



## **Comments of the Center or Economic Justice**

### **To the NAIC Market Regulation and Consumer Affairs (D) Committee**

**Revised December 10, 2021**

#### **2022 Charges**

CEJ writes to recommend additional and revised charges for the D Committee in 2022.

#### **Market Information Systems Task Force**

In 2021, MISTF had a charge to develop recommendations for the incorporation of artificial intelligence (AI) in market analysis. The MISRD working group presented a paper and analysis to MISTF in response to the charge, but MISTF did not adopt that paper and recommendations.

We suggest that a fundamental problem encountered by both MISRD and MISTF was the breadth and vagueness of the charge. In addition, the MISRD paper mischaracterized AI as data mining and framed AI as the opposite of robust statistical methods. The proposed 2022 charges for MISTF now include the same AI charge as for 2021, presumably to continue discussion based on the MISRD paper.

We suggest that instead of repeating the 2021 charge for 2022, MISTF be given the following more focused charges:

- Explore opportunities for utilizing advanced statistical methods and AI for market regulation with existing NAIC and state data resources and report any recommendations by the 2022 Spring National Meeting.
- Identify new data resources needed to employ advanced statistical methods and AI for market regulation and report any recommendations by the 2022 Spring National Meeting.

These recommended charges provide will better focus MISTF's efforts regarding AI and market regulation by, one, recognizing that advanced statistical methods (meaning statistical methods not yet widely used by market regulators for market analysis) and AI are complementary and not mutually exclusive, and, two, that the ability to apply advanced statistical methods and AI to any problem depends on the available data.

The charges therefore reflect two distinct and discrete issues – are other opportunities to better analyze existing data resources and what additional data would be needed to utilize advanced statistical tools and AI to better realize the promise of market analysis for timelier, more efficient and more effective identification of market and company market problems.

### **Market Regulation and Consumer Affairs (D) Committee – Dark Patterns**

We have previously approached the Committee about investigating insurers’ use of “dark patterns” in electronic applications and disclosures.

*Dark patterns are user interfaces whose designers knowingly confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions. They typically exploit cognitive biases and prompt online consumers to purchase goods and services that they do not want or to reveal personal information they would prefer not to disclose.<sup>1</sup>*

There is great urgency in regulatory understanding of and examination of electronic disclosures for dark patterns. Electronic interfaces create completely different opportunities for manipulation and deception than possible with paper disclosures for a number of reasons, including the ability to modify the interface and messaging in real time depending upon actions by the consumer. It is critical for regulators to understand how dark patterns work not just to enable review of disclosures presented as screen shots in regulatory filings, but to examine the operation of the disclosures in operation.

The rapid deployment in digital interfaces – and related consumer consent forms – as a result of the pandemic is transforming the nature of consumer-insurer interaction and the nature of consumer disclosures and consents. The current market regulation framework is oriented around a mode of consumer information, disclosure and consent – paper – that has been eclipsed by digital. This charge will start regulators on the path of learning about and adapting regulatory oversight to the new forms of digital interactions between consumers and insurers.

The proposed charge is:

- Explore the use of manipulative and deceptive practices in digital insurance interfaces, including applications and disclosures – “dark patterns” – and recommend any changes needed in training for market regulation staff and any changes needed in regulatory guidance to insurers. Report by 2022 Fall National Meeting.

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<sup>1</sup> <https://doi.org/10.1093/jla/laaa006>

## **Market Regulation and Consumer Affairs (D) Committee – Public Access to MCAS**

When the Market Conduct Annual Statement effort was launched as pilot project over 15 years ago, regulators opted to use market conduct examination authority to facilitate the data collection. The result, of course, was that individual MCAS submissions were treated as confidential.

There is no reason why individual company MCAS data should be confidential and good reason to make the submissions public information. Unlike virtually every other consumer product, there is scant information about the performance of insurers and insurance products. For example, if a consumer wanted to know how well an insurer performs on the basic promise of the insurance – claim settlement performance – the consumer is out of luck. A consumer has no ability to compare how quickly different insurers settle claims, how often the insurer denies claims or how frequently the consumer is forced to go to court. Public access to individual insurer MCAS data would permit individual consumers and more importantly, third parties, to analyze the data and rank insurers, just as, say, Consumers Union, does with other consumer products.

The use of market conduct examination authority – and consequently the confidentiality of individual MCAS data – is unwarranted. States should be collecting MCAS data through a general data call authority. Unlike market conduct examination work papers, there is nothing in MCAS directly related to any examination. Further, the MCAS data are not trade secrets and do not warrant insurer confidentiality. In some instances, the same or similar MCAS data is publicly available in market conduct examination reports. Moreover, there is no more competitive harm to insurers that public access to insurer pricing information. Statistics on the speed and outcomes of claim settlements or the frequency of insurer non-renewals or the frequency of litigation are not the types of data that warrant a trade secret claim nor are MCAS data any more a market conduct examination work paper than a rate filing permitting consumers and third parties to analyze pricing differences among insurers.

The proposed charge is:

- Explore benefits and costs of public access to individual company MCAS submissions and methods of MCAS data collection that would permit public access. Report by 2022 Summer National Meeting.

## Market Regulation and Consumer Affairs (D) Committee – Race and Insurance

We proposed several charges for the D Committee to engage on race and insurance. Attached is our letter to the Committee on Race urging their endorsement of charges related to race and insurance to subject matter committees, task forces and working groups.

Despite powerful statements<sup>2</sup> made in connection with the establishment of the Committee on Race regarding the importance and urgency of addressing issues of race in insurance in July 2020, the Committee has progressed very slowly with little progress or concrete actions. One notable exception is the work of the health work stream's efforts to develop principles for data collection to facilitate analysis of racially-biased outcomes in health insurance.

While we endorse the role of the Committee on Race as a coordinating body for the NAIC's efforts to address systemic racism in insurance, placing all work on race and insurance has been limited to the activities of the Committee. This has proven to be an unproductive approach for at least two reasons.

First, the work streams – particularly life and p/c – have moved very slowly and have had a difficult time developing a strategy for moving forward. The p/c stream has only recently – last week! – started on the important step of reviewing critical concepts in unfair discrimination. But the scale of the issue of race and insurance is far too great for all the work to be done in one location, as evidenced by the lack of progress by the Committee.

Two, whenever CEJ has raised the issue of racial bias in subject matter committees, task forces and working groups, the response has always been that the issues are being addressed at the Committee on Race and the subject matter group declines to even examine issues of race and insurance in their subject matter areas. ***By excluding the subject matter groups from examining issues of race and insurance in their areas of expertise, the Committee on Race loses the opportunity for better understanding of racial impacts in particular phases of the insurance life cycle and the members of the subject matter groups lose the opportunity to engage more fully and better understand issues of race and insurance.***

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<sup>2</sup> “It is the duty of the insurance sector to address racial inequality while promoting diversity in the insurance sector. We welcome the public commitments of industry leaders to address these issues and I am excited by the strong and personal commitment of my fellow commissioners to take action on these important subjects. If not us, who? If not now, when?” NAIC President Ray Farmer

“Our regulatory system and insurance in general is a reflection of the society it aims to protect, and while state insurance regulators have worked to eliminate overt discrimination and racism, we all have been increasingly aware that unconscious bias can be just as damaging to society,” said NAIC CEO, Mike Consedine.

At [https://content.naic.org/article/news\\_release\\_naic\\_announces\\_special\\_committee\\_race\\_and\\_insurance.htm](https://content.naic.org/article/news_release_naic_announces_special_committee_race_and_insurance.htm)

Consequently, we have urged the Committee on Race to distribute important and necessary work to the relevant subject matter committees, task forces and working groups, while continuing both the coordination of work on race and insurance and addressing the high-level issues that cross lines of insurance and phases of the insurance life cycle. We urge to D Committee to seek and accept relevant charges related to exploring issues of race and insurance for market regulation.

We proposed the following D Committee charges:

- Antifraud Task Force: Examine and identify sources of data and algorithms used by insurers to identify and investigate suspected fraud that may produce or have produced racially-biased outcomes. Focus on personal auto, residential property and life insurance lines of business. Report findings to the Committee on Race by the 2022 Summer National Meeting.
- D Committee: Examine and identify sources of data and algorithms used by insurers for claim settlement that may produce racially-biased claim settlement outcomes. Focus on personal auto, residential property and life insurance line of business Reporting findings to the Committee on Race by the 2022 Summer National Meeting.
- D Committee: Examine and identify sources of data and algorithms used by insurers for marketing particular types of insurance products based on particular consumer characteristics that may produce racially-biased opportunities for consumers. Focus on personal auto, residential property and life insurance line of business. Report findings to the Committee on Race by the 2022 Sumer National Meeting.
- Market Conduct Examinations Guidelines Working Group: Develop procedures and guidance for examiners to test for racial bias in insurer marketing, claim settlement and antifraud practices in personal lines (auto, home and life insurance) and for pricing in life insurance.

Thank you for your consideration.