American Academy *of* Actuaries

March 7, 2023

Commissioner Michael Conway
Colorado Division of Insurance
1560 Broadway, Suite 850
Denver, CO 80202

Dear Commissioner Conway:

On behalf of the American Academy of Actuaries' (Academy)[1] Life Practice Council (LPC), Health Practice Council (HPC), and Casualty Practice Council (CPC), we are writing to offer input on the Governance and Risk Management Framework Requirements for Life Insurance Carriers' Use of External Consumer Data and Information Sources (ECDIS), Algorithms, and Predictive Models regulation exposed on February 7, 2023, pertaining to the implementation of Colorado Revised Statute (C.R.S.) § 10-3-1104.9 signed into law on July 6, 2021.

It is our understanding that you and the Division of Insurance (DOI) will be gathering input from stakeholders and other interested parties regarding the exposure draft of the proposed regulation. We offer the following comments for your consideration and welcome further engagement with the DOI as it pursues regulatory implementation of the statute.

The comments that follow relate to all lines of insurance generally with specific considerations for life, accident and health, and property casualty insurance. We understand that while the regulation is specific to life insurers, the DOI is considering similar regulations for application to other practice areas. As the DOI considers regulations for different types of insurance, it will be important to recognize the differences in business practice between various types of insurance.

We support efforts to eliminate unfair discrimination and understand the importance of regulating the use of personal characteristics, external data, algorithms, and predictive models by insurers. With regards to the draft regulation, we offer the following main points:

1. Scope Concerns: Discussions at the stakeholder meetings have exclusively focused on one component of Life Insurance Practice: underwriting. Additionally, the only protected class that has been discussed thus far has been race. The statute also refers to other classes, including national or ethnic origin, religion, sex, sexual orientation, disability, etc. Moving forward, we request clarification on whether and how insurers would be required to comply with internal governance requirements for these other protected classes.

---

[1] The American Academy of Actuaries is a 19,500-member professional association whose mission is to serve the public and the U.S. actuarial profession. For more than 50 years, the Academy has assisted public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

2. The use of data in algorithms and predictive modeling is a rapidly evolving science with insurers at various states of implementation. Insurers would need to describe how their governance framework ensures that the use of ECDIS, and the algorithms and predictive models using ECDIS, do not lead to unfair discrimination. Given the expected wide range of implementation across the insurance industry, we suggest establishing expectations for compliance ranging from the rudimentary to sophisticated.

3. The draft regulation specifically targets the use of ECDIS, algorithms, and predictive models that use ECDIS. Since many companies have one governance framework for all types of data, algorithms, and models, we suggest consideration of a broader compliance framework.

4. External Vendors: Compliance may be difficult due to limitations contained in contracts between insurance companies and third-party vendors. Additionally, we recommend clarifying whether it is permissible for the external vendors to provide documentation of compliance to be referenced in the insurers' submissions rather than having insurers documenting it themselves.

Specific Comments on the Draft Regulation

1. ***Section 4.B***.: How would a disproportionately negative outcome be measured? To date, insurance has not been evaluated using disproportionate outcomes; applying disproportionate outcomes for a class of individuals (rather than for an individual applicant) is a fundamentally different standard for insurers. Certain protected classes are fundamental risk factors used to establish risk pools. For example, sex and disability status are key risk criteria used in traditional life insurance underwriting. The Academy's February 4, 2022, letter states, "Sex is a common rating characteristic used in Colorado that is permissible under certain conditions (CRS 10-3-1104(f)(iii)), which is routinely collected as part of the underwriting process for certain insurance products. Given its usage in rating plans, we recommend the commissioner consider clarifying through rulemaking a company's ability to continue to use sex as a rating variable, unless prohibited by state and/or federal law, and provide guidance as to the circumstances where the use of sex could be considered unfairly discriminatory." The Division could consider clarifying that sex and disability may still be used under these conditions.

2. ***Section 4.D***.: The exposure draft defines ECDIS differently than in (C.R.S.) § 10-3-1104.9. One of the differences clarifies occupations to mean occupations that don't have a direct relationship to mortality, morbidity, or longevity risk. What is meant by direct relationship? For life insurance, there are no risks with a direct "causal" relationship to claims; all risks are correlated to claims to varying degrees.

3. ***Section 4.H.1***.: What is meant by "having a direct relationship" here? For life insurance, there are no risks with a direct "causal" relationship to claims; all risks are correlated to claims to varying degrees. Fraud could also be included in addition to mortality, morbidity, or longevity risk. Further, the use of the word "traditional" may lead to significantly different interpretations by companies.

4. *Section 5.A.9*: There is confusion around what is meant by Unintended Consequences. Is the key concern regarding unintended unfair discrimination and bias? We suggest you clarify what is meant by Unintended Consequences to avoid confusion or misinterpretation.

5. *Section 6.A.4:* In addition to a description of testing conducted to detect unfair discrimination, this also could include long-term monitoring of the models in use.

6. *Section 6.A.10*: We suggest that you clarify what is meant to "engage outside experts for performing audits when internal resources are insufficient." Should a statement be included if outside experts are engaged? What if resources are sufficient but an expert is also engaged?

7. *Section 6.A.12:* What is meant by "decision" in this section? Is this specifically focused on decisions involving ECDIS and algorithms and models using ECDIS, or does this also include each underwriting decision? We suggest clarification.

8. *Section 6.A.12.a.:* We suggest requiring the use of titles and/or positions instead of individual names listed here.

9. *Section 7.C:* If an insurer has not changed any business practices in the two-year period, would the insurer be required to submit an updated report? We suggest waiving the reporting requirements if the insurer certifies that their practices have not changed.

10. *Section 7.E*: We suggest this section be clarified. Is the intent to approve any new use of ECDIS or algorithms and/or predictive models using ECDIS before implementation?

Comments Specific to Each Type of Insurance

Life Practice Comments

While many of the issues that are discussed in this letter apply to all lines of insurance, an important issue is that the purchase of life insurance is a voluntary transaction between a consumer and a life insurance company. Further, the decision to purchase life insurance is an independent, stand-alone decision that is not mandated as a result of another activity (e.g., obtaining a mortgage or driving a car). The risk selection process for a life insurance applicant is performed at the time of application and is not repeated over the lifetime of that policy, which can be more than 50 years. Is it essential for life insurers to evaluate the applicant's risks to ensure (1) the compatibility of the individual applicant with established risk pools and (2) the suitability of the insurance (i.e., the applicant's financial need and ability to pay).

Generally speaking, life insurers' use of third party data in predictive models is not as advanced as in other types of insurance. Further, there is a wide range of adoption across the life insurance industry. In the stakeholder meetings, the regulations were described as living documents. Also, the discussions in the stakeholder meetings have been focused on life insurance underwriting and the use of inferred race. As such, we suggest that the first phase of this regulation focus exclusively on life insurance underwriting and the use of inferred race. We suggest that subsequent phases move beyond race.

Health Practice Comments

Section 3 notes that the proposed regulation would apply to all life insurers authorized to do business in Colorado. Because life insurers often sell health products, this regulation would apply to life insurers selling health products, but not health insurers, health maintenance organizations, property casualty insurers, or other entities that also sell health products. This could create different rules for different entities offering health products and an unlevel playing field. To avoid this outcome, the Division may want to consider limiting the scope or delaying the effective date of this regulation.

Property/Casualty Practice Comments

We understand from prior hearings on this topic that the Commissioner is interested in comments regarding similar regulation on property and casualty (P/C) lines of business. There are many differences in products, practices, laws, and regulations that should be considered when contemplating similar regulation for property and casualty lines of business. We include a few considerations here and welcome the opportunity to provide actuarial perspective in the future as these regulations are being developed.

Definition of External Data and Traditional Underwriting Factors
The definition of "External Consumer Data and Information Source" (ECDIS) and "Traditional Underwriting Factors" is drafted to consider life insurance practices. As regulation is developed to consider property and casualty insurance practices, we observe that most data used for property and casualty insurance practices could at least potentially result in unfairly discriminatory insurance practices, even if unintended. Therefore, a broad definition that would include regulation of most data used by P/C insurers may be appropriate.

Rate Filing Process
Proposed regulation for lines of business that already have an existing regulation regarding rate filing and review, such as private passenger auto (PPA) and homeowners (HO), should consider any potential conflicts or overlapping requirements with these existing regulations. For example, if certain documentation regarding data sources, algorithms, and predictive models have already been provided to the Division via the rate filing process, that information may not need to be captured as part of this process, or vice versa.

Multiple Lines of Business
We recognize that different insurance products have their own unique features—including homeowners, renters, condos, private passenger auto, motorcycle, and umbrella. As regulation develops, these unique characteristics between various property and casualty products should be examined, especially with respect to the definition of Traditional Underwriting Factors.

As the DOI considers proposed regulations pertaining to P/C lines of business, we suggest reviewing the Academy's recently published Issue Brief, "**P/C Issue Brief Addresses Approaches to Identify, Mitigate Bias**."

Final Comments

The following sections from the Academy's February 4, 2022, letter contain additional considerations related to reviewing protected classes:

- o Develop Rules that Reflect Intersectionality and Interconnectedness of Protected Classes
- o Consider Frequency of Refreshing Data on Protected Classes
- o Data Collection Considerations
- o Class Definition Considerations
- o Small Companies—Consideration may be desirable for smaller insurers, which could have additional challenges in complying with the regulations, due to credibility and practical limitations (among others).

We suggest consistent applicability across lines of business so that products offered by different types of insurers are similarly impacted. Specifically, ensuring that the impacts to any products are the same regardless of whether they are sold by a Life, Health or P/C Insurer, etc.

The American Academy of Actuaries appreciates this opportunity to provide comments to the Colorado Division of Insurance. We hope these observations are helpful and, as you undertake the stakeholder engagement process to implement C.R.S. § 10-3-1104.9, we would welcome the opportunity to discuss these comments with you directly. In the meantime, if you have any questions, please contact Matthew Sonduck, the Academy's director of public policy, at sonduck@actuary.org, or Amanda Barry-Moilanen, the Academy's life policy analyst at barrymoilanen@actuary.org.

Sincerely,

Sue Bartholf, MAAA, FSA
Chairperson, Life Underwriting and Risk Classification Work Group

Kirsten Pedersen, MAAA, FSA
Chairperson, SB21-169 Subgroup
Life Practice Council

Annette V. James, MAAA, FSA, FCA
Chairperson, Health Equity Committee
Health Practice Council

Lauren Cavanaugh, MAAA, FCAS
Chairperson, Committee on Equity and Fairness
Casualty Practice Council