Comments of the Center for Economic Justice

To the NAIC Accelerated Underwriting Working Group

July 31, 2020

Due to a conflict with another working group meeting, CEJ may not be able to participate in the entire meeting of the AUW WG on July 31, 2020. We offer the following comments regarding the proposed work plan in the event we are not able to comment during the call.

We note that the charge for the working group is to draft guidance for the states regarding use of external data and data analytics in accelerated underwriting.

The proposed work plan includes a liaison subgroup to monitor and coordinate with the many other NAIC working groups dealing with pieces of the consumer protections issues raised by insurers' use of big data analytics / artificial intelligence. (BDA / AI). In the absence of an EX Task Force focused on these consumer protection issues, the proposed monitoring and coordination with the other working groups is necessary.

The proposed work plan includes a drafting subgroup to prepare a document that focuses on identifying the issues, synthesizing the information received and making a recommendation to the Working Group about a work product. This drafting subgroup will also propose a process for developing that work product.

We appreciate the information gathering conducted by the working group to date, but note that the issues raised by CEJ last September remain the issues for which consumer protection efforts and guidance for states and insurers are needed. Those comments and recommendations are attached.

The intervening months have shown our 2019 guidance recommendations to be even more relevant today as nearly a year ago. Insurers' use of BDA / AI in AUW has shown to be infected by systemic racism, including, for example credit scores and facial analytics. Our 2019 recommendations explicit recognition of proxy discrimination against protected classes as unfair discrimination, filing and regulatory review of AUW models, and extension of Fair Credit Reporting Act-type consumer protections for all AUW data sources should be core components of guidance to the states and insurers.

Regarding the work product of the proposed drafting group, we suggest focusing on consumer protection issues, not business incentives or alleged benefits of AUW. It's a given that there are benefits – if there weren't, then insurers would not be using it. Guidance for states does not require a recitation of AUW business incentives or benefits to insurers. We suggest that a synthesis document should identify key features / operation of AUW and any consumer protection concerns and gaps in regulatory authority or oversight associated with those key features. We also suggest that the synthesis highlight the difference in current regulatory oversight and treatment of predictive models used for personal auto and residential property insurance. It makes no sense for regulators to be reviewing insurance credit scoring models used for personal auto and residential property insurance, but not for life insurance.

Thank you for your consideration.

Comments for the Center for Economic Justice

To the NAIC Accelerated Underwriting (A) Working Group

Comments on Proposed Work Plan and CEJ's Proposed Work Plan

September 29, 2019

The Center for Economic Justice offers the following comments on the September 16, 2019 exposure draft work plan for the Accelerated Underwriting (AUW) Working Group.

The proposed work plan sets out a timeline in which a decision about whether to produce a work product and what work product to produce does not occur until the August 2020 National Meeting – over ten months from now. The proposed work plan then contemplates that the agreed-upon work product will be developed in the three months between the Summer and Fall National meetings. The three-month work product development phase seems unrealistic, but the main problem is unnecessarily spending ten months to come up with needed work products.

As discussed in more detail below, CEJ suggests that the regulatory and consumer protection issues arising from insurers' use of Big Data analytics, generally, and from insurers' use of AUW, specifically, are well known and have been well known for several years. There is no need to take ten more months to learn what is already well known.

We urge the AUW working group to identify and prioritize the necessary work products to address consumer protection and regulatory oversight issues of AUW, as suggested below, by the 2019 Fall National meeting and then start work to develop the work products to address those issues. We suggest that, instead of another presentation at the Fall National meeting, the working group devote that meeting to identifying and prioritizing work products.

The proposed AUW work plan inexplicably starts at the 2019 Fall National as if the prior three years of work on the issue had not occurred and as if the NAIC had not learned anything about consumer and regulatory concerns with insurers' use of Big Data analytics over the past six years. The leisurely work plan seems inconsistent with Big Data analytics being one of the NAIC priorities in 2019.

The work plan proposes a "level setting" presentation by an academic who, at best, likely has limited first-hand knowledge of what data and algorithms individual companies are using. More relevant, however, is the fact that there have been numerous presentations at LATF and the Big Data working group on AUW. Consequently, it is unclear what type of "level setting" is needed or what the academic can add to what has already been presented.

The presentations at LATF and the Big Data WG, as well as the New York Department of Financial Services (NY DFS) Circular Letter to insurers on AUW, have identified the types of data used by insurers for AUW, including consumer credit data, prescription databases, facial analytics, social media and more. LATF currently has an exposure for PBR data collection listing many of the types of data used for AUW. If "level-setting" is needed, NAIC staff can quickly summarize the ample information gathered or presented to date.

But, "level setting" is not needed. The relevant information regarding AUW is known – just as it is known for other Big Data analytics applications in marketing, pricing, claims settlement, loss prevention partnerships and customer relations. Insurers are tapping a variety of new non-insurance databases of personal consumer information (primarily data generated by consumers through mobile devices, web browsing, social media, shopping and more) as well as databases of more granular descriptions of the built and natural environment.

In combination with more granular traditional insurance data, insurers and vendors are developing algorithms to improve insurance products and each phase of the insurance product life-cycle. The potential benefits are well known – improved ease and speed of application and underwriting, more "refined" pricing, loss prevention partnerships, faster claims settlement, development of protection packages of insurance and non-insurance product and services, improved loss mitigation, new coverages and improved customer relationships.

Similarly, the potential harms of insurers' use of Big Data analytics are well known.

- Biased or incomplete data sets producing biased algorithms that can affect thousands of consumers quickly.

- Biased algorithms due to biased modeling.

- Faulty algorithms that threaten insurer solvency.

- Use of proxy data or factors that have a disproportionate impact on protected classes.

- Micro-segmentation that leads to exclusion of certain groups of consumers or makes insurance unaffordable.

- Consumers' digital rights, including disclosure of the data use to the consumer, permission by the consumer to use the data, ownership of consumer-generated data by the consumer, notification of adverse action on the basis of the data, ability to review the data in question, correct errors and request reconsideration based on corrected data.

- Transparency and accountability of the data and algorithms to regulators and consumers, particularly with machine learning algorithms.

- Use of data for suitable purposes and prohibition against use of data for inappropriate uses.

- Actual consumer market outcomes differing from intended outcomes.

- Antitrust and competition issues, including, but not limited to third party vendors acting as advisory organizations with being regulated as such..

There are clear and necessary regulatory actions needed. We suggest the following work plan for Big Data analytics, generally, as well as for specific applications, like AUW. Our proposed work plan builds on the NAIC's investigations into Big Data analytics over the past six years, including AUW, and provides concrete actions to address well-recognized issues.

1. ***Develop a template for state insurance departments to use to survey insurers and large producers (e.g., MGAs) on the types and sources of data used and the parts of the insurance product life-cycle for which the data are used.***

This step is essential for regulators to gather first-hand information from insurers about the data they are using and the purposes for which they are using the data. The stages of the product life cycle are: product design, marketing, underwriting/pricing, loss prevention/loss mitigation, claims settlement/anti-fraud, customer relations, non-insurance products and services. The survey would ask insurers to report:

Type of Data: Describe the type of data being used
Source of Data: Identify the source of the data being used
Uses of the Data: Identify which of the phases of the product life cycle for which the data are being used.

Such a periodic survey is essential for regulators to carry out your consumer protection responsibilities. In an era of Big Data analytics, this type of survey is as important as requiring insurers to file rates or policy forms.

2. ***Identify current regulatory authority or, if needed, develop a model law or revise an existing model to provide clear authority to the Commissioner to collect the information in item 1 and to publish aggregate results of the survey.***

Publication of the types and sources of data is essential to foster a public policy discussion about the data and the uses of the data by insurers.

3. ***Develop a model law or modify an existing model to clarify that disparate impact against protected classes is a form of unfair discrimination and to establish clear guidelines to assess, minimize and provide insurers with a safe harbor for disparate impact unfair discrimination.***

When we ask regulators if you have authority to stop the use of certain data or algorithms that have the effect of discriminating against protected classes, we have always heard you say, "Yes." But, insurers argue vehemently that disparate impact is not recognized as unfair discrimination under states' laws and that such a standard is inappropriate for insurance. Of course, we disagree with the insurers' position. At the most basic level, why would regulators permit the use of data and algorithms that have the same effect as if the insurer discriminated intentionally on the basis of protected classes? At a more technical level, recognizing and developing requirements to minimize disparate impact improves cost-based pricing by ridding algorithms of spurious correlations.

In any event, the debate over disparate impact is long overdue and has become urgent with insurers' use of new data sources and complex algorithms which have far greater potential for proxy discrimination than ever before.

4. ***Develop guidelines for consumers' rights regarding consumer-generated data in insurance transactions.***

Life the other parts of the proposed work plan, this item is relevant for any type of Big Data analytics application – including AUW. To be clear, this issue is related to, but different from, protection of consumer data (cybersecurity) and data privacy. This issue deals with consumers' ownership and control of the data they create through interactions with the insurer or devices provided by or monitored by the insurer as well as the permissible uses of those data by insurers.

5. ***Develop new tools and techniques for monitoring consumer market outcomes resulting from insurers' use of Big Data analytics, including AUW.***

While regulators have historically pursued consumer protection by reviewing insurer forms and rates on the front end, the variety and volume of new data sources and complexity of algorithms requires a revision to the historical regulatory approach. Consumer protection in an era of Big Data analytics requires regulators to collect and analyze granular data on actual consumer market outcomes. This is necessary not only because comprehensive review on the front end is likely no longer possible, but also because actual market outcomes may differ dramatically from intended or purported market outcomes. Stated differently, it is no longer sufficient (if it ever was) to rely on a front-end assessment of a data source or algorithm to ensure fair consumer treatment and the absence of unfair discrimination. Routine analysis of actual consumer market outcomes is needed. It is also completely feasible today.

6. ***Revise model laws regarding advisory organizations to ensure that data brokers and vendors of algorithms who are engaged in advisory organization activities are properly licensed and supervised and that the advisory organization-type activities are properly regulated.***

As with the other work plan components, this consumer protection issue has been presented to NAIC members on numerous occasions for several years. Organizations not licensed or supervised as advisory organizations are engaging in precisely the same type of activities as licensed advisory organizations – collecting data from insurers, analyzing the data and combining it with other data and information and producing collective pricing and claim settlement recommendations in the form of algorithms. The vendors of algorithms are providing the same type of guidance as the archetype of advisory organizations – the Insurance Services Office producing loss cost recommendations. Vendors of data or algorithms for AUW are engaged in advisory organization-type activity. Review and updating of advisory organization model laws – as well as application beyond property casualty insurance – is urgently needed.

Thank you for your consideration.