

INNOVATION, CYBERSECURITY, AND TECHNOLOGY (H) COMMITTEE

Innovation, Cybersecurity, and Technology (H) Committee Aug. 10, 2022, Minutes
Request for NAIC Model Law Development from the Privacy Protections (H) Working Group (Attachment One)
Big Data and Artificial Intelligence (H) Working Group Aug. 10, 2022, Minutes (Attachment Two)
Big Data and Artificial Intelligence (H) Working Group July 14, 2022, Minutes (Attachment Two-A)
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Draft: 8/28/22

Innovation, Cybersecurity, and Technology (H) Committee
Portland, Oregon
August 10, 2022

The Innovation, Cybersecurity, and Technology (H) Committee met in Portland, OR, Aug. 10, 2022. The following Committee members participated: Kathleen A. Birrane, Chair (MD); Evan G. Daniels, Co-Vice Chair (AZ); Dana Popish Severinghaus, Co-Vice Chair (IL); Karima M. Woods (DC); John F. King (GA); Amy L. Beard (IN); Chlora Lindley-Myers (MO); Troy Downing (MT); Jon Godfread (ND); Adrienne A. Harris represented by Sumit Sud (NY); Judith L. French (OH); Elizabeth Kelleher Dwyer (RI); Carter Lawrence (TN); Kevin Gaffney (VT); and Mike Kreidler (WA). Also participating were: Cynthia Amann (MO); and Katie Johnson (VA).

1. Adopted its Spring National Meeting Minutes

Commissioner Birrane said the Committee met April 5.

Commissioner Downing made a motion, seconded by Director Popish Severinghaus, to adopt the Committee's April 5 minutes (*see NAIC Proceedings – Spring 2022, Innovation, Cybersecurity, and Technology (H) Committee*). The motion passed unanimously.

2. Adopted a Request for NAIC Model Law Development from the Privacy Protections (H) Working Group

Ms. Johnson, chair of the Privacy Protections (H) Working Group, presented the Working Group's Request for NAIC Model Law Development, noting that it will incorporate some aspects of the *NAIC Insurance Information and Privacy Protection Model Act* (#670) and the *Privacy of Consumer Financial and Health Information Regulation* (#672) into a new model. She said the concepts found in Model #670 and Model #672 need to be modernized considering changes to industry practices, and adopting this request will provide the appropriate next steps for discussing substantive issues regarding the appropriate privacy protections for the insurance marketplace.

Commissioner Godfread made a motion, seconded by Director Lindley-Myers, to adopt the proposed Request for NAIC Model Law Development (Attachment One). The motion passed unanimously.

3. Adopted the Reports of its Working Groups

A. Big Data and Artificial Intelligence (H) Working Group

Superintendent Dwyer said the Big Data and Artificial Intelligence (H) Working Group met July 14 and held a Collaboration Forum on Algorithmic Bias, which included a presentation from Scott Kosnoff (Faegre Drinker Biddle & Reath LLP) on different perspectives on artificial intelligence (AI) risk management and governance and a presentation from Eric Krafcheck (Milliman) on bias detection methods and tools. The Working Group also received reports from Workstreams One and Two. Workstream One is focusing on AI/machine learning (ML) surveys led by Commissioner Gaffney, and Workstream Two reported on its work focusing on determining the appropriate regulatory evaluation of third-party data and model vendors.

B. Cybersecurity (H) Working Group

Ms. Amann said the Cybersecurity (H) Working Group met July 14 and received an update on its work plan. She said the Working Group launched a volunteer group to draft a state insurance regulator survey, and the survey represents one of the Working Group's key deliverables to be completed. She said an initial survey has been

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drafted and updated, and it is expected to be sent to state insurance regulators in August. She said the Working Group also received an update on the implementation of the *Insurance Data Security Model Law* (#668), noting that 21 states have now adopted it. She said the Working Group also received an update on federal activity related to cybersecurity, the NAIC's cybersecurity tabletop exercises, and state insurance regulatory cybersecurity tools.

C. E-Commerce (H) Working Group

Commissioner Downing said the E-Commerce (H) Working Group met May 26 and May 5 in regulator-to-regulator session, pursuant to paragraph 4 (internal or administrative matters of the NAIC or any NAIC member) of the NAIC Policy Statement on Open Meetings to plan steps to accomplish its 2022 charges. He said the Working Group has also been working to clarify and analyze the various issues raised by the states and industry in response to the e-commerce surveys that were sent out in late 2021. The survey was sent to the states asking what exceptions to state laws or regulations were implemented during the pandemic to allow e-commerce, electronic transactions, and electronic communications to take place when in-person methods were not possible. Commissioner Downing said at the same time, the survey was sent to industry asking the companies to identify regulations or regulatory practices related to any specific technologies, communications, transactions, or any other forms and methods of e-commerce that may currently impede their ability to conduct business electronically. Based on the survey results, the Working Group prepared a working framework that categorized identified issues related to e-signatures, e-notices, claims, policy, and a general "other" category.

Commissioner Downing said since developing the framework, various members of the Working Group volunteered to dig deeper into each of these topics to explore what options were offered by the states and industry via the survey; identify what actions, if any, have been taken by the states in relation to these topics; and identify potential solutions to any outstanding or otherwise remaining issues. He said the Working Group plans to complete the updated framework to reflect the work done by the Working Group volunteers and expose that document for review and comment in the next few weeks. He said the Working Group also plans to meet to discuss the framework and get feedback on its overall plan.

D. Innovation in Technology and Regulation (H) Working Group

Director Daniels said the Innovation in Technology and Regulation (H) Working Group met May 25 to: 1) review its charges; and 2) outline its plan for the year, including quarterly meetings on various topics. He said the Working Group focused on various state approaches facilitating innovation across the country, including sandbox concepts and other strategies. He said presentations were provided by the District of Columbia, Illinois, and Wisconsin departments of insurance (DOIs); they were well received, and other approaches were discussed. He said the Working Group has plans to meet two more times in 2022 on topics related to innovation and technology in insurance.

E. Privacy Protections (H) Working Group

Ms. Johnson said the Privacy Protections (H) Working Group met three times in regulator-to-regulator session to review draft revisions to Sections 1–12 of Model #670, and it met twice in open meetings. She said during its June 15 meeting, the Working Group: 1) adopted its Spring National Meeting minutes; and 2) received comments on its draft revisions to Sections 1–2 of Model #670. She highlighted a few of the comments, noting that after considering these comments, the Working Group decided to clarify its direction and agreed to replace Model #670 and Model #672 with one new model. She said during its Aug. 9 meeting, the Working Group: 1) adopted its Aug. 2 minutes; 2) heard updates on state and federal privacy legislation; and 3) discussed next steps on the *Consumer Data Ownership and Use* white paper, the drafting of the new model, and the related work plan.

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Commissioner Kreidler made a motion, seconded by Commissioner Godfread, to adopt the reports of the Big Data and Artificial Intelligence (H) Working Group (Attachment Two), the Cybersecurity (H) Working Group (Attachment Three), the E-Commerce (H) Working Group, the Innovation in Technology and Regulation (H) Working Group, and the Privacy Protections (H) Working Group (Attachment Four). The motion passed unanimously.

4. Received an Update on its Projects

A. ICT-Hub Concepts and Progress

Commissioner Birrane asked Scott Morris (NAIC) to provide an update on the Innovations, Cybersecurity, and Technology (ICT) Hub project intended to assist in fulfilling the Committee's charge to coordinate the work of NAIC committees on issues related to innovation, technology, cybersecurity, and data privacy referred to as "Related Groups." She said it is intended to provide a link to committee work pages, a summary of their relevant work, and a library of resources. She said this is intended to enable users to easily identify various workstreams and work products developed or being developed by different committees and groups at the NAIC.

Mr. Morris said the NAIC is working on this project and has gathered information and outlined use cases to define what the ICT-Hub should provide. He said the NAIC Communications Department has built a demo of the platform that was shared with Committee members after the Collaboration Forum on Algorithmic Bias on July 19. He said as part of implementing a new website, a content management platform will be a foundational component and will allow a smarter and more streamlined approach. He said it will benefit all NAIC committees and the website generally by allowing content to be tagged so that it can be presented on different pages or different topics. He provided some examples of what that might be and what it would include. He said the NAIC will start by building a taxonomy to classify the content, beginning with topics related to the Committee and then expand it from there. He said feedback was received, and staff will now go back to the Communications team to help build out a project timeline and costs. He said the project will take a more technology driven approach, but it is believed to be the best approach for the long term. He said there are plans to get something out in the interim that will be based on the more traditional platform in existence today.

B. Collaboration Forum on Algorithmic Bias Program and Kansas City Fly-In

Commissioner Birrane said she wants to clarify that the Collaboration Forum is not an event but a methodology. She said it is intended to bring different groups together to collaborate, and holding educational events as a part of the methodology is part of the process of bringing those groups together regarding a common topic to coordinate through the Collaboration Forum. She said it is a collaboration effort that we are calling a forum. She said the Committee is charged with collaborating and coordinating NAIC work on Committee topics, and most of that work can be done through communication with the Related Groups directly but recognizing that some topics are so big and substantial and cut across so many groups that it makes it important to collaborate to assure consistency and efficiency.

Commissioner Birrane said it became clear early on that there were many workstreams at the NAIC looking at the subject of unfair bias in algorithms and how AI/ML driven decisional systems can result in illegal discrimination, so this was the perfect subject for the first Collaboration Forum. She said it began in May, and as the Collaboration Forum evolved into regulator-to-regulator session, three areas of focus emerged:

1. The need to identify the Related Groups and ensure regular and ongoing communication about what each are doing and communicate regarding the ICT-Hub.
2. Providing foundational education to commissioners and other senior state insurance regulators to ensure a common foundation of understanding.

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3. Work together to identify the common and foundational elements of regulatory oversight of AI use in insurance, including the development of a common vocabulary and the identification of regulatory tools.

Commissioner Birrane reviewed the progress made over the last few months, including hosting foundational education at the Commissioners' Mid-Year Roundtable, hosting a regulator-only Fly-In in Kansas City, holding Forum sessions during the Summer National Meeting at the Big Data and Artificial Intelligence (H) Working Group meeting, and continuing that with a session after the Committee meeting. She said there will be other public sessions held on particular "use cases" put on by the other workstreams in the future.

Having no further business, the Innovation, Cybersecurity, and Technology (H) Committee adjourned into the Collaboration Forum on Algorithmic Bias session.

5. Held the Collaboration Forum on Algorithmic Bias

Commissioner Birrane introduced the presenters for the Collaboration Forum on Algorithmic Bias session. She said the topic is, "Approaches Companies Are or Can Implement to Manage and Mitigate the Risk of Unintended Bias and Illegal Discrimination When Developing and Using AI/ML," and she introduced each of the presenters.

Dale Hall (Society of Actuaries—SOA) talked about the SOA's Ethical & Responsible Use of Data & Predictive Models Certificate Program. He said it is designed for state insurance regulators, actuaries, data scientists, and others who work in the insurance profession; the full program was released in 2021, and an executive version is being developed. He said the focus is on an ethical framework. It is based on a set of principles, which are then applied in practice; provides a way to organize data processes and analyze a given situation; facilitates the ability to have checkpoints and ask important questions; and suggests different approaches to frameworks that may have the same core intentions.

Mr. Hall said the three main points of the program are to promote: 1) fairness, ensuring it is equitable, avoids bias, gives thought to social considerations; 2) safety, ensuring the data is robust, useful, meets privacy standards, a technically sustainable model, and accurate; and 3) transparency and accountability, ensuring it is well documented, explained, communicated, and interpreted well, and there is accountability in terms of who owns it and will be answering questions regarding it and its use. He said highlighted in the process is gathering the data and developing the initial models, avoiding bias, and understanding how various modeling approaches relate to the framework. He talked about the need to ensure that models are fair and avoid disparate impact and treatment and unintended discrimination. He said potential approaches to doing this might include collecting protected data to ensure the model does not discriminate and require direct causal relationships.

Mr. Hall said the program also includes model safety and governance. He said this follows generally accepted enterprise risk management (ERM) principles that actuaries are already very involved in and work with auditors and others in the company to ensure it is well understood who owns and manages the processes. He said being able to explain the model is very important and should be a strong and simple explanation. He said there is an ongoing responsibility to ensure feedback and control after deployment.

Tulsee Doshi (Google and Lemonade) presented on today's approaches to algorithmic bias. She reviewed different ways AI is being used across the world, including helping the industry to determine risk, detect fraud, and many other things showing it has many benefits even if it also has risks. She said the question is, how to balance those benefits against the risks while still being intentional about the other effects. She said human biases affect the way products affect the world, and she provided examples. She said humans are at the center of creating bias, and that it is not unique to AI, but AI is likely to exacerbate the problem. She said it is not necessarily an issue of equality or providing everyone with the exact same thing but of equity; i.e., providing the same, yet reducing the risk of higher risk areas and communities. She said fairness is a little bit of both. She reviewed the components of

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developing the models, and she said it is important to have governance and responsibility built into each one. She said human bias can be introduced at each stage. She emphasized that it is important to be intentional in mitigating these biases and document each stage and that humans continue to be in the loop.

Ms. Doshi said because ML uses and users are so diverse, ML fairness concerns can take many different forms, and she provided examples. She said the problems do not look the same; therefore, you must understand the context, user, and use case to understand how bias may manifest itself, which dictates the metrics and what will need to be done to solve for it; therefore, the solutions will be different. She said the approach will need to include establishing the problem with a diverse set of users in mind, collecting data across the user base, defining fairness opportunities, testing, designing mitigation approaches, and monitoring. She said across all of this is developing and growing an inclusive workforce and bringing in diverse perspectives. She talked about the concept of a uniform loss ratio and talked about model cards as methods for detecting bias and providing transparency. She said face detection model cards are an example of something that is growing across the industry in terms of a standardized way to provide transparency around models.

Ms. Doshi identified three important challenges in solving for bias: 1) the need to have class attributes to test for them; 2) it is often hard to collect enough data, as is the case with claims; and 3) even once identified, it can take time to resolve bias issues. She said it is also important to ensure new bias is not created when trying to improve for the first identified bias issue.

Daniel Schwarcz (University of Minnesota) covered understanding the risk of biased AI in general and in insurance and how limiting it requires the initial step of testing for disparate impact. He said there is no effective understanding of potential bias unless testing the outcomes of the model. He said he would focus on the ML aspect of AI, which is based on massive amounts of historic training data and bias in statutorily protected groups. He provided several examples of bias against protected groups in AI models, including a Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) algorithm that disproportionately over-predicted recidivism for blacks and underpredicted it for whites, Amazon's hiring algorithm that discriminated against women, and Optum's health algorithm that directed resources disproportionately to white individuals. He said one must not only look at the results but why those results are being presented.

Mr. Schwarcz said he did not believe a lot of insurers were using AI and ML in underwriting or rating, but he said it is in flux and they are on the precipice of doing this. He said the issue or proxy discrimination is when a protected attribute is predictive of risk but is illegal to be used. However, it is often predictive of claims, but whatever the reason, those attributes are not allowed to be used. The ML will develop proxies for those attributes because it is predictive of risk. Mr. Schwarcz said the examples of models behaving with disparate impact have been identified by testing. He said there is no other way to determine if there is bias in algorithms other than to test them, and he said insurers should be explicitly allowed to collect this data to do this testing. He said he recognizes that disparate impact may not represent a legal or regulatory problem, but that is where the inquiry should begin even if it does not create liability or necessarily indicate a problem. He said this is the first step, but there are a lot of additional difficult steps to take and testing is critical to having an effective regulatory regime.

Commissioner Birrane thanked the presenters, and she said to send questions to NAIC staff if one is a state insurance regulator, and for interested parties, there will be a Committee meeting set up to provide an opportunity to speak on this topic.

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Adopted by the Innovation, Cybersecurity, and Technology (H) Committee – 8/10/22

Adopted by the Privacy Protections (H) Working Group – 8/2/22

REQUEST FOR NAIC MODEL LAW DEVELOPMENT

This form is intended to gather information to support the development of a new model law or amendment to an existing model law. Prior to development of a new or amended model law, approval of the respective parent committee and the NAIC's Executive (EX) Committee is required. The NAIC's Executive (EX) Committee will consider whether the request fits the criteria for model law development. Please complete all questions and provide as much detail, as necessary, to help in this determination.

Please check whether this is: New Model Law or Amendment to Existing Model

1. Name of group to be responsible for drafting the model:

Privacy Protections (H) Working Group

2. NAIC staff support contact information:

Lois E. Alexander
Market Regulation Manager II lalexander@naic.org
816-783-8517

3. Please provide a brief description of the proposed new model or the amendment(s) to the existing model. If you are proposing a new model, please also provide a proposed title. If an existing model law, please provide the title, attach a current version to this form, and reference the section(s) proposed to be amended.

Proposed Title: *Insurance Consumer Privacy Protection Model Law*

The NAIC's models addressing data privacy—*NAIC Insurance Information and Privacy Protection Model Act* (#670) and *Privacy of Consumer Financial and Health Information Regulation* (#672)—were adopted several decades ago. After studying this issue over the past two years, the Privacy Protections (H) Working Group has determined that a new model law is necessary to enhance the consumer protections and the corresponding obligations of entities licensed by the insurance department to reflect the extensive innovations that have been made in communications and technology over these decades.

4. Does the model law meet the Model Law Criteria? Yes or No (Check one)

(If answering no to any of these questions, please reevaluate charge and proceed accordingly to address issues).

a. Does the subject of the model law necessitate a national standard and require uniformity amongst all states? Yes or No (Check one)

If yes, please explain why:

Access to consumer data by insurance companies, insurance producers, and their third-party vendors has multiplied exponentially via the internet, telematics, and other data tracking technology. This, in turn, has increased the use of complex algorithms, including machine learning (ML) and artificial intelligence (AI). State insurance regulators applying current model law and regulation requirements to consumer privacy notifications have encountered questions about the extent of consumer ownership and control of the use of such consumer data by the insurance industry. Consumers are faced with opt-in/opt-out decisions that leave questions as to whether they may have given away their rights to control their personal data, much of which insure do not even need to determine insurability and risk.

b. Does Committee believe NAIC members should devote significant regulator and Association resources to educate, communicate and support this model law?

Yes or No (Check one)

5. What is the likelihood that your Committee will be able to draft and adopt the model law within one year from the date of Executive (EX) Committee approval?

1 2 3 4 5 (Check one)

High Likelihood

Low Likelihood

Explanation, if necessary: The Privacy Protections (H) Working Group has a work plan in place that is posted on the Working Group's web page and drafting groups committed to drafting and adopting revisions to Models #670 and Model #672 by the 2023 Summer National Meeting.

6. What is the likelihood that a minimum two-thirds majority of NAIC members would ultimately vote to adopt the proposed model law?

1 2 3 4 5 (Check one)

High Likelihood

Low Likelihood

Explanation, if necessary: NAIC members are aware of the need for a new model law to enhance consumer privacy protections via notifications and education to consumers regarding standards for licensees and their third-party vendors responsibilities regarding collection, use, and disclosure of consumers' information.

7. What is the likelihood that state legislatures will adopt the model law in a uniform manner within three years of adoption by the NAIC?

1 2 3 4 5 (Check one)

High Likelihood

Low Likelihood

Explanation, if necessary:

8. Is this model law referenced in the NAIC Accreditation Standards? If so, does the standard require the model law to be adopted in a substantially similar manner?

It is not.

9. Is this model law in response to or impacted by federal laws or regulations? If yes, please explain.

The federal Gramm-Leach-Bliley Act (GLBA), enacted in 1999, imposed privacy and security standards on financial institutions and directed state insurance commissioners to adopt certain data privacy and data security regulations. Model #672 is the regulation adopted in response to the GLBA. The new model will include GLBA data privacy standards and replace Model #672.

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Draft: 8/28/22

Big Data and Artificial Intelligence (H) Working Group
Portland, OR
August 10, 2022

The Big Data and Artificial Intelligence (H) Working Group of the Innovation, Cybersecurity, and Technology (H) Committee met in Portland, OR, Aug. 10, 2022. The following Working Group members participated: Elizabeth Keller Dwyer, Chair (RI); Amy L. Beard, Co-Vice Chair, represented by Victoria Hastings (IN); Doug Ommen, Co-Vice Chair (IA); Adrienne A. Harris, Co-Vice Chair, represented by Sumit Sud (NY); Kevin Gaffney, Co-Vice Chair (VT); Anna Latham (AK); Ken Allen (CA); Peg Brown (CO); George Bradner and Wanchin Chou (CT); John Reilly (FL); Weston Trexler and Randy Pipal (ID); Erica Weyhenmeyer (IL); Rob Roberts (KY); Tom Travis (LA); Rachel Davison (MA); Kathleen A. Birrane and Alexander Borkowski (MD); Sandra Darby (ME); Karen Dennis (MI); Phil Vigliaturo (MN); Cynthia Amann (MO); Tracy Biehn and Angela Hatchell (NC); Jon Godfread and Chris Aufenthie (ND); Christian Citarella (NH); Barbara D. Richardson (NV); Tom Botsko (OH); Alex Cheng (OR); Shannen Logue and Michael McKenney (PA); Michael Wise (SC); Travis Jordan (SD); Carter Lawrence (TN); Leah Gillum (TX); Jon Pike (UT); Katie Johnson (VA); Molly Nollette (WA); Rebecca Rebholz (WI); and Greg Elam (WV).

1. Adopted its July 14 Minutes

The Working Group met July 14 and took the following action: 1) adopted its April 5 minutes; and 2) received reports from its four workstreams.

Commissioner Ommen made a motion, seconded by Mr. Vigliaturo, to adopt the Working Group's July 14 minutes (Attachment Two-A). The motion passed unanimously.

2. Held the Collaboration Forum on Algorithmic Bias

Superintendent Dwyer said one of the highest priority charges to the Innovation, Cybersecurity, and Technology (H) Committee is to facilitate appropriate levels of coordination and collaboration among NAIC working groups with respect to topics that relate to innovation, technology, cybersecurity, and privacy. This is being accomplished through the Collaboration Forum, which has an initial focus on algorithmic bias. Superintendent Dwyer said the Big Data and Artificial Intelligence (H) Working Group is playing a role in providing a public forum for education and discussion.

Scott Kosnoff (Faegre Drinker Biddle & Reath) talked about how insurers that are using artificial intelligence (AI) or algorithmic decision making can protect themselves from regulatory litigation and reputational risk. Mr. Kosnoff said AI tools can assist in customer engagement, rating, underwriting, claims management, and fraud detection and that insurers invest in these tools for better decision making and to remain competitive. While there are many benefits to the use of these tools, Mr. Kosnoff said state insurance regulators have expressed concerns about fairness, unintended discrimination, and lack of transparency.

Mr. Kosnoff said concerns surrounding the use of AI are not unique to the insurance industry, and he then reviewed steps insurers could take to minimize their risks. He said insurers should have a risk management framework, which includes how to identify potential bias. Mr. Kosnoff said insurers have a difficult situation because there is no clear guidance regarding what level of correlation of a data variable with a protected class is

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acceptable and under what circumstances. He said an insurer should take reasonable steps to identify, manage, and mitigate the risk of negative outcomes. Mr. Kosnoff said the risk management framework should be an extension of an insurer's enterprise risk management (ERM) and include the following: 1) written policies and procedures; 2) clear assignment of responsibility and accountability; 3) communication of policies; 4) training and supervision; 5) consistent use and application; 6) monitoring and corrective action, if needed; and 7) documentation.

Mr. Kosnoff said an insurer needs to inventory the organization's algorithms, understand each algorithm's objective and how it will be used, identify potential risks for each algorithm, assess the seriousness of potential harm that could occur, and the likeliness of harm occurring. After this, he said an insurer should implement appropriate safeguards, including humans having some level of oversight. Finally, Mr. Kosnoff said insurers should consider testing for bias and said he thinks this is the only part of the risk management framework that is controversial.

Mr. Kosnoff said an insurer should have a multidisciplinary team, diversity, clear assignment of roles, and board oversight for the development of AI and risk management framework. He said the risk management framework should be proportionate to the likelihood of harm and should cover every stage of the AI life cycle, which includes pre-design, design and development, testing and evaluation, deployment, and monitoring. In response to a question regarding how to monitor an algorithm that can learn over time, Mr. Kosnoff said it is important to recognize testing cannot occur only at initial deployment.

Eric Krafcheck (Milliman) said his comments today are through the lens of how to evaluate a rating plan but are applicable to other ways models are used. He said his comments focus on the testing for bias and said one needs to first identify the scope of analysis, define the fairness measure, and then collect the necessary data to test for bias, which includes protected class data. Mr. Krafcheck said detecting bias for insurance is complicated because insurance is centered on the concept of fair discrimination by treating different risks differently. Because of this, he said any methodology should use multivariate methods.

Mr. Krafcheck said the type of model used and how the model is used will dictate what methodology to use for testing of bias. For example, he said it is easy to tell if a facial recognition model is working as intended, whereas it is more difficult to tell if an insurance pricing model is working as intended. Mr. Krafcheck said the testing method may vary if one is testing for overall model prediction versus testing for disparate impact. He said the volume of data and granularity of protected class data available will also affect testing methodology. Mr. Krafcheck said it is important to establish the questions one is seeking to answer to determine the best testing methodology. He provided an overview of the following potential testing based on the question being asked.

- Is the model/variable a proxy? Mr. Krafcheck suggested the use of a control variable test, which involves adding a protected class variable as a predictor in the model to account for the predictive effect of the protected class. One can then compare the model output before and after the protected class variable is used in the model to see if there is a material difference. Mr. Krafcheck used the hypothetical example of vehicle color being correlated to risk of loss and vehicle color also being corrected to a protected class. The observable difference in how losses vary across vehicle color after accounting for the protective class would identify whether there is a proxy effect through the use of vehicle color.

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- Is the predictive effect consistent across protected classes? Mr. Krafcheck suggested the use of an interaction test, which involves adding the protected class variable as an interaction in the model. The output of the model will produce separate estimates for each protected class for that variable. One can then compare the effect across different protective classes to see if there is consistency. Mr. Krafcheck said this test will help determine if the predictive effect is consistent across protected classes.
- Does the inclusion of a variable disproportionately affect otherwise similar risks? Mr. Krafcheck suggested the use of a nonparametric matching test. For every policyholder of a given protected class, this test involves matching a policyholder who is not of the same protected class but has similar risk characteristics for all variables except for the variable being evaluated. Mr. Krafcheck said one would then take two matched data sets and compare average model predictions by protection class by including the evaluated variable and then excluding the evaluated variable. He said one could then add loss experience to determine whether the actual loss experience supports the relationship seen for the variable being evaluated and is within the parameters of defined fairness.
- Does the variable improve predictions across protected classes? Mr. Krafcheck suggested the use of a double life chart test, which is a test that modelers use as they are developing models. This test involves including a variable of interest and then excluding that variable to compare which model lines up better with actual experience. Mr. Krafcheck said this allows one to assess whether the model is consistently improving across protected classes.

Mr. Krafcheck said there are other tools that could be used, and one needs to balance between statistical significance (whether the result of the analysis occurred randomly) and practical significance (whether the result of the analysis has real-world relevance). He said the statistical significance will depend on whether one is using a large or small data set. Mr. Krafcheck also said the results of any analysis may be limited by the available data and that some data may have some sort of selection bias. He said one might also want to consider the intersectionality of protected classes, such as looking at race by gender, and consider looking at groups of variables because there might not be any bias at an individual variable level. In response to a question regarding the importance of having data about loss experiences for protected classes, Mr. Krafcheck said this data is important to any analysis.

3. Received Reports from Workstream One and Workstream Two

a. Workstream One

Commissioner Gaffney said the subject matter experts (SMEs) of Workstream One have been collaborating with multiple states to conduct AI/machine learning (ML) surveys for private passenger automobile (PPA) insurance, homeowners insurance, and life insurance. The goals of these surveys are to: 1) identify the current level of risk and exposure from the use of AI and whether or how the industry is managing or mitigating that risk; 2) develop information for trending, such as how the risk is evolving over time, and the industry's responsive actions; and 3) inform a meaningful and useful regulatory approach, framework, and/or strategy for overseeing and monitoring this activity.

Commissioner Gaffney said the AI/ML PPA survey was conducted last year, and NAIC technical staff produced a confidential data analysis report for the AI/ML PPA survey on June 30. The SMEs been studying this report and plan to present their public PPA survey report to this Working Group at the Fall National Meeting.

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Commissioner Gaffney said the homeowners survey was exposed for comment. He said no comments were received by the comment deadline of Aug. 1. However, pilot companies have provided feedback to improve the survey. Commissioner Gaffney said the survey will be completed soon, and the NAIC will then program the survey into its systems. Once programmed, the 10 states conducting the survey will formally issue their market conduct data call. Companies will likely be asked for responses within 30 days from the issuance of the formal data call.

Commissioner Gaffney said the AI/ML life insurance survey is being developed, and outreach to pilot companies has been completed. Similar to the other survey, the pilot companies have provided useful feedback to improve the survey. The life insurance survey should be exposed by the end of August for a 30-day public comment period. Commissioner Gaffney said the life insurance survey will not be issued until the homeowners survey is completed.

b. Workstream Two

Commissioner Ommen said Workstream Two is leveraging the results of the PPA survey, and the discussions for this workstream have remained regulator-to-regulator since the SMEs have been discussing specific third-party vendors identified through the PPA survey. Commissioner Ommen said recent discussions of the Workstream members have included several potential initial steps for enhanced regulatory oversight of third-party vendors and models. One potential initial approach discussed was that state insurance regulators require contracting insurance companies to obtain verification from their third-party vendor that an actuary/other professional has reviewed a model prior to using the model certifying its compliance with AI standards. Another initial regulatory option discussed was the concept that state insurance regulators create a library of third-party vendors, classified by line of insurance and operational area. This Workstream has a deadline of the Fall National Meeting to report its findings to the Big Data and Artificial Intelligence (H) Working Group with suggestions for implementation of deliverables to be considered by the Innovation, Cybersecurity, and Technology (H) Committee.

David Snyder (American Property Casualty Insurance Association—APCIA) said he supports the approach of determining appropriate definitions for AI. Mr. Snyder said a fundamental issue is how this work fits within the risk-based pricing framework and the regulatory standard of insurance rates not being excessive, inadequate, or unfairly discriminatory.

Scott Harrison (American InsurTech) said he agrees with Mr. Kosnoff's comments and the need for risk management for the use of AI and technology. Mr. Harrison said companies need to understand what they are doing, state insurance regulators need to have confidence that companies understand what they are doing, and consumers need to have confidence in the use of AI and technology. Mr. Harrison said this requires state insurance regulators establishing uniform standards and the ability of state insurance regulators to assess compliance with these standards.

Draft Pending Adoption

Birny Birnbaum (Center for Economic Justice—CEJ) suggested workstream two address antitrust issues. He said the use of big data and AI is different from past insurer practices and is a revolution in how companies operate. Mr. Birnbaum said he agrees a risk management framework is necessary but said this is not sufficient. He said testing of consumer outcomes is essential. Mr. Birnbaum said the insurance industry is not immune from the impact of structural racism and the data sources and algorithms that perpetuate structural racism. He said actuarial fairness is one standard but that state insurance regulators should also test for racial bias, proxy discrimination, and disparate impact. Mr. Birnbaum said there is a need for a uniform approach that can be measured across insurers and across lines of business.

Having no further business, the Big Data and Artificial Intelligence (H) Working Group adjourned.

SharePoint/NAIC Support Staff Hub/Member Meetings/H CMTE/2022_Summer/_BDAIWG/BDAI Minutes 8.10.22.docx

Draft: 8/28/22

Big Data and Artificial Intelligence (H) Working Group
Virtual Meeting
July 14, 2022

The Big Data and Artificial Intelligence (H) Working Group of the Innovation, Cybersecurity, and Technology (H) Committee met July 14, 2022. The following Working Group members participated: Elizabeth Keller Dwyer, Chair (RI); Amy L. Beard, Co-Vice Chair (IN); Doug Ommen, Co-Vice Chair (IA); Adrienne A. Harris, Co-Vice Chair, represented by Seema Shah (NY); Kevin Gaffney, Co-Vice Chair (VT); Sian Ng-Ashcraft (AK); Tom Zuppan (AZ); Ken Allen (CA); Peg Brown (CO); Kristin Fabian (CT); Frank Pyle (DE); Rebecca Smid (FL); Judy Mottar (IL); Tom Travis (LA); Caleb Huntington (MA); Kathleen A. Birrane (MD); Sandra Darby (ME); Karen Dennis (MI); Matthew Vatter and Phil Vigliaturo (MN); Cynthia Amann (MO); Kathy Shortt (NC); Chris Aufenthie (ND); Christian Citarella (NH); Gennady Stolyarov (NV); Lori Barron (OH); Teresa Green (OK); Shannen Logue (PA); Anamaria Burg and Andy Dvorine (SC); Carter Lawrence (TN); J'ne Byckoyski and Rachel Cloyd (TX); Tanji J. Northrup (UT); Katie Johnson (VA); Eric Slavich and John Haworth (WA); Nathan Houdek (WI); and Joylynn Fix and Juanita Wimmer (WV).

1. Adopted its Spring National Meeting Minutes

Commissioner Ommen made a motion, seconded by Commissioner Lawrence, to adopt the Working Group's April 5 minutes (*see NAIC Proceedings – Spring 2022, Innovation, Cybersecurity, and Technology (H) Committee, Attachment Two*). The motion passed unanimously.

2. Received Reports on its Workstreams

Superintendent Dwyer said the activity of the Working Group consists of four workstreams. He said the primary purpose today's meeting is to receive updates on the progress of the four workstreams and obtain feedback from state insurance regulators, industry, and consumer representatives to ensure all perspectives are considered as the workstreams develop initial proposals for public discussion and continue their efforts through 2022.

Superintendent Dwyer said the first workstream is focusing on artificial intelligence (AI)/machine learning (ML) surveys. The second workstream is focusing on third-party data and model vendors. This workstream is determining the appropriate regulatory evaluation of third-party data and model vendors, and it will provide recommendations on the appropriate regulatory framework for monitoring and overseeing industry's use of third-party data and model vendors. The third workstream is evaluating tools and resources for monitoring industry's use of data and AI/ML. Superintendent Dwyer said this workstream is gathering data and evaluating information on governance models and software tools, which could assist state insurance regulators in overseeing and monitoring industry's use of data and AI/ML and eliminating any bias in such use. The fourth workstream is focusing on the broader regulatory framework and governance. This workstream is evaluating how best to implement the expectations outlined in the NAIC AI Principles and will provide suggestions on next steps for developing a regulatory framework.

A. Workstream One

Commissioner Gaffney said NAIC staff have reviewed the data from the private passenger auto (PPA) survey conducted in 2021 and produced analysis needed by the state subject matter experts (SMEs) to draft a report identifying potential next steps. The SMEs will present their report to the Working Group at the Fall National Meeting.

Commissioner Gaffney said the draft homeowners (HO) survey and definitions were posted on the NAIC website and exposed for a public comment period ending Aug. 1. Insurance companies that were writing HO insurance in 2020 with HO premium of more than \$50 million will be asked to complete the survey. With this criteria, 190 companies will be asked to complete the survey compared to the 193 for PPA survey. Commissioner Gaffney said the definition of AI/ML was modified for the HO survey to provide companies more clarity. The definition of AI/ML for the PPA survey was intentionally written to exclude the types of models that state insurance regulators have been reviewing for a large portion of the industry for more than 20 years. While not changing the definition applicable to most of the HO survey, Commissioner Gaffney said the HO survey includes a couple of rows to provide an indication of the full scope of AI/ML models used, including the older types of models. The goal of this change is to help ensure consistent reporting by all insurers and collect information needed for other workstreams. Commissioner Gaffney said the HO survey also contains some questions about the types of models being used to help state insurance regulators better understand the impact on consumers and the expertise needed in states to properly regulate models. Commissioner Gaffney said the governance questions asked on the PPA survey are now asked for each operational area of an insurer.

Commissioner Gaffney said progress is being made on the life insurance survey, and outreach has been made to a handful of pilot companies for feedback. The SMEs working on the survey will consider the company feedback and then expose the draft survey for comment by all interested parties. Commissioner Gaffney said the SMEs are planning to expose the draft survey in August and that the life insurance survey will issued shortly after the HO survey is completed.

B. Workstream 2

Commissioner Ommen said the first objective of the workstream is to identify third-party vendors that provide nontraditional data and/or models to insurers. This includes models and data from rating, underwriting, marketing, fraud detection, claims, and loss prevention. The second objective is to identify whether and how states are currently licensing these third-party vendors. Commissioner Ommen said the SMEs for this workstream are reviewing state statutes and definitions for the licensing of advisory organizations, rating organizations, insurance service organizations, and statistical agents. The third objective is to better understand the operating practices of third-party vendors and then develop examination standards or questions that state insurance regulators can use to engage with the third-party vendors. Commissioner Ommen said the results of the PPA survey have been used for these discussions, and the meetings have remained regulator-to-regulator since the SMEs have been discussing third-party vendors identified through the PPA survey.

C. Workstream 3

Ms. Shah said the objective of this workstream is to evaluate the tools and resources for monitoring the insurance industry's use of data and AI. She said this workstream is gathering data and information from publicly available sources, including third-party vendors, academia, and international regulatory authorities. Ms. Shah said this review should help identify governance models and software tools state insurance regulators could use to monitor the insurance industry's use of data with a specific focus on how to detect and mitigate for bias AI/ML activity related to claims, underwriting, and rating. Ms. Shah said the workstream is establishing a foundational vocabulary and a common understanding of concepts to enable a productive dialogue. She said the workstream is seeking input from all parties on the following three questions: 1) What are the tools/metrics and/or resources currently being used by or available to the industry for managing AI/ML activity? 2) What governance frameworks is industry using or are available for managing its AI/ML activity? and 3) What are the strengths and weaknesses of these tools/metrics, resources, and governance frameworks?

D. Workstream 4

Commissioner Beard said this workstream is focusing on the regulatory framework and how best to implement the expectations outlined in the NAIC AI principles, which include regulatory guidance such as model governance. Commissioner Beard said the workstream has started to evaluate other regulatory structures and guidance for overseeing risk. This includes the prior Innovation and Technology (EX) Task Force's presentation on components of a model governance framework, the Big Data and Artificial Intelligence (H) Working Group presentation on applying cybersecurity lessons learned for AI regulation, and the New York State Department of Financial Service's (DFS') climate change disclosure survey review framework. Commissioner Beard said the Information Systems Audit and Control Association (ISACA) framework, National Institute of Standards and Technology (NIST) framework, and European Insurance and Occupational Pensions Authority (EIOPA) approach to monitoring AI are being considered. Commissioner Beard said the workstream is also reviewing *Market Regulation Handbook* and the *Financial Condition Examiners Handbook* guidance related to data breaches, cybersecurity, and information technology (IT) security to identify a potential auditing framework. Commissioner Beard said the workstream will monitor and consider the work products from the other workstreams in the overall recommended regulatory framework.

Commissioner Beard said the workstream is seeking comments from all interested parties on published governance frameworks related to AI, including the ISACA Governance Framework, the NIST Draft Risk Management Framework, the EIOPA AI Governance Principles, or other internationally published guidance such as the Singapore's AI Governance Framework. Commissioner Beard said the PPA survey results indicated few companies are using existing standards or guidance and is also seeking comments from interested parties to better understand industry's reasons for not adopting a standard or a publicly available governance framework. Commissioner Beard said the workstream will use its review and feedback from interested parties to develop an outline of components for a potential regulatory framework.

Birny Birnbaum (Center for Economic Justice—CEJ) questioned how workstreams three and four interact with each other, the Special (EX) Committee on Race and Insurance, and the Collaboration Forum. Mr. Birnbaum also asked if the Working Group anticipates allowing interested parties to make presentations in addition to providing comments on the drafts for the workstreams. Superintendent Dwyer said the workstreams are being coordinated through the Working Group, and the use of workstreams is intended to break up the broad scope of work into smaller units. Superintendent Dwyer said some of the work across other areas of the NAIC are being coordinated through the Innovation, Cybersecurity, and Technology (H) Committee.

Mr. Birnbaum said he thinks the collection of more granular data and analysis of consumer outcomes are essential tools for state insurance regulators to use in monitoring the use of data and AI. Mr. Birnbaum said the monitoring of consumer outcomes is important to identify and eliminate unintended bias since algorithms do not always produce the intended results. Mr. Birnbaum said a governance framework does not guarantee fair treatment of consumers. Mr. Birnbaum said any model governance approach should include the collection of more granular data to test the actual outcomes of algorithms.

David Snyder (American Property Casualty Insurance Association—APCIA) said the development of common definitions and an understanding of the existing statutory standards that govern what insurance companies can or cannot do is important for further discussions and engagement. Mr. Snyder said it is important that the discussions do not divert from these standards and that all parties keep in the mind both the cost and effectiveness of potential regulatory frameworks.

Superintendent Dwyer emphasized the desire to have input from all interested parties as draft work products are developed and circulated. Superintendent Dwyer also encouraged all parties to follow individual state efforts, such as the efforts in Colorado and the District of Columbia.

Having no further business, the Big Data and Artificial Intelligence (H) Working Group adjourned.

SharePoint/NAIC Support Staff Hub/Member Meetings/H CMTE/2022_Summer/_BDAIWG/July 14 Call/BDAI Min 7.14.22.docx

Draft: 8/28/22

Cybersecurity (H) Working Group
Virtual Meeting
July 14, 2022

The Cybersecurity (H) Working Group of the Innovation, Cybersecurity, and Technology (H) Committee met July 14, 2022. The following Working Group members participated: Cynthia Amann, Co-Chair (MO); Wendy Erdly, Co-Chair (NY); C.J. Metcalf, Co-Vice Chair, represented by Erica Weyhenmeyer (IL); Michael Peterson, Co-Vice Chair (VA); Chris Erwin (AR); Damon Diederich (CA); Michael Shanahan (CT); Paula Shamburger (GA); Lance Hirano (HI); Shane Mead (KS); Van Dorsey (MD); Jake Martin (MI); Colton Schulz and Chris Aufenthie (ND); David Bettencourt (NH); Barbara D. Richardson (NV); Don Layson (OH); Rosemary Raszka (VT); John Haworth (WA); and Nathan Houdek (WI). Also participating was: Matt Gendron (RI).

1. Heard Opening Remarks and Updates

Ms. Erdly opened the meeting by acknowledging that the Working Group met May 3 in regulator-to-regulator session, pursuant to paragraph 6 (consultations with NAIC staff members related to NAIC technical guidance) of the NAIC Policy Statement on Open Meetings, to talk through its updated work plan receiving guidance from the NAIC along the way.

2. Received an Update on its Work Plan

Ms. Erdly and Mr. Peterson then lead a discussion about the Working Group's updated work plan.

Mr. Peterson said the rise of ransomware attacks and the shift to remote work, which increased attack surfaces, has heightened the need to understand insurance industry posture in the future. However, Mr. Peterson indicated that the updated work plan first directs state insurance regulators to look inward, with a survey of regulator policies and procedures being the first substantive item the Working Group will take on. Performing a state insurance regulator survey first, will allow regulators to compare notes and later work with industry on a unified and predictable response to cybersecurity issues.

The plan to complete a state insurance regulator survey first represents a shift from the former plan, which previously included an industry-focused survey. A state insurance regulator survey will also allow the Working Group to prioritize its charges. For instance, the Working Group has a charge to develop a cybersecurity response plan that could benefit from the survey's insights. State insurance regulators have started work on this effort with a volunteer group meeting earlier this year to start the drafting process. The Working Group hopes to have the survey out in August, with responses back this year to allow the Working Group to advance on work based on the responses received.

Ms. Erdly noted that the rest of the work plan includes revisiting the cybersecurity response plan after the Working Group completes the state insurance regulator survey. This is a broad monitoring effort, where state insurance regulators will receive updates on cybersecurity as it is discussed within the NAIC, as well as at federal and international levels, as appropriate, and a training effort, which again will benefit from the completion of the regulator survey work. The NAIC is planning on three cybersecurity themed sessions at the NAIC Insurance Summit, but there is likely an opportunity for the Working Group to provide beneficial input to the NAIC on topics that may be relevant to be covered either at the Insurance Summit or in other settings (e.g., webinars).

3. Received an Update on Implementation of Model #668

The Working Group next received an update from Holly Weatherford (NAIC) on the state effort to adopt the *Insurance Data Security Model Law* (#668).

Ms. Weatherford said state insurance regulators are keenly aware of the potentially devastating effects of cyberattacks and therefore recognize the importance of cybersecurity risk management. Model #668 has now been adopted by 21 states, representing over 80% of the market by gross written premiums. Ms. Weatherford offered to support states considering adoption, as they have learned from the NAIC's experience in supporting other states in passing the law.

Simit Pandya (Medical Professional Liability Association—MPL Association) asked if Ms. Weatherford knows of further states that might be considering adoption of Model #668. Mr. Gendron noted that Rhode Island would be considering passage of the legislation at its next legislative session. Beyond that, Ms. Weatherford indicated that there are likely additional states but none that can be publicly disclosed at this time.

4. Receive an Update on Federal Activity Related to Cybersecurity

The Working Group next received an update from Brooke Stringer (NAIC) on the federal activity related to cybersecurity. Ms. Stringer said the Financial and Banking Information Infrastructure Committee (FBII) has been looking to improve communication and enhance resilience of the financial sector. The current focus has been led by a member, the U.S. Department of the Treasury (Treasury Department), to understand concentration risks. Specifically, the Treasury Department has been studying the risks provided by cloud service providers. The Treasury Department will be publishing a report that summarizes what its research has found focusing on the impact of cloud service providers to the operational resilience of the insurance industry. Legislation wise, the Cyber Incident Reporting for Critical Infrastructure Act of 2022 (CIRCA) was signed into law, requiring that owners and operators of critical infrastructure report cybersecurity incidents to the U.S. Department of Homeland Security (DHS) and the Cybersecurity and Infrastructure Security Agency (CISA). Lastly, Ms. Stringer also mentioned that the current instance of the National Defense Authorization Act (NDAA) includes language that would require insurers to report on cyber claims data, which is language that has caused concern among insurance trade associations. Miguel Romero (NAIC) asked Ms. Stringer if there was any discussion of federal preemption of state laws on cybersecurity, which Ms. Stringer said does not seem likely in the immediate future given the changes in administration since that topic was last discussed.

5. Receive an Update on the NAIC's Cybersecurity Tabletop Exercises

The Working Group next received an update from Frosty Mohn (NAIC) on the NAIC's Cybersecurity Tabletop project. Mr. Mohn noted that this project was born out of the Treasury Department's Hamilton series, which was a series of banking-focused tabletop exercises. Mr. Romero noted that at these exercises, insurers, state insurance regulators, and law enforcement agencies have a discussion on how each would react as a simulated cybersecurity event unfolds. In November, the NAIC will host a virtual session with Maryland regulators. Mr. Mohn noted that past exercises have led to the development of best practices for attendees to consider, such as a hard card generated from the last tabletop exercise offering guidance on how insurers and state insurance regulators could respond in the event of a cybersecurity event. Mr. Mohn noted that the NAIC will travel to Ohio for a cybersecurity session in May 2023; the NAIC has had discussions with North Dakota and South Dakota about a joint session as well.

6. Receive an Update on State Insurance Regulator Cybersecurity Tools

Mr. Romero discussed the attached Summary of Cybersecurity Tools drafted by NAIC staff as a resource for state insurance regulators. The memo describes the various tools that state insurance regulators have available, and it is intended to be a reference guide for future regulators that follow the Working Group's work. Given the varying backgrounds of state insurance regulators talking about cybersecurity, this memo can help regulators quickly understand the tools available across functions; i.e., financial and market. Ms. Erdly agreed to expose the document for a public comment period ending Aug. 16. The date was announced via e-mail after the call.

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

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Draft Pending Adoption

Draft: 8/28/22

Privacy Protections (H) Working Group
Portland, Oregon
August 9, 2022

The Privacy Protections (H) Working Group of the Innovation, Cybersecurity, and Technology (H) Committee met in Portland, OR, Aug. 9, 2022. The following Working Group members participated: Katie Johnson, Chair, and Scott A. White (VA); Cynthia Amann, Co-Vice Chair (MO); Chris Aufenthie, Co-Vice Chair (ND); Damon Diederich (CA); George Bradner (CT); LeAnn Crow (KS); Ron Kreiter (KY); Kathleen A. Birrane and Van Dorsey (MD); Robert Wake (ME); T.J. Patton (MN); Troy Downing and Molly Plummer (MT); Martin Swanson (NE); Antonya Debose and Teresa Green (OK); Raven Collins, Brian Fordham, and Cassie Soucy (OR); Gary Jones (PA); Frank Marnell (SD); Mark Worman (TX); Todd Dixon (WA); and Rachel Cissne Carabell and Richard Wicka (WI).

1. Adopted its Aug. 2 Minutes

Ms. Johnson said the Working Group met Aug. 2. During this meeting, the Working Group took the following action: 1) adopted its June 15 minutes, which included updates on state and federal privacy legislation and a discussion of the Working Group's initial work plan for 2022; 2) adopted the Request for NAIC Model Law Development replacing the NAIC Insurance Information and Privacy Protection Model Act (#670) and the Privacy of Consumer Financial and Health Information Regulation (#672) with one new model; and 3) discussed the Working Group's revised work plan.

The Working Group also met three times in regulator-to-regulator session, pursuant to paragraph 8 (consideration of strategic planning issues) of the NAIC Policy Statement on Open Meetings, to review draft revisions of sections 1–12 of Model #670. The drafting group of subject matter experts (SMEs) met several times to conduct the initial drafting of the *Consumer Data Ownership and Use* white paper and once on the consumer data privacy ownership and use survey.

Ms. Amann made a motion, seconded by Mr. Kreiter, to adopt the Working Group's Aug. 2 (Attachment Four-A) minutes. The motion passed unanimously.

2. Heard Updates on State and Federal Privacy Legislation

Jennifer McAdam (NAIC) said she reported during the Working Group's June 15 meeting that Connecticut had recently adopted An Act Concerning Personal Data Privacy and Online Monitoring (CTDPA). She said there are now five generally applicable state data privacy laws in: 1) California; 2) Colorado; 3) Connecticut; 4) Utah; and 5) Virginia. Ms. McAdam said there has not been much activity since June. However, she said some state legislatures are still in session, and there are privacy bills currently pending in six jurisdictions: 1) the District of Columbia; 2) Massachusetts; 3) Michigan; 4) New Jersey; 5) Ohio; and 6) Pennsylvania. Ms. McAdam said these bills are all still in their committees of origin, so there has not been much movement with them. She said the District of Columbia bill is based on the Uniform Law Commission's (ULC's) model privacy bill, the Uniform Personal Data Protection Act (UPDPA). Ms. McAdam said that Nebraska and Oklahoma had also introduced legislation based on the UPDPA earlier this year but that those bills died when their sessions ended. She said charts tracking state legislation are posted on the Privacy Protections (H) Working Group's web page for those wanting to read more about these bills. Ms. McAdam said the charts list the business obligations imposed, the consumer rights provided, the manner

Draft Pending Adoption

of enforcement (whether by the attorney general or a private right of action), and any federal Gramm-Leach-Bliley Act (GLBA) or federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) exemptions. She said her office would continue to follow state data privacy legislation and update the Working Group during its next meeting.

Brooke Stringer (NAIC) reminded the Working Group that the U.S. House Committee on Energy and Commerce approved the American Data Privacy and Protection Act (ADPPA) (H.R. 8152) on July 20 by a vote of 53-2. She said the bill was authored by: Frank Pallone Jr. (D-NJ), chair of the House Committee on Energy and Commerce; Cathy McMorris Rodgers (R-WA), ranking member of the House Committee on Energy and Commerce; and Roger Wicker (R-MS), ranking member of the U.S. Senate Committee on Commerce, Science, and Transportation. She said the bill is being viewed as a breakthrough compromise on two major sticking points for Congress—preemption and private right of action. Ms. Stringer said that the ADPPA would preempt most state privacy laws with some nuanced exceptions and that GLBA- and HIPAA-covered entities are not carved out specifically but are deemed to be in compliance if the entities comply with those laws. She said that even though the ADPPA includes a GLBA provision, the insurance trades are advocating for language that would clearly exempt insurers, agents, and brokers from the scope of the ADPPA. Ms. Stringer said that during the markup of the bill, Rep. Anna G. Eshoo (D-CA) offered an amendment that would have modified the bill's preemption provision to allow states to create stricter laws, but it did not pass. She said the bill provides consumers who believe their rights under the law were violated with the option of suing companies in federal court. However, the private right of action would not take effect until two years after the law is enacted. The bill also provides a small business exemption to the private right of action. Ms. Stringer said this is the first time a comprehensive federal privacy bill has advanced out of committee and that could be made available for a full chamber vote. However, she said time is short with the August recess and an upcoming focus shift to midterm elections. Ms. Stringer said the bill faces some headwinds in that Maria Cantwell (D-WA), chair of the Senate Committee on Commerce, Science, and Transportation, has not signed on to the bill. She said the House Committee on Energy and Commerce has made some changes to the bill in areas where she had some concerns, so it remains to be seen how the bill may fare in the Senate as no Senate Democrat has yet signed on to the bill. Ms. Stringer said she would keep the Working Group posted, and she encouraged the Working Group to keep up its important work.

3. Discussed its Next Steps on the *Consumer Data Ownership and Use White Paper*

Ms. Johnson said the Working Group is still getting responses to the survey and that even though the deadline was July 28, the Working Group will keep the survey tool open to encourage as many responses as possible from anyone who is interested. She said the Working Group is in the process of reviewing and compiling the responses already received. Ms. Johnson said the results will be summarized for use by the Working Group in helping to guide the discussion and drafting of the white paper on consumer data ownership and use assigned to the Working Group in its 2022 charges. She said the white paper will be exposed for public comment in December and discussed under normal NAIC transparency guidelines.

Mr. Aufenthie said the main points of the white paper will consist of a brief history; current personal data collected; use of consumer data for legal and economic purposes; recommendations regarding who owns the data; and what changes should be implemented. He thanked responders for their input through the survey and said the purpose of the survey was to start the conversation only. Mr. Aufenthie said there would be a two-month response period for submitting comments that would be the basis for discussion regarding the initial draft.

Draft Pending Adoption

4. Discussed its Next Steps for the Drafting of the Model and the Working Group's Final Work Plan

Ms. Johnson said that the Request for NAIC Model Law Development that was adopted during the Working Group's Aug. 2 meeting was for the Working Group to formally request approval to move forward with the creation of one new model to replace the existing privacy Model #670 and Model #672 rather than update them. She said this change was made in response to comments from Working Group members, interested state insurance regulators, interested parties from the insurance industry, and consumer representatives asking for one new model, as well as due to the extensive nature of revising models that were written several decades ago.

Ms. Johnson said adoption of the Request for NAIC Model Law Development by the Working Group was a part of the standard review process necessary to move forward with the Working Group's charges to review and change NAIC privacy models, such as Model #670 and Model #672 as needed. As noted during prior Working Group meetings, she said the work plan and its schedule have been revised to address the needs of the Working Group to meet its charges and timeline. The new work plan is in the meeting materials posted on the NAIC website.

Ms. Johnson said the drafting group for the model language has been working all summer and is on track to post the draft model for comment in December. She said a two-month comment period will be given for review of the initial exposure draft of the model. She said given the comments received from interested parties who are concerned about provisions that they believe could possibly be included in the draft, the drafting group wanted to provide the following information: 1) that the drafting group is not recommending a private right of action in the draft model; and 2) that the drafting group is considering language to provide a safe harbor for HIPAA entities/data in the model.

Ms. Johnson said that the Working Group is continuing to work closely with the Innovation, Cybersecurity, and Technology (H) Committee and its other working groups in this arena by meeting on a monthly basis—the Big Data and Artificial Intelligence (H) Working Group, the Cybersecurity (H) Working Group, and the E-Commerce (H) Working Group—as well as those not under the Committee, such as the Accelerated Underwriting (A) Working Group—as each Working Group has its unique set of issues that nevertheless require coordination, especially with regard to definitions.

5. Discussed Other Matters

Ms. Johnson reminded attendees about the upcoming Insurance Summit, which will be held in Kansas City, MO, Sept. 19–23.

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

SharePoint/NAIC Support Staff Hub/Member Meetings/H CMTE/_Privacy/Minutes/PPWG Minutes 08.09.22.docx

Draft: 8/28/22

Privacy Protections (H) Working Group
Virtual Meeting
August 2, 2022

The Privacy Protections (H) Working Group of the Innovation, Cybersecurity, and Technology (H) Committee met Aug. 2, 2022. The following Working Group members participated: Katie Johnson, Chair (VA); Cynthia Amann, Co-Vice Chair, represented by Jo LeDuc (MO); Chris Aufenthie, Co-Vice Chair (ND); Chelsy Maller (AK); Damon Diederich (CA); George Bradner and Kristin Fabian (CT); Erica Weyhenmeyer (IL); LeAnn Crow (KS); Ron Kreiter (KY); Benjamin Yardley (ME); T.J. Patton (MN); Martin Swanson (NE); Teresa Green (OK); Gary Jones (PA); Frank Marnell (SD); Todd Dixon represented by Michael Walker (WA); and Timothy Cornelius and Lauren Van Buren (WI). Also participating were Scott Woods (FL); Jeff Hayden (MI); Chlora Lindley-Myers (MO); Laura Arp (NE); Hermoliva Abejar (NV); George McNab (OH); Mary Block (VT); Shari Maier (WA); and Barbara Belling and Richard Wicka (WI).

1. Adopted its June 15 Minutes

Mr. Aufenthie made a motion, seconded by Mr. Kreiter, to adopt the Working Group's June 15 minutes (Attachment Four-A1). The motion passed unanimously.

2. Considered Adoption of a Request for NAIC Model Law Development Replacing Model #670 and Model #672 with One New Model

Ms. Johnson said the next item on the agenda is for the Working Group to consider adoption of the Request for NAIC Model Law Development replacing the *NAIC Insurance Information and Privacy Protection Model Act* (#670) and the *Privacy of Consumer Financial and Health Information Regulation* (#672) with one new model. She said the Request for NAIC Model Law Development was changed to reflect the creation of one new model to replace Model #670 and Model #672 rather than updating both existing models in response to comments from various industry and consumer representatives asking for one new model and due to the extensive nature of revising models that were written several decades ago. She said adoption of the Request for NAIC Model Law Development is part of the standard review process to move forward with the Working Group's charges to review and change NAIC privacy models, such as Model #670 and Model #672, as needed. She said she would also like to address additional comments that were received from interested parties after the revised Request for NAIC Model Law Development was distributed. She said changing the Request for NAIC Model Law Development does not change the newer work plan that will be posted following the meeting, and the drafting group's plan is still to have an exposure draft available for the 2023 Summer National Meeting. She said the work that was done on revisions to Model #670, which is nearly completed, will be incorporated into the one new model and be consistent with the work done previously on Model #672. She said in response to comments asking if the scope of the revisions would go beyond Model #670 and Model #672, it would because the whole point of the charges given to the Working Group was to move consumer privacy protections into the 21st century and address technical changes already made within the insurance industry. She said the suggestion to comments that companies do not collect data they do not need, the survey on consumer data ownership indicated that much of the data companies collect is not needed to provide consumers with insurance coverage, so the suggestion is declined.

Chris Petersen (Arbor Strategies LLC), representing the Healthcare Coalition, said the Working Group is overly optimistic about the number of states that will adopt or pass legislation based on the number of states that passed Model #670 and Model #672. He said the Request for NAIC Model Law Development was sending the wrong message to the Innovations, Cybersecurity, and Technology (H) Committee and the Executive (EX) Committee and

Plenary, and it will be defeated like the [State] Pharmacy Benefit Manager Licensure and Regulation Model Act. He said all existing privacy regulation does not distinguish from mail or internet notices, so he warned the Working Group against trying to regulate the methods of data collection, but rather the Working Group should stick to regulating the use and disclosure of data. Robert W. Woody (American Property Casualty Insurance Association—APCIA) said he agrees with Mr. Petersen that the survey responses to the question about companies collecting data that they did not need to write about insurance coverage were wrong. He also suggested that the word “much” in the Request for NAIC Model Law Development should be changed to the word “some.” Mr. Swanson said he agrees with Mr. Petersen about being cautious about the need for a private right of action and including a safe harbor for Health Insurance Portability and Accountability Act of 1996 (HIPAA) to ensure passage. Birny Birnbaum (Center for Economic Justice—CEJ) said insurers collect data for much more than insurability; i.e., profitability. He recommended that the current Request for NAIC Model Law Development wording be kept even though there would be changes to be considered going forward through the process, and he welcomes the opportunity to provide input from a consumer perspective.

Ms. Johnson said the focus right now is just on getting permission to move forward and open the models. She said everyone would have several months to comment on the exposure draft of the new model. Cate Paolino (National Association of Mutual Insurance Companies—NAMIC) said the Request for NAIC Model Law Development is not perfectly clear about revisions versus drafting a new model from scratch. She said a single new model appears best, but it is not so easy to implement legislation, and she suggested that the Working Group focus on Model #672 notices that were passed in most states. She said based on the topics being raised by the parent committee, such as artificial intelligence (AI), a single model may be premature with the lack of transparency and Model #672 not being an omnibus model. She asked for clarification about how future topics being discussed in other working groups could be incorporated into the new model before such topics are fully discussed. Mr. Diederich said two models mean different protections for consumers in different states. He said insurers have requested uniformity, which would seem to suggest that one model is needed.

As noted during prior Working Group calls, Ms. Johnson said the work plan schedule may be revised when necessary to address the needs of the Working Group to meet its charges and timeline. She said the Working Group is continuing to work very closely with the other Innovation, Cybersecurity, and Technology (H) Committee working groups in this area by participating in monthly Working Group calls and coordinating with other working groups—the Big Data and Artificial Intelligence (H) Working Group, the Accelerated Underwriting (A) Working Group, the Cybersecurity (H) Working Group, and the E-Commerce (H) Working Group—as each has its own unique set of issues that nevertheless require coordination, especially definitions.

Mr. Aufenthie made a motion, seconded by Mr. Diederich, to adopt the Working Group’s Request for NAIC Model Law Development replacing Model #670 and Model #672 with one new model (*See NAIC Proceedings – Summer 2022, Innovation, Cybersecurity, and Technology (H) Committee, Attachment One*). The motion passed with Nebraska opposed.

3. Discussed Other Matters

Ms. Johnson reminded attendees about the upcoming Working Group meeting, which will be held on Aug. 9 during the Summer National Meeting in Portland, OR.

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

SharePoint/NAIC Support Staff Hub/Member Meetings/H CMTE/_Privacy/Minutes/PPWG Minutes 08.02.22.docx

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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