

What New Conn. Insurance Bulletin Means For Data And AI

By **Elizabeth Retersdorf, Ashley Dubin and Damian Privitera** (April 18, 2024)

On Feb. 26, the Connecticut Insurance Department issued Bulletin No. MC-25 on the use of artificial intelligence systems by insurers.

The Connecticut bulletin replaces the CID's April 20, 2022, notice concerning the usage of big data and avoidance of discriminatory practices, and largely adopts the National Association of Insurance Commissioners' recent model bulletin on the use of AI systems by insurers, issued on Dec. 4, 2023, with a few Connecticut twists.

Consistent with the stated views of the NAIC, the Connecticut bulletin emphasizes that Connecticut has the power to regulate insurer use of AI through existing statutes and regulations, including anti-discrimination laws and those that prohibit unfair practices by insurers in their adoption of new technologies.

Thus, without passing any new laws or promulgating new regulations, the Connecticut bulletin serves to put insurers on notice of how the CID intends to apply and enforce the legal authorities already at its disposal.

Notably, this Connecticut bulletin marks a potential deviation from the CID's 2022 notice, which focused on insurer use of data, a subject on which the final NAIC bulletin was more restrained.

Apart from a few other stylistic, immaterial differences, and the insertion of the Connecticut-specific legal authority for the guidance, the Connecticut bulletin "aligns Connecticut with the [NAIC Bulletin]," according to CID's press release.

This means the Connecticut bulletin carries over the extensive artificial intelligence system program guidelines, guidelines on third-party AI systems and data, and regulatory oversight and examination considerations that were contemplated under the NAIC bulletin.

The Connecticut bulletin primarily deviates from the NAIC bulletin with respect to the CID's continued requirement for an annual certification. The CID was one of the first-moving states with respect to explicit regulation of insurers' use of big data and AI.

Prior to adoption of its bulletin, the CID issued and amended a notice concerning use of big data. In its first iteration, dated April 14, 2021, the notice focused on reminding insurers of their obligations with respect to compliance with anti-discrimination laws and the implications that usage of so-called big data had with respect to those laws — basically a reminder that the CID was watching.

Its 2022 notice took it up a notch, adding a compliance requirement, an annual data certification. The certification form required insurers acknowledge: (1) that there is an established process concerning third-party-derived data, (2) that "all data used to build models or algorithms" will be provided to the CID upon request, and (3) that the entity or



Elizabeth Retersdorf



Ashley Dubin



Damian Privitera

certificate signer will maintain the necessary records, schedules and data to support the certificate for a commercially reasonable time.

While arguably simple to submit, the certification indicated a possible intent by the CID to delve deep into insurers' use of big data, including when that use was of third-party models — a potentially onerous ask on insurers.

This focus on big data was noticeably absent from the December 2023 NAIC bulletin, which removed big data from its definitions and inclusion within "AI Systems."

And now, in adopting the NAIC bulletin, Connecticut has at least nominally followed suit. The CID's 2022 notice's "Data Certification" has now been replaced with an "Artificial Intelligence Certification" in the Connecticut bulletin, and the substantive difference in these certifications suggests the possibility of a change in focus.

Pursuant to the data certification process under the 2022 notice, insurers were required to certify that "all data used to build models or algorithms will be provided to the CID upon request."

By contrast, the new artificial intelligence certification requires insurers to certify either that (1) the insurer is not currently using any AI systems; or (2) the insurer's use of AI is substantially consistent with the guidance, either because the insurer has a written program established, is currently establishing a written program or (3) is able to demonstrate compliance with the Connecticut bulletin through alternative means.

While the artificial intelligence certification does include a certification that the insurer will make available all information and documentation requested consistent with Section 4 of the Connecticut bulletin, the information sought by the CID no longer explicitly includes the underlying data used to build AI and data models.

The CID bulletin's more fleshed-out framework and annual certification may seem burdensome, but it has the potential to protect insurers from looming requirements imposed by the Connecticut state Legislature.

This is because in addition to the CID's regulatory framework, the Connecticut Legislature has shown its own interest in regulating AI. First, Public Act No. 23-16 was signed into law last year on June 7, 2023, and focuses on enhancing personal data privacy protections and governance in automated decision-making processes, affecting insurers by setting standards for the ethical use and management of personal data used by Connecticut state agencies.

Public Act 23-16 requires the state Department of Administrative Services to annually inventory AI systems in use by state agencies, including: (1) their name and vendor; (2) their general capabilities and uses; (3) whether they were used to independently make, inform or materially support a conclusion, decision or judgment; and (4) whether they underwent an impact assessment prior to implementation.

The act also requires the DAS to perform ongoing assessments of AI systems in use by state agencies to ensure they do not result in unlawful discrimination or disparate impact.

It stands to reason that the CID, facing such an annual inquiry and ongoing assessment requirement itself, may have felt compelled to push similar requirements down to regulated insurers via the CID bulletin. Indeed, adjacent financial industries have also been seeing such knock-on effects where regulators require the industries they regulate to share the

burden of complying with AI oversight and assessment.

Second, and most recently, S.B. 2 was introduced in the February session, which provides a comprehensive legislative framework aimed at regulating the development, deployment and use of AI systems to make consequential decisions in insurance services, among others, with an emphasis on ensuring transparency, accountability and consumer protection.

The proposed language in S.B. 2 requires AI developers and deployers of high-risk AI systems to, in part, use reasonable care to protect consumers from known or reasonably foreseeable risks of algorithmic discrimination.

S.B. 2 introduces requirements resonating with the bulletin's principles, focusing on the responsible use of AI, especially in high-risk decision-making scenarios, while following a similar tactic of reemphasizing the existence of consumer protection laws that are technology-neutral and designating violations as Connecticut Unfair Trade Practices Act violations.

Unlike the NAIC and CID bulletins, however, S.B. 2 creates an explicit enforcement action, by law, via the Connecticut attorney general or commissioner of consumer protection, as well as the Commission on Human Rights and Opportunities, for violation of the requirements set forth in the prospective statute.

But S.B. 2 also provides that adherence to certain risk mitigation frameworks for AI systems shall be an affirmative defense in these actions. Specifically, compliance with "any risk management framework for artificial intelligence systems designated by the ... Insurance Commissioner if the developer or deployer is regulated by the ... Insurance Department" will serve as an affirmative defense.

In other words, compliance with the bulletin should, if S.B. 2 is passed, in effect constitute compliance with state law, and violation will expose insurers to actions by state actors other than the insurance commissioner, including by those actors on behalf of individuals.

Thus, while the NAIC bulletin leaves a lot of wiggle room for adopting states to enforce it as they see fit, insurers would be wise to prepare for the CID's approach to AI and big data to remain consistent with its previous approach under the 2022 notice and data certification.

Although the glaring absence of any focus on big data in the CID's adoption of the NAIC bulletin does leave open the possibility that its approach will change.

Regardless, insurers should keep a close eye on the CID's enforcement of its new bulletin, especially in view of the potential impact compliance will have on compliance with other potential statutes, as the Connecticut legislature has certainly demonstrated its interest in staying relevant in the conversation about regulating AI.

Elizabeth P. Retersdorf is a partner, and Ashley Picker Dubin and Damian Privitera are counsel, at Day Pitney LLP.

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