Title of Exposure Draft:

Comment Deadline: [Month, Day, Year]

Instructions: Please review the exposure draft, and give the ASB the benefit or your recommendations by completing this comment template. Please fill out the tables within the section below, adding rows as necessary. Sample for completing the template provided at the following link: http://www.actuarialstandardsboard.org/email/2020/ASB-Comment-Template-Sample.docx

Each completed comment template received by the comment deadline will receive consideration by the drafting committee and the ASB. The ASB accepts comments by email. Please send to comments@actuary.org and include the phrase 'ASB COMMENTS' in the subject line. Please note: Any email not containing this exact phrase in the subject line will be deleted by our system's spam filter.

The ASB posts all signed comments received to its website to encourage transparency and dialogue. Comments received after the deadline may not be considered. Anonymous comments will not be considered by the ASB nor posted to the website. Comments will be posted in the order that they are received. The ASB disclaims any responsibility for the content of the comments, which are solely the responsibility of those who submit them.

I. Identification:

Name of Commentator / Company
National Council of Insurance Legislators (NCOIL)

II. ASB Questions (If Any). Responses to any transmittal memorandum questions should be entered below.

Question No.	Commentator Response

III. Specific Recommendations:

Section # (e.g. 3.2.a)	Commentator Recommendation (Please provide recommended wording for any suggested changes)	Commentator Rationale (Support for the recommendation)
2.8, 3.2.8, 3.4, 3.5	Delete in their entirety	See comment below in "commenter rationale."
Current sections 3.2.2, 3.2.5	Reinstate sections 3.2.2 and 3.2.5 of current ASOP 12 in their entirety	See comment below in "commenter rationale."

IV. General Recommendations (If Any):

Commentator Recommendation (Identify relevant sections when possible)	Commentator Rationale (Support for the recommendation)
Delete sections 2.8, 3.2.8, 3.4, 3.5. Reinstate sections 3.2.2, 3.2.5.	NCOIL, speaking on behalf of the state legislators who write the laws governing discrimination in insurance risk classification, respectfully expresses its strong concern that the Draft, if adopted, would encourage practices inconsistent with state insurance codes and undermine legislative authority.

	Section 3.2.5 of the current ASOP 12 is entitled "Applicable Law." It plainly establishes that the state rating statutes are the starting point for, and control, the work of actuaries in risk classification. But "applicable law" is no longer a subject heading in the Draft. Instead, the exposed document in a new Section 3.2.8 lumps the term "applicable law" into a list with "applicable . . . business" and "industry practices," under the general heading "External Environment." This is troubling: The insurance code is not just one of many "external influences" to be "taken into account." It is a standalone, non-negotiable umbrella over the entire process. The term "applicable law" is also found in the Draft's newly created sections of "potential for unintended bias" (Sec. 3.4) and "protected classes" (Sec. 3.5), which are the heart of the proposed revisions. No state statute that we are aware of encompasses the concept of "unintended bias." Instead, the basic framework of the state unfair discrimination law is that price must correlate to risk and the expected cost of providing insurance coverage, with statutorily enumerated exceptions that prohibit discriminatory treatment via the use of protected classes even if they are predictive. The way that "unintended bias" is defined—"impacts or outcomes . . . not intentionally designed to result in such impacts or outcomes"—and used—"the actuary should consider the potential for unintended bias"—strongly suggests a disparate impact standard, which exists in no state insurance code. Instead, state insurance discrimination statutes follow the basic framework described above—risk-based pricing with discretely enumerated prohibitions on the use of certain factors. For instance, under the 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. . . . Risks may be classified in any way except that no risk may be classified on the basis of race, color, creed, or national origin." And "proxy discrimination" is tightly defined as "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." The NAIC Property and Casualty Model Rating Law #1775 similarly instructs that "Unfair discrimination exists, if after allowing for practical limitations, price differentials fail to

	reflect equitably the differences in expected losses and expenses. A rate is not unfairly discriminatory if it is averaged broadly among persons insured under a group, franchise or blanket policy or a mass marketed plan. . . . No risk classification, however, may be based upon race, creed, national origin, or the religion of the insured." Protected class discrimination is well and simply defined in State law. But the Exposure at Section 3.5 creates a new heading regarding "Protected Classes" which appears to be designed to import new legal standards without the assistance of elected legislators. While this new provision recites the truism that "The actuary must follow applicable law regarding prohibited impacts or outcomes on risk subjects in protected classes," the text of subsections (b) and (c) elaborates that this includes: "b. how unintended bias is treated under applicable law, if applicable; and c. how methods for estimating the impact of the risk classification framework on protected classes are addressed under applicable law, if applicable." But unintended bias is not cognizable under state insurance law; nor is "impact" on protected classes. This is contrary to all relevant state law authority, which govern treatment, not impact. As the NAIC explained to the Supreme Court: "In insurance, discrimination is not necessarily a negative term so much as a descriptive one. For instance, fair discrimination is not only permitted, but necessary. . . . Unfair discrimination occurs when an underwriting decision is based on race. . . . Unfair discrimination also occurs when there is not statistical support for an underwriting decision. . . . The assertion of claims which may use the 'disparate impact' theory . . . overthrows state laws . . . that allow insurers to use rationally based, neutral underwriting guidelines." 1996 WL 33467770. *See also Thompson v. IDS Life Ins. Co*., 274 Or. 649, 654 (1976) ("The Insurance Commissioner is instructed to eliminate unfair discrimination, whereas the Public Accommodations Act prohibits all discrimination. The reason for the different standards…is that insurance…always involves discrimination…based on statistical differences and actuarial tables. The legislature specifically intended…to only prohibit unfair discrimination in the sale of insurance policies."); *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.").

	(We note that whether disparate impact is cognizable under the Federal Fair Housing Act is currently being litigated in the courts with respect to property insurance lines only. We also note that the recent Colorado statute governing unfair discrimination does not establish a disparate impact standard but instead requires verification that, if a protected class pays higher rates on average, those rates correlate to risk.) Just as the Draft removed the core heading "Applicable Law," it also deletes the existing section 3.2.2, entitled "Causality," which crisply summarizes controlling law: "While the actuary should select risk characteristics that are related to expected outcomes, it is not necessary for the actuary to establish a cause and effect relationship between the risk characteristic and expected outcome in order to use a specific risk characteristic." *See, e.g., Dept. of Ins. v. Ins. Services Ofc.*, 434 So.2d 908, 912-913 (Fla. App. 1983) (rejecting the regulator's argument that "a rating factor will be deemed unfairly discriminatory and inequitable unless it has a causal connection to expected losses"; applying the rule that "the most equitable classification factors are those that are the most actuarially sound"; and approvingly noting that the department had "historically…measure[d] the equitableness of a rating factor by its predictive accuracy"). The Draft replaces ASOP 12's plainly stated, objective standard based on controlling law with a new, subjective measure at Section 3.2.3: "The actuary should have a rational explanation that the relationship between a risk characteristic and a risk measure is not obscure, irrelevant, or arbitrary; however, the actuary is not required to demonstrate a causal relationship. In some cases, the actuary may lack clear evidence or face other practical impediments to demonstrate a consistent relationship between risk characteristics and a risk measure. In such circumstances, the actuary may use professional judgment to select risk characteristics. Whether it is appropriate to use a risk characteristic may depend on societal, regulatory, and industry practices or may depend on the scope and context of the actuary's work." This replaces an objective legal rule with a new and unprecedented subjective standard. The "rational explanation" standard comes from an NAIC white paper never subject to codification or any democratic lawmaking process. As a result, it has no legal authority, and utilization of it conflicts with or seeks to supersede existing law as adopted through the democratic processes by elected officials. And the Draft, with its reference to "societal, regulatory, and industry practices," again encourages actuaries to stray far from constitutionally established lawmaking in applying the unfair discrimination statutes,

	which are the purview of the people's elected representatives. NCOIL is not unaware of the substantial interest in issues like unintended bias, impact on protected classes, and causality amongst actuaries. These are important subjects for vigorous debate. And they have been for many years, including since the formation of special committees on race in insurance underwriting at NAIC and NCOIL in 2020, and debates in legislatures over bills such as the new law passed in Colorado. Not one of these processes has produced a state law, or even a model law, which recognizes unintended bias, disparate impact, and causality as a legal standard. And legal standards, as the current ASOP 12 and even the Exposure, recognize, control insurer risk discrimination practices. White papers and principles documents are not law, and are not authority. If supporters of such documents wish to attempt to codify them, there are many avenues to attempt to do so. This is the way to establish controlling standards. NCOIL respectfully subjects that is not appropriate for an ASOP to attempt to circumvent the codification process. The NCOIL special committee process included multiple hearings totaling 13 hours, with testimony from experts from across the spectrum, including actuaries, consumer representatives, industry trade associations, and other leaders in the field. The committee's extensive fact finding and deliberations produced a definition and prohibition on proxy discrimination which precisely addresses and prohibits exactly the main scenario described by leading consumer representatives as the primary danger posed by the use of artificial intelligence/machine learning. We respectfully suggest that the ASB advocate for passage of this measure in the States rather than seeking to create new standards that do not have the appropriate legislative foundation.

V. Signature:

Commentator Signature	Date
Will Melofchik, NCOIL General Counsel	May 1, 2024