

**AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION
RESPONSE TO DISB REQUEST FOR COMMENTS
ON GATHERING DATA RELATED TO
UNINTENTIONAL BIAS IN PERSONAL AUTOMOBILE INSURANCE
AUGUST 22, 2022**

To: Phillip Barlow, Associate Commissioner for Insurance
Phillip.barlow@dc.gov

The American Property Casualty Insurance Association (APCIA) represents over 1,200 member companies that provide insurance coverage and reinsurance in every state and around the world. APCIA members write 57.2% of the private passenger auto insurance in D.C. and have a long-term commitment to the welfare of the District and our customers.

We appreciate DISB holding the June 29th hearing to receive industry input on the proposed data call and this second request for specific comments on the data call. We continue to emphasize that we want to be at the table going forward prior to any further DISB actions and recommendations; however, the proposed data call and study have raised many questions and fundamental issues for our members that we would like to share with DISB.

Section A: Foundation for the specific responses that follow in Sections B and C.

This section of APCIA's written comments on DISB's proposed data call regarding unintentional bias is foundational and applies to the specific comments in Sections B and C. In short, APCIA believes the Commissioner lacks the authority to promulgate rules to regulate unintentional bias without a clear legislative directive. To do otherwise is a violation of the separation of powers and exceeds the Commissioner's authority. If, however, DISB assumes authority to regulate in this area and issues the proposed data call, APCIA asserts that much of the information sought is part of the insurer's self-evaluation process and, as such, the data to be collected should be protected against disclosure by the self-evaluative audit privilege under DC ST § 31-853.

1. Lack of Authority

"Unfairly discriminatory" is one of three components of the rating standard set forth in the District's Insurance Code to govern rate-setting. Specifically, insurance rates "shall not be excessive, inadequate or unfairly discriminatory." DC ST § 31-2703(a).¹ All three components of the rating standard are tied by statute to the risk of loss – namely, past and prospective loss experience and

¹ DISB's statutory obligation is to exercise its rate-setting authority in a way that gives due consideration to all three components of the rating standard, which includes considering the interests of consumers, insurers and the insurance market broadly.

expenses, the nature of the hazards (physical and catastrophe); and the rarity or peculiar characteristics of the risks presented among others. DC ST § 31-2703(b)²

The term “unfairly discriminatory” has a specific meaning within the District’s Insurance Code. It is defined in multiple parts of the Code as prohibiting rates that treat applicants and policyholders with similar risk profiles differently. The concept is expressed this way in DC ST § 31-2703(c):

Nothing in this section shall be taken to prohibit as unfairly discriminatory the establishment of classifications or modifications of classifications of risks based upon the size, expense, management, individual experience, location or dispersion of hazard, or any other reasonable considerations attributable to such risks *provided such classifications and modifications apply to all risks under the same or substantially similar circumstances or conditions.* [Emphasis added.]

Similarly, DC ST § 31-2231.13(c) provides:

No insurer shall make or permit an unfair discrimination between insured property having like insuring or risk characteristics, in the premium or rates charged for insurance, in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the insurance. [Emphasis added.]

Even when the Insurance Code addresses certain consumer characteristics (some of which are protected class characteristics), it provides for differentials in ratings, premium payments, or dividends if there is an actuarial justification. In other words, the statute does not declare use of a listed characteristic as unfairly discriminatory if there is a risk-based justification for the related differential. See DC ST § 31-2231.13(d).³

The only part of the District’s Insurance Code we have found that addresses unfair discrimination differently from the universal formulation requiring persons presenting the same or substantially similar risks, circumstances or conditions to be treated similarly is Subsection (f) of DC ST § 31-2231.13. Subsection (f) provides as follows:

No person shall commit or permit an unfair discrimination between individuals or risks of the same class and of essentially the same hazard by refusing to insure, refusing to renew, canceling, or limiting the amount of insurance coverage on a property or casualty risk solely because of the geographic location of the individual or risk, unless the action is for a sound business purpose that is not a mere pretext for unfair discrimination, or unless the refusal, cancellation, or limitation is required by law or regulatory mandate. [Emphasis added.]

The “because of” and “pretext” language underlined above are terms of legal significance, which have been worked out over more than 50 years of litigation under Title VII of the Civil Rights Act of 1964. Specifically, the underlined language is a classic formulation of the legal theory known as “disparate treatment”. Disparate treatment, as it has been historically defined, is a form of

² Other rate-setting considerations in DC ST § 31-2703(b) are particularly relevant to the “inadequate” component of the rating standard and reflect a concern for ensuring the financial health (a/k/a solvency) of insurers. Those other considerations include the following: reasonable margin for underwriting profit and contingencies; dividends, savings, or unabsorbed premium deposits allowed or returned by companies; and net investment income (including realized capital gains) on all cash and invested assets held against all unearned premium reserves and loss reserves.

³ See the related discussion at Section C, Subsection 3 and the related Comment. See also, DC STAT 31-2231.11(d)

intentional discrimination requiring evidence of intent or a desire to exclude a protected class as a motivating factor. See, for example, Community Services, Inc. v. Wind Gap Mun. Auth., 421 F.3d 170 (3d Cir. 2005). Given the long history of disparate treatment and the precise formulation of that concept in DC ST § 31-2231.13(f), it can only be assumed the legislature (Congress in this instance) intended to address intentional discrimination in the form of disparate treatment in this part of the Insurance Code. The Commissioner has no authority to rely on this formulation as authority to explore “potential unintentional bias”.⁴

In a word, the methodologies and outcomes that form the basis of DISB’s new examination via the proposed survey conflicts with its past history and introduces a materially different approach from the approach employed in considering and approving rate filings over decades. We assert this materially different approach requires legislative authorization to pursue and to construe the Insurance Code otherwise is to stretch the interpretation of the Commissioner’s authority to the point of breaking.

DISB proposes to collect protected class data and produce a related study that purports to identify the potential for “unintentional bias” in rate-setting. Although there is no definition of “unintentional bias” in DISB’s proposal, it suggests a definition based on the District’s Human Rights Act. We assert that the Commissioner does not have the authority to supplant the definition of “unfairly discriminatory” as codified by the legislature (Congress in this context) in the portions of the Insurance Code cited herein with something different. When a legislature has specifically defined a term, it cannot be displaced by a contrary or inconsistent definition in a subsequent rule or regulation, including the one to be developed based on DISB’s proposal. To do so would exceed the Commissioner’s authority and constitute a violation of the separation of powers. This is particularly true because such a change marks a departure from long-standing public policy impacting a significant portion of the District’s economy and therefore is within the exclusive purview of the legislature.⁵ It is also true under statutory rules of construction that a general statute like the District’s Human Rights Act cannot displace the more specific statutory definition of unfairly discriminatory in the Insurance Code. To date, the legislature has defined “unfair discrimination” as tied to treating consumers who present the same or similar risk profiles differently, which requires a focus on comparative loss ratios as described more fully in Section C below.

⁴ This also applies to the “because of” language codified in § 31-2231.11, which language (along with the reference to “pretext” are key components of the disparate treatment formulation.

⁵ Although the United States Supreme Court’s June 30, 2022 decision in West Virginia v. the Environmental Protection Agency is not binding on state courts, it articulates a set of principles that is useful for addressing the question whether a regulator has exceeded his or her legislatively delegated authority in proposing a specific rule or regulation. The Court also tracks (in a single decision) many of the principles applied by state courts in state court challenges regarding regulatory authority.

2. Self-evaluation privilege

Without conceding any of the arguments regarding lack of authority and violation of the separation of powers in Subsection 1 above, APCIA offers the following.

To be sure the data proposed for collection seeks not only proprietary information or trade secrets but also the data of consumers who have an expectation of privacy deserving of confidential treatment. As referenced in the Footnote 6, trade secrets are exempt from disclosure under the District's Open Records Act. See DC ST § 2-531 *et seq.*⁶

However, APCIA asserts in addition that the self-evaluative audit privilege under DC ST § 31-853 applies. Much of the information sought by the DISB's proposed data call is part of insurers' self-evaluation process, including their continuing efforts to ensure the accuracy and fairness of rates charged and the correlation of rating factors to the risk-based elements of the District's rating standard specifically and its Insurance Code broadly. No doubt the legislature recognized that warning signs of potential non-compliance or harm to consumers are apparent first to those who issue insurance products (insurers in our context) and only later to regulators. Incenting self-evaluative efforts to identify early potential areas of non-compliance or harm is typically done by extending a privilege to protect those efforts from public disclosure and potential litigation. Incenting self-evaluation in the insurance context surely informed the codification of the self-evaluation privilege in § 31-853 and we assert it applies here. This privilege is even more important where, as here, the Commissioner seeks information to identify potential unintentional bias, which is not recognized in the existing Insurance Code, materially differs from DISB's past practice, and represents a significant change in public policy as described more fully in Subsection 1 above.

Section B: Fundamental Flaws and Concerns with the Proposed Data Call

The proposed data call will create insurmountable problems and impose significant costs on companies and the DISB.

As proposed, the data call will ask for application data. Such data contains significant amounts of sensitive personal information that unless DISB and its contractor can assure its protection, will expose DISB, its contractor, insurers aggregators and agents to significant risk exposure. There also will be significant new costs to create a data system to receive and protect data from dozens of different insurance companies', aggregators', and agents' systems. For example, a mandate on insurance companies to provide anything other than the fully completed applications received is to demand something that cannot be provided.

Further, application data is irrelevant without knowing projected loss results for insureds to determine if there is any unfair discrimination for protected classes. In fact, the matching of premiums to actual and projected losses is exactly what insurers do in their rate filings, which are subject to DISB review and approval.

DISB's stated motivation for this data call is to determine if there are practices causing "harm" to protected classes, but there is no definition of harm in the proposal.

What does the Department contemplate as the definition of what constitutes harm to an insured? For instance, would it be harmful to charge an individual more based on their risk of loss, for

⁶ This paragraph supplements APCIA's comments in Section C under the heading "More Detailed Discussion of DISB's Request for Comments" and subheading "Questions on Confidentiality & Consumer Privacy".

multiple DUIs for example, if they happen to be a member of a protected class, even though that action is in full compliance with applicable legal, statutory, and actuarial standards?

In addition, DISB’s motivation section specifically lists as targets rating factors that are constantly analyzed by the companies and DISB to assure that their use complies with applicable law and ensure that they are not unlawfully discriminatory.

Before using a factor in rating, companies determine whether or not it is predictive of risk using actuarially sound methods. Moreover, insurers engage in a continuing self-evaluation process to ensure the accuracy and fairness of rates charged and the correlation of rating factors to the risk-based elements of the District’s rating standard specifically and its Insurance Code broadly.

APCIA is concerned about the independence of the Consultant Cathy O’Neil, of the O’Neil Risk Consulting and Algorithmic Auditing (ORCAA).

Commissioner Woods has stated that the process will be deliberative and transparent to ensure the resultant data would address the issue of unintentional bias. However, in O’Neil’s book, *“Weapons of Math Destruction, How Big Data Increases Inequality and Threatens Democracy”* the author dedicated an entire chapter to alleged bias in insurance and by insurers and states: “They punish the poor, and especially racial and ethnic minorities. And they back up their analysis with ream of statistics which give them the studies air of evenhanded science.⁷” These kinds of statements certainly give the impression that she has already reached a conclusion about what the results of the analysis will be.

There is no hard evidence, from complaint data or any other data, that a data call that raises the legal, practical and resource issues is warranted.

This is a particularly important consideration in an environment as here where insurers and their consumers are facing dramatic increases in claims severity and frequency and will ultimately bear the additional costs for this data call.

Section C: More Detailed Discussion of DISB’s Request for Comments

1. Proposed potential outcomes the review will investigate.

The table below includes areas within the insurance application, underwriting and rating processes that have been identified for investigation and review. The areas identified are based on information provided by the American Academy of Actuaries and were cited in support of our discussion of motivations for undertaking this project, specifically, the Department’s statement that it intended to use the review process to “explore whether the use of certain information by auto insurers in the application and underwriting process may cause harm.”

Outcome Data	Consumer harm questions	Population
Quotes (\$)	Is a certain group being quoted higher prices?	Interested potential customers

⁷ “Weapons of Math Destruction” pp. 162-163.

Underwriting decision (decline/accept/ tier/class)	Is a certain group declined more often, or more likely to be placed in an expensive tier/company?	Applicants
Premium (\$)	Is a certain group paying higher premiums?	Customers
Loss ratio (%)	Is a certain group charged more in premium, relative to the insurance losses they sustained?	Customers

The Department would like to receive comments on the proposed outcomes and any additional potential outcomes for consideration, with rationale or justification.

COMMENT

Quotes are not always reflective of the final price paid, any data collected will be incomplete, therefore should not be considered.

The common definition of a “quote” is to provide an estimate, or an approximation of the cost of something. As is the case with repairing a car, or a home, the “quote” or estimate is only the first step in the purchasing process.

Insurance is no different, and in many cases, the quoted price is not the same as the final price until the consumer takes the steps to purchase at which point in the process final steps are taken to verify information provided by the customer (e.g., driving record and vehicles.) and provide a final price.

There are other selections that might apply after the quote step, such as changes to coverages, changes to selected limits or deductibles, or paid in full discounts. Attempting to capture the iterations of the quote process would exponentially complicate the task and could still not reflect the price actually paid by the customer.

There are no requirements that we are aware of for retaining quotes either for policies not actually written, or not accepted by the customer. If retained, an individual insurer would only have access to quotes they provided, and would likely have no knowledge of, or access to quotes from other sources.

There are many avenues provided to consumers for quoting, including on-line aggregators; agents comparative software; and company direct websites to name a few. Does the department anticipate collecting quotes from these sources directly?

When quotes come from outside of the insurers’ own quoting systems (such as comparative raters, quoting aggregators, or digital agencies with their own technology), those systems often make assumptions or purchase their own data to complete the quote and ask as few questions as possible. In those situations, insurers are not privy to the assumptions they make (including any potential bias related to them) and should not be held responsible for the assumptions made by outside quoting systems.

Consumers and agents quote multiple times while shopping to find the best rate and to experiment to see how different vehicles or different coverage options would impact their rates. This experimentation and shopping behavior renders the resulting data set unreliable as a gauge of

current outcomes. Moreover, the resulting data set will be substantially larger (at least 10 - 20x) than only looking at policies.

Underwriting decision data should be limited to declinations and not tier placements.

It would be challenging to quantify the detriment to a consumer for tier placement as its usage varies widely by company. Any underwriting tier placement would be one of the contributing factors in evaluating loss ratio and premium results.

Premiums should not be considered alone; they must be considered in the context of the historical losses they are based upon.

Actuarial standards require that the insurance premium reflects the costs of the risk transfer. Analysis of premiums alone do not reflect the cost of providing coverage.

Examining loss ratios of protected classes is a more appropriate method to test for unfair bias.

A more effective approach is to gather premium and loss information from one or more statistical agents and compare the loss ratio outcomes by zip code with relevant demographic data from the Census to determine whether there is a systemic issue that warrants a more detailed look.

Loss ratios will provide a better indication of any patterns of non-risk related overcharging.

Loss ratio analysis provides an excellent alternative to the proposed data call for revealing any patterns of overcharging in minority-majority areas as compared to other areas. In its consideration of loss ratio, DISB should consider that a permissible loss ratio may differ among carriers based on how business is conducted (i.e., Direct v Agent/Distribution Channel). Loss ratio is commonly combined with the expense ratio. The difference between an independent or exclusive agent's sales commission v direct mail marketing, and other general expenses, is reflected in the premium.

2. Proposed underwriting and rating factors not considered reflective of unintentional bias.

The Department recognizes that risk classification is a necessary part of the insurance underwriting and rating functions. The characteristics listed below are currently among those approved for use in rating automobile insurance policies issued in the District. The Department proposes to accept that some of the outcomes above may differ according to these characteristics. To the extent that differences in outcomes between groups are explained by these characteristics, they will not be considered reflective of unintentional bias. In practical terms, this means the characteristics below will be included in our data call and will be accounted for in the comparison of outcomes between groups.

- Age
- Loss history
- Driving record

The Department would like to receive comments on our determination related to the characteristics above and any additional characteristics we should consider for inclusion. For any additional characteristics, please provide analysis to support their inclusion. The Department will adjust the identified criteria based on the feedback received.

COMMENT

The following characteristics should also be considered for inclusion and should not be considered reflective of unintentional bias.

- Coverage. Premiums vary based on the coverages selected (including mandatory and voluntary coverages).
- Liability limits and physical damage deductibles. Losses paid (and financial risk assumed) are inherently impacted by these selections.
- Vehicle Age and Symbol. Differences in vehicles can account for differences in vehicle safety and performance while driving, likelihood of theft, as well as accounting for differences in repair costs and in the total value of the insured vehicle.
- Number of Drivers and Number of Vehicles. A policy with multiple vehicles will inherently carry more risk than a policy that covers a single vehicle. Likewise, a vehicle that is shared by multiple drivers is likely to be driven more often than a vehicle used by a single driver.
- Annual Mileage. The more a vehicle is driven, the greater the risk that an accident will occur.
- Vehicle Usage. Whether a vehicle is used for pleasure, commuting, business, or as part of a Transportation Network Company (TNC) impacts both the amount of usage a vehicle receives and the time of day the vehicle is driven (high congestion commute or non-peak hours).
- Years licensed. Years of driving experience.

3. Consideration of potential bias in factors that are both a protected class and comply with Actuarial Standard of Practice #12.

The Department recognizes that insurance underwriting and rating criteria includes characteristics related to protected class statuses. The characteristics listed below are among those that typically comply with Actuarial Standard of Practice #12 for use in rating automobile insurance policies issued in the District but are also recognized protected classes in the District. The Department would like to understand if these characteristics should be subject to review for unintentional bias when they meet ASOP #12. The Department suggests that correlation with losses may not be sufficient to forgo review. In practical terms, this means we would like information to determine whether these characteristics should be included in 2 above or in 4 below.

- Gender
- Marital status

The Department would like to receive comments, with justification, on how to consider these characteristics and whether any additional characteristics should receive similar analysis.

COMMENT

Neither gender nor marital status should be subject to review for unintentional bias, as doing so would be contrary to clear statutory law and legislative intent in the District. Specifically, DC ST § 31-2231.13 sets forth the statutory requirements and prohibitions concerning unfair discrimination and rebates for property, casualty, and surety insurance. With respect to demographic and other

variables in particular, DC ST § 31-2231.13(d) states that there should not be a differential in ratings "unless there is actuarial justification for the differential."

The clear language of DC ST § 31-2231.13(d) demonstrates that the legislature specifically contemplated that many variables (beyond age, loss history, and driving history) would be utilized by property, casualty, and surety insurers to make or permit a differential in ratings or premium payments, and that such differential based upon these variables does not as a matter of law constitute unfair discrimination if there is "actuarial justification for the differential." By cross-reference then, a differential in ratings or premium payments supported by actuarial justification does not and cannot constitute "unfair trade practices" under the definition supplied by the legislature in DC ST § 31-2231.01(9) *et seq.* The language is clear as chosen by the legislature in DC ST § 31-2231.13(d). Thus, it would be improper for DISB to review these variables for unintentional bias.⁸

Additionally, gender should be considered **not reflective** of unintentional bias. The Insurance Institute for Highway Safety (IIHS) has compiled data⁹ from the US DOT Fatality Analysis Reporting System (FARS) that shows that male drivers pose a much greater risk for fatalities, particularly for younger drivers. Similar data for IIHS shows that male drivers are more likely to engage in other risky behaviors, such as speeding¹⁰, red-light running¹¹, and lower seat-belt use¹². There is an interaction between gender and age, particularly at younger ages, that demonstrates males pose an even greater frequency risk than females in the same age group. Likewise, at certain life stages women are more likely to drive family members around, leading women of some age groups to drive with higher exposures on average, which increases severity risk. Behaviors vary across genders, and this is why gender should be considered **not reflective** of unintentional bias.

Passenger vehicle fatal crash rates per 100 million miles traveled, by driver sex, April 2016 - March 2017									
Age	Male			Female			Total*		
	Crash involvements	Miles	Rate	Crash involvements	Miles	Rate	Crash involvements	Miles	Rate
16-19	2,019	31,732,691,896	6.4	1,003	30,677,731,652	3.3	3,023	62,410,423,548	4.8
20-29	7,327	187,497,565,846	3.9	3,246	198,148,511,278	1.6	10,578	385,646,077,124	2.7
30-59	12,875	785,270,175,131	1.6	6,011	558,224,868,022	1.1	18,888	1,343,495,043,154	1.4
60-69	3,019	207,918,951,320	1.5	1,380	136,711,746,704	1.0	4,400	344,630,698,024	1.3
≥70	2,924	104,684,593,355	2.8	1,377	66,739,614,422	2.1	4,302	171,424,207,778	2.5
Total*	28,182	1,317,103,977,548	2.1	13,020	990,502,472,079	1.3	41,234	2,307,606,449,627	1.8

*Total includes other and/or unknowns

⁸ Consistent with the discussion in Section A, Subsection 1, the term "unfair discrimination" in the District's Insurance Code is defined in the actuarial sense as tied to projected losses and related expenses and not to the term is defined in Title VII of the Civil Rights Act of 1964 or the District's Human Rights Act.

⁹ [Males and females \(iihs.org\)](https://www.iihs.org)

¹⁰ [Speed \(iihs.org\)](https://www.iihs.org)

¹¹ [Red light running \(iihs.org\)](https://www.iihs.org)

¹² [Seat belts \(iihs.org\)](https://www.iihs.org)

Additionally, while this increased risk level does, to some extent, lessen with age, men generally continue to present greater risk throughout their lives. Many more men than women die each year in motor vehicle crashes. Men typically drive more miles than women and are more likely to engage in risky driving practices, including not using safety belts, driving while impaired by alcohol, and speeding. Crashes involving male drivers often are more severe than those involving female drivers. Per IIHS, each year from 1982 to 2019, the proportion of fatally injured passenger vehicle drivers with blood alcohol concentrations (BACs) at or above 0.08 percent has been substantially higher for males than for females.

Marital status (same-sex or opposite-sex) should be considered **not reflective** of unintentional bias. A married couple would have different driving patterns as compared to a policy with 2 single drivers (such as roommates). The married couple is more likely to travel together for work or social events, thereby reducing the overall miles driven in aggregate, and resulting in fewer tickets, accidents and insurance claims thereby lowering aggregate risk. Auto insurers have collected data for decades and **marital status is an accurate variable** for predicting the likelihood and severity of insurance claims. Married drivers tend to take fewer risks than single drivers. The data indicates that when people get married, they tend to become more responsible, more concerned about their health, and take fewer risks.

The department recognizes that that the use of gender and marital status are predictive of loss and consistent with actuarial standards, but that alone “may not be sufficient” to forgo review. By what other criteria would the department propose to review gender and marital status?

4. Proposed criteria to be evaluated for bias.

The Department proposes to consider the potential for introduction of protected class bias for specific criteria. In practical terms, this means that any identified characteristic will either be directly included in the data call or data will be collected that will allow for inference of the characteristic, and that a separate analysis of the data will be conducted on each characteristic to investigate for potential bias. Currently, the criterion for consideration is the following:

- Race/ethnicity – this characteristic will be inferred as discussed in the public hearing and we are also investigating whether data collected by other District government agencies may be available to enhance the inference.

The Department would like to receive comments on this proposed characteristic and the method used to determine the characteristic. We would also like to receive comments on additional characteristics to be considered for evaluation and how each characteristic will be determined.

COMMENT

The proposed DISB analysis would rely heavily on ZIP codes to infer race. Cathy O'Neil testified during the June 29 hearing that DC's highly segregated neighborhoods would make such inferences more reliable. If this is the case, DISB might instead start with a data call to report loss ratios, premiums, and pure premiums by ZIP code from insurers to identify if consumers in majority-minority zip codes have lower loss ratios than other zip codes.

This is similar to the methodology employed by the Pennsylvania Department of Insurance in 2016¹³ to determine if premiums were "commensurate with insured loss experience in zip codes with large minority populations, low household incomes; and low percentages of college graduates."

¹³ [https://www.insurance.pa.gov/Coverage/Documents/Auto/Significant%20Findings%20\(Final\).pdf](https://www.insurance.pa.gov/Coverage/Documents/Auto/Significant%20Findings%20(Final).pdf)

The study concluded that the loss ratios were higher in zip codes with large minority populations, low educational attainment, and low income.

The NAIC developed an extensive database on auto insurance at a zip code level and issued a draft study in March 2020 utilizing this database. The primary objective of the report was to show the data available to each state insurance department and demonstrate how the data could be used to examine auto insurance availability and affordability. The NAIC combined the insurance data with data from the American Community Survey (ACS) on economic and demographic variables for each zip code where available.

That said, it is important to emphasize that insurers within the District adhere to the prohibitions on the use of territory under DC ST § 31-2231.13(f) and 26-A DCMR § 200. Thus, inferring race based on territory is highly problematic given these statutory prohibitions. The legislature expressly said territory could be used as long as it is not a pretext for unfair discrimination,¹⁴. Thus, the potential for unfair discrimination or unintentional bias based upon race or ethnicity has already been resolved by the legislature through the Unfair Insurance Trade Practices Act. To date, DISB has not made any determinations or findings that insurers are not adhering to these statutory prohibitions. Displacing the legislature's solution on this issue would exceed the Commissioner's authority and violate the separation of powers.

Section D: Supplemental Comments

Questions on Confidentiality & Consumer Privacy

We are concerned about ensuring data privacy for the data call that would include personally identifiable information. DISB's request includes information that is subject to confidentiality and trade secret protections. In addition to the discussion under A.2. the Open Records Act (DC ST § 2-531 *et seq.*), expressly provides that trade secrets are exempt from public inspection (DC ST § 2-534(a)(1)). Even so, nothing in DISB's proposal addresses how insurers can both respond to the request for data and protect the trade secret information used in their core business models that provide a significant competitive advantage in the marketplace from not being generally known or readily ascertainable by proper means. Much of the data being requested by DISB constitutes trade secret information that cannot be placed in the public domain (or provided to a public entity subject to FOIA requests without any agreement to maintain the information's confidentiality) without causing significant and irreparable competitive harm.¹⁵

What steps will DISB take to ensure data is secure? Will consumers be given the opportunity to opt out of participation in the data call? Will ORCA be employing any subcontractors to assist? Do the agreements between the DISB and its contractors and between ORCA and its subcontractors include a non-disclosure clause with penalties for related breaches or violations?

There Are Better Ways to Proceed

A loss ratio study of zip codes should be performed to determine if there is any pattern of over-charging. If it is found that minority zip codes have lower loss ratios, then additional study might be warranted. We are willing to work with DISB on such a study.

¹⁴ See the related discussion at Section A, Subsection 1 of this document.

¹⁵ See the discussion regarding the self-evaluative privilege in Section A, Subsection 2 above.

We also note that the NAIC, NIST, the U.S Chamber, and actuarial groups are all exploring ways to determine if unfair bias/discrimination exists and to identify remedies where it does. We note that DISB especially should consider recent presentations to the NAIC by a Milliman actuary and a Faegre Drinker attorney and recent reports issued by actuarial groups.

Conclusion

For all the above reasons, we urge DISB to consider all the issues before going forward with the data call as proposed. We also urge DISB to consider the far more cost-effective/beneficial ways available for addressing DEI issues, which would not be disruptive to the market and, thereby, impact the availability or affordability of insurance for District consumers or be inconsistent with legal and statutory standards, including the Commissioner's authority. Instead, we ask the DISB to work with us to better use the extensive amounts of existing data in the context of applicable legal and statutory standards and identify what steps we can take to address the underlying insured costs and losses that are literally driving insurance pricing.

Please contact us with any questions.

Nancy J. Egan, Esq.
Vice-President and State Government
Relations Counsel
Nancy.egan@apci.org
Cell: 443-841-4174

David F. Snyder
Vice President and Counsel, Policy Research
david.snyder@apci.org
202-828-7108

Robert C. Passmore
Vice President, Personal Lines
robert.passmore@apci.org
847-553-3612