

July 13, 2021

Honorable Neil D. Breslin
Member, New York State Senate
Chair, NCOIL Special Committee on Race in Insurance Underwriting
c/o Will Melofchik, Esq., NCOIL General Counsel, via email, wmelofchik@ncoil.org

Re: Resolution Regarding the Use of Certain Rating Factors (July 8 draft)

Dear Chairman Breslin:

Thank you for your leadership, and the committee and staff for their diligent work—in an open, transparent, and thorough process—on this very important Special Committee. I believe you are quite close to finishing an essential, valuable end product, and respectfully offer the following comments for your consideration.

The resolution's urging the prohibition on using certain non-pending arrests, charges, and indictments in risk classification is reasonable. My main concern is the references to "protected class status" and "adverse effect." I recommend: In the seventh Whereas clause, replacing "considerations related to protected class status" with "public policy considerations"; and in the first Resolved clause, replacing "the negative and adverse effect that the use of these factors have on protected classes" with "public policy considerations."

"Protected classes"

The resolution uses a key undefined term which could be interpreted a number of ways. For instance, which "protected classes" are at issue? Race, the titular subject of the Special Committee? Race, color, creed, national origin, and sexual orientation, the protected classes in the NCOIL Property Casualty Insurance Modernization Act, where the Special Committee's "proxy discrimination" definition was inserted?

Or does this term encompass the dozens of other protected classes in state insurance codes? These include, but are not limited to, marital status; armed service members; organ donors; naloxone hydrochloride use; public officials; genetics; and people with bad credit due to medical coding, multiple auto lender, and multiple mortgage lender inquiries.

Using but not defining "protected classes" creates ambiguity; and attempting to define the term will lead to thorny line-drawing problems about which protected classes should be included.

"Adverse effect"

Referencing "adverse effect...on protected classes" is similar to NCOIL's objections to NAIC's use of the term "proxy discrimination against protected classes" in NAIC's Principles on Artificial Intelligence, which both left the term undefined and seemed to suggest a disparate impact standard.

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I respectfully suggest that the resolution's reference to "adverse effect...on protected classes" is inconsistent with NCOIL's prior expressions of policy opposing a disparate impact standard, including but not limited to the tight, understandable, intent-based definition of "proxy discrimination" in the recently adopted amendments to NCOIL's Property Casualty Insurance Modernization Act.¹

Protected class policymaking

All states prohibit insurance unfair discrimination, meaning that like risks must be treated alike and a risk classification factor fairly discriminates if it is actuarially justified. All states also have legislatively determined exceptions to this core standard, whereby specified classes are protected, meaning that the factor cannot be used even if it is actuarially predictive of risk and meets the core unfair discrimination standard.

These exceptions stand on their own as protected classes. Race, religion, national origin, sexual orientation, genetics, organ donor status, armed services membership, etc.—they are determined, for public policy reasons, to merit protection. The resolution promotes adding to the list insureds with certain non-pending arrests, charges, or indictments. An adverse effect/disparate impact on one of these protected classes, absent intent via proxy discrimination, is not a recognized standard for determining unfair discrimination.

Protected classes reflect a variety of public policy judgments by legislators at particular points in political time. They are as a matter of law ultimately crafted to prevent direct discrimination against that class, not "based upon the...adverse effect that the use of these factors have on [other] protected classes."

Conclusion

I appreciate your and your members' consideration of my comments and would welcome the chance to discuss them at your meeting on Thursday. The Special Committee is poised to precisely meet its mission—by defining proxy discrimination and urging prohibition of a factor that it found to be unfairly discriminatory. The committee has chosen to do the latter by resolution, not model law, which is its prerogative. I merely respectfully suggest that promoting the creation of a new, directly protected class—without reference to indirect "adverse effects"—sufficiently and successfully fulfills your charge.

Best regards,



Nat Shapo

¹ See, e.g., NCOIL letter of Oct. 11, 2019, to Dept. of Housing and Urban Development ("State insurance codes prohibit direct (but not indirect, disparate impact) discrimination by insurers against protected social classes."); NCOIL Property/Casualty Insurance Modernization Act ("Proxy discrimination' means the intentional substitution of a neutral factor for a factor based on race, color, creed, national origin, or sexual orientation for the purpose of discriminating against a consumer to prevent that consumer from obtaining insurance or obtaining a preferred or more advantageous rate due to that consumer's race, color, creed, national origin, or sexual orientation.").