

Draft Pending Adoption

Attachment --
Innovation, Cybersecurity, and Technology (H) Committee
8/13/23

Draft: 8/30/23

Privacy Protections (H) Working Group
Seattle, Washington
August 13, 2023

The Privacy Protections (H) Working Group of the Innovation, Cybersecurity, and Technology (H) Committee met in Seattle, WA, Aug. 13, 2023. The following Working Group members participated: Katie Johnson, Chair (VA); Cynthia Amann, Vice Chair (MO); Lori K. Wing-Heier (AK); Catherine O'Neil (AZ); Damon Diederich (CA); George Bradner (CT); Erica Weyhenmeyer (IL); LeAnn Crow (KS); Ron Kreiter (KY); Van Dorsey (MD); Robert Wake and Sandra Darby (ME); Jeff Hayden (MI); T.J. Patton (MN); Santana Edison represented by Colton Schulz (ND); Martin Swanson (NE); Teresa Green (OK); Raven Collins (OR); Gary Jones (PA); Patrick Smock (RI); Frank Marnell (SD); Todd Dixon (WA); Rachel Cissne Carabell and Timothy Cornelius (WI). Also participating were: Sarah Bailey and Heather Carpenter (AK); Peg Brown (CO); Doug Ommen (IA); Victoria Hastings (IN); Jamie Sexton (MD); Eric Dunning (NE); Judith L. French (OH); Matthew Tarpley (TX); and Don Beatty (VA).

1. Heard Opening Remarks

Johnson said the Working Group has what looks like a simple agenda, but it has important discussions ahead of it. She said she and the Working Group would like to thank everyone who has been and continues to be an important part of this transparent, collegial, and collaborative process, especially those who spent considerable time, money, and input for two full days—four days including travel time—to dig into seven important issues with the model.

Johnson said she would like to give an update on the Working Group's activities to ensure all stakeholders are on the same page going forward. She said the 60-day comment period for the first draft of the new *Insurance Consumer Privacy Protections Model Law* (#674) ended April 3.

Johnson said the drafting group met with companies privately to discuss current consumer data practices on May 9, May 4, April 28, April 27, April 20, April 13, April 12, April 11, April 6, and April 5.

Johnson said the Working Group met July 25, June 5–6 at an in-person meeting in Kansas City, MO; May 16; May 2; April 18; and at the Spring National Meeting to discuss comments received and collaborate on workable language. She said the interim meeting sessions were working sessions focused on the drafting of model language. She said the 112 in-person attendees—29 state insurance regulators, including one commissioner; three NAIC consumer representatives; 68 industry representatives; and 12 NAIC staff members—were asked to be prepared to consider new language and offer their pros and cons. She said participants were asked to keep their comments specific to the topic under discussion. She said topics already discussed in open meetings were not revisited during this meeting.

Johnson said a drafting group met Aug. 9, July 20, July 10, July 7, June 30, June 29, June 26, June 23, June 2, May 17, May 12, and May 5 in regulator-to-regulator session.

Johnson said because Version 1.2 of the new Model #674 was based on changes discussed at the interim meeting, the Working Group exposed it July 11 for a public comment period ending July 28. She said the drafting group privately continued its meetings with industry trades and companies to discuss current consumer data practices Aug. 9, meetings with two different companies on Aug. 3, Aug. 2, and July 28.

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Johnson said the Working Group sent interested parties an invitation that it would continue scheduling private calls with trades, companies, and other interested parties. She said the Working Group also notified interested parties that so many comment letters had been received since the interim meeting that the Working Group has been unable to post them all prior to the Summer National Meeting. She said the Working Group will continue posting comments to the website after the national meeting. She said due to the sheer volume of comments and the number of one-on-one calls requested, the Working Group has determined that more time is needed to engage the public and continue drafting the model.

2. Adopted its July 25, June 5–6, May 16, May 2, April 18, and Spring National Meeting Minutes

Johnson said the Working Group met July 25, June 5–6, May 16, May 2, and April 18. During its meetings, the Working Group took the following action:

- A. Discussed comments received and collaborated on workable language regarding the following seven topics:
 - i. Third-party service providers, including the definition of third-party service providers, third-party service providers not related to an insurance transaction but that have access to consumers' personal information, and contracts with third-party service providers.
 - ii. Definitions of insurance transactions and additional permitted transactions.
 - iii. Marketing, including marketing insurance products to consumers using consumers' personal information, marketing other products to consumers using consumers' personal information, and affiliate marketing.
 - iv. Joint marketing agreements (JMAs), JMAs with affiliates, and JMAs with non-affiliated third parties.
 - v. Opt-in versus opt-out consent to marketing and the difference between marketing insurance and non-insurance products.
 - vi. Notice of Consumer Privacy Practices – Contents.
 - vii. Notice of Consumer Privacy Protections – Frequency and Methodology of Delivery.
- B. Drafted Model #674 language. In-person attendees were asked to be prepared to consider the new language and offer pros and cons. Participants were asked to keep their comments specific to the topic under discussion. Topics already discussed in open meetings were not revisited during this meeting.
- C. Exposed Version 1.2 of the new Model #674 on July 11 because it was based on changes discussed at an interim meeting, with a public comment period ending July 28. The drafting group continued its meetings with industry trade companies privately Aug. 9, Aug. 3, Aug. 2, and July 28 to discuss current consumer data practices.
- D. Notified interested parties that so many comment letters have been received since the interim meeting that the Working Group has been unable to post them all prior to the Summer National Meeting. The Working Group will continue posting comments to the website after the national meeting. Due to the sheer volume of comments and the number of one-on-one calls requested, the Working Group has determined that more time is needed to engage the public and continue drafting Model #674.
- E. Discussed comments received and engaged the public to continue drafting Model #674.

The Working Group also met Aug. 12 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.

Amann made a motion, seconded by Diederich, to adopt the Working Group's July 26 (Attachment A5), June 5–6 (Attachment A4), May 16 (Attachment A3), May 2 (Attachment A2), April 18 (Attachment A1), and March 22 (see

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NAIC Proceedings – Spring 2023, Innovation, Cybersecurity, and Technology (H) Committee, Attachment Three) minutes. The motion passed unanimously.

3. Heard Updates from NAIC Staff on State and Federal Privacy Legislation

Jennifer Neuerburg (NAIC) said in the continuing absence of congressional action on a comprehensive U.S. federal privacy law, many states have enacted state data privacy laws or are considering legislative action. She said on June 30, the Delaware legislature passed the Delaware Personal Data Privacy Act (HB 154), and the bill is ready for governor consideration. She said assuming that the bill becomes law, Delaware will become the 12th state—the seventh this year—to pass a consumer data privacy law. The other states that have passed bills this year are Indiana, Iowa, Montana, Oregon, Tennessee, and Texas. Neuerburg said at least 16 additional states have introduced data privacy bills during the current legislative cycle that are either comprehensive in nature or address a range of data privacy issues, and if anyone wants to read more about these bills, there are charts tracking state legislation on the Working Group’s web page.

Shana Oppenheim (NAIC) said the privacy legal and regulatory landscape is changing quickly in the U.S., particularly for financial institutions, which hold significant volumes of consumer data. She said at the federal level last year, the U.S. Congress (Congress) made significant bipartisan progress on comprehensive federal privacy legislation, advancing the proposed federal American Data Privacy and Protection Act (ADPPA), which passed out of the U.S. House of Representatives (House) Committee on Energy and Commerce with a 53-2 vote and almost made it to a House floor vote. Earlier this year, she said the House Committee on Energy and Commerce’s new Subcommittee on Innovation, Data, and Commerce held a hearing in March titled “Promoting United States Innovation and Individual Liberty Through a National Standard for Data Privacy.” Additionally, she said House Financial Services Committee Chair, Patrick McHenry’s, financial data privacy bill, the Data Privacy Act of 2023 (H.R. 1165), passed out of the Committee along party lines in February. She said it would: 1) revamp existing financial privacy protections for consumers under the federal Gramm-Leach-Bliley Act (GLBA); and 2) create a preemptive ceiling and floor to create a uniform federal standard. She said the current bill allows for enforcement by functional regulators, provides a new deletion right for consumers, and allows consumers to stop collecting and disclosing their data, among other provisions. She said Representative Maxine Waters (D-CA) and the Democrats have been critical of any preemption because it would hinder the states’ ability to act as a laboratory for innovation while establishing a weak federal standard. She said although there seemed to be some legislative momentum earlier this year, nothing has yet come of it. She said more limited/focused data privacy actions seem more likely. For example: 1) the House Judiciary Committee also approved a bill in July that would ban law enforcement agencies from buying people’s sensitive information from data brokers—the Fourth Amendment Is Not For Sale Act; and 2) for the second consecutive year, the U.S. Senate (Senate) has approved two children’s online privacy measures—the Kids Online Safety Act (KOSA)—for floor consideration just before departing for the month-long August recess. Oppenheim said KOSA is focused on social media companies and children’s data. She said U.S. state insurance regulators are also drafting several regulations that may be pertinent: 1) the Consumer Financial Protection Bureau (CFPB) is in the process of issuing a rule for the long-awaited implementation of Section 1033 of the federal Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which would require that consumers be able to access their financial data. She said the rule may specifically affect checking, savings, and credit card accounts. It is expected later this year with a final rule slated for 2024; 2) the CFPB also launched an inquiry into data brokers under the federal Fair Credit Reporting Act (FCRA), and it is attempting to understand the “full scope and breadth of data brokers and their business practices, their impact on the daily lives of consumers, and whether they are all playing by the same rules.” She said the Federal Trade Commission (FTC) is also investigating commercial surveillance industries, which it defines as collecting, analyzing, and profiting from information about people. She said the term encompasses the collection, aggregation, analysis,

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retention, transfer, or monetization of consumer data. She also said in an advanced notice of proposed rulemaking in August 2022, the FTC posed 95 questions about consumer harm, data security, and related topics to commercial surveillance companies.

4. Discussed an Extension to Develop the New Model #674

Johnson said the Working Group would like to discuss an extension of the time to develop the new Model #674 due to the sheer volume of comments received on Version 1.2 from July 11 through Aug. 8 and the number of requests for private calls with trade associations, consumer representatives, and companies.

Johnson said the 15 comment letters received prior to the July 28 due date are posted to the Working Group's web page and the meeting platform in the Summer National Meeting Event App. She also said the eight comment letters received after the July 28 due date will be posted to the Working Group's web page following the Summer National Meeting. She said the Working Group received 32 separate comments and redlined language documents in total. Additionally, she said the Working Group needs to review previously received comments to ensure all comments have been considered.

Johnson said extending the timeline would give the Working Group the time it needs to review all the comments submitted and have conversations with those who submitted the comments to ensure all stakeholders are heard and all parties understand the functional differences between different licensees and the various types of insurance being offered to consumers.

Johnson said the next version of the draft would be a redline that includes comments submitted, and the exposure draft period would allow a reasonable time of four to six weeks to review and comment on it. She said the Working Group will probably have another interim meeting before the Fall National Meeting, when a new timeline will be presented. Crow read a statement indicating that more work and time is needed for the state to support the draft model. Hastings thanked the Working Group for all its efforts in drafting a model that could work for all stakeholders, and she said Indiana has concerns that the interested state insurance regulators will work with the Working Group to resolve.

5. Discussed the Sections on Marketing, Consumer Notices, and Opt-Out/Opt-In in the Second Exposure Draft of Model #674

Johnson said the next item on the agenda is to discuss the topics on which the most comments were received; i.e., marketing, consumer notices, and opt-in/opt-out. She said the Working Group would hear from anyone who would like to talk about these topics. She asked that each stakeholder limit their comments to three minutes if possible and please focus on what, in their opinion, works and what does not. She said this will give Working Group members and other state insurance regulators time to ask questions and discuss the issues presented. Marnell reiterated the comments he submitted on the first exposure draft of the model prior to the Working Group's interim meeting in June, indicating that South Dakota could not support Version 1.2 of the model in its current form. Swanson said Nebraska agreed with the comments submitted by Marnell.

Shelby Schoensee (American Property Casualty Insurance Association—APCIA) said she appreciates all the hard work the Working Group put into Version 1.2 of the model, but she is disappointed that it did not include all of the APCIA's comments from the interim meeting in June. She said it was a patchwork of extensive regulatory changes that included unworkable notice requirements, such as obtaining consumers' signed consent for insurance data retention, sharing, and annually renewable data review, so it needs more work.

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Kristin Abbott (American Council of Life Insurers—ACLI) said the drafting group was clearly dedicated given the tremendous amount of work that had already been accomplished, and she said she appreciated working with the drafting group on specific issues of concern to her members. She said, however, that a redline document would allow the most constructive feedback to be given to avoid conflicting verbiage. She also said she was extremely disappointed that the ACLI's ideas about JMAs, marketing, retention, deletion, and data correction had not been included.

Karrol Kitt (University of Texas at Austin) said state insurance regulators need to know that consumers need this revised model desperately, and consumers need their help in protecting personally identifiable information because most insurance consumers do not understand the implications of what happens to their data once companies share it with other non-insurance companies.

Lauren Pachman (National Association of Professional Insurance Agents—PIA) said she submitted comments on behalf of the PIA's members last week and was surprised that the adverse underwriting decision language had been kept in Version 1.2 of the model. At the interim meeting in June, she said she asked that the National Flood Insurance Program (NFIP) be fit into the draft model because only 10% of consumers buy flood insurance directly through the NFIP. Agents are selling it to the other 90% of consumers through an arrangement with the federal government—via federal government borrowing money or the Federal Emergency Management Agency (FEMA) through upstream and downstream agreements—that could be considered a JMA in this model. Pachman said most flood policies sold cover \$250,000, and agents sell flood insurance for homes over that amount to ensure full coverage for homeowners. She asked how agents could offer this excess coverage under the model and if agents would need to get the consumer's approval in advance via written consent, which would be a potential errors and omissions (E&O) problem for consumers.

Johnson said she would be happy to set up a call with Pachman to discuss the sale of flood insurance further, as this concern was an unintentional consequence. She said she still believes state insurance regulation is better for consumers than federal regulation. Diederich said he believes the model has the same definition of financial institution as the federal government. Johnson confirmed that it is in Version 1.2.

Harry Ting (Health Consumer Advocate) said the new state insurance regulatory protections are sorely needed. He said the model is not confusing to consumers. For Sections 9 and 10 of Model #674, he suggested creating a standard template for consumer notices that could be clearly understood and uniform; i.e., like those created for the Medicare program.

Matthew J. Smith (Coalition Against Insurance Fraud—CAIF) said he submitted written comments on July 27 and urged state insurance regulators to update the model to protect consumers against insurance fraud. He asked the Working Group to focus on two issues: 1) consider making sure investigations of insurance fraud can continue by taking care not to prevent such investigations inadvertently; and 2) take the opportunity to designate fraud prevention clearly.

Peter Kochenburger (Southern University Law School) said he supports the revision of the model and understands that whether consumers should be given the opportunity to opt-in or opt-out of sharing their personal information is always the question. He said opt-in should be the default because opt-out means companies will share a consumer's personally identifiable information with their affiliates. Industry understands this, so that is what they prefer. Kochenburger said it is up to the Working Group to determine if consumers can have the protection of an opt-in consent that would provide the opportunity for consumers to know what they are agreeing to. He said he recently signed up for the highest level of Wi-Fi access, and the acceptance of the terms included several pages of

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legalism in very small print that was hard to read, even for an attorney. He said the only realistic opportunity for consumers to control the use of their data is an opt-in consent form. Kochenburger said the creation of an opt-in consent form is a complicated topic that needs further consideration. He said the Working Group has done a great job of putting together real consumer protection provided through state insurance regulation, whereas the federal government could adopt a broad bill.

Diederich said due to the GLBA, JMAs make it difficult to do this, and he needs ideas from Kochenburger on banks.

Wes Bissett (Independent Insurance Agents & Brokers of America—IIABA) said his members have threshold concerns, and he agrees that privacy is important, as is uniformity. He said the disagreement is on how to do it. He said the GLBA is wonderful, and the Working Group needs to use it. He said he has carried a lot of water for state insurance regulation over federal insurance oversight throughout the years because he supports state insurance regulation. However, he said he believes the Working Group should discontinue drafting a new model to replace the *NAIC Insurance Information and Privacy Protection Model Act* (#670) and the *Privacy of Consumer Financial and Health Information Regulation* (#672). He also said Model #670 and Model #672 only need minor adjustments, as they have worked well for many years.

Amann said she was actively involved when Model #672 was drafted in 1992, and the new model is being conscientiously drafted with language referred from Model #670 and Model #672. She said it would be helpful if Bissett could tell the Working Group where exactly it went off the rails because lines of business are different, as are companies' business processes. She also said new technologies have been and are being brought to the table, which is why the Working Group would appreciate any direction regarding Bissett's members' concerns.

Cate Paolino (National Association of Mutual Insurance Companies—NAMIC) said she appreciates the drafting group's willingness to discuss issues of concern in the model with her members. She highlighted the importance of making the new model more workable for companies, and she asked that it be more like California's privacy regulations. She pointed out that the timeline in Section 5 of Version 1.2 is three times longer than it is in California; instead, it should be in alignment with California, like railroad tracks, rather than trying to change the entire landscape of privacy, which would take a major effort on the part of insurance companies. She asked if there was any need to go beyond what California or Model #672 did, particularly Sections A.6 and A.7 of the new model. She said these sections address marketing across jurisdictions, which should not be a topic for a privacy discussion. She said her members continue to be willing to work with the Working Group to revise the wording in Version 1.2 to address these outstanding issues.

Erica Eversman (Automotive Education & Policy Institute—AEPI) said she echoes the thoughts of the other consumer representatives, and she suggested specifically identifying certain types of data categories by looking to California, as companies are already complying with it. She said other personally identifiable information, such as commercial, financial, banking, internet, browsing, fingerprints, voice prints, geo data, audio, visual, education, and professional/employer information, should be considered as inferences that industry could use to create a profile that could lead to automotive insurance disputes. She said bodily injury under personal injury protection (PIP) auto insurance requires that the consumer waives federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) rights to give access to health information for claims. She asked if this gives other companies access to medical data that they would not normally have due to HIPAA protections.

Eric Ellsworth (Consumers' Checkbook) said he is a data scientist with both an information technology (IT) and a HIPAA background who believes in strong data protection. He said there has been a lot of discussion about the inability of companies to access data in legacy systems to correct or delete a specific consumer's data when it is

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no longer needed. He said while it is true that legacy systems require a lot of maintenance and a lot of work, it is not true that data in legacy systems is safe because companies cannot access it. He said an experienced data scientist can access data located anywhere and from any type of system, including a legacy system. He said it is also true that companies may not know what data they have or where the data they have accumulated, especially through agreements, mergers, and acquisitions of blocks of business from other companies, is located. He said contrary to what is being said about consumers having to pay higher premiums to cover the additional costs companies will incur to comply with the new privacy act, history has proven that not to be the case. He said the same thing was said about HIPAA and California's privacy law, yet neither HIPAA nor California privacy compliance has bankrupted any insurers. He said state insurance regulators need to bind companies to the same rules as HIPAA, and he encouraged state insurance regulators to maintain this level of control over consumers' data.

Diederich said the Parliament of India recently enacted very strong data privacy protections with a data fiduciary requiring consent. He said this is a level setting, as the U.S. is very technologically advanced but not very advanced in privacy protection.

6. Discussed Other Matters

Johnson reminded attendees about the Insurance Summit, Sept. 11–14.

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

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