American Property Casualty Insurance Association
INSURING AMERICA apci.org

STATEMENT
OF
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION
IN CONNECTION WITH
JUNE 29, 2022 HEARING ON GATHERING DATA RELATED TO
UNINTENTIONAL BIAS IN PERSONAL AUTOMOBILE INSURANCE
JULY 8, 2022

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 we emphasize that we want to be at the table going forward prior to any further DISB actions and recommendations. The proposed data call and study have raised many questions for our members which we would like to share with DISB.

APCIA and Members' Commitment to Diversity, Equity and Inclusion (DEI)

We share the DISB priority on DEI. Accordingly, APCIA and its members have initiated a number of actions that further that important goal. These include a compiling a catalogue of members' actions regarding DEI that is constantly expanding and holding conferences bringing together experts to help improve and recognize those who are improving DEI. Here is a list of recent APCIA DEI initiatives:

- Co-founded the Insurance Careers Movement, a global initiative designed to inspire more people to choose insurance as a career and remain in the insurance industry, with a goal of creating a more diverse and inclusive workforce.
- APCIA founded the Emerging Leaders Conference, designed to retain, and develop talent.
- APCIA, ACLI and Life Insurance Council of New York co-founded the annual "Diversity, Equity and Inclusion Conference: Expanding Opportunity in Insurance"

We would very much like to discuss these actions and initiatives with DISB and work with DISB on other initiatives consistent with established legal standards and the maintenance of a competitive and financially sound insurance market that ultimately is the most fundamental consumer protection.

Market Context for Our Comments on the Proposed Data Call

The District of Columbia is a viable and competitive market, despite serious challenges such as inflationary pressures and the growth in costs resulting from those pressures in a highly urbanized environment. Those challenges are increasing and affect all of us—especially the deterioration in highway safety performance throughout the region and the dramatic inflation upswing that particularly affects the products and services auto insurance pays for.

Our comments are provided in the spirit of maintaining this healthy and competitive market and avoiding the unintended harm to the DC market and consumers if the proposed data call or ban on risk-based pricing factors are implemented. Rather than impose unnecessary new costs on insurers as the data call would do, and administratively adopting a standard for review of that data that is in conflict with long standing and proven effective current law, we ask for a cooperative effort to understand and address the challenges that negatively affect all consumers.

General Concerns with the Proposed Data Call

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 example multiple DUIs, if they happen to be a member of a protected class, even though that action is in full compliance with applicable legal 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. We also note that many studies have shown that the use of credit information, regulated by federal and state law, actually provides a discount or is neutral for the majority of policyholders.

More Detailed Discussion of Concerns

1. **Given the amount of data already collected by the Department and at its disposal, this proposed collection of application data is costly, complicated and unnecessary.**

The information provided in connection with the hearing states that the necessary data is unavailable according to subject matter consultants contacted by internal staff. Could DISB explain why and what data is not available? The proposed study states that application data is to be collected, as opposed to the already available information in rate filings and market conduct examinations, including the special market conduct examinations of the four largest carriers already carried out. Has any report been released regarding those exams?

The specific details of what information is to be collected are not clear. Operating systems of the various carriers differ, and application data would have to be collected from a wide variety of sources with many different systems, including independent agents, captive agents, companies, and websites. At what stage in the underwriting process must the data represent—quotes, final premiums, and what if the consumer rejects the quote? Is it all new applications issued during a certain period? Will this "test" need to be completed prior to submission of data? Will this require a re-programing of company operating systems?

Why pursue this time consuming and resource intensive approach when DISB already would appear to have access to all of the information it needs to determine if insurers' underwriting and rating practices comply with the law, as exemplified by Section 31-2703? The costs of auto repairs and replacement parts have skyrocketed in recent years and labor shortages add to costs and delays in repairs. Rising used car values increase the cost of claims for vehicles that cannot be repaired. The rise in thefts of vehicles and catalytic converters is also a growing concern. Objective, empirical data is available to establish each of the cost drivers just referenced. This data call expense will impact rates by adding additional costs at a time when inflation is already a major problem for consumers and insurers.

As the discussion in the hearing from many witnesses indicated, collecting premium or application data without taking into account risk, is utterly inappropriate and inconsistent both with sound actuarial principles and statutory and legal standards governing rate-setting. To make the collection of application data relevant, there would need to be the collection of claims data, which would require a new multi-year look back program, with significant new costs to DISB, as most auto insurance claims mature over a two-year period. In fact, companies do exactly what DISB would need to do for a legitimate analysis of applications combined with losses, with their rate filings when they aggregate statistically significant loss data with premium data to create and file their risk classification plans and rate filings. Therefore, it makes no sense for DISB to recreate this

process with new and unnecessary expenses and new privacy protection challenges for companies, DISB and ultimately consumers and taxpayers.

2. **The apparent standard for review of the data—"potential for unintentional bias"—is ambiguous and exists nowhere in the current law with which insurers must comply and that regulators must enforce.**

To the contrary, the fundamental statutory standard with which insurers must comply and that regulators must enforce is embodied in the "excessive inadequate, unfairly discriminatory" standard in Section 31-2703. The definition of each element of the rating standard set forth in Section 31-2703 requires projecting the risk of loss. In fact, the universally accepted purpose of the "unfairly discriminatory" element of the rating standard is to prohibit rates that treat people with similar risk profiles differently. The proposed study's use of the phrase "potential for unintentional bias" to describe the standard against which the data will be collected and studied is inconsistent, if not in conflict, with the legislated and established standards, which in turn gives rise to many fundamental questions about the study.

The question was posed to us during the hearing about whether unintentional bias is a concern for insurers. All AI users in all sectors share a concern for eliminating inaccuracies and bias and insurers along with other sectors are working on how best to do that, consistent with insurance regulatory standards, for example by participating in the National Institute of Standards and Technology's work.

Moreover, the prevailing standard for a finding of unintentional discrimination was articulated by the United States Supreme Court most recently in the 2015 case *Texas Department of Housing and Community Affairs, et al v. The Inclusive Communities Project, Inc. et al.* Under no set of facts would the Court hold as unlawful the "appearance of" or "potential for" unintentional discrimination. The US Supreme Court requires a finding of unlawful discrimination in two scenarios where there is a demonstrated adverse impact on a protected class: (1) where there is no valid interest served by the challenged factor or (2) where there is a valid interest served but an equally effective alternative with less adverse impact exists then the alternative must be used in place of the challenged factor.

There are two certain outcomes if the District persists on this course: (1) The District will be out of compliance with its own statutory rating standard and with the U.S. Supreme Court's standard for unintentional discrimination and (2) A significant number of District constituents will be adversely affected when factors that are demonstrably predictive of the risk of loss are eliminated from rating and underwriting.

3. **Since current law mandates that underwriting and rating be based on comparative risk, how will the DISB factor in the riskiness and resulting expected costs of drivers, which is required under current law?**

The definition of "potential for unintentional bias" does not include consideration of comparative risk. Given that, what is the legal justification for that definition? What will this study add to determining whether insurers are complying with existing legal standards, beyond the market conduct work already done by DISB? Considering that the existing legal standard is important for solvency purposes, wouldn't a study that ignores comparative risk as a reason for accepting, declining, and rating policies, result in a report that would be misleading, or even damaging to the market?

4. **We appreciate this hearing and the promise of transparency and commitment to have the industry at the table as a participant. However, DISB in its details about the hearing stated that internal staff consulted with external subject matter experts.**

Who were the experts consulted by internal staff and what was their input into designing the outline of the study? Are there any reports based on these consultations?

5. **How should bias be measured?**

There is no agreed-upon means of measuring bias. We applaud the Department's decision to retain outside experts, but we strongly encourage the Department to collaborate with the NAIC, industry and others to ensure that the means of measuring bias is appropriate and reflects the realities and legal regulatory standards applicable to the insurance business.

6. What level of correlation with race is acceptable and under what circumstances?

Even assuming we can reach consensus on how to measure racial bias, there is no agreed upon yardstick that can tell us whether a particular correlation with race exceeds the correlation with risk and, therefore, a cause for concern. Simply put, the fact that a particular factor may have some correlation with race does not necessarily mean that it is discriminatory or should be excluded from consideration when predicting loss. Again, collaboration with the NAIC, industry and others are critical, as insurers cannot be subjected to different yardsticks in different jurisdictions.

7. The appropriate recognition and regulation of bias is newly emerging and very unsettled.

There is no agreed-upon means of measuring unintentional bias in insurance. We strongly encourage the Department to collaborate with the NAIC, industry and others to ensure that the means of measuring unintentional bias is appropriate and reflects the intricacies of the insurance business.

8. There may be an alternative to this proposed study. that could be done far more cost-effectively.

For example, the study, like that performed nationally by the NAIC in 2020, would determine whether there is a significant problem of premiums in minority and low-income zip codes exceeding the underlying losses in a pattern that would identify areas of concern. We also agree that a loss ratio examination might provide useful direction.

9. We appreciate several elements of the proposed study, including the confidentiality for individual company responses but how will information be shared with ORCAA during the data collection and study?

Will company confidentiality be maintained? Will ORCAA's access to information be subject to restrictions to prevent this information from being used for other purposes? The proposal raises many serious privacy concerns. Insurers and agents collect, use and protect significant amounts of personal information subject to intensive regulation. Are consumers aware and have they given their permission to have their personal data shared with the government and government vendors? What protections will DISB provide to insurers, agents and consumers? What is the cost of creating these new protections necessitated only by this study?

10. How can consumer protection concerns be addressed without sacrificing the benefits that come from using AI?

We strongly encourage DISB to coordinate with the NAIC and industry to ensure that any competing interests are balanced appropriately and consistently from jurisdiction to jurisdiction.

Response to Critiques from Activist Organizations

The CFA, CEJ and Consumers Reports witnesses summarized their prior reports critical of various regulated and legally permitted industry practices. While we respect their right to comment, in all cases they failed to associate risk of loss and losses with the rating factors on which they were commenting. This is a fatal flaw. Insurance is the transfer of the defined risk of loss from the policyholder to the insurer in exchange for a premium that has been shown to predict future losses for the group(s) of which the policyholder is a part. This linkage between losses and premiums makes sense, is the basis of actuarial science, and is the law.

The laws in many jurisdictions include bans on collecting defined types of data, including racial data, and no one has proven that insurers are doing so.

Conclusion

For all the above reasons, we urge DISB to consider all of the issues we raise before going forward with the study as proposed and conclude that there are far more cost-effective/beneficial ways to consider DEI issues that would not harm the market and not be inconsistent with legal and statutory standards. 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
Cell: 202-779-3039