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September 21, 2023

The Honorable Kathleen A. Birrane
Commissioner, Maryland Insurance Administration
Chair, Innovation, Cybersecurity, and Technology (H) Committee
National Association of Insurance Commissioners
1100 Walnut Street, Suite 1500
Kansas City, MO 64106-2197

*Attn: Miguel Romero – Director, P&C Regulatory Services*
*Via e-mail: maromero@naic.org*

**RE: NCOIL Comments on Exposure Draft of Model Bulletin on the Use of Algorithms, Predictive Models, and Artificial Intelligence Systems by Insurers**

Dear Commissioner Birrane:

The National Council of Insurance Legislators (NCOIL) appreciates the opportunity to submit these comments, focusing on a few high-level issues, regarding the Draft Model Bulletin on Use of Algorithms, Predictive Models, and Artificial Intelligence Systems by Insurers ("the Proposal").

**NCOIL Appreciates the NAIC's Attention to These Critically Important Issues**

The subject matter of the Proposal is of substantial importance to NCOIL and its members. We commend NAIC for its attention to issues regarding artificial intelligence and proper risk classification. NCOIL has been following these issues for some time and believes that proper regulatory oversight over developing technology is essential for ensuring consumer confidence in this important industry.

**Regulatory Bulletins Must Apply, Rather Than Create, Law And Regulatory Standards**

As part of that process, we wish to offer our conviction, as representatives of the branch of government that makes the laws, that any bulletin issued by an insurance regulator must be carefully crafted to carry

out its necessary role of applying existing, codified law to market conditions—and to avoid any hint of establishing new legal regulatory standards. Our comments focus on this distinction and are offered in the spirit of the strong and mutually beneficial working relationship between NAIC and NCOIL.
The Proposal properly recognizes in its first paragraph that "decisions impacting consumers . . . must comply with all applicable insurance laws and regulations," and entitles its first section "Introduction, Background, and Legislative Authority." This is a proper format for regulatory bulletins, which are not produced by a lawmaking process and therefore must be issued solely in the furtherance of the enforcement of the insurance code crafted by elected legislators.

We believe that defining terms in a Model Bulletin that are undefined in statute or regulation invites regulators to implement the usage of those definitions without proper process and oversight. While we will discuss just two terms from the Proposal herein, we do believe this larger point applies to all uncodified terms.

**"Bias" is Not a Statutory Standard, and, as Defined in the Proposal, is Not Nefarious**

The direction of the Proposal to insurers to avoid the non-statutory term "bias" is sufficiently troubling to merit special mention. Insurers are instructed to engage in "bias analysis and minimization," and to avoid "unfair bias." This establishes "bias" as a regulatory standard, but bias is not a term found in the insurance codes.

"Bias" is currently defined in the Proposal as "the differential treatment that results in favored or unfavored treatment of a person, group or attribute." This could just as easily be a clinical description of the basic work of the business of insurance—discriminating between, and classifying, risks. *See Telles v. Com'r of Ins.*, 574 N.E.2d 359, 361-362 (Mass. 1991) ("The statutory pattern which deals with insurance regulation authorizes insurers to 'discriminate fairly.'...[T]he basic principle underlying statutes governing underwriting practices is that insurers have the right to classify risks and to elect not to insure risks if the discrimination is fair....The intended result of the...process is that persons of substantially the same risk will be grouped together."); NAIC Product Filing Review Handbook at 12 ("'Unfairly discriminatory' is a concept often based on 'cost based pricing,' with the key word being 'unfairly.' For example, charging different prices to a man vs. a woman is discriminatory; however, it is only unfairly discriminatory if it cannot be reasonably explained by differences in expected costs.").

But the Proposal creates a regulatory standard of "bias analysis and minimization." If bias, the "differential treatment that results in favored or unfavored treatment of a person, group or attribute," is based on risk, then the state insurance statutes authorize (and require) this result—unless the classification method is itself a protected class (or a proxy for protected class under the NCOIL (but not

the NAIC) Model).[1] "Bias . . . minimization" is therefore generally not a goal of the insurance statutes, and instead is generally anathema to these laws.[2]

**Algorithm is Defined Very Broadly**

Interested parties have raised specific concerns regarding the breadth of some of the definitions used in the Proposal. In the interest of brevity, we limit our comments to one: The Proposal's definition of "algorithm"—"A computational or machine learning process that augments or replaces human decision-making in insurance operations that impact consumers." This definition would appear to impose very burdensome compliance obligations and to extend a new compliance regime designed to protect against AI abuses to more mundane and established practices.

Because computational processes that augment human decision making in insurance operations are well-established and common, and insurers have used technology in this way for decades, this definition appears to be broad enough to sweep in ordinary rating practices which are qualitatively different from the types of artificial intelligence driven decision making that we understand to be the underlying concern behind the Proposal. We thus are concerned that the current definition of "algorithm" could thus impose an unnecessarily costly burden upon insurers.

We also seek a better understanding about how the broad sweep of the definition of "algorithm" and the strictures in the Proposal might interact with existing rules. For instance, would credit based insurance scoring methods which have been in place for as long as a quarter century, and which are comprehensively regulated by the NCOIL Model Act Regarding Use of Credit Information in Personal Insurance, be captured by this definition? If so, is a new compliance regime necessary in an area where consumers are enjoying the benefits of accurate risk classification with substantial, proven regulatory protections?

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[1] *See* NCOIL Property/Casualty Insurance Modernization Act ("'Unfairly discriminatory' refers either to rates that cannot be actuarially justified, or to rates that can be actuarially justified but are based on proxy discrimination. It does not refer to rates that produce differences in premiums for policyholders with like loss exposures, so long as the rate reflects such differences with reasonable accuracy. . . . Risks may be classified in any way except that no risk may be classified on the basis of race, color, creed, or national origin. . . . '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."); NAIC Model 1775, Property and Casualty Model Rating Law (File and Use Version) ("Unfair discrimination exists if, after allowing for practical limitations, price differentials fail to reflect equitably the differences in expected losses and expenses.").

[2] The Proposal's other references to "bias"—"unfair bias" "resulting in" or "lead[ing] to . . . unfair discrimination," or causing "potential harm to consumers"—are also problematic. These suggest "bias" is different from discrimination, and "unfair bias" is different from "unfair discrimination." If so, that would be of great concern to legislators, who insist that core regulatory standards can only be created by lawmaking. And if "bias" and "unfair bias" are meant to be equivalent to "discrimination" and "unfair discrimination," then we respectfully suggest that only the latter, statutory, terms should be used.

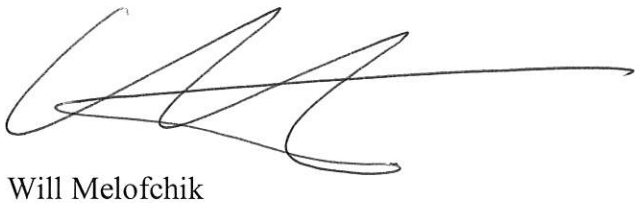
## Conclusion

Because the use and utilization of the word "bias" is a significant potential problem that threatens the viability of an otherwise potentially valuable Proposal, we respectfully suggest that this non-statutory term should be removed from the document. Given the already substantively complicated and politically charged recent debates over unfair discrimination standards, we believe it is imperative that any regulatory guidance regarding compliance take place within the confines of codified statutory rules.[3]

We also believe that the Committee should review the scope of its definitions, including considering tightening up the definition of "algorithm" to focus on supervising truly AI-directed decision making rather than established uses of technology in risk classification.

Thank you again for the opportunity to provide these comments, and we look forward to continue working with you on this important issue.

Sincerely,



Will Melofchik
General Counsel
NCOIL

[3] The non-statutory term "bias" has appeared in NAIC dialogue many times throughout the past few years. "Bias" is a floater term being used in a manner which we respectfully suggest can only introduce confusion into this important matter.