may be, the NAIC starts from the foundational premise that disparate impact is unfair discrimination in insurance. If changes are needed in legislative intent or regulatory authority, the NAIC will develop the model guidance necessary, but there should not be debate about the principle that is the foundation of racial justice.

2. Develop guidance to require insurers to test for and minimize disparate impact in all aspects of their consumer-facing operations – marketing, underwriting, pricing, claims settlement, antifraud, payment plan eligibility, investments

Simply stated, it should be part of the DNA of insurers to test all their practices, operations and algorithms for disparate impact and take steps to minimize that impact within the risk-based framework of insurance. The burden must be on insurers to employ practices that do not unnecessarily and unintentionally reflect and perpetuate systemic racism. It is unreasonable to place the burden on consumers or regulators to identify such practices and then challenge insurers, particularly when the vast majority of the practices are opaque to regulators or consumers and incorporated into black-box big data algorithms.

Lenders have had such a responsibility for decades and testing for and minimizing disparate impact is simply part of the development of lender underwriting, pricing and other practices.[1]

It is also essential that insurers test for racial inequities in all aspects of their consumer-facing operations. It is far from sufficient to examine only underwriting and pricing. In an era of big data micro-targeting, insurers, like other businesses, have the ability to micro-target particular product marketing to individuals with the result that the underwriting process is effectively moved to the marketing program.

Slides 25 to 27 of the attached CEJ presentation to NCOIL cite insurer CEO statements to investment analysts in which the CEO explain not just their intent to attract "high-value" customers and repel low-value customers – labels which reflect racial bias – but the ability to use marketing tools and big data to micro-target those high-value customers. It is specifically the big data tools like price optimization, customer lifetime value and propensity for fraud that are use and which rely on data and algorithms that reflect and perpetuate systemic discrimination. The

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[1] See for example, chapter 10 of *Credit Scoring for Risk Managers: The Handbook for Lenders*.

amount of personal consumer information available for micro-targeting is incomprehensibly large – just look at the websites of data brokers or vendors specializing in assisting insurers like Carpe Data or Journaya.

We've repeatedly raised the concern about claim settlement and antifraud algorithms that rely on biased data and biased modelers. In the case of antifraud, biased algorithms become self-fulfilling because an insurer will not find fraud if the claim isn't investigated. So bias in deciding which claims are suspicious will lead to bias in the claims labeled as fraudulent.

Insurers should also examine their investments and investment practices for climate and environmental justice. Numerous studies have shown that historical racism in housing has led to more severe impacts of climate change on communities of color as well as more severe impacts of the pandemic. Further, racial justice must consider and incorporate environmental and economic justice. Insurers should be examining their investments and investment practices to ensure they are not, for example, supporting predatory lenders or racist housing and environmental policies.

It is essential that the approach taken to address racism in insurance be holistic and comprehensive. Attempting to prohibit one offensive rating factor or data source or algorithm is a fool's errand. The same racial bias from that one prohibited factor will likely be replicated by another new data source or algorithm. Further, the goal should not be to eliminate data sources for insurers, but require the use of any data source in a manner that eliminates or minimizes the disparate impact.

The action needed here is for the Committee on Race and Insurance to develop the guidance for the requirement that insurers test for and minimize disparate impact in their practices. This will be universal guidance – and the guidance sought by many of the NAIC working groups – like the Casualty Actuarial and Statistical Task Force and the Anti-Fraud Task Force – who have punted on addressing issues of racial equity in algorithms.

3. Develop guidance for regulators and insurers for acceptable methods of testing and reporting results of testing for disparate impact to regulators and the public

Once the requirement for insurers to test for and minimize disparate impact is established, the next step is for the Committee on Race and Insurance to develop the guidance for how insurers should test, minimize and report the results of such disparate impact testing. This guidance should include data sources for protected class characteristics if the insurers does not collect those data, acceptable and unacceptable methods of testing, safe harbors for insurers who test for and minimize disparate impact and how and how often to test and report results to regulators and the public.

It is important to note that insurance regulators do not have to reinvent the wheel here. There is a rich history of disparate impact testing methodologies not just from here in the U.S. related to federal employment, lending and housing laws – and applications of disparate impact analysis to insurance under the Fair Housing Act – but experience from other nations about how to address disparate impact in insurance.

4. Develop a data reporting framework to permit meaningful and timely analysis of availability and affordability of insurance, generally, and in communities of color, specifically – sales data showing products sold with price by specific type by granular geography area.

The Committee on Race and Insurance must address another key structural impediment to racial justice in insurance – the absence of routine data reporting by insurers of granular consumer market outcomes sufficient to analyze the impact of insurer marketing, sales, claims and antifraud practices on communities of color.

The contrast between the lack of market outcome data in insurance and other financial services is stark. While public and private sources have reported the impact of the pandemic and federal relief (e.g. CARES Act) on all types of borrowers on a weekly and monthly basis – including changes in delinquencies, late payments, use of forbearance and much more – insurance regulators have had no information on consumers' use of premium relief or real-time changes in claims during the pandemic.

More important, insurers have steadfastly opposed the publication of data by individual insurers by ZIP Code or Census Block that permits regulators, academics, consumer and civil rights groups from analyzing racial disparities in insurance. Regulators must overcome this opposition and develop a market regulation data reporting regime that matches the financial regulation data reporting regime in breadth and intensity.

Taken together, these four common-to-all-work stream actions should be memorialized in two charges to the Committee on Race and Insurance – one regarding disparate impact and one regarding data collection.

Recommendation for Specific to Lines of Business

In addition to certain racial justice actions that should be centralized at the Committee on Race and Insurance, there are also activities that should be assigned to other NAIC committees, task force and working groups. We mentioned above that some NAIC working groups have specifically rejected requests to examine racial bias in insurer practices that fall under that working group activity. For example, the CASTF white paper on predictive modeling explicitly rejected addressing racial bias in regulatory review of algorithms. The Antifraud Task Force explicitly rejected including a requirement for insurers to test for racial bias in antifraud practices and algorithms in the recent update the antifraud policy guideline. Both groups based their decision on the claim that other groups at the NAIC were working on the issue.

While the development the guidance on how to test for, minimize and reporting the findings of disparate impact analysis should be centralized at the Committee on Race and Insurance, there are several actions that individual committees, task forces and working groups can and should take to help achieve racial justice in insurance.

1. Add a charge to identify potential **insurer practices** that disadvantage or disproportionately discriminate against communities of color.

Each committee, task force and working group should receive a charge for 2021 to identify insurer practices that may disadvantage or disproportionately discriminate against communities of color. Such a charge is vital for each of the subject matter groups to have ownership of the issue and to educate themselves about race and insurance. The outcome from this charge – a list of practices that insurers should prioritize for disparate impact testing – will complement the work of the Committee on Race and Insurance.

2. Add a charge examine **public policies** that disadvantage or disproportionately discrimination against communities of color.

This second charge to all committees, task forces and working groups is directed at public policies that unfairly harm communities of color. This charge focuses more on laws and regulatory guidance, as opposed to practices under the discretion of insurers. The outcome form tis charge – a list of public policies, laws, regulations and regulatory guidance that unfairly discriminate against communities of color – will also complement the work of the Committee on Race and Insurance. To illustrate, we list some public policies related to private passenger auto that disproportionately and unfairly impact communities of color.

        a. Property Casualty / PPA
           i. Pay to Play Laws Punishing Uninsured Drivers
          ii. Territorial Rating for Uninsured Motorists
        iii. High Minimum Limits
        iv. Criminal Penalties / Debtors Prison for Uninsured Motorists
         v. Oversight of Advisory Organizations / Data Brokers

3. Add a charge to **identify low-value products targeted to communities of color and new high-value products opportunities that better meet the needs of communities of color.**

A third charge to all committees, task forces and working groups is directed at identifying current products that, because of their low-value, strip consumers of assets instead of protecting those assets. In our experience, these low-value products are disproportionately marketed to and sold in and to communities of color. In addition, some lines of business simply have no products designed for the needs of communities of color and there are opportunities to identify the unique needs of these communities and then develop high-value products targeted to meet those needs. As discussed below, this charge is also relevant for addressing diversity in insurers and producers.

Recommendations for Regulatory Diversity

We have a series of recommendation to improve diversity within the regulatory community. As set out in our earlier comments and presentations to the Committee, the lack of diversity among the regulatory community and the regulatory decisions which codify disparate impact are a result of a lack of consumer stakeholder participation, generally, and an even greater absence of stakeholders from communities of color, specifically. Our recommendations are:

1. Develop guidance for establishing a public agency dedicated to representing consumer before the Department of Insurance and the Legislature – a Bureau of the Insurance Consumer Advocate.

2. Measure consumer participation, generally, and minority participation, specifically in NAIC meetings and conferences and events

3. Allocate speaking time, when there are time constraints, based on industry / consumer, not based on number of speakers

4. Increase funding for NAIC consumer participation to permit consumer reps to retain experts for priority projects.

Discussion

1. Develop guidance for establishing a public agency dedicated to representing consumer before the Department of Insurance and the Legislature – a Bureau of the Insurance Consumer Advocate.

There is a great need to establish institutions to advocate on behalf of consumers before insurance departments and state legislatures to level the playing field versus the hundreds of millions of dollars of policyholder-supplied funds spent by insurers and trade associations to press their views.

The establishment of a Bureau of Insurance Consumer Advocate in each state would have an impact far beyond the advocacy for consumers performed by that agency. These BICAs create opportunities for employment, including minority employment, in insurance other than working for insurers or regulators. And they create employment opportunities outside of industry for regulators who want to leave the insurance department. BICAs are a strategy to increase diversity in insurance as well as addressing a core barrier to ending systemic racism in insurance.

2. Measure consumer participation, generally, and minority participation, specifically in NAIC meetings and conferences and events.

3. Allocate speaking time, when there are time constraints, based on industry / consumer, not based on number of speakers

If you can't measure it, you can't fix it. Speaking about diversity in abstract terms cannot lead to assessment of failure or success of the strategies to improve diversity. Further, a requirement to measure diversity in NAIC events will raise awareness of the need to improve diversity.

The need for such improvement is huge. We've pointed out that the CIPR events at the NAIC Summit not only failed to include any minority voices, but included one overtly racist presentation. We've pointed out that this year's Insurance Regulatory Examiners' Society Career Development Seminar failed to include any minority or consumer presenters. And these results occurred after the NAIC declared its commitment to racial justice. It gets worse. At the recent Fall National Meeting, the CIPR event on pandemic insurance featured eight white men. No members of the communities of color most impacted by the lack of pandemic insurance. No small businesses from communities of color. No consumer stakeholders who have been active in these debates from day 1.

The two actions will help ensure that NAIC event planners, committees, task forces and working groups better understand the importance of consumer stakeholder participation, generally, and minority participation, specifically.

As someone who is often the only consumer stakeholder among many industry stakeholders in NAIC meetings, I'm keenly aware of situations in which a half dozen industry trades each have the same amount of time as me – to repeat and agree with each other trade's comments. To be clear, this is not always the case, but the larger point is that, when speakers' time is limited, the allocation of that time should be based on the major positons/views and not on the sheer number of speakers.

4. Increase funding for NAIC consumer participation to permit consumer reps to retain experts for priority projects and engage with stakeholders from communities of color impacted by NAIC deliberations.

As someone who has been involved in the NAIC Consumer Participation program from its beginning 30 years ago, I'm grateful for the NAIC's commitment to consumer participation. The NAIC program stands in contrast to the absence of such a formal consumer participation program in most states and other organizations, like NCOIL.

The NAIC consumer participation budget is about 0.1% of the total NAIC budget. It covers reimbursement of travel expenses for funded consumer representatives to attend NAIC national and interim meetings and some IAIS events. It also covers registration fees, publication costs and conference call costs for funded and unfunded consumer representatives. No consumer

representative is paid for their time out of NAIC funds. Most funded and unfunded consumer representatives volunteer their time – beyond their regulator work commitments – to advocate for consumers at the NAIC.

We are not asking for NAIC consumer representatives to be compensated for our time at NAIC events. Rather, we're asking for additional funding to leverage our individual contributions to retain subject-matter experts or consultants or to fund participation from key stakeholders from communities of color to assist the consumer representatives on key issues. This assistance is particularly important in areas like consumer testing of information and disclosures and analyzing actuarial, reserving, accounting, investment or capital-related proposals.

The NAIC consumer representatives took responsibility for the lack of minority voices among our group in 2020 by recruiting heavily for applicants representing communities of color. We were successful in encouraging many new, exceptionally-qualified applicants of color and hope they will be accepted as NAIC consumer representatives. But, we want these new consumer representatives – if accepted by the Consumer Board of Trustees – to feel their time is well spent and to continue to participate for years to come while helping recruit new consumer stakeholders of color. For that to happen, the Consumer Participation program must be strengthened and one way is to increase NAIC funding for the consumer reps to use to retain experts and consultants and reach out to communities and stakeholders impacted by NAIC discussions.

Recommendations for Insurer Diversity

1. Identify products providing low-value to communities of color and develop new high-value products that better meet the needs of communities of color

We offer this action to improve insurer diversity based on the belief that someone will want to work for companies who provide products and services that that person and that person's community values and likes. Why would members of community color want to work for an industry that the community perceives as ripping them off? We suggest that if communities of color value the products sold by insurers, members of those communities are more likely to seek out work with those insurers.

This recommendation is essentially the opposite of suggestions to improve financial or other education in communities of color. In our view, the improve-education argument blames the victim. Our approach suggests that people are not uneducated, but want to work for companies providing products that they and their community like and value.

2. Examine impact of criminal history in producer licensing qualifications

We raise this specific issue because of documented disparity and racial discrimination.in policing and criminal complaints against members of communities of color.