

Draft: 8/28/22

Privacy Protections (H) Working Group
Virtual Meeting
June 15, 2022

The Privacy Protections (H) Working Group of the Innovation, Cybersecurity, and Technology (H) Committee met June 15, 2022. The following Working Group members participated: Katie Johnson, Chair (VA); Cynthia Amann, Co-Vice Chair, Jo LeDuc, and Marjorie Thompson (MO); Chris Aufenthie, Co-Vice Chair (ND); Sarah Bailey (AK); Shane Foster (AZ); Damon Diederich (CA); George Bradner, Kristin Fabian and Kurt Swan (CT); Erica Weyhenmeyer (IL); LeAnn Crow, Tate Flott, and Brenda Johnson (KS); Ron Kreiter (KY); Van Dorsey and Alexander Borkowski (MD); Robert Wake (ME); Rick Cruz (MN); Martin Swanson and Connie Van Slyke (NE); Teresa Green (OK); Gary Jones (PA); Carole Cearley and David Gonzalez (TX); Michael Walker, Shari Maier, and Michael Walker (WA); and Timothy Cornelius, Rachel Cissne Carabell, Lauren Van Buren, and Barbara Belling (WI). Also participating were Evan Daniels (AZ); Scott Woods and Rebecca Smid (FL); Kristen Finau (ID); George McNab (OH); Scott D. Martin (OR); Megan Mihara and Ray Santilli (RI); Shelli Isiminger (TN); Shelley Wiseman (UT); Don Beatty, Richard Tozer, and James Young (VA); and Mary Block and Karla Nuisl (VT).

1. Adopted its Spring National Meeting Minutes

Mr. Diederich, made a motion, seconded by Mr. Aufenthie, to adopt the Working Group's April 4 minutes (*see NAIC Proceedings – Spring 2022, Market Regulation and Consumer Affairs (D) Committee, Attachment Six*). The motion passed unanimously.

2. Heard Updates on State Privacy Legislation and on Federal Privacy

Jennifer McAdam (NAIC) said the Legal Division tracks comprehensive state privacy legislation in two charts that are located on the Working Group's web page and that Connecticut is the most recent state to adopt a comprehensive privacy law. She said the charts list the business obligations imposed and the consumer rights provided in each state. She said that the exemptions applicable to insurers are as follows: 1) California has a data-level exemption for the federal Gramm-Leach-Bliley Act (GLBA) and an entity-level exemption for the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA); 2) Virginia has an entity-level exemption for the GLBA and HIPAA; 3) Colorado has a data-level exemption for the GLBA and HIPAA; 4) Utah has a data-level exemption for HIPAA and an entity-level exemption for the GLBA; and 5) Connecticut has an entity exemption and data-level exemptions for the GLBA and HIPAA.

Ms. McAdam said the reasons it is important to follow what states are doing with these more broadly applicable data privacy laws are to: 1) track the consumer rights and business obligations being established nationally; and 2) be aware of the carve-outs applicable to the insurance industry so that the Working Group can amend the NAIC privacy laws accordingly. She said the Legal Division will continue to follow state data privacy legislation and update the Working Group at upcoming meetings.

Brooke Stringer (NAIC) said in the past few weeks, there has been a breakthrough in congressional negotiations on a draft data privacy bill, the American Data Privacy and Protection Act. She said the draft legislation was unveiled by U.S. Rep. Frank Pallone, (D-NJ), chairman of the House Committee on Energy and Commerce; U.S. Rep. Cathy McMorris Rodgers, (R-WA), the panel's ranking member; and U.S. Sen. Roger Wicker (R-MS), ranking member of the Senate Committee on Commerce, Science, and Transportation. It reflects a compromise on two of the biggest sticking points in federal privacy negotiations: 1) preemption of state laws; and 2) private right of

action. Ms. Stringer said the bill adds individual rights that allow people to control their data, opt out of targeted advertising, and stop their data from being sold without their permission. She said it also requires the largest companies to conduct impact assessments on their algorithms, including whether they may harm protected classes. Ms. Stringer said it does not rely exclusively on the notice and consent regime generally employed by state privacy laws. She said covered entities may not collect, process, or transfer covered data beyond what is reasonably necessary, proportionate, and limited to provide specifically requested products and services or communicate with individuals in a manner they reasonably anticipate. She also said this duty applies irrespective of any consent from an individual. Moreover, she said covered data must be permanently disposed of or deleted once no longer necessary for the purpose for which it was collected, processed, or transferred. Ms. Stringer said covered entities are defined broadly. As defined in the draft, she said a covered entity is one that “collects, processes, or transfers covered data and is subject to the Federal Trade Commission Act,” plus nonprofits and common carriers. She said she does not think this includes insurers but that she needs to review it and that data brokers are covered subject to specific prescriptive rules.

Ms. Stringer said it preempts most state laws with various exemptions that are nuanced. She said there are several exemptions to the preemption of state law, including part of the California Consumer Privacy Act’s (CCPA’s) private right of action concerning data breaches, the Illinois Biometric Information Privacy Act (BIPA), and state unfair and deceptive acts and practices laws. Ms. Stringer said for data security, entities regulated by and in compliance with the data security requirements in GLBA and the HIPAA will be deemed in compliance with this section. She said the private right of action would take effect four years after enactment and provides consumers who believe their rights under the law were violated with the option of suing companies in federal court.

Ms. Stringer said while this is a significant step forward in data privacy legislation, U.S. Sen. Maria Cantwell (D-WA), chair of the Senate Committee on Commerce, Science, and Transportation, has not signed on to the American Data Privacy and Protection Act (ADPPA). Although the bill appears it may have some bipartisan support in the U.S. House of Representatives, she said the lack of an endorsement from Sen. Cantwell (or another Senate Democrat) means the bill does not yet have bipartisan support in the Senate. Ms. Stringer said she will keep the Working Group posted.

Mr. Diederich asked if the federal draft bill had state law preemptions. Ms. Stringer said the intent of the law is to preempt all state data and privacy laws unless there is some sort of specific exemption. Mr. Wake said if one is a literalist, this bill has neither a federal McLaren-Ferguson Act saving clause nor a federal McLaren-Ferguson Act override clause. So, he said one could at least say that the absence of an override would make it reverse preempted by the federal McClaren-Ferguson Act. Ms. Stringer said that was a good point and one that the NAIC Legal Division would be following closely. Mr. Diederich asked if there was any discussion about the safe harbors that are contained in the bill as it appears to allow companies to create their own compliance standards. He said this is concerning to state insurance regulators because it raises a specter of different, competing standards for compliance, making it very hard to enforce.

3. Discussed Comments Received on the Exposure Draft of its Revisions to Sections 1–3 of Model #670

Ms. Johnson said she wanted to thank all interested parties who provided comments on the Working Group’s revisions. She said the comments are helpful and that the Working Group appreciates those who took the time to look at the work that the Working Group has done. Ms. Johnson said in response to previous comments regarding the work plan, she is going to redo the schedule so the Working Group would finish the revisions to Section 1 and Section 13 of *NAIC Insurance Information and Privacy Protection Model Act (#670)*, exposing them by the end of August for a six-week public comment period. As the rest of the sections in Model #670 are civil proceedings, the review and comment process for will conclude with the public comments received by the end of August to be

discussed during a future meeting. Ms. Johnson said Working Group will be coordinating with other working groups under the Innovation, Cybersecurity, and Technology (H) Committee.

Mr. Wake said it is possible that only one model may be needed that would include new high-tech definitions like biotech, algorithms, etc., as placeholders for now that would be kept as needed for now and revisited as the working groups bring their separate areas of work together into a collaborative state insurance regulatory effort. Bob Ridgeway (America's Health Insurance Plans—AHIP) said it would be a good idea to fold in both models together. Ms. Johnson said there are two notices currently and only one is necessary. Mr. Ridgeway said while he applauds the Working Group finishing Model #670 first, he wondered why the policy changed from starting with the *Privacy of Consumer Financial and Health Information Regulation* (#672) first and shifting to Model #670. Ms. Johnson said this shift was made at the Spring National Meeting because many states require specific authority through laws as an act prior to doing a regulation interpreting that law. She said Model #670 is the authority for Model #672.

Kristin Abbott- (American Council of Life Insurers—ACLI) said the ACLI's members would like common definitions and framework in the form of one uniform model rather than the current patchwork of state insurance privacy laws, rules, and regulations. Lauren Pachman- (Professional Insurance Agents—PIA) said the adverse underwriting decision- (AUD) is a concern and asked if it would apply to all lines of business versus life and health versus non-specific lines. She said the AUD description and definition should vary with the agent's relationship with consumers rather than become an extra requirement on agents.

Ms. Johnson said the original language in the model as well as in Virginia law was not changed. Bob Woody (American Property Casualty Insurance Association—APCIA) said the Working Group is revising the Model #670 and Model #672 again. Randy Chapman- (Blue Cross Blue Shield Association—BCBSA) agreed and asked that the models align with HIPAA. Ms. Johnson said the Working Group is looking at it and will want industry's help on it every step of the way. She emphasized that late comments from the public, industry, state insurance regulators, and consumer representatives will always be accepted.

4. Discussed Other Matters

Ms. Johnson reminded attendees that responses to the Consumer Data Ownership survey questions for the white paper that were distributed and posted July 1 are due by July 28.

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

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