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Via Email to: rulescoordinator@oic.wa.gov

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RE: Office of the Insurance Commissioner (the "OIC") Matter R 2021-07 (WSR 21-26-1260) CR-102 Written Testimony

Mr. Forte:

On behalf of the American Property Casualty Insurance Association (APCIA), please accept this written testimony in response to the CR-102 Notice of Rulemaking to ban indefinitely, and in no event for fewer than three years, the use of credit history to determine rates, premiums, or eligibility for coverage for private passenger automobile and homeowner's insurance, which was issued by the OIC on October 6, 2021 (the "Proposed Rule"). Although we will not repeat in this letter APCIA's previous comments in connection with the CR-101 Notice and the two Stakeholder Drafts, we request that the OIC reconsider its decision not to include most of the changes suggested in the foregoing comments. We incorporate those previous comments herein by reference, and we have included them as Exhibits A, B, and C to this comment letter to ensure that all three are part of the agency record.

Also attached as Exhibits D, E, and F are: 1) Motion for Summary Judgment filings submitted by APCIA and co-petitioners Professional Insurance Agents of Washington and Independent Insurance Agents and Brokers of Washington in the Thurston County Superior Court proceeding challenging the validity of the emergency rules previously adopted by the Insurance Commissioner temporarily banning credit scoring (the "Emergency Rules"), which detail, among other things, the history of the Insurance Commissioner's prior failed efforts to convince the Washington Legislature to ban the use of credit history in insurance; 2) the summary judgment filings in the Thurston County Superior Court proceeding submitted by intervenor and co-petitioner National Association of Mutual Insurance Companies (NAMIC); and 3) the October 28, 2021 decision of the Thurston County Superior Court granting the motions for summary judgment and enjoining the OIC and the Insurance Commissioner from implementing and enforcing the Emergency Rules.[1]

[1] The OIC adopted the original Emergency Rule on March 22, 2021 and re-adopted the same Rule on July 15, 2021. Both Rules were declared invalid by the October 28 decision.

For all the reasons discussed below, the OIC should not adopt the Proposed Rule. These reasons are of two distinct types: 1) reasons that apply to the substance of the Proposed Rule; and 2) reasons that apply to procedural irregularities associated with the Proposed Rule.

I. SUBSTANTIVE OBJECTIONS TO THE PROPOSED RULE

A. The Commissioner's Proposed Rule violates the separation of powers as it usurps the Legislature's role in enacting substantive public policy.

An agency rule is invalid if the rule is unconstitutional (RCW 34.05.570(2)(c)). An administrative rule cannot suspend, amend, or repeal a law, as such authority can never be delegated by the Legislature. *Diversified Investment Partnership v. Dept. of Social and Health Services*, 113 Wn. 2d 19, 24, 775 P.2d 947 (1989); *City of Union Gap v. Carey*, 64 Wn.2d 43, 49, 390 P.2d 674 (1964). The Proposed Rule would suspend the use of credit history indefinitely and in no event for fewer than three years. The Commissioner and the OIC are constitutionally prohibited from taking such action, and the Proposed Rule should, therefore, be withdrawn.

B. The Proposed Rule exceeds the Commissioner's and the OIC's statutory authority.

The OIC should withdraw the Proposed Rule because it exceeds the OIC's and the Commissioner's statutory rulemaking authority to implement the use of credit history in setting rates and eligibility for personal lines coverage. *See* RCW 48.18.545(7), RCW 48.19.035(5), and the following:

1) An agency rule is invalid if it is contrary to law or exceeds the agency's authority. RCW 34.05.570(2)(c); *Lake Union Drydock Co. v. State, Dep't of Natural Resources,* 143 Wn. App. 644, 651-52, 179 P.3d 844 (2008). An administrative action is contrary to law when it exceeds the agency's authority or violates rules governing its exercise of discretion. *See LaRose v. Dep't of Labor and Industries*, 11 Wn. App. 2d 862, 883, 456 P.3d 879 (2020) (agency rule is invalid if it exceeds the statutory authority of the agency). *See also Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 97, 11 P.3d 726 (2000). Any rule purporting to take such action is invalid. *Swinomish Indian Tribal Comm. v. Washington State Dep't of Ecology*, 178 Wn.2d 571, 580-81, 311 P.3d 6 (2013); *see also Center for Biological Diversity v. Dep't of Fish and Wildlife*, 14 Wn. App. 2d 945, 968-74, 474 P.3d 1107 (2020) (ruling that agency exceeded statutory authority). A regulation also is invalid if it is inconsistent with the statute under which it was promulgated. *Postema*, 142 Wn.2d at 83.

   RCW 48.18.545(4) provides that "[a]n insurer *may use credit history* to deny personal insurance . . ." in combination with other substantive underwriting factors (emphasis added). *See also* RCW 48.19.035(2)(a) (authorizing use of credit history to determine

personal insurance rates, premiums, or eligibility for coverage provided insurance scoring models are filed with the Commissioner). In contradiction of this clear mandate, the Proposed Rule states that "[f]or all homeowners and private passenger automobile coverage issued in the State of Washington, insurers *must not use credit history* to determine personal insurance rates, premiums, or eligibility for coverage." WAC 284-24A-090(3) (emphasis added). There is no way to reconcile the authority granted by the statutes with the prohibition imposed by the Proposed Rule, and the Rule should, therefore, be withdrawn.

In addition, the Proposed Rule far exceeds the general authority of the Commissioner found in RCW 48.02.060(3)(a), which merely authorizes the Commissioner to make "reasonable rules necessary for *effectuating*" any provision of the Insurance Code. The Commissioner has suggested that the overall statutory scheme of the Insurance Code gives him broad authority to adopt regulations such as the Proposed Rule to ensure compliance with all provisions of the Code. This rationale cannot justify an agency rule that purports to prohibit indefinitely a practice expressly authorized by the Washington Legislature, one that the Legislature has purposefully declined to prohibit on a number of occasions. *See Sim v. Washington State Parks and Recreation Commission*, 94 Wn.2d 552, 617 P.2d 1028 (1980); *Kim v. Pollution Control Hearing Bd.*, 115 Wn. App. 157, 61 P.3d 1211 (2003).

2) The Commissioner also lacks the authority to require affiliates or group member companies of an insurer subject to the Proposed Rule to provide quotes or coverage, or both, for an insured of the subject insurer even if the insured does not meet the non-credit history underwriting criteria of the affiliate or group company. Yet, that is exactly what the Proposed Rule purports to do. *See* WAC 284-24A-090(7)(b). This would not be required if the same insured sought a quote from an unaffiliated or non-group company. The result is that the Commissioner is picking winners and losers among insurers (which he has no authority to do), leading to a less competitive marketplace to the detriment of consumers.

3) New section WAC 284-24A-090(4)(b) in the Proposed Rule prohibits the use of credit history to determine a consumer's eligibility for any payment plan whatsoever. This provision of the Proposed Rule is beyond the scope of the Commissioner's authority because it interferes with and materially alters the financial relationship between the consumer who has the right to determine how to pay for coverage and the insurer who has the right to determine what forms of payment are acceptable. The necessary corollary is that the Commissioner's authority is limited to determining eligibility for coverage and the rates based on which the resulting premium is calculated; it does not extend to regulating how a consumer chooses to pay or finance that premium or the forms of payment acceptable to the insurer.

The Proposed Rule is inconsistent with the statutes authorizing use of credit history and is beyond any statutory authority conferred on the Commissioner or the OIC. For these reasons, the Rule should be withdrawn.

C. The Proposed Rule is based on an incorrect and unsupported understanding of the impact of the CARES Act on credit-based insurance scores.

The Commissioner's position that the CARES Act (P.L. 116-136) creates actuarial unfair discrimination allegedly resulting from the use of credit scoring is based on speculation, faulty assumptions and a lack of understanding of the status—following the end of the pandemic national emergency—of accommodations granted under the CARES Act.

First, the Commissioner has failed to develop any credible evidence to support his statement that "[t]he result of the CARES Act is that all credit bureaus are collecting a credit history that is *objectively inaccurate* for some consumers and therefore results in an unreliable credit score being assigned to them . . . ." (Emphasis added). The adoption of the Proposed Rule would, therefore, be based purely on conjecture. For a detailed discussion of the types of analyses that the OIC should have, but has not, conducted, attached hereto as part of Exhibit "E " is the Declaration of Nancy Watkins ("Watkins Dec.") submitted by NAMIC in connection with its Motion for Summary Judgment in the Thurston County Superior Court proceeding challenging the Commissioner's Emergency Rules banning credit scoring. Ex. E at E082 (¶ 11), E91-96 (¶¶ 32-44).[2]

In addition to the lack of an analytical or evidentiary basis, the OIC's incorrect understanding of the CARES Act and related federal agency guidance is reflected in the OIC's faulty rationale that the use of credit-based insurance scoring results in "unfairly discriminatory" rates in the actuarial sense because credit scoring treats persons with negative credit history resulting from the pandemic differently from persons with negative credit history pre-pandemic. To this assertion, we offer the following response:

1) Washington's statutory rating standard states that premium rates for insurance shall not be "excessive, inadequate, or unfairly discriminatory." RCW 48.19.020. "Unfairly discriminatory" is defined as charging different premiums for insureds having substantially like risk, exposure factors, and expense elements. RCW 48.18.480. In contrast, nowhere does the Insurance Code state or suggest that "unfair discrimination" in the actuarial sense can be displaced or materially modified by "unlawful discrimination" in the sense of treating a person or group of persons in a protected class

[2] This comment letter incorporates various arguments made and documents proffered in the recent Thurston County Superior Court challenge of the Emergency Rules, which led to their invalidation for the Commissioner's failure to establish good cause. The Emergency Rules and the Proposed Rule are substantially similar, which makes incorporation necessary and appropriate.

less favorably than others because of their membership in the class. The purpose of the prohibition of "unfairly discriminatory" rates in the actuarial sense, as expressed in the rating standards at RCW 48.18.480, RCW 48.19.020 and RCW 48.19.030, among others, is to prohibit rates that treat persons with similar risk profiles differently. *See also* Watkins Dec., Ex. E at E88-89 (¶¶ 26-27). The goal is to ensure that rates are fair to consumers based on the risks they present and adequate to support insurer solvency. To insert considerations of "unlawful discrimination" into "actuarially-based unfairly discriminatory" rates would require thoughtful amendments to the Insurance Code, which are not within the Commissioner's rulemaking authority.

2) The Proposed Rule is based on a misunderstanding of the credit accommodations addressed by the CARES Act. The OIC asserts in support of the Proposed Rule that credit protections provided for by the CARES Act have caused credit reporting to become inaccurate as to certain consumers, leading to actuarial unfair discrimination between those who have been granted credit-related accommodations pursuant to the CARES Act (thereby causing their credit ratings to be artificially and inaccurately inflated) and those who have not (whose credit ratings remain accurate). According to the OIC, insurers' credit scoring models relying on this data will lead to lower premiums being charged to those who have received accommodations even though their "true" credit profiles would not actuarially justify the lower amount.

   But the OIC's evidence-free speculation rests on a complete misconstruction of the CARES Act and a fundamental misunderstanding of the credit-reporting industry. Specifically, the OIC's position ignores that both before and after the CARES Act was passed, creditors extended forbearance and deferrals to consumers and thereafter reported such deferrals to credit-reporting agencies as current. Nothing in the CARES Act required creditors to change this practice during the pandemic, and there is nothing unique to the CARES Act in this respect to warrant the extreme action proposed by OIC.

   Public statements from key players in the credit reporting industry confirm that OIC's position rests on factually inaccurate premises. At the outset of the COVID-19 pandemic—and roughly two weeks before passage of the CARES Act—the Consumer Data Industry Association ("CDIA")[3] issued public guidance for consumers impacted by the pandemic. ("CDIA Consumer Guidance").[4] The CDIA Consumer Guidance noted,

[3] CDIA represents all categories of consumer reporting agencies, both nationwide, regional, and specialized. In that role, CDIA provides compliance guidance and resources regarding the plethora of related federal regulations and statutes for consumers and the credit-reporting industry.

[4] "Helping Consumers Avoid Credit Problems if They Have Been Impacted by Coronavirus (COVID-19)" available at https://www.cdiaonline.org/wp-content/uploads/2020/03/CDIA-NEWSCoronavirus-The-Credit-Bureaus-Response_3.15.2020.pdf. Exhibit G hereto.

among other things, that "nationwide credit bureaus long ago put systems in place to accept reporting from lenders and creditors to handle mass events like Coronavirus." *Id*. at 2. Under these long-existing systems, the Guidance continued, "[w]hen a consumer is in a deferred payment or forbearance program reported to a credit bureau, or with a natural disaster code, there is no negative scoring impact." *Id*. at 3. As such, the Guidance cited statements made by the "country's leading score developers" for the pre-CARES Act proposition that "forbearance and deferred payment scenarios have a neutral impact on a consumer's credit score." *Id*. And, this is true whether the forbearance or deferred payment accommodation was granted before, during, or after the Coronavirus.

The CDIA Consumer Guidance cited to separate industry-facing guidance the CDIA had prepared approximately a week earlier, on March 9, 2020 ("CDIA Industry Guidance," Exhibit H). That Guidance reminded lenders that the long-existing credit-reporting systems utilize specific codes that creditors can enter to report forbearances, deferrals and other "natural or declared disaster events."[5] In particular, the CDIA Industry Guidance referred lenders to FAQs prepared by the CDIA that describe specific Comment Codes that creditors can enter to report borrowers in forbearance (CP), deferral (D), and affected by a natural disaster (AW).[6] These FAQs also instruct creditors to separately enter Account Status Code 11, *i.e*., "Current account." That is, prior to the CARES Act, the industry standard for deferred and forborne accounts was for the creditor to advise the reporting bureaus that the account was "Current" and to enter a comment code regarding the accommodation.

Industry reports indicate that this process continued unchanged after the CARES Act required Coronavirus accommodations to be reported as "Current." Shortly after the CARES Act was enacted, the CDIA issued "CARES Act Reporting Guidelines". Those Guidelines recommend that, consistent with the statute, creditors should enter Account Status Code 11, *i.e*., "Current account" during any accommodation period. They further advise that creditors using FAQ 44 (Deferred), FAQ 45 (Forbearance) or FAQ 58 (Natural Disaster) comment codes "should do so in accordance with the CARES Act amendment

[5] "Reporting information on consumers (1) for accounts affected by natural or declared disaster, or (2) accounts in forbearance from a natural or declared disaster, or for other reasons."

[6] FAQ 45, titled "How should accounts in forbearance be reported" is available at https://crrg.s3.amazonaws.com/2020+CRRG/FAQ+45.pdf, Exhibit I; FAQ 58, titled "What are the available options for reporting an account affected by a natural or declared disaster?" is available at https://crrg.s3.amazonaws.com/2020+CRRG/FAQ+58.pdf, Exhibit J; FAQ 58, in turn, refers to FAQ 44, titled "How should deferred loans be reported," which is available at https://www.m2reporter.com/uploads/1/7/4/9/17495243/2019_faq.44.pdf, Exhibit K.

to the FCRA as outlined above."[7] Notably, FICO issued an industry-facing statement around the same time referring to the same Comment Codes (*i.e.*, D, AW, and CP): "None of the common CARES Act-related reporting scenarios listed below will affect a consumer's FICO Score."[8] In short, industry publications indicate that creditors furnished the same information respecting accommodations both before and after passage of the CARES Act, and that such reporting codes had similar impacts on credit scoring both before and after the CARES Act was passed. Consequently, the Commissioner's position that persons with negative credit history resulting from the pandemic are treated differently from persons with negative credit history pre-pandemic is patently erroneous.

Assuming for the sake of argument that there is differential treatment of consumers based upon whether their negative credit events occurred prior to or during the pandemic, the OIC's assertions about actuarial unfair discrimination rest on the erroneous premise that negative credit events occurring as a result of the pandemic are the same as other negative credit events. But, as a matter of federal law, the opposite is true: Congress adopted the CARES Act in recognition of the economic impact of the pandemic on consumers and that consumers would not be suffering these negative credit events but for the pandemic. When Congress has determined as a matter of federal law that consumers with credit events resulting from the pandemic are different, it is "fair," indeed required as a matter of federal law, to treat these consumers differently. There is no question of "inaccuracy"; those consumers' credit histories must be, and are, accurate under federal law. Accordingly, they are not similarly situated with consumers who have not received accommodations for non-pandemic-related negative credit events. There is, therefore, no actuarial unfair discrimination in treating these two categories of consumers differently (to the extent

[7] The CARES Act Reporting Guidelines are available at https://cdia-news.s3.amazonaws.com/COVID-19/CRA+Data+Reporting++COVID-19+CARES+Act+Guidance+4-2-2020-2.pdf; Exhibit L.

[8] That FICO statement, titled "Credit Reporting in the U.S. During the COVID-19 Pandemic," is available at https://www.fico.com/en/covid-19-credit-reporting-impact-US. Exhibit M. In a consumer-facing statement, FICO reiterated: "The placement and reporting of an account in forbearance or a deferred payment plan in and of itself does not negatively impact a FICO® Score. This holds true with all versions of the FICO Scores." That FICO statement, titled "Protecting Your Credit during the Coronavirus Outbreak," is available at https://www.fico.com/blogs/protecting-your-credit-during-coronavirus-outbreak. Exhibit N.

that they are being treated differently, which the OIC has not shown), when pricing insurance and determining eligibility for coverage. [9]

3) When the CARES Act expires, consumers will not lose the benefit of any accommodations, and lenders may not retroactively add a delinquency status for the Accommodation Period. Thus, the "flood" of negative credit history that the OIC asserts will transpire when the protections of the CARES Act expire will not occur.

The Consumer Financial Protection Bureau's (CFPB) Consumer Reporting FAQs Related to the CARES Act and COVID-19 Pandemic, FAQ No. 10 (Exhibit O hereto) states: "The consumer reporting protections of the CARES Act continue to apply to the time period that was covered by the accommodation after the accommodation ends. Assuming payments were not required or the consumer met any payment requirements of the accommodation, a furnisher cannot report a consumer that was reported as current pursuant to the CARES Act as delinquent based on the time period covered by the accommodation after the accommodation ends. A furnisher also cannot advance[10] the delinquency of a consumer that was maintained pursuant to the CARES Act based on the time period covered by the accommodation after the accommodation ends." Thus, once an accommodation has been granted, the borrower must be reported as current during the entirety of the accommodation period. After the accommodation period lapses, the borrower can be reported as delinquent if the borrower thereafter misses a payment, but the prior reporting as to prior accommodations cannot change.

The CFPB's conclusion is consistent with a natural reading of the CARES Act's amendment to the Fair Credit Reporting Act, found at 5 U.S.C. § 1681s-2(a)(1)(F). Indeed, a proper reading of the statute reveals that it is mistaken to frame the issue as "when the CARES Act expires." By its terms, the CARES Act amendment to the FCRA never expires. To be sure, the defined term "covered period" will have a finite endpoint, *i.e.*, 120 days after the COVID-19 national emergency terminates, but even after the "covered period" ends, the CARES Act will remain in effect. The term "covered period" merely helps to define the term "accommodation," *i.e.*, a creditor's agreement

[9] The same is true with respect to any form of debt (for example, federally-backed student loans) that the CARES Act requires be treated more favorably (for example, by mandating forbearance). Any differential treatment resulting from federal mandate cannot be considered "unfair discrimination" if, in fact, such differential treatment is actually occurring, which the OIC has failed to show. Indeed, to the extent that the CARES Act does not *mandate* accommodations for certain types of debt, private creditors are not precluded from granting accommodations, as has been done on a large scale.

[10] To "advance" a delinquency status is simply to extend its length (*e.g.*, changing a 30-day delinquency to 60 days) based upon a continuing failure to bring a debt current. The CARES Act does not permit such extensions based on the passage of time during the period of accommodation, either while the accommodation is in place or after it ends.

to defer/forbear/modify/grant any other relief to a consumer "who is affected by the coronavirus disease 2019 (COVID–19) pandemic during the covered period." *Id*. § 1681s-2(a)(1)(F)(i)(I). Thus, a creditor could continue for years to offer accommodations to a debtor who was affected by the pandemic during the "covered period". If so, those ongoing accommodations would continue to be reported as current.

But even if the CARES Act applies only to accommodations made during the covered period, the statutory obligation to report the accommodation as current never lapses. The "accommodation" is the agreement to forgive or forbear, for example, one or more payments. Once an "accommodation" is made with respect to a given credit obligation, the furnisher "shall report the credit obligation or account as current" (unless the obligation was already delinquent before the accommodation, in which case the furnisher must "maintain the delinquent status" for the duration of the accommodation). *Id*. § 1681s-2(a)(1)(F)(ii)(I),(II)(aa). The reporting obligation for the "accommodation," once granted, does not change under the statute and is not affected by the end of the "covered period"—the accommodation must always be treated the same way, *i.e.*, as current.

Thus, the OIC's postulated "flood" of negative credit information will never occur. As required by law, an accommodation must always be reported as though payments were made during the period of the accommodation agreed to by the creditor. If borrowers are delinquent after the accommodation period, then they will be reported as such, but the same would hold true if no accommodations were granted in the first place (or if the CARES Act were never passed).

The CDIA has issued Post-Accommodation Reporting Guidance (Exhibit P hereto), which confirms this interpretation: "For CARES Act Post-Accommodation credit reporting purposes, if the consumer was not responsible for payments or met any required obligations during the Accommodation period, the Account Status cannot advance upon the period ending. Accounts that were current must continue to be reported as current based on the Accommodation period timeframe." The CDIA piece later adds that "[i]t is important to remember that you should not update the Accommodation Payment History Profile entries post the Accommodation period."[11]

4) Contrary to the Commissioner's assumptions, there is evidence that the impact of the CARES Act and the financial relief afforded to consumers during the pandemic has *improved* the credit scores of many consumers. On September 29, 2021, the CFPB

[11] The Guidelines are available at https://cdia-news.s3.amazonaws.com/CARES+Act+Post-Accommodation+Reporting+Guidance.pdf.

issued its fifth biennial Consumer Credit Card Market Report to Congress, a summary of which is available at 86 FR 54681.[12] In its report, it touted the impact of the CARES Act and the related relief provided by credit card issuers, resulting in historically low account delinquencies:

> As the fifth biennial report to Congress on the credit card market, this report details how swift actions by both the public and private sectors likely impacted how many consumers used their credit cards and managed their debts during the pandemic. To address hardships caused by COVID–19, the Federal government provided consumers direct relief by issuing a series of economic impact payments, providing enhanced unemployment benefits, suspending student loan payments and interest accrual for federally held loans, offering mortgage forbearance, and enacting a moratorium on evictions. At the same time, credit card issuers provided voluntary relief to consumers by offering payment deferral and fee waivers. Supported by these efforts, this report finds that the decline in credit card debt during the pandemic was unprecedented in speed and magnitude. Measures of consumer stress, such as late payment incidence and the share of accounts delinquent, hit record lows.

The full report, in turn, noted that consumers of all credit standing took advantage of the deferral programs:

> Many consumers received some form of relief on their credit card debts from their credit card providers during the pandemic. The Bureau estimates that over 25 million consumer credit card accounts representing approximately $68 billion in outstanding credit card debt entered relief programs in 2020, figures vastly higher than in prior years. The Bureau also estimates that surveyed issuers' cardholders were able to forgo principal payments of anywhere from $0.5 billion to $1.5 billion against their credit card debts in 2020 due to these relief programs. Entries into payment deferral relief were spread fairly evenly across credit score tiers, but accounts held by consumers with lower scores received payment deferrals at the highest rate.

The report continued: "Research suggests that the Coronavirus Aid, Relief, and Economic Security Act's (CARES Act) forbearance provisions, in combination with income support programs and reduced consumption during the pandemic, accelerated a decline in the share of borrowers with subprime credit scores. This pronounced improvement in credit

[12] The full report is available on the CFPB website at https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

scores complicates analyses of credit measures using the above classifications during 2020."

The specific research the report cited—an April 30, 2021 Federal Reserve Report entitled Developments in the Credit Score Distribution over 2020[13]—noted a decrease in the number of subprime borrowers, an increase in credit scores in the subprime arena, and a decrease in subprime delinquencies. As to the credit scores in particular, "improvements in credit scores last year were concentrated at the bottom of the distribution. In particular, the sharp increases in the scores delineating the bottom decile and bottom quartile of this distribution indicate a clear break from trend shortly after the onset of the COVID-19 pandemic and its corresponding relief measures."

This data demonstrates that the CARES Act served its purpose and even exceeded expectations. The CARES Act cannot, then, justify drastic intervention on behalf of consumers with poor credit. If the Insurance Commissioner's concern is how credit-based insurance scores will fare once accommodations fall by the wayside, that concern is wholly speculative and unsupported by the facts. If falling scores were imminent, the Commissioner would need to establish that prospect, and he has not.

D. The Commissioner's invalid Emergency Rules resulted in rates that violated the rate standard of RCW 48.19.020, and the Proposed Rule will do so as well.

Even though the Emergency Rules were declared invalid, the rate filings that were modified based on those Rules remain in effect for the majority of insurers. When the Commissioner issued the first Emergency Rule, his actions and the method he chose to modify the previously-approved rate filings by substituting a "neutral" factor for credit history totally disrupted the relationships among the remaining rating factors. The Commissioner's rating change was imposed without considering that removal of this factor significantly altered the characteristics of the previous rate filings that were approved following a painstaking review of both the credit score models and multivariate analyses, thus resulting in inaccurate rates. Watkins Dec., Ex. E at E97-98 (¶¶ 45-51).

The OIC's instructions to insurers through the invalid Emergency Rules to modify their previously-approved rate filings by substituting a neutral score for the credit history component resulted in rates that no longer support the level of risk assumed and no longer accurately segment insureds based on their overall risk profile under the insurer's rating plan. This is contrary to all three components of the Washington rating standard (*i.e.*, "excessive, inadequate, and unfairly discriminatory"). The resulting premiums charged based on the invalid

[13] The Federal Reserve Report can be found at https://www.federalreserve.gov/econres/notes/feds-notes/developments-in-the-credit-score-distribution-over-2020-20210430.htm.

Emergency Rules violate the statutory rating standard requiring price to match risk. Watkins Dec., Ex. E at E97-98 (¶¶ 45-51).

This reclassification of risk mandated by the Commissioner's Emergency Rules resulted in some consumers, like senior citizens who have good driving records, a lack of claims history and excellent credit, being faced with significant premium increases, while other consumers received premium discounts even though their non-credit-related risk profile did not support the premium reduction. This change to the risk segmentation within an insurer's block of business was the result of the Commissioner requiring the substitution of a "neutral" credit factor and not affording companies enough time to refile and recalibrate the remaining rating factors through a revised rate filing. Insurers had no choice but to follow the Commissioner's directive to remain active in the market, and there is no assurance that the resulting rates (as a result of the Commissioner's directive) conform to the statutory requirement prohibiting rates that are inadequate, excessive or unfairly discriminatory. Watkins Dec., Ex. E at E97-98 (¶¶ 45-51). Moreover, steps taken by the Commissioner since the Emergency Rules were declared invalid, as well as the pendency of this permanent rulemaking, have chilled efforts by insurers to revert to previously-approved base rates in place prior to adoption of the Emergency Rules and thereby restore the status quo for consumers. Indeed, the Commissioner has explicitly discouraged such action:

> We encourage insurers to carefully consider whether or not to switch back to using credit for rating. Although the court ruled that OIC did not have a sufficient basis to enact the prohibition on the use of credit on an emergency basis, OIC continues to work on notice-and-comment rule making. Given the limited time until the notice-and-comment rule could take effect, it may not be practical for some insurers to revert back to using credit now only to have to stop using credit after OIC adopts a new rule. Barring any changes or delays following the public hearing, OIC anticipates adopting the notice-and-comment rule as early as November 24, 2021.

On September 21, 2021, Senator Mark Mullet held a hearing on the impact on insurance rates of the Commissioner's Emergency Rules banning credit scoring. *See* Transcript of September 21, 2021 Hearing before the Senate Business, Financial Services & Trade Committee on Credit Scoring Ban Impact on Insurance Rates. Exhibit Q. The committee heard from senior citizens[14] and a single mother[15], among others, about the adverse impact of the Emergency Rules. The

[14] https://www.tvw.org/watch/?clientID=9375922947&eventID=2021091086&startStreamAt=4240&stopStreamAt=4514&autoStartStream=true

[15] https://www.tvw.org/watch/?clientID=9375922947&eventID=2021091086&startStreamAt=3896&stopStreamAt=4111&autoStartStream=true

committee heard that premium increases were almost immediately imposed on senior citizens when their "good credit discounts" were eliminated because of the Emergency Rules. The committee further heard about the damage caused to workers on tight budgets when their auto insurance and homeowner's insurance premiums increased because of the Emergency Rules. None of these premium increases had anything to do with claims that had been submitted or a change in risk profile. Instead, they were directly attributable to the Emergency Rules. Ex. P at 49-58; 61-67. This testimony was corroborated by insurance agents, who also made clear that the Commissioner's suggestion that those negatively impacted by the ban on credit scoring "shop around" is completely unrealistic for seniors. Ex. P at 89-90. This testimony provides real world evidence of the negative impact of the Emergency Rules, an impact that will only worsen if the Proposed Rule is adopted.

In addition to the rate standard violations discussed above, the Proposed Rule goes beyond the Emergency Rules' requirements to remove credit history from pricing as it also impacts the non-credit-related rating characteristics and underwriting criteria supporting the initial rate filing. The above-described violation of the statutory rating standard is especially true for individuals guaranteed a quote or coverage in an affiliate as a result of the plain language of the proposed section WAC 284-24A-090(7)(b). That provision requires affiliate or group member companies of an insurer subject to the Rule to provide quotes or coverage or both for an insured of the subject insurer even if the insured does not meet the non-credit history underwriting criteria of the affiliate or group company. This would not be required if the same insured sought a quote from an unaffiliated company. The effect of this aspect of the Proposed Rule would be to pick "winners and losers" among insurers (which the Commissioner has no authority to do), leading to a less competitive marketplace to the detriment of consumers and creating negative financial consequences for some companies.

Moreover, the result of this requirement is that an insurer must provide a quote or offer coverage to an insured even though that individual or property may not meet the non-credit-related underwriting criteria that support the company's rates. A driver with multiple moving violations or accidents that would otherwise not be eligible for a quote from an affiliated company must be offered a quote, even though that quote would not adequately reflect that driver's overall risk profile. As a result, it is likely that the rate charged that individual would be inadequate for the risk the company is forced to assume if the Proposed Rule is adopted.

The effects of the ban on credit scoring on the Washington insurance market have been profound. Based on S&P Global Market Intelligence data for 2020 (filed NAIC Annual Statements), 127 insurers write homeowners insurance in the State of Washington (with direct

written premium above $500). There are 69 homeowners rate filings (for groups and individual companies) that indicate removal of credit on the OIC website (between April 1, 2021, and May 15, 2021). Based on a mid-year APCIA survey of its members (approximately 4% of the homeowners market, based on 2020 direct written premium), more than 55% of all Washington residents are estimated to have experienced or will experience rate increases at renewal solely because of the suspension on the use of credit history.

In addition, based on S&P Global Market Intelligence data for 2020 (filed NAIC Annual Statements), 142 insurers write Private Passenger Auto ("PPA")insurance in the State of Washington (with direct written premium above $500). There are 95 PPA rate filings (for groups and individual companies) that indicate removal of credit on the OIC website (between April 1, 2021, and May 15, 2021). Based on a mid-year APCIA survey of its members (approximately 27% of the private passenger automobile market, based on 2020 direct written premium) and adjusting the results for their market shares to reflect the entire industry, more than 2 million Washington residents have experienced or will experience rate increases solely because of the suspension of the use of credit history.

The results of a 4th quarter APCIA survey, reflecting the subsequent impact of the removal of credit for actual new and renewed policies, are consistent with the mid-year survey. The new survey includes companies with approximate a 25% market share. The average impact from just the removal of credit scores on policies experiencing a premium increase is in the range of 15.5%-16.4%.

II. PROCEDURAL OBJECTIONS TO THE PROPOSED RULE

A. The Commissioner's actions to date and the Proposed Rule are contrary to the intent of the Administrative Procedure Act.

This Rulemaking clearly violates many requirements of the Administrative Procedure Act (APA), chapter 34.05 RCW, in particular the limitations on state agencies' administrative authority and the requirement to consider public input on proposed rules. OIC must demonstrate prior to adoption of the Proposed Rule that it does not violate these provisions. Otherwise, the OIC must withdraw the Rule.

B. The scope of the Proposed Rule exceeds the parameters of the CR-101 and CR-102 Notices.

The stated purpose of the Rulemaking set forth in the CR-101 and CR-102 notices, as required by RCW 34.05.320, describes the Proposed Rule as limited to the use of credit history for

purposes of determining eligibility for coverage and rating. However, in addition to the ban on the use of credit history (which was disclosed), the Rule also addresses without adequate notice a requirement of limited disclosure and establishes non-credit-based underwriting and eligibility standards for some personal line insurers, but not all. Specifically, the Rule requires certain disclosures/notices to a subset of the insurance buying public (those insured by a company within a group of affiliated companies). This disparity results in an anticompetitive market and is beyond the scope of the Commissioner's authority. The Proposed Rule also fails to point to the rulemaking authority of RCW 48.18.545(7) and, therefore, conflicts with the statutory language regarding non-credit history underwriting factors. The declared purpose of the Proposed Rule is to eliminate credit history from determinations of eligibility and rate-setting; however, it goes beyond that to include mandating disclosure and offer when neither is included in the notice, in violation of the APA. Further, the Proposed Rule would prohibit the use of credit history to determine a consumer's eligibility for any payment plan whatsoever (*see* WAC 284-24A-090(4)(b)), another significant aspect of the Rule that is nowhere included in the notice.

C. The Commissioner's public statements are contrary to the APA's requirements for public comment and consideration by the agency.

As demonstrated above, the APA contemplates an open and transparent rulemaking process and that the agency not prejudge the outcome of the public process. In adopting the APA, the Legislature mandated that "[m]embers of the public affected by administrative rules must have the opportunity for a meaningful role in their development; the bases for agency action must be legitimate and clearly articulated . . . ." 1995 Wash. Laws ch. 403 § 1. The Legislature adopted the APA in part "to provide greater public and legislative access to administrative decision making." RCW 34.05.001.

"Any member of the public…has a statutory procedural right to participate in notice and comment rulemaking when the agency adopts a rule." *Center for Biological Diversity v. Dep't of Fish & Wildlife*, 14 Wn. App. 2d 945, 981, 474 P.3d 1107 (2020). The agency must provide both public notice of a proposed rule and an opportunity to comment on the proposal at a public rule-making hearing. *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 648-49, 835 P.2d 1030 (1992) (citing RCW 34.05.320; RCW 34.05.325). The agency must not only hear but consider public input, "[o]therwise, administrative agencies will act as unelected legislatures." *Loyal Pig, LLC v. Washington State Dep't of Ecology*, 13 Wn. App. 2d 127, 146, 463 P.3d 106 (2020).

The Commissioner's statements in press releases and other public statements (prior to receiving public testimony and conducting a hearing on November 23, 2021) declaring that he

will adopt the Proposed Rule on November 24, 2021 and make it effective on January 1, 2022 violate this standard. The Commissioner has demonstrated through his prior actions and comments his intention to adopt the Rule regardless of the public testimony. It also appears that he does not intend to give serious consideration to the previously-submitted stakeholder comment letters, or to the public testimony provided in person or in writing at the public hearing prior to adopting the Rule. Indeed, on November 18, the OIC issued an "update" on the public hearing scheduled for November 23 that is transparently designed to discourage live testimony. Specifically, the OIC has advised those who have provided written comments not to testify and has set a patently insufficient two-minute time limit for each person's testimony. See Exhibit R. These actions are clearly inconsistent with the expectations set forth in the APA that the public have a meaningful opportunity to be heard on proposed rules.

D. The Commissioner's Proposed Rule is incomplete and unsupported because of the Thurston County Superior Court's invalidation of the previous Emergency Rules.

The Proposed Rule language was issued prior to the Thurston County Superior Court's order granting the motions for summary judgement. The Proposed Rule's language was based on the assumption that the two previous Emergency Rules would establish the foundation of the permanent Proposed Rule and provide the basis for continuation in the form of the Proposed Rule. Now that the Emergency Rules have been nullified, the previously-submitted rate filings that removed the use of credit history are no longer supported by those invalid Rules. As a result, should the Commissioner proceed with banning the use of credit history, at a minimum, the Proposed Rule should be withdrawn and the Commissioner should start over with new language that lays the foundation for review and approval of the rate filings. Please note that this comment must not be construed as endorsing such a step as we believe doing so exceeds the Commissioner's authority. This comment is provided only to illustrate that the proposed language cannot stand on its own, and the Proposed Rule is fundamentally flawed because based upon the predecessor Emergency Rules, which were declared invalid.

If the Commissioner ignores our objection to any Rulemaking banning the use of credit history, then the OIC should withdraw this Proposed Rule and issue a new and more complete proposed permanent rule ("revised proposed rule") that is consistent with existing statutes, in particular statutory rating standards.

E. A new proposed rule must provide an adequate implementation period that accounts for the lack of OIC resources and the complexity of revising and implementing new rate filings.

Should the Commissioner proceed with a revised proposed rule, that rule must at a minimum allow insurers to submit and gain approval of new base rate filings. The revised proposed rule must also include an adequate implementation period that factors in the time it will take for insurers to develop and submit new filings; the OIC staff to review and approve the filings; and insurers to then implement the approved rates. The implementation period following approval should not be disregarded as a considerable amount of post-approval work is required to implement a newly-approved rate filing.

In any event, the submission of new filings, and OIC review, would be an arduous and impractical undertaking under any circumstances. Even if the Commissioner proceeds to adopt the existing Proposed Rule, insurers may be forced to undertake a massive endeavor to refile their base rate filings. This will have a significant negative impact on the insurers forced to submit new filings, as well as the entire property and casualty (alternatively, "P&C") industry given the inadequate staff resources the OIC allocates to rate review for all P&C lines.

The considerable time required to develop and implement any base rate revisions, including those removing the use of credit history for rating and eligibility, is demonstrated by our analysis of base rate filing submission and approval data obtained from the OIC through a public disclosure request for the personal automobile and homeowners base rate filings submitted between January 1, 2018 to May 6, 2021. This analysis demonstrates that the average times for review, approval and implementation of base rates filings are as follows:

Personal Lines	# of filings	Average number of Days from first Submission by the insurer to OIC for Approval	Average number of days from Approval to Effective Date and Implementation	Average Total number of days from submission of the filing process to implementation
Private Passenger Auto T.O.I. 190	69	102	162	264
Homeowners T.O.I 140	66	87	179	266

The data shown above does not include the time insurers must invest in preparing their filings prior to submission to the OIC or to implement the approved rates post-approval, which together could easily take months to execute.

Based on the three-year history of the rate review and implementation timeframes for the filings shown in the chart above and on the spreadsheet attached as Exhibit S, it is apparent that a complete resubmission of base rate private passenger and homeowner filings will require upwards of a full year to develop, review, approve and implement. This requirement will also have a significant impact on other lines of property and casualty insurance rate filings because of the OIC's lack of staff assigned to all lines of P&C rate filing review.

Over the past few years, the Commissioner has failed to adequately staff the P&C rates unit to meet the statutory 30-day review period set forth in RCW 48.19.060. This chronic backlog of rate filings will be exacerbated by the adoption of the Proposed Rule. A minimum of one year should be built into the Rule for implementation.

Rather than adequately staffing the P&C rate review unit, the Commissioner has diverted staff resources to the health care rate review unit. The Official OIC Organization Chart as of October 21, 2021 (*see* Exhibit T) shows that only two actuaries and four analyst positions are assigned to review property and casualty rates compared to five actuaries and four analysts assigned to review health care rate filings even though the market share based on total premium volume is only one third that of the property and casualty market. The disparate staffing in the P&C rate review unit compared to other units in the Rates and Forms Division results in significant delays in review of all P&C rate filings and significantly harms insurance consumers and the industry.

For all the reasons discussed above, the OIC should not adopt the Proposed Rule.

Sincerely,

Mark Sektnan
Vice President, State Government Relations

Enclosures (Exhibits A-S)

Exhibit A

American Property Casualty Insurance Association
INSURING AMERICA apci.org

EXHIBIT A

VIA EMAIL

July 30, 2021

David Forte
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RE: Insurance Commissioner Matter R 2021-07 (CR-101)

The following comments on the above-referenced matter are submitted on behalf of the members of the American Property Casualty Insurance Association (APCIA) – a national property casualty trade association that promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA member companies write approximately 36.9 percent of all personal lines insurance sold in Washington.

The Office of Insurance Commissioner (OIC) should allow the emergency rule temporarily prohibiting the use of credit history in personal lines (R 2021 -02) (Emergency Rule) to expire at the end of the 120 days permitted for an Emergency Rule under RCW 34.05.350.[1] Insurers should be permitted to reinstate their previously approved rates and continue to utilize credit history in their underwriting and rating practices.

Notwithstanding legal challenges currently pending in Thurston County Washington Superior Court, adopting the Emergency Rule without allowing a complete base rate repricing by insurers in compliance with RCW 48.19.020 and WAC 284-24-065 necessarily results in rates that are excessive, inadequate, or unfairly discriminatory. When the Commissioner arbitrarily prohibited insurers from considering one of the most important, if not *the* most important, rating factor available for predicting the risk of future loss and related insurance costs, it disrupted the inter-relationship of all the remaining rating factors and their collective role in accurately matching price with risk as the law requires.

The prior rate filings were approved by the OIC and therefore deemed not to be excessive, inadequate, or unfairly discriminatory (alternatively "the rate standard"). During the previous review process, the filings and insurance scoring models were subject to in-depth and rigorous review, including the multi-variate analysis required by WAC 284-24A-045 through -065. Undertaking this analysis often resulted in adjustments to other rating factors to satisfy the rate standard. The distortion created in those rating and pricing structures by the removal of a significant component (credit history) necessarily violates the rate

[1] On July 15, 2021, OIC adopted an emergency rule effective the same date prohibiting the use of credit history, consistent its predecessor R 2021 -02, except that the July 15 emergency rule expires on November 12, 2021.

standard. The resulting distortion has resulted in new rates that are excessive for many policyholders, inadequate for many others, and unfairly discriminatory for most. This has led to surcharges for many policyholders and subsidies for many others without any relationship to the level of risk and claims history. The removal of credit history in calculating an insured's premium without adjustments to other rating factors means that there is no assurance the company's rate filing complies with the rate standard of RCW 48.19.020 and WAC 284-24-065.

Although the Commissioner contends that the original Emergency Rule was permitted due to the Governor of the State of Washington's proclamation number 20-05 and RCW 48.02.060, APCIA disputes this position, and the matter is currently being litigated. Regardless of the outcome of that litigation, however, any proposed permanent rule cannot rely on the emergency power's authority once the emergency ends. For that reason, after the expiration of the current state of emergency due to COVID 19, any permanent rule dealing with credit history must be based only on the authority granted to the Commissioner by the Legislature, including the rulemaking authority for the use of credit history under RCW 48.19.035(5). This specific authority governs the rule making for the use of credit history considering RCW 48.01.150 which states:

> *Provisions of this code relating to a particular kind of insurance or a particular type of insurer or to a particular matter prevail over provisions relating to insurance in general or insurers in general or to such matter in general.*

In addition, the CR-101 document for the permanent rule making states that RCW 48.19.035 authorizes such rulemaking. This is not correct. RCW 48.19.035(5) specifically addresses the filing and permitted use of credit history including the method of determining that rates are not unfairly discriminatory. The Commissioner does not have the authority to ban the use of credit history as that authority has not been granted to the Commissioner by the Legislature.

The Commissioner states in CR-101 that "[t]he result of the CARES Act is that all credit bureaus are collecting a credit history that is objectively inaccurate for some consumers." However, he fails to provide any evidence to support this statement. He similarly offers no evidence for the proposition that consumers will see their credit-based insurance scores drop once the CARES Act expires. In fact, an August 2020 report from the Consumer Financial Protection Bureau, *The Early Effects of the COVID-19 Pandemic on Consumer Credit,* finds "through June 2020 consumers did not experience many of the negative credit consequences that might be expected during periods of high unemployment and large income shocks."[2]

[2] Consumer Financial Protection Bureau, *The Early Effects of the COVID-19 Pandemic on Consumer Credit* (August 2020), available at https://files.consumerfinance.gov/f/documents/cfpb_early-effects-covid-19-consumer-credit_issue-brief.pdf (accessed July 29, 2021).

A follow-up report issued in April, *Changes in consumer financial status during the early months of the pandemic,*[3] finds much the same, directly contradicting the Commissioner's allegations.

If the emergency ban remains in place, rather than banning the use of credit history, OIC should consider modifying the current rate stability rule found in WAC 284-24-130. This modification could be designed to provide relief to those insureds who requested an accommodation under the provisions of the CARES Act by maintaining their pre-pandemic credit score for a set period while not penalizing insureds who maintained or improved their credit score during the pandemic. In making this modification, insurers should be allowed to revert to their previously approved rate filing with the submission of a rate stability rule.

A rate stability rule could also incorporate some of the components of the National Council of Insurance Legislators (NCOIL) *Model Act Regarding Use of Credit Information in Personal Insurance – Sec. Six - Extraordinary Life Circumstance.* Despite the Commissioner's recent public statements, these standards were drafted and adopted by NCOIL and are in-force in 29 states. The use of the standards could be adopted by administrative rule and the actual rating rules filed with the OIC for review and approval to ensure they are uniformly and fairly applied by insurers.

Alternatively, the OIC should consider modifying their rules for permitted elements utilized to develop credit-based insurance scores to disregard data that reflects CARES Act accommodations. These elements are identified in data held by credit bureaus through certain data codes. Those codes are "natural disaster," "forbearance," and "deferment." This proposed directive is similar to the previously established guidelines in WAC 284-24A-055(2)(a) and (b) dealing with no hit (no credit history) and thin files (insufficient credit history to generate a score).

In addition, the OIC should consider a robust stakeholder process including industry meetings with both insurers and credit-based insurance score modeling vendors to discuss what if any changes could be made to scoring models to exclude debt information associated with a CARES Act accommodation. Further, OIC should consult with financial experts to determine the appropriate time frame for this extraordinary relief. The three-year period appears to be arbitrary and not based on any meaningful data. It is unclear how and why the Commissioner chose the three-year time frame for prohibiting the use of credit history for rating purposes. The rationale for this time frame should be set forth as it clearly will extend beyond the declared emergency.

If the Commissioner continues this rulemaking exercise, immediate steps will need to be taken to revise the underlying manual of classification, manual of rules and rates so that they meet the rate standard of RCW 48.19.020. The Commissioner must permit companies to submit updated base rate filings and establish a review standard or process that allows for prompt approval within the standard thirty-day

3 Consumer Financial Protection Bureau, *Changes in consumer financial status during the early months of the pandemic* (April 2021) available at https://files.consumerfinance.gov/f/documents/cfpb_making-ends-meet-wave-2_report_2021-04.pdf (accessed July 29, 2021).

review period of RCW 48.19.060. The OIC's historical lack of timely review and approval of personal lines rate filings must not be a barrier to insurers revision of rating factors to prohibit excessive, inadequate or unfairly discriminatory rates. To that end, the Commissioner should consider establishing a filing certification process analogous to that set forth in RCW 48.18.100 (3) and (6) as well as RCW 48.19.080 and permit the use of the revised rates until such time as the certified filing is withdrawn by the insurer or Commissioner under the standards of RCW 48.19.120.

We thank you for the opportunity to submit these comments.

Sincerely,

Mark Sektnan
Vice President, State Government Relations
American Property Casualty Insurance Association

Exhibit B

American Property Casualty Insurance Association℠
INSURING AMERICA apci.org

EXHIBIT B

August 6, 2021

David Forte
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RE: Office of the Insurance Commissioner (the "OIC") Matter R 2021-07 Stakeholder Draft released on July 13, 2021

The following comments on the above-referenced matter are submitted on behalf of the members of the American Property Casualty Insurance Association (APCIA) - a national property casualty trade association that promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA member companies write approximately 36.9 percent of all personal lines' insurance sold in Washington.

Thank you for the opportunity to review and comment on the first stakeholder draft, which if adopted, would implement a 3-year ban on the use of credit history for homeowners and private passenger automobile insurance as those terms are defined in the above-referenced draft at Sections 4(a). Although we recognize that the OIC believes there is some urgency in adopting a final rule, this draft was released on July 13, 2021, which is prior to the expiration of the CR-101 comment period. As a result, the OIC prepared the stakeholder draft without having reviewed any stakeholder comments to ensure a fair and transparent rulemaking process under the Administrative Procedures Act.

In addition to APCIA's specific comments and edits to the July 13, 2021 draft set forth herein, we respectfully request that the OIC also consider and address the comments contained in APCIA's July 30, 2021 CR-101 comment letter, which is incorporated herein by reference, during the stakeholder draft process. As previously stated in the July 30 comment letter, APCI believes this rulemaking should be withdrawn and the Emergency Rule allowed to expire.

Based on the text of the CR-101 notice and the July 13, 2021 stakeholder draft, the OIC fails to distinguish between a Credit Score that is used for determining an individual's credit worthiness and a Credit Based Insurance Score ("CBIS"). Unlike a financial Credit Score that uses credit history only, CBIS are specialized for insurance underwriting purposes and are predictive of future insurance losses and related costs using multiple factors of which credit history is only

one. By conflating these two types of scores, the OIC fails to recognize that the models used to produce CBIS continue to remain stable during the period of the pandemic. This stability results from the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") protections afforded to consumers with accommodations due to a natural disaster, forbearance, and deferment, including the Covid 19 Pandemic. Reports of forbearance and deferment accommodations due to COVID-19 cannot be used to adversely affect consumers' current or future CBIS during or after the expiration of the CARES Act. In fact, CBIS models have been calibrated to exclude such accommodations whether occurring pre-, during-, or post- COVID. [1] Furthermore, the stability of CBIS will remain unaffected after the CARES Act expires because, accommodations for forbearance or deferment due to COVID-19 (or any natural disaster) must continue to be excluded. [2]

We will not repeat much of the technical information we know was submitted by interested parties during the CR-101 comment period, but we refer you to the July 30, 2021 CR-101 comment letter submitted by Nancy Watkins, FCAS, MAAA of Milliman, Inc. on behalf of the National Association of Mutual Insurance Companies (NAMIC) as well as the July 30, 2021 CR-101 comment letter from The Consumer Data Industry Association [3]. These two letters provide excellent overviews of the impact of the CARES Act and the COVID 19 Pandemic on Credit Scores used for determining credit worthiness as well as CBIS. The CDIA letter explains in great detail (with citations) why the Commissioner's understanding of the impact of the COVID 19 pandemic on consumer credit worthiness is demonstrably wrong. In fact, many of the measures of the average consumer's financial wellbeing have shown improvement such as FICO scores increased by 7 percent and credit card debt reduced by 14 percent. Along with APCIA's July 30 comments and these August 6 comments, these letters taken together rebut many of the inaccurate and unsubstantiated statements made by the OIC in support of the current rulemaking

In addition, we wish to reinforce some of the key points the OIC must consider when reviewing the various CR-101 comment letters described above to include the following:

[1] See the first bulleted paragraph at the top of p. 3.

[2] Additional examples of credit data that are not included in a CBIS are "No Hits" and "No Scores", which are prohibited by the OIC's current rules.

[3] The Consumer Data Industry Association submitted letters to the OIC on July 21 and July 30, 2021. The July 30, 2021 letter provides an excellent and factual overview of the impact of the COVID 19 Pandemic and the CARES Act on consumer credit.

- The CARES Act sets forth a variety of requirements to provide economic and relief during the Pandemic. Of particular importance to this rulemaking is that it required credit vendors to treat the Pandemic like a natural disaster and use the natural disaster accommodation codes already built into CBIS such that disaster accommodations related and un-related to COVID 19 (prior to and during the CARES Act) have not been considered in calculating CBIS.

- Using the same disaster codes (pre-, during- and post CARES Act), means there is no different treatment between consumers experiencing a negative event before, during, or even after COVID 19, negating the OIC's unfair discrimination rationale in support of the proposed rule. Disaster code reports are excluded as "anomalous data" in CBIS contributing to their stability, accuracy, and reliability.

- Disaster-related credit history (including the Pandemic history) does not adversely impact CBIS because it **is not** included in the CBIS. As a result, the following OIC statement in the CR-101 notice is inaccurate: "Remaining consumer credit protections in the CARES Act will expire after the national state of emergency. When the CARES Act fully expires, a large volume of negative credit corrections will flood consumer credit histories. This flood of negative credit history has not been accounted for in the current credit scoring models . . . ."

- CARES Act protections continue after the accommodation ends, so there will be no data correction to be made in CBIS models. Previously excluded disaster code data will not be reported or included in CBIS when the Pandemic ends.

Based on the foregoing comments, APCIA asserts there is no basis for banning credit history as a component of CBIS. Accommodations due to COVID-19 do not now nor will they after the Pandemic ends adversely impact consumers' credit history. As a result, there is no need for rulemaking other than as it relates to Section II below.

If, however, the OIC persists in pursuing rulemaking as proposed in the CR-101, the text in Sections I, II, and III below addresses related modifications, additions, and deletions. Section I addresses suggested revisions in the July 13, 2021 stakeholder draft, to add and delete certain sections and to clarify that CBIS **may be** used but only credit history directly tied to the CARES Act accommodations is prohibited. Sections II and III include suggestions APCIA made in the July 30, 2021 CR-101 comment letter.

Section I - Modifications in or related to July 13, 2021, Stakeholder draft incorporating ACPIA's comments from its CR-101 comment letter dated July 30, 2021:

WAC 284-24A-005
Definitions that apply to this chapter.
The definitions in this section apply throughout this chapter:
(1) "Credit Based Insurance Score" or "Insurance Score" means a number or rating that is derived from an algorithm, computer application, model, or other process that is based in part on credit information permitted to be used by law for the purposes of predicting the future insurance loss exposure of an individual applicant. Such scores are specialized for insurance underwriting rating purposes and are predictive of future insurance losses and are not used to determine an applicant's credit worthiness for financial transactions.
(2) "Demographic factors" means the factors listed below if they are used in an insurer's rates, rating tiers, rating factors, rating rules or risk classification plan:
  (a) Age of the insured;
  (b) Sex of the insured;
  (c) The rating territory assigned to the property location for residential property insurance and to the vehicle's garage location for personal auto insurance.
(3) "Premium" means the same as RCW **48.18.170**.
(4) "Rate" means the cost of insurance per exposure unit.
(5) "Rating factor" means a number used to calculate premium.
(6) "Risk classification plan" means a plan to formulate different premiums for the same coverage based on group characteristics.
(7) "SERFF" means the System for Electronic Rate and Form Filing. SERFF is a proprietary National Association of Insurance Commissioners (NAIC) computer-based application that allows insurers and other entities to create and submit rate, rule and form filings electronically to the commissioner.
(8) "Significant factor" means an important element of a consumer's credit history or insurance score. Examples of significant factors include:
  (a) Bankruptcies, judgments, and liens;
  (b) Delinquent accounts;
  (c) Accounts in collection;
  (d) Payment history;
  (e) Outstanding debt;
  (f) Length of credit history; and
  (g) Number of credit accounts.

"Significant Factor" does not include the negative impact of forbearance, deferment, or other accommodation on consumers' credit history (referred to herein as "Prohibited Data Elements") pursuant to the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") or, if such Prohibited Data Elements are included, they must be given a neutral score.

(9) "Substantive underwriting factor" means a factor that is very important to an underwriting decision. Examples of substantive underwriting factors include:
   (a) History of filing claims;
   (b) History of moving violations or accidents;
   (c) History of driving uninsured;
   (d) Type of performance for which a vehicle is designed; and
   (e) Maintenance of a structure to be insured.

(10) "Vehicle" means any motorized vehicle that can be insured under a private passenger

WAC 284-24A-015

When must an insurer file the insurance scoring model to comply with the law?

(1) Every insurer that uses an insurance scoring model to underwrite personal insurance coverage must file the model with the commissioner before January 1, 2003.

(2) Every insurer that uses an insurance scoring model to determine personal insurance rates or premiums must file the model with the commissioner before June 30, 2003. Related rates, risk classification plans, rating factors and rating plans must be filed and approved by June 30, 2003. Such model may not use Prohibited Data Elements described in WAC 284-24A-005(8) .

(3) Every insurer that uses an insurance scoring model for homeowners, dwelling property or private passenger automobile rating or underwriting prior to June 20, 2021 shall either:
   (a) File a certification signed by an officer of the company stating that the previously approved credit-based insurance scoring model does not incorporate one or more Prohibited Data Elements described in WAC 284-24A-005(8) or
   (b) ~~Refile the insurance scoring model removing the data elements based on credit information otherwise deferred or accommodated under the CARES Act.~~ If the insurer's previously filed and approved model uses one or more such Prohibited Data Elements, the insurer must refile the insurance scoring model after removing them or giving them a neutral score.

WAC 284-24A-025

Filings by insurance scoring model vendors.

(1) The commissioner will allow vendors to file insurance scoring models. The vendor must file the scoring model in SERFF in accordance with the *Washington State SERFF Personal*

Insurance Scoring Model Filing General Instructions posted on the commissioner's web site (www.insurance.wa.gov).

(2) Insurers may use models filed by vendors after the commissioner determines the model complies with Washington state laws and regulations, including those banning the use of the Prohibited Data Elements described in WAC 254-24A-005(8).

(3) An insurer may use a model that has been filed by a vendor and accepted by the commissioner if the insurer submits a filing in SERFF that:
   (a) References the vendor that filed the model;
   (b) References the filing number and model name used by the vendor;
   (c) States whether the insurance scoring model will be used for underwriting, rating, or both; and
   (d) Proposes an effective date for the insurer's use of the model.

(4) Models in use prior to June 20, 2021, may continue to be used without refiling if the vendor submits a certification signed by an officer of the vendor's company stating that the scoring model does not use the Prohibited Data Elements described in WAC 284-24A-005(8) or if used, they have been assigned a neutral score.

WAC 284-24A-050

What types of information must an insurer include in a multivariate analysis?

(1) A multivariate statistical analysis must evaluate the rating factors listed below (if applicable to the rating plan, and to the extent that data are credible):
   (a) For homeowners, dwelling property, earthquake, and personal inland marine insurance:
      (i) Insurance score produced by a Credit Based Insurance Scoring model;
      (ii) Territory and/or geographic area;
      (iii) Protection class;
      (iv) Amount of insurance;
      (v) Surcharges or discounts based on loss history;
      (vi) Number of family units; and
      (vii) Policy form relativity.
   (b) For private passenger automobile, personal liability and theft, and mechanical breakdown insurance:
      (i) Insurance score produced by a Credit Based Insurance Scoring model;
      (ii) Driver class;
      (iii) Multicar discount;
      (iv) Territory and/or geographic area;
      (v) Vehicle use;
      (vi) Rating factors related to driving record; and

(vii) Surcharges or discounts based on loss history.

(2) An insurer must provide a general description of the model used to perform the multivariate analysis, including the:
(a) Formulas the model uses;
(b) Rating factors that are included in the modeling process;
(c) Output from the model, such as indicated rates or rating factors.

(3) An insurer must show how the proposed rates or rating factors are related to the multivariate analysis.

~~(4) The temporary prohibition in WAC 284-24A-090 on the use of credit history to determine personal insurance rates, premiums, or eligibility for coverage for all homeowners and private passenger automobile coverage will remain in effect for three years following the day the national emergency concerning the novel coronavirus disease (COVID-19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) terminates, or the day the Governor's Proclamation 20-05, proclaiming a State of Emergency throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States expires, whichever is later.~~

~~(a) The definitions in this subsection apply through this section unless the context clearly requires otherwise.~~

~~(i) Homeowners coverage includes dwelling property, mobile homeowners, manufactured homeowners, renter, and condominium owner's coverage.~~

~~(ii) Private Passenger Automobile coverage includes motorcycles and recreational vehicle coverage~~

~~(b) The temporary prohibition on the use of credit history to determine personal insurance rates, premiums, or eligibility for coverage for all homeowners and private passenger automobile coverage does not apply to commercial lines, personal liability and theft, earthquake, personal inland marine, or mechanical breakdown coverage.~~

<u>NEW SECTION WAC 284-24A-090</u> Temporary ban regarding the use of Prohibited Data Elements described in WAC 284-24A-005(8). (*Special note for the following section: The OIC provides inaccurate and misleading information that is not based on actual data as part of the draft's New Section 284-24A-090 (2). This information should not be incorporated into the rule.)*

(1) Not withstanding any other provision of this chapter, this section applies to all homeowners and private passenger automobile insurance pertaining to and issued in the state of Washington while this rule is effective.

(2) The insurance commissioner finds that as a result of <u>the economic and legal relief provided to consumers under state and federal programs during the course of the COVID 19 pandemic, certain data elements that represent forbearance, deferment or other</u>

accommodation due to 2019 Covid Pandemic ("Prohibited Data Elements" described in WAC 284-24A-005) should not be used in a credit based insurance scoring model at any time during or after the COVID 19 Pandemic. ~~broad negative economic impact of the coronavirus pandemic, the disproportionately negative economic impact the coronavirus pandemic has had on communities of color, and the disruption to credit reporting caused by both the state and federal consumer protections designed to alleviate the economic impacts of the pandemic, for homeowner's coverage and private passenger automobile coverage issued in the state of Washington,~~

~~The use of such factors in a credit-based insurance scoring model may result in premiums that are excessive, inadequate, or unfairly discriminatory within the meaning of RCW 48.19.020 and RCW 48.18.480.~~

(3) For all homeowner's coverage and private passenger automobile coverage issued in the state of Washington, insurers must not use a credit-based insurance scoring model that incorporates Prohibited Data Elements (described in WAC 284-24A-005) to determine personal insurance rates, premiums, or eligibility for coverage.

(4) For purposes of this section, insurers may not:

(a) Use credit history reported as subject to an accommodation due to the CARES Act to place insurance coverage with a particular affiliated insurer or insurer within an overall group of affiliated insurance companies.

~~(b) Use credit history to determine a consumer's eligibility for any payment plan. .~~

Note : APCIA suggests deleting 4(b) because by removing the use of credit from payment options, customers who have a history of making payments on time will have to pay more and, thereby, subsidize customers who do not make payments. This is unfairly discriminatory as it relates to responsible customers.

~~(5) In order to comply with this section, insurers subject to this rule may substitute any insurance credit score factor used in a rate filing with a neutral rating factor~~.

~~(b) For purposes of this section, insurers may, but are not required to, implement the neutral factor by peril or coverage.~~

(~~6~~ 5) Insurers may ~~not~~ include rate stability rules in filings submitted to mitigate changes to the credit-based insurance score that result in either a significant increase or decrease in an insured's premium based solely on the change to the insurance score with this section.

(~~7~~ 6)The prohibitions in this rule must apply to all new policies effective and existing policies processed for renewal on or after XXXX (Note - Sufficient lead time must be granted to initiate this change.)

~~(8) The temporary prohibitions on the use of credit history in this section will remain in effect for three years following the day the national emergency concerning the novel coronavirus disease (COVID-19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) terminates, or the day the Governor's Proclamation~~

~~20-05, proclaiming a State of Emergency throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States expires, whichever is later.~~
(~~9~~ 7)The definitions in this subsection apply through this section unless the context clearly requires otherwise.

(a) Homeowners coverage includes dwelling property, mobile homeowners, manufactured homeowners, renter, and condominium owner's coverage.

(b) Private Passenger Automobile coverage includes motorcycles and recreational vehicle coverage

(c) "Neutral factor" means a single constant factor calculated such that, when it is applied in lieu of insurance-score-based rating factors to all policies in an insurer's book of business, the total premium for the book of business is unchanged.

Section II Suggested Alternative to the Ban of the use of CBIS that protects consumers – Extraordinary Life Circumstances (ELC):

Virtually every state that allows the use of CBIS also requires consideration of extraordinary life circumstances (ELC) to mitigate or neutralize the effects of external events on credit history, such as job loss, divorce, medical diagnosis, and other challenging life events. These states adopt ELC through either statute, rule, bulletin, or practice. The only state that prohibits consideration of ELC is the State of Washington. Earlier this year, HB 1351 was introduced, which (if adopted) would require insurers to provide reasonable relief from insurance rates and rules for consumers whose credit history was negatively impacted by extraordinary life events. Commissioner Kreidler actively opposed the Bill, which did not proceed.

The following proposed rule language would allow requests for and the granting of relief due to an ELC while maintaining regulatory control over the application of such rating rules as set forth in Section 3(b) of the proposed language shown below. Unlike the Emergency Rule banning the use of credit history, APCIA believes the Commissioner has the authority to adopt this rule under RCW 48.19.035(5).

NEW SECTION WAC 284-24A-XXX Extraordinary Life Circumstances

(1) Notwithstanding any requirement of Title 48 RCW and Title 284 WAC, an insurer that uses a Credit Based Insurance Score shall, on written request from an applicant for insurance coverage or an insured, provide reasonable exceptions to the insurer's rates, rating classifications, company or tier placement, or underwriting rules or guidelines for a consumer who has experienced and whose credit information has been directly influenced by any of the following events:

(a) Catastrophic event, as declared by the federal or state government.
(b) Serious illness or injury, or serious illness or injury to an immediate family member.
(c) Death of a spouse, child, or parent.
(d) Divorce or involuntary interruption of legally-owed alimony or support payments;
(e) Identity theft.
(f) Temporary loss of employment for a period of 3 months or more, if it results from involuntary termination.
(g) Military deployment overseas.
(h) Other events, as determined by the insurer.

(2) If an applicant or insured submits a request for an exception as set forth in Section 1 an insurer may:
(a) Require the consumer to provide reasonable written and independently verifiable documentation of the event.
(b) Require the consumer to demonstrate that the event had direct and meaningful impact on the consumer's credit information.
(c) Require such request be made no more than 60 days from the date of the application for insurance or the policy renewal.
(d) Grant an exception despite the consumer not providing the initial request for an exception in writing.
(e) Grant an exception where the consumer asks for consideration of repeated events or the insurer has considered this event previously.

(3) The insurer shall file rating rules for approval that sets forth the criteria the insurer will use to grant an exception due to extraordinary life circumstances and will demonstrate that the granting of such an exception is uniformly applied to all similarly situated applicants or insureds.

(4) An insurer is not out of compliance with its previously approved rate filing as a result of granting an exception under this section, if the insurer has filed and received approval of a rating rule as set forth in this section.

Section III - Expedited Rate filings Based July 30, 2021 APCI Comments made necessary if the OIC proceeds with its rulemaking to ban the use of Credit History.

If the OIC continues with this rulemaking to ban the use of credit history for rating and underwriting purposes, then insurers must be allowed to make updated base rate filings that meet the rate standard of RW 48.19.020, and the new rate filings must be implemented as soon as reasonably possible.

As previously stated in APCIA's July 30 CR-101 Comment letter, when the OIC adopted the Emergency Rule without allowing a complete base rate repricing by insurers in compliance with RCW 48.19.020 and WAC 284-24-065, that action necessarily resulted in rates that are excessive, inadequate, or unfairly discriminatory. When the OIC arbitrarily prohibited insurers from considering one of the most important, if not the most important, rating factor available for predicting the risk of future loss and related insurance costs, it disrupted the inter-relationship of all the remaining rating factors and their collective role in accurately matching price with risk as the law requires.

In order to expedite the filing and approval of base rate filings that meet the rate standards of RCW 48.19.020 and WAC 284-24-065 while allowing insurers to adjust for the impact of the OIC's emergency and potentially permanent rule, the OIC must adjust the filing and approval required for these filings. The Commissioner is granted such authority by RCW 48.19.080.[4] This adjustment is necessary as the OIC lacks the staff and resources to otherwise review and approve the revised base rate filings on a timely basis as demonstrated by historic review patterns for base rate filings. Companies and consumers should not be penalized by the inability of the OIC to review and approve these filings within the 30-day requirement for normal and routine filings.

NEW SECTION – Expedited Filing review and Certification of Personal lines Auto and Homeowners Rate Filings

(1) All insurers of personal lines auto and homeowners coverage that used an approved credit-based insurance scoring model prior to June 20, 2021 may file revised rates that remove the use of the insurance score based on a credit-based insurance model and adjusts all remaining rating factors.
(2) Such filings shall be effective upon filing if accompanied by a certification signed by an officer of the company stating that rate filing removes the use of a credit-based insurance score and adjusts the remaining rate factors to comply with the rates standard set forth in RCW 48.19.020.
(3) Revised rate filings submitted under this section shall be deemed approved upon filing.

[4] "Under such rules and regulations as he or she shall adopt the commissioner may, by order, suspend or modify the requirement of filing as to any kind of insurance. Such orders, rules and regulations shall be made known to insurers and rating organizations affected thereby. The commissioner may make such examination as he or she may deem advisable to ascertain whether any rates affected by such order meet the standard prescribed in RCW **48.19.020**."

(4) The Commissioner may subsequently withdraw approval of rate filings submitted under this section under the authority set forth in RCW 48.19.120[5]. For purposes of this section and RCW 48.19.120 the waiting period for use of the base rate filing to remove the use of the credit-based insurance score is waived.

We thank you for the opportunity to submit these comments.

Sincerely,

Mark Sektnan Vice President,
State Government Relations
American Property Casualty Insurance Association

[5] "(1) If at any time subsequent to the applicable review period provided in RCW 48.19.060 or 48.19.110, the commissioner finds that a filing does not meet the requirements of this chapter, he or she shall, after a hearing, notice of which was given to every insurer and rating organization which made such filing, issue his or her order specifying in what respect he or she finds that such filing fails to meet the requirements of this chapter, and stating when, within a reasonable period thereafter, the filings shall be deemed no longer effective.

"(2) Such order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in the order.

"(3) Any person aggrieved with respect to any filing then in effect, other than the insurer or rating organization which made the filing, may make written application to the commissioner for a hearing thereon. The application shall specify the grounds to be relied upon by the applicant. If the commissioner finds that the application is made in good faith, that the applicant would be so aggrieved if his or her grounds are established, and that such grounds otherwise justify holding the hearing, he or she shall, within thirty days after receipt of the application, hold a hearing as required in subsection (1) of this section." RCW 48.19.120 (1)-(3).

Exhibit C

American Property Casualty Insurance Association℠
INSURING AMERICA apci.org

VIA EMAIL

September 17, 2021

David Forte
Office of Insurance Commissioner
State of Washington
302 Sid Snyder Ave., SW
Olympia, WA 98504
rulescoordinator@oic.wa.gov

RE: Insurance Commissioner Matter R 2021-07 Second Stakeholder Draft release September 7, 2021

On behalf of the American Property Casualty Insurance Association (APCIA), please accept these comments in response to the Second Stakeholder draft issued on September 7, 2021 by the Office of Insurance Commissioner (OIC). Although we will not repeat, in this comment letter, APCIA's previous comments in connection with the CR-101 Notice and First Stakeholder Draft, we request that the Office of the Insurance Commissioner reconsider its decision not to include any changes suggested in the foregoing comments. We incorporate those previous comments herein by reference and we have included them as Exhibits A and B to this comment letter to ensure all three are part of the agency record.

Based on our review, we note that the second stakeholder draft includes only one significant change from the first stakeholder draft. Specifically, the second draft addresses disclosure and underwriting requirements in New Section WAC 284-24A-090. This letter will focus on that Section.

WAC 284-24A-090(7)

This Section's new disclosure requirements are problematic by creating several significant concerns and disruptions to the existing non-credit history based underwriting criteria utilized by insurers. It appears that the OIC is requiring insurers to fundamentally change their historical underwriting guidelines and to do so prospectively. This requirement exceeds the stated goal of the proposed rule – namely, to ban consideration of credit history in determining eligibility or premiums for coverage in a given company for a 3-year period.

Even if it is not the OIC's intent to interfere with other established non-credit related underwriting guidelines, this section remains unworkable. Insurers will face significant challenges when determining for which of the affiliated companies an applicant would qualify based on the remaining non-credit based underwriting criteria reflected in the applicable underwriting algorithm. The non-credit related

variables evaluated for placement in the algorithm are mutually exclusive and are designed to place the applicant based on their specific risk profile into the correct company.

Should the OIC disregard these concerns and continue to adopt some version of WAC 284-24A-090(7), the following comments should be considered.

The new disclosure requirement refers to a "credit-based insurance score [alternatively CBIS]". Because CBIS is made up of several factors and is only partially reliant on certain permitted components of the insured's credit history (as limited by RCW 48.19.035(3)) we once again request that the rule contain a definition of a credit-based insurance score.

The reason for the disclosure should be identified for consumers who receive it. Specifically, consumers should be advised that the disclosure is required because the new rule adopted by the Office of the Insurance Commissioner bans the use of credit history and credit-based insurance scores.

The disclosure statement itself is overly broad and may not be fully understood by consumers. Consumers will not understand what the phrase "other non-credit based insurance score factors may still apply" means. In addition, consumers will not understand that an affiliate's non-credit history based underwriting criteria could preclude them from coverage or favorable rates in an affiliate. Clearly explaining that "other non-credit based insurance score factors may still apply" and clarifying that consumers remain subject to an affiliate's non-credit history based underwriting criteria are essential for two reasons: (1) empowering the consumer to make an informed decision and (2) mitigating consumer perceptions that they were misled.

In addition, the 60-day advanced notice required prior to renewal does not match the statutory notice of renewal periods and may mislead the insured who may wrongly conclude that coverage is being renewed. This stand-alone notice needs to indicate it <u>is not an</u> offer to renew the policy. Alternatively, the disclosure notice requirement could be revised to be included with the company's renewal notice in advance of the policy's termination date.

Because of Information Technology system programming constraints and necessary changes to the underwriting algorithm described above, a reasonable lead time should be provided for the implementation of the disclosure requirement. The OIC should solicit input from impacted insurers, but it is likely that some companies may need significant lead time to develop new underwriting algorithms and to reprogram their systems to meet the new disclosure requirement. Insurers may need as much as six to nine months to make these changes, which could result in the need to file new rating rules or manuals.

As currently drafted, the second stakeholder draft appears to require that disclosure notices be sent to any consumer to whom a new policy is issued on or after June 20, 2021. If accurate, this requirement constitutes a retroactive application of the rule to which we object for two reasons: (1) consumers have a right to advance notice of policy and policy-related changes and (2) without clarification, consumers will wrongly conclude the failure to provide advance notice is the fault of their insurer.

In addition, we believe the invitation to insureds to contact either their company or agent for a quote may interfere with the contractual relationship between the producer and the insurer. Should an insured choose to call the company for a quote, the producer could potentially not receive the renewal

commission. This may be particularly disruptive for companies that utilize captive producers who are only permitted to offer a particular insurer's products.

We suggest the following revision:

> The following notice is required to be sent to you by the Washington State Insurance Commissioner 60 days before your coverage is set to renew. This notice is required as a result of the new rule banning the use of credit history and credit-based insurance scores adopted by the Office of the Insurance Commissioner. **Please note that this** i**s not a notice of our intent to renew your coverage**. If we renew your coverage, you will receive a separate renewal notice as required by law at least 20 days in advance of your renewal date.
>
> You are currently insured with [COMPANY NAME] and your eligibility for coverage and the premiums you paid were based at least in part on ~~a Credit-based Insurance Score~~ your credit history. Insurance companies are no longer permitted by the Washington State Insurance Commissioner to consider your credit history when setting rates or determining your eligibility for coverage. The elimination of credit history has affected your rate. If your rate has increased, you may also be eligible for coverage in one or more of our affiliated companies; ~~, which~~ if you are otherwise eligible, non-credit-history based insurance ~~score~~ factors ~~may~~ that impact your premiums and eligibility for coverage will still apply. Please contact your Agent for further assistance. If you do not have an Agent, you may contact our customer service representatives directly at [PHONE NUMBER] for assistance.

WAC 284-24A-090(7)(b)

This requirement is overly broad and appears to require companies to provide quotes to consumers that would otherwise not meet certain other non-credit history-based underwriting criteria. For example, an applicant with a history of traffic offences may not otherwise qualify for coverage in a preferred affiliate.

We suggest the following revision to this section:

> (b) Must allow an impacted insured who otherwise meets non-credit history based underwriting criteria to either secure quotes, or secure coverage, or both, in an~~y~~ affiliated insurer, if otherwise eligible. This section does not require a company to provide a quote or issue coverage if the applicant fails to meet other established noncredit based underwriting criteria and;

WAC 284-24A-090(7)(c)

This language is vague and overly broad, and a clearer statement of regulatory intent and guidance needs to be provided. Do you intend to say that the company may not apply an underwriting guideline to its decision to allow coverage in a preferred affiliate? If an individual was placed in a non-preferred company based on underwriting criteria that is not credit based, are you intending that the company

may not "consider" the previous non-credit based underwriting and claims history when determining the premium for the new company?

Depending on your intent, and in the attempt to limit the scope to prohibiting the use of credit history, we suggest the following revision:

> (c) May not consider the credit-based insurance score utilized by the prior company when determining premiums for impacted insured being offered coverage by the affiliate. This section does not prohibit company from considering other non-credit based underwriting criteria including claims history under the prior company or otherwise when setting the premium under the new company.

We thank you for the opportunity to submit these comments.

Sincerely,

Mark Sektnan
Vice President, State Government Relations
American Property Casualty Insurance Association

Enclosures (Exhibits A and B)

Exhibit D

☐ EXPEDITE
☒ Hearing is set
Date: September 3, 2021
Time: 9:00 a.m.
Judge/Calendar: Mary Sue Wilson

☐ No hearing is set

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

NO. 21-2-00542-34

PETITIONERS' MOTION FOR SUMMARY JUDGMENT ON THEIR CLAIM FOR DECLARATORY RELIEF, FOR A PERMANENT INJUNCTION, AND TO SUPPLEMENT THE RECORD

CARNEY BADLEY SPELLMAN, P.S.
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I. INTRODUCTION AND REQUESTED RELIEF

In this action for declaratory and injunctive relief, Petitioners, the American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents and Brokers of Washington, move for summary judgment on their claim for declaratory relief and for a permanent injunction to enjoin Respondents, the Office of the Insurance Commissioner of the State of Washington ("OIC") and Insurance Commissioner Mike Kreidler, from implementing and enforcing an emergency rule that the Commissioner adopted on March 22, 2021 (the "Emergency Rule").[1]

The Emergency Rule suspends for 120 days insurers' use of consumers' credit histories to determine rates, premiums, or eligibility for coverage (sometimes called "credit scoring") with respect to all private passenger automobile, renters, and homeowners insurance issued in Washington. The Commissioner adopted the Emergency Rule about one year after the federal and state measures which he asserts gave rise to the emergency necessitating the Rule, but less than two weeks after his most recent effort to convince the Washington Legislature to ban the use of credit histories failed.

Summary judgment is appropriate, first, because the Emergency Rule violates the constitutional separation of powers. The Rule, adopted almost immediately after the Legislature declined to ban the use of credit history, was an unconstitutional invasion of the Legislature's exclusive prerogative to amend its own statutes. Second, summary judgment should be granted because the Commissioner lacked the statutory authority to adopt the Emergency Rule. Washington law permits the use of credit history as a factor to determine rates, premiums, and eligibility for coverage, and limits the Commissioner's authority to adopting implementing rules. The Emergency Rule suspends a statutorily authorized use and is invalid as a result. The

[1] This motion and the entire action are limited to the Emergency Rule and do not in any way address the Commissioner's expressed intention to adopt a permanent rule banning use of credit history for at least 3 years. Such a hypothetical challenge would not be ripe in any event.

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Commissioner has no authority to suspend legislative enactments, as he has done here. Third, summary judgment is appropriate because the Commissioner did not have the requisite statutory good cause to adopt the Emergency Rule. Fourth, Petitioners are entitled to summary judgment because the Emergency Rule, which is based on no supporting evidence, is arbitrary and capricious. In addition, because Petitioners have demonstrated their entitlement to relief, pursuant to RCW 34.05.574(1)(b), the Court can and should enter a permanent injunction enjoining Respondents from implementing and enforcing the Emergency Rule.

Petitioners recognize that this motion raises some issues that also were presented by Petitioners' prior motion for a preliminary injunction, which the Court denied. Petitioners respectfully submit that the Court's decision was erroneous and intend to demonstrate as much in the context of this new motion which, in any event, is considered under different standards. Moreover, and more importantly, evidence has come to light which conclusively demonstrates that the motion for summary judgment should be granted.

Senator Mark Mullet has come forward on his own accord to set the record straight regarding Respondents' conduct in connection with their legislative efforts to ban the use of credit history in insurance. Senator Mullet chairs the senate committee that considered the bill that the Commissioner recently sponsored to impose a ban, and he interacted extensively with Respondents in connection with that bill. Senator Mullet makes clear that at no time during their legislative efforts did Respondents suggest that they had the regulatory authority to suspend the use of credit history. Nor did Respondents ever suggest that action was necessary to address an emergency, that any emergency even existed, or that credit scoring was unfairly discriminatory in the manner Respondents assert in this case.

Moreover, on May 26, 2021, Respondents finally transmitted and served what they certify is the emergency rule-making file for the Emergency Rule. This file is devoid of even a superficial analysis by the Commissioner's staff of the third-party documents included in the

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file and also lacks any evidentiary support for the Commissioner's purported finding of good cause that an emergency existed. Nor is there any evidence in the file to support the speculation in the Emergency Rule itself, and by Respondents, that use of credit history is unfairly discriminatory in the manner Respondents have asserted in this case.

This powerful new evidence confirms that Petitioners' motion for summary judgment on their claim for a declaratory judgment, and for entry of a permanent injunction, should be granted. Respect for the rule of law, including respect for the Administrative Procedure Act's strong preference for regular order and public engagement in rulemaking, demands that Respondents' gross regulatory overreach be stopped in its tracks.

II. STATEMENT OF FACTS

A. The Legislature authorized credit scoring for insurance underwriting and rating purposes in 2002, rejecting the Commissioner's request to ban it.

In 2002, over the Commissioner's opposition, the Legislature passed Engrossed Substitute House Bill 2544, which enacted RCW 48.18.545 and RCW 48.19.035—statutes that authorize credit scoring in underwriting and setting rates, subject to certain requirements and restrictions. LAWS OF 2002, ch. 360.[2] Both statutes provide that the Commissioner "may adopt rules to *implement*" the sections. RCW 48.18.545(7) & RCW 48.19.035(5) (emphasis added). And the Commissioner has in fact done so. *See* WAC 284-24A-001, *et seq*. Among his adopted rules are WAC 284-24A-010 and 284-24A-011 (specifying what an insurer must tell a consumer about significant factors that adversely affect the consumer's credit history as well as significant factors that led to a decision to charge a higher premium or to reject coverage) and WAC 284-24A-045, 284-24A-050 and 284-24A-055 (detailing how an insurer using credit history as a factor to determine insurance rates can show that its rating plan results in rates that are not excessive, inadequate, or unfairly discriminatory).

[2] http://lawfilesext.leg.wa.gov/biennium/2001-02/Pdf/Bills/Session%20Laws/House/2544-S.SL.pdf?q=20210609164555.

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B. The Commissioner again tried unsuccessfully to get the Legislature to ban credit scoring in 2010.

In 2010, the Commissioner supported Senate Bill 6252, which would have banned the use of credit history in insurance for any purposes, including underwriting or rating.[3] The bill failed, never making it out of committee hearings.[4]

C. The Legislature rejected the Commissioner's latest attempt to ban credit scoring earlier this year.

On January 11, 2021, at the behest of the Commissioner and the Governor, two senators introduced Senate Bill 5010 which, if passed, would have prohibited insurers that issue personal lines insurance policies (such as private passenger automobile, renters and homeowners insurance), from refusing to issue or renew a private insurance policy based upon an individual's credit history or credit information. Senate Bill 5010 also would have prohibited insurers from filing rates with the OIC for personal lines that incorporated credit information. *See* Declaration of Jason W. Anderson in Support of Petitioners' Motion for Summary Judgment ("Anderson Dec.") ¶ 2, Ex. 1.

On January 14, 2021, a public hearing was held on Senate Bill 5010 before the Senate Committee on Business, Financial Services & Trade. Anderson Dec. ¶ 3, Ex. 2. Two representatives of the Insurance Commissioner spoke at the hearing—John Noski, the legislative liaison for the OIC, and Eric Slavich, the OIC's lead actuary for property and casualty insurance. Anderson Dec. ¶ 4, Ex. 3 at 8. Mr. Slavich testified that he understood why insurers use credit history and aptly described the choice confronting the Legislature:

> As an actuary, I understand why insurers use credit to help set their premium rates. Actuarially, there is a correlation between credit scores and insurance

[3] SB 6252, 2010 Reg. Sess., http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bills/Senate%20Bills/6252.pdf?q=20210403132302. *See* Mike Kreidler, "Washington Legislature must ban the insurance industry's use of credit scoring," *The Seattle Times* (January 21, 2010).

[4] https://app.leg.wa.gov/billsummary?BillNumber=6252&Year=2009&Initiative=false.

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> claims. But as legislators, you must decide if the rating factor is justified. Does the correlation matter more than its impact on society?

Anderson Dec., Ex. 3 at 11. As Mr. Slavich recognized, this is an archetypal example of the kind of policy judgments that are the province of elected legislatures. Ultimately, the Legislature did not adopt the policy rationale that the Commissioner urged, and the Commissioner's bill failed to pass. Anderson Dec., Ex. 2.

D. Shortly after the 2021 bill failed, and without notice, the Commissioner adopted an emergency rule banning credit scoring.

With no prior notice, and less than two weeks after expiration of the March 9 deadline for the Senate to pass Senate Bill 5010, the Commissioner adopted the Emergency Rule. Anderson Dec. ¶ 5, Ex. 4. The Rule creates two new provisions—WAC 284-24A-088 and 284-24A-089 (Anderson Dec., Ex. 4 at 1).

The first provision, WAC 284-24A-088, contains the Commissioner's "Findings" in support of the Emergency Rule. In the second provision, WAC 284-24A-089, the Commissioner "finds" that, as a result of the broad negative economic impact of the COVID-19 pandemic, the disproportionate negative economic impact of the pandemic on communities of color, and the purported disruption to credit reporting resulting from federal and state consumer protection measures, use of credit-based insurance scores for private passenger automobile coverage, renters coverage and homeowners coverage results in premiums that are excessive, inadequate, or unfairly discriminatory under RCW 48.19.020 and 48.18.480. *See* WAC 284-24A-089(2). On these grounds, for all policies effective or processed for renewal on or after June 20, 2021, the Emergency Rule suspends for 120 days the use of credit history as a factor to determine personal insurance rates or eligibility for coverage for private passenger automobile coverage, renters coverage and homeowners coverage. The Emergency Rule further required each insurer to file, by May 6, 2021, amendments to their rate plans for all insurance policies covered by the Rule. WAC 284-24A-089(3), (7).

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E. Significant developments since the hearing on petitioners' request for a preliminary injunction support the pending motion.

On April 23, 2021, this Court heard argument on Petitioners' motion for a preliminary injunction to enjoin implementation and enforcement of the Emergency Rule. At the conclusion of the hearing, the Court denied the motion. Since then, there have been significant developments that bear directly on the issues presented by this motion for summary judgment.

In particular, Senator Mark Mullet is the Chair of the Senate Committee on Business, Financial Services & Trade, which has jurisdiction over legislation relating to insurance. He has come forward to confirm that, in adopting the Emergency Rule, the Insurance Commissioner abused his regulatory authority. *See* Declaration of Mark Mullet ("Mullet Dec.") ¶¶ 1-3.

Senator Mullet attests to a series of facts that support this conclusion. First, OIC staff contacted him by text message on June 10, 2020 and spoke with him on June 11 about a bill proposal to ban use of credit scoring in pricing and underwriting personal insurance. Neither in the text message nor during the call did OIC staff say that the bill was necessary to address an emergency. Mullet Dec. ¶ 4. Later, on October 7, 2020, OIC staff contacted members of Senator Mullet's committee seeking support for legislation to be introduced in the upcoming legislative session prohibiting the use of credit history in personal insurance in Washington. OIC's explanation in support of the bill related entirely to social justice considerations, and there was no suggestion that the bill was necessary to address any emergency. Mullet Dec. ¶ 5.

On December 10, 2020, SB 5010 was pre-filed for introduction. Senator Mullet had two competing concerns. He wanted to provide relief to those in economic distress but was alarmed about the impact banning the use of credit history could have on the Washington insurance market and the insurance premiums of millions of Washington residents. Seeking a possible alternative to SB 5010 that would help those in need, but with less dramatic consequences for the Washington insurance market, he requested that his committee's staff draft language that

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would provide relief to insureds experiencing "extraordinary life circumstances," such as a lost job. Mullet Dec. ¶ 6.

Senator Mullet presided over the January 14, 2021 hearing held before his committee on SB 5010. He attests that, at no time during this hearing, or to his knowledge at any other time in connection with SB 5010, did anyone from the OIC assert that SB 5010 was necessary to address an emergency. Nor did anyone from the OIC assert that use of credit history in insurance was unfairly discriminatory in the actuarial sense (*i.e.*, that it led to differences in premiums charged that did not correspond to expected losses). Instead, SB 5010 was again touted as a social justice measure. Mullet Dec. ¶ 7. As such, it was not a measure designed to address unfair discrimination as it is defined in Washington's insurance code generally and RCW 48.18.480 specifically.[5]

On January 22, 2021, Representative Steve Kirby, Chair of the Committee on Consumer Protection and Business of the Washington House of Representatives, introduced House Bill 1351, which would have required insurers to provide reasonable relief from insurance rates and underwriting rules to consumers whose credit histories had been negatively impacted by extraordinary life events such as a lost job or the death of a close family member. HB 1351 would have provided meaningful assistance to those in need without causing massive disruption to the Washington insurance market. Nevertheless, the OIC and Commissioner Kreidler opposed the bill. Mullet Dec. ¶¶ 6, 8.

A hearing on HB 1351 was held before Representative Kirby's committee on February 1, 2021. The bill was unanimously approved by the committee on February 4, 2021, and it was

[5] RCW 48.18.480, entitled "Discrimination Prohibited," provides: "No insurer shall make or permit any unfair discrimination between insureds or subjects of insurance *having substantially like insuring risk, and exposure factors, and expense elements,* in the terms or conditions of any insurance contract, or in the rate or amount of premium charged therefor, or in the benefits payable or in any other rights or privileges accruing thereunder. The provision shall not prohibit fair discrimination by a life insurer as between individuals having unequal expectation of life." (Emphasis added).

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Senator Mullet's understanding that the bill had sufficient support to pass on the House floor. However, Commissioner Kreidler successfully urged House leaders to keep the bill from being brought to an up-or-down vote on the floor, even though it would have directly benefited Washington consumers. The Commissioner's actions have left Washington as the only state in the country that does not provide relief to consumers from extraordinary life events. Mullet Dec. ¶ 9.

From late January through mid-February, Senator Mullet had separate informal discussions with his committee staff, OIC staff and industry stakeholders regarding possible amendments to SB 5010. On February 9, 2021, OIC staff proposed a compromise that would have allowed insurers to continue to use credit history but that also would have limited its impact. Later that day, Senator Mullet met with Commissioner Kreidler in the hope of reaching a definitive agreement, but the Commissioner refused to honor the compromise that his own staff had proposed. At no time during this meeting did Commissioner Kreidler claim that use of credit history was unfairly discriminatory in the actuarial sense. Nor did the Commissioner assert that SB 5010 was meant to address any kind of emergency resulting from use of credit history or that any emergency even existed. Mullet Dec. ¶ 10.

Notwithstanding the Commissioner's unwillingness to engage constructively, Senator Mullet continued his efforts to achieve a solution. Those efforts led to introduction of Substituted Senate Bill 5010. SSB 5010 would have allowed insurers to continue to use credit history, but for a period of three years would have permitted such use only when doing so resulted in lower premiums for the insured. In this way, SSB 5010 would have protected Washington insureds whose credit scores were negatively affected by the pandemic. Nevertheless, Commissioner Kreidler adamantly opposed SSB 5010. Mullet Dec. ¶ 11.

Senator Mullet's committee approved SSB 5010. Furthermore, his vote count on the Senate floor made clear to him that the bill had sufficient support to pass on the floor. But just

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as he had requested House leaders not to allow HB 1351 to come to a vote on the House floor, Commissioner Kreidler successfully urged Senate leaders to prevent SSB 5010 from coming to an up-or-down vote on the Senate floor, even though the bill would have directly benefitted consumers. As a result, SSB 5010 was not voted on by the March 9 deadline for bills to receive an up-or-down vote in the legislative session. On March 10, Commissioner Kreidler issued a press release arguing that original SB 5010 could still move forward, but later that day, the Senate and House majority leaders made clear that this would not happen. Mullet Dec. ¶¶ 12-13.

Senator Mullet found Commissioner Kreidler's adoption of the Emergency Rule less than two weeks later to be shocking and in blatant defiance of the legislative will. At no time during their efforts to obtain a legislative ban on the use of credit history did the Commissioner or the OIC ever state or suggest to Senator Mullet that they had the authority through regulatory action to suspend the use of credit history in insurance. Mullet Dec. ¶ 14. Equally shocking to Senator Mullet is any conclusion that there was any emergency which justified proceeding by emergency rule rather than the normal rule-making process. At no time since the OIC first approached Senator Mullet in June 2020 through to the day that SB 5010 died in March 2021, did the Commissioner or any representative of OIC claim to Senator Mullet that immediate action on use of credit history was necessary to avoid some kind of imminent emergency or that credit scoring was unfairly discriminatory in the manner Respondents claim in this litigation. Mullet Dec. ¶¶ 7, 10. Senator Mullet concludes by stating what by now must be obvious to any fair-minded observer—it was only because of Commissioner Kreidler's failure to pass SB 5010 that the Commissioner adopted the Emergency Rule when he did. Mullet Dec. ¶¶ 15-16.

Senator Mullet's declaration confirms that everything about the Emergency Rule is a sham. Respondents were never concerned about whether use of credit history was unfairly discriminatory in the way Respondents now assert and never claimed that an emergency existed

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that necessitated immediate action. All of these concerns and considerations simply did not exist until Respondents fabricated them, less than two weeks after their legislative efforts had failed, to justify the Emergency Rule.

The emergency rule-making file, which Respondents cryptically describe as the "record of the administrative injunction proceeding," confirms this. The file contains 1,019 pages, over half of which are unannotated copies of the text of the CARES Act and another federal pandemic-relief law. *See* Anderson Dec., Ex. 5 at 2-4. Most of the rest are various articles and reports contained in a "Background File." The "Rule Text File" and the "CR 103 E File" are composed primarily of identical versions of the Emergency Rule as adopted. *Id.* The file contains not a scintilla of evidence supporting the Commissioner's "good cause" determination and not a scintilla of evidence that insurers' use of credit history is unfairly discriminatory in the manner claimed in this litigation.

III. AUTHORITY AND ARGUMENT

A. The Summary Judgment Standards.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* CR 56(c); *Ehrhart v. King County*, 195 Wn.2d 388, 409, 460 P.3d 612 (2020); *Johnson v. Lake Cushman Maintenance Co.*, 5 Wn. App. 2d 765, 776, 425 P.3d 560 (2018). A material fact is one that affects the outcome of the litigation. *Elon Construction, Inc. v. Eastern Washington Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012). A genuine issue of material fact exists when reasonable minds could differ on such facts. *Ehrhart*, 195 Wn.2d at 409.

The moving party in a summary judgment motion bears the initial burden of showing the absence of an issue of material fact. If the moving party makes this initial showing, the inquiry shifts to the opposing party to show the existence of a genuine issue of material fact. If

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the opposing party fails to make a showing sufficient to establish a genuine issue of material fact, then summary judgment is appropriate. *Johnson*, 5 Wn. App. 2d at 777-78.

Petitioners seek summary judgment on four grounds, each of which requires that the motion be granted. The first ground is that the Emergency Rule violated the constitutional separation of powers. This ground presents an issue of law. *See In re Combs*, 176 Wn. App. 112, 116, 308 P.3d 763 (Div. 2 2013). The second ground is that the Commissioner lacked the statutory authority to adopt the Emergency Rule. This ground also presents only an issue of law (*see id*. at 116), although certain facts recently have come to light which reinforce the legal conclusion that the Commissioner lacked authority to promulgate the Emergency Rule. The third ground is that the Commissioner lacked the good cause necessary to adopt the Emergency Rule. This ground involves a limited number of material facts but no genuine issue as to any of them. The fourth ground is that the emergency rule is arbitrary and capricious. It, too, involves a discrete number of material facts but no genuine issue regarding any of them. Accordingly, as demonstrated below, Petitioners' motion for summary judgment on its claim for declaratory judgment should be granted. *See Benton County v. Zink*, 191 Wn. App. 269, 361 P.3d 801 (2015) (granting summary judgment to plaintiff in declaratory judgment action); *New York Underwriters Ins. Co. v. Doty*, 58 Wn. App. 546, 794 P.2d 521 (1990) (same).

B. Petitioners are entitled to summary judgment on their claim for declaratory relief.

1. The Court should grant summary judgment because the Commissioner's adoption of the Emergency Rule violated the constitutional separation of powers.

Separation of powers is a vital doctrine that is implicit in the Washington State Constitution and arises from the division of government into three separate and independent branches—legislative, executive, and judicial. *State v. Gresham*, 173 Wn.2d 405, 428, 269 P.3d 207 (2012); *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009); *State v. David*, 134 Wn. App. 470, 478, 141 P.3d 646 (Div. 2 2006). To determine whether a particular action

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violates separation of powers, a court looks not to whether the two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another. *Brown*, 165 Wn.2d at 718; *see also Gresham*, 173 Wn.2d at 428; *David*, 134 Wn. App. at 478. As noted above, whether an action violates the separation of powers is a question of law. *See Combs*, 176 Wn. App. at 116.

In adopting the Emergency Rule when he did, the Commissioner, as an elected executive officer,[6] invaded the prerogatives of the Washington Legislature. The Legislature was presented the opportunity to repeal or otherwise amend the statutes authorizing use of credit history and exercised its prerogative not to do so. *See City of Union Gap v. Carey*, 64 Wn.2d 43, 49, 390 P.2d 674 (1964) ("It is the exclusive prerogative of the legislature to amend its own statutes."). In suspending the use of credit history for 120 days, not even two weeks after his legislative efforts failed, the Commissioner invaded this exercise of the Legislature's prerogative.[7] *See also* Mullet Dec. ¶¶ 3, 14 (describing the Emergency Rule as a usurpation of legislative authority and a violation of the separation of powers). The Commissioner's adoption of the Emergency Rule violated the constitutional separation of powers, and Petitioners' motion for summary judgment should, therefore, be granted.

2. Summary judgment is appropriate because the Emergency Rule exceeded the Commissioner's authority.

This Court has the inherent and statutory authority to declare the Emergency Rule invalid if it determines that the Rule is contrary to law or exceeds the Commissioner's authority.

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[6] *See State ex rel. Lemon v. Langile*, 45 Wn.2d 82, 105, 273 P.2d 464 (1954).

[7] It is no answer to assert, as Respondents did previously, that courts generally do not ascribe meaning to a failure to pass a bill into law. The authority Respondents cited to support this contention involved issues of statutory interpretation. But applying the doctrine of separation of powers is not a matter of statutory interpretation, and petitioners do not ask this Court to interpret any statute in light of the Legislature's failure to amend the statutes authorizing use of credit history. All that matters is that the Legislature did not exercise its exclusive prerogative to amend those statutes. What meaning, if any, this declination may have for the interpretation of any statute is irrelevant to whether the Commissioner invaded that exclusive legislative prerogative when he adopted the Emergency Rule. He did. *See also* Mullet Dec. ¶ 13.

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RCW 34.05.570(2)(c); *Lake Union Drydock Co. v. State, Dep't of Nat. Res.,* 143 Wn. App. 644, 651-52, 179 P.3d 844 (2008).

An administrative action is contrary to law when it exceeds the agency's authority or violates rules governing its exercise of discretion. *Id.*; *see also LaRose v. Dep't of Labor & Indus.*, 11 Wn. App. 2d 862, 883, 456 P.3d 879 (2020) (agency rule is invalid if it exceeds the statutory authority of the agency). An administrative rule cannot enact, suspend, or repeal a law, as such authority can never be delegated by the Legislature. *Diversified Inv. P-ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989); *see also Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 97, 11 P.3d 726 (2000). Any rule purporting to take such action must be invalidated. *Swinomish Indian Tribal Comm. v. Washington State Dep't of Ecology*, 178 Wn.2d 571, 580-81, 311 P.3d 6 (2013); *see also Center for Biological Diversity v. Dep't of Fish & Wildlife*, 14 Wn. App. 2d 945, 968-74, 474 P.3d 1107 (2020) (ruling that agency exceeded statutory authority). A regulation also is invalid if it is inconsistent with the statute under which it was promulgated. *Postema*, 142 Wn.2d at 83. The validity of an agency rule is a question of law. *LaRose*, 11 Wn. App. 2d at 883.

The Emergency Rule suspends for 120 days the use of credit history to price and underwrite personal insurance. But the power to suspend a law belongs solely to the Legislature and cannot be delegated. *See Diversified Inv. P-ship*, 113 Wn.2d at 24. For this reason alone, the Emergency Rule is beyond the Insurance Commissioner's authority, and Petitioners' motion for summary judgment should be granted.

But even if the Legislature could delegate authority to suspend a law, it did not do so here. The extent of an agency's statutory rule-making authority also is a question of law. *LaRose*, 11 Wn. App. 2d at 883. Moreover, a court should determine on its own whether a regulation and statute conflict, without deference to the agency. *Postema*, 142 Wn.2d at 77 ("[A]n agency's view of a statute will not be accorded deference if it conflicts with the statute.

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Ultimately, it is for the court to determine the meaning and purpose of a statute.") (citations omitted); *see also Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 217, 173 P.3d 885 (2007) (court reviewing agency's interpretation or application of a statute may substitute its interpretation of the law for the agency's). These precepts are merely specific applications of the general rule that statutory interpretation is a question of law. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012); *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 292, 253 P.3d 430; *see also Spokane County v. Bates*, 96 Wn. App. 893, 896, 982 P.2d 642 (1999) (application of statute to a specific set of facts is an issue of law); *Sintra v. City of Seattle*, 96 Wn. App. 757, 761, 980 P.2d 796 (1999) (same).

Determining the Commissioner's rule-making authority is a matter of statutory interpretation. The court's fundamental objective when interpreting a statute is to "ascertain and carry out the Legislature's intent[.]" *State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Washington follows the plain-meaning rule for interpreting statutes: "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id*. The plain meaning is discerned from "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id*. at 11. The court should also consider legislative purposes appearing on the face of the statute and background facts of which judicial notice can be taken. *Id*. "[I]f, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history." *Id*. at 12.

There is no ambiguity here. RCW 48.18.545(4) provides that "[a]n insurer *may use credit history* to deny personal insurance" in combination with other substantive underwriting factors (emphasis added). *See also* RCW 48.19.035(2)(a) (authorizing use of credit history to determine personal insurance rates, premiums, or eligibility for coverage provided insurance

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scoring models are filed with the Commissioner). In blatant defiance of this clear mandate, the Emergency Rule states that "[f]or all private passenger automobile coverage, renter's coverage, and homeowner's coverage issued in the state of Washington, insurers *shall not use credit history* to determine personal insurance rates, premiums, or eligibility for coverage." WAC 284-24A-89(3) (emphasis added). A starker conflict is difficult to imagine, and there is no way to reconcile the authority granted by the statutes with the prohibition imposed by the Rule.

Yet, somehow, the Commissioner cites RCW 48.19.035 as statutory authority for adopting the Emergency Rule (*see* Anderson Dec., Ex. 4 at 1). But that provision, of course, *authorizes the use of credit history*. Unless and until the Legislature says differently, RCW 48.19.035 and RCW 48.18.545 leave the decision to insurers, not the Commissioner, whether to use credit history and limits the Commissioner's authority to "adopt[ing] rules to *implement* this section." RCW 48.19.035(5) (emphasis added). Implement is not defined in the statute. To determine the plain meaning of an undefined term, the court may look to the dictionary. *Home Street, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). To "implement" means to "carry out" or "accomplish."[8] Thus, under the plain meaning of RCW 48.19.035(5), that provision authorizes the Commissioner to adopt only rules that would "carry out" or "accomplish" the specific requirements and restrictions set forth in the statute. The Emergency Rule does no such thing. Rather, it suspends operation of the statute. Not only, then, does RCW 48.19.035(5) not authorize the Emergency Rule, the Rule is inconsistent with, indeed contrary to, the statute. The Rule is, therefore, invalid. *See Postema*, 142 Wn.2d at 83 (any regulation that is inconsistent with the statute under which it is promulgated is invalid). *Lake Union*, 143 Wn. App. at 651-52 (an administrative action is contrary to law when it violates statutory authority).

[8] *Implement*, MERRIAM WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/implement (last visited April 5, 2021).

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The Commissioner's citation to RCW 48.02.060 (*see* Anderson Dec., Ex. 4 at 1) as authorizing the Emergency Rule is equally unavailing. To begin, nothing in RCW 48.02.060 authorizes the Commissioner to suspend laws duly enacted by the Legislature. To the contrary, RCW 48.02.060(3)(a) authorizes the Commissioner to "make reasonable rules for *effectuating*" any provision of the Insurance Code. (Emphasis added.) "Effectuate" means "to put (something) into effect or operation."[9] The Commissioner's authority to "put…into effect" the Insurance Code—which includes statutes that authorize credit scoring—certainly does not allow him to suspend the use of credit scoring.

Moreover, RCW 48.02.060 limits the Commissioner's emergency authority to four discrete topics: 1) reporting requirements for claims; 2) grace periods for payment of insurance premiums and performance of other duties by insureds; 3) temporary postponement of cancellations and nonrenewals; and 4) medical coverage to ensure access to care. RCW 48.02.060(4). The Emergency Rule plainly does not pertain to any of these topics, and RCW 48.02.060 therefore does not authorize the Rule. Indeed, because RCW 48.02.060 specifically sets forth and limits the Commissioner's emergency authority, its limitations prevail over the general grants of authority that the Commissioner has cited in support of the Emergency Rule (RCW 48.19.020 and RCW 48.18.480), even if those general statutes otherwise authorized the Commissioner's actions. *See Jespersen v. Clark County*, 199 Wn. App. 568, 578, 399 P.3d 1209 (Div. 2 2017) (specific statute will supersede a general one when both apply).[10]

But even if those general statutes could authorize the Commissioner's actions, they do not. RCW 48.19.020 (*see* Anderson Dec., Ex. 4 at 1) merely recites the universal standard that

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[9] *Effectuate*, MERRIAM WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/effectuate (last visited April 5, 2021).

[10] Previously, Respondents contended that the limitations on the Commissioner's emergency authority found in RCW 48.02.060 apply only to orders the Commissioner may issue, not to rules he may adopt. The Commissioner did not cite any authority for this distinction, and we are aware of none. Moreover, the Emergency Rule is actually titled "Rule-Making Order."

insurance premium rates shall not be excessive, inadequate, or unfairly discriminatory. RCW 48.18.480 (Anderson Dec., Ex. 4 at 1) is similar. By no stretch of the imagination could these general pronouncements reasonably be interpreted as authorizing the Commissioner to suspend by emergency edict the operation of specific statutes (RCW 48.19.035 and RCW 48.18.545) that *expressly authorize* the use of credit history in determining rates, premiums and eligibility for coverage for personal lines of insurance, statutes that the Legislature declined to modify just two weeks before the Commissioner adopted the Emergency Rule. If such general statements were sufficient to suspend a specific statute and defy legislative intent, the Commissioner would have virtually unfettered regulatory power.

In addition, the Commissioner's citation to RCW 48.19.080 (waiver of filing) (*see* Anderson Dec., Ex. 4 at 1) is of no consequence here. This procedural provision merely permits the Commissioner to suspend or modify filing requirements by order or to examine rates affected by such order pursuant to the standard prescribed in RCW 48.19.020. It authorizes no further action by the Commissioner.

Finally, Respondents' own conduct confirms the Commissioner's lack of statutory authority to adopt the Emergency Rule. Specifically, as Senator Mullet attests, at no time during the entire eight-month period that Respondents attempted to secure a legislative ban on the use of credit history did they state or suggest that the Commissioner had the authority to suspend such use. Mullet Dec. ¶ 14.

The Emergency Rule is an exercise of a non-delegable power of the Legislature, is inconsistent with the statutes authorizing use of credit history and is beyond any statutory authority conferred on the Commissioner. For each of these reasons, it is invalid as a matter of law, and the Court should grant Petitioners' motion for summary judgment on their claim for declaratory relief.

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3. Summary judgment is appropriate because the Commissioner lacked good cause to take immediate action.

RCW 34.05.350(1)(a) of Washington's Administrative Procedure Act (the "APA") permits an agency to adopt an emergency rule only if the agency, for "good cause," finds "[t]hat immediate adoption . . . of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest." The Commissioner parrots this provision to justify his assertion of good cause. Anderson Dec., Ex. 4 at 1. But that assertion is unfounded, and the Commissioner lacked good cause to adopt the Emergency Rule.

No Washington case comprehensively discusses RCW 34.05.350's good cause requirement or the level of scrutiny to apply to an agency's assertion of good cause. However, when enacting Washington's APA, of which RCW 34.05.350 is a part, the Legislature codified its intent and specifically admonished courts to "interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts." *See* RCW 34.05.001. Consistent with this directive, the Supreme Court has stated that in the absence of Washington case law, federal precedent may serve as persuasive authority. *See King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 179, 979 P.2d 374 (1999).

In *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), the Ninth Circuit Court of Appeals discussed why the federal APA counterpart to RCW 34.05.350's "good cause" requirement should be "narrowly construed":

> Exceptions to notice and comment rulemaking are not lightly to be presumed. [I]t is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later. Failure to follow notice and comment rulemaking may be excused when good cause exists . . . .

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> Good cause is to be narrowly construed and only reluctantly countenanced. As such, the good cause exception is usually invoked in emergencies, and an agency must overcome a high bar to do so. . . .

Id. at 575-76 (citations and quotation marks omitted). As *Azar* suggests, the Commissioner's assertion of good cause should be viewed with a skeptical eye. Indeed, because good cause is the only prerequisite under Washington law to engage in the extraordinary action of emergency rule-making, it is particularly critical that the requirement be applied rigorously to ensure that executive agencies and officers do not invoke emergency power as a matter of course to impose regulations before anyone has an opportunity to comment on them.

The Commissioner did not satisfy the good-cause standard because his claimed emergency was an archetype of an artificial fabrication. *See State v. MacKenzie*, 114 Wn. App. 687, 699, 60 P.3d 607 (2002) (indicating that a fabricated or artificial emergency does not satisfy the good cause requirement). The Commissioner cites to certain actions taken by the President, Congress, and the Governor that he says have disrupted credit reporting and thereby made credit-based insurance scoring unreliable. Anderson Dec. ¶¶ 7-11, Exs. 6-10. These are the Governor's Proclamations 20-05 (declaring a state of emergency in Washington) (Anderson Dec., Ex. 6); 20-19 (placing a moratorium on evictions) (Anderson Dec., Ex. 7); 20-49 (placing a moratorium on garnishments) (Anderson Dec., Ex. 8); the President's declaration of a National Emergency (Anderson Dec., Ex. 9); and the federal CARES Act (Anderson Dec., Ex. 10). The original dates of enactment of these measures were February 29, 2020 (Anderson Dec., Ex. 6 at 2), March 18, 2020 (Anderson Dec., Ex. 7 at 3), April 14, 2020 (Anderson Dec., Ex. 8 at 3), March 13, 2020 (Anderson Dec., Ex. 9 at 1), and March 27, 2020 (Anderson Dec., Ex. 4 at 1), respectively. The Commissioner has offered no evidence to show why these measures, most over one year old when the Emergency Rule was adopted, suddenly caused an emergency justifying immediate adoption of the Rule.

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The Commissioner contends that an emergency existed, justifying immediate action, because it was uncertain when the federal and state measures (in particular the CARES Act) he relies upon will expire. Anderson Dec., Ex. 4 at 2. But the Commissioner has failed to offer any evidence to show that expiration of any of these measures was so imminent that good cause existed for immediate adoption of the Emergency Rule and circumvention of the regular procedure codified in the APA. To the contrary, the credit-reporting moratorium in the CARES Act will not expire until 120 days after the President's March 13, 2020 declaration of a National Emergency expires. *See* CARES Act Section 4021 (Anderson Dec., Ex. 10 at 3). And the President recently extended that declaration for as long as another year (Anderson Dec. ¶ 12, Ex. 11). Similarly, Proclamation 20-49 has been amended and extended 14 times, and the latest version, 20-49.14, will not expire until termination of the COVID-19 State of Emergency or until rescinded, whichever is first. (Anderson Dec. ¶ 13, Ex. 12). And although the latest version of Proclamation 20-19 has an end date of June 30, 2021 (Anderson Dec. ¶ 14, Ex. 13), the proclamation has already been amended and extended six times, and there is no suggestion in the latest iteration that the Governor will not extend it again. There simply was and is no genuine emergency.

Senator Mullet's declaration confirms that no genuine emergency necessitating the Emergency Rule ever existed. Respondents first began their latest effort to secure a legislative ban on credit history in June 2020. That effort ended on March 10, 2021, more than eight months later. At no time during this entire period did Respondents ever assert that action was necessary to address any kind of emergency or that any emergency existed. The Senator avers that the timing of the Emergency Rule is the result, not of any actual emergency, but of the respondents' failure to convince the Legislature to ban credit history. Mullet Dec. ¶¶ 4-5, 7, 10, 15-16. Indisputably, the Commissioner fabricated an artificial emergency as a pretext to justify his extraordinary actions.

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The rule-making record confirms this. Nowhere in that record is there any indication that the OIC or the Commissioner believed, or even discussed, that an emergency existed that required immediate action. Only when required to do so by the CR-103 E form itself, did the Commissioner identify, for the first time, the claimed emergency. Anderson Dec. ¶ 15, Ex. 14. It is hard to imagine a clearer example of the fabrication of an artificial emergency.

The Commissioner's conduct shows a breathtaking disregard for the rule of law. Having failed to achieve his legislative aim, he has circumvented the normal rule-making process by conjuring out of thin air an artificial emergency based upon alleged concerns and considerations that he never raised during the entire eight-month period of his legislative efforts. His actions reflect, not a desire to follow the law, but to evade it.

The Commissioner can offer no evidence to create a genuine issue of material fact over whether the good cause requirement of RCW 34.05.350(1)(a) was satisfied. It was not. For this independent reason, Petitioners' motion for summary judgment on their claim for declaratory judgment should be granted.

4. Summary judgment also is appropriate because the Emergency Rule is arbitrary and capricious.

Agency action is not arbitrary and capricious when the evidence on which the agency based its decision leaves room for two opinions even though the court may believe that the agency reached an erroneous conclusion. *Floating Homes Ass'n v. WA Dep't of Fish and Wildlife*, 115 Wn. App. 780, 789, 64 P.3d 29 (2003). Agency action that has no evidentiary support, or that is based upon speculation, is arbitrary and capricious. *See Norway Hill Preservation & Prot. Ass'n v. King*, 87 Wn.2d 267, 274, n.5, 552 P.2d 674 (1976); *Hamilton Corner I, LLC v. City of Napavine*, 200 Wash. App. 258, 273-74, 402 P.3d 368 (2017) (upholding agency determination because based on evidence, not speculation).

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Respondents contend in this action that consumer-protection measures such as the CARES Act have caused insurers' use of credit history to become unfairly discriminatory in the actuarial sense that it results in improper discrimination against consumers whose credit was impaired before the pandemic and who therefore are not entitled to the credit reporting protections of the CARES Act. But the rule-making record is devoid of any evidence to support this speculation or any evidence demonstrating the extent and magnitude, if any, of such effect, assuming it exists at all.[11] And Senator Mullet attests that Respondents never asserted to him that credit scoring was unfairly discriminatory in the actuarial sense. Mullet Dec. ¶¶ 7, 10. Summary judgment is, therefore, appropriate on the ground that the Emergency Rule is arbitrary and capricious.

C. The Court should enter a permanent injunction enjoining implementation and enforcement of the Emergency Rule.

Once a petitioner has demonstrated entitlement to relief, the Court has an array of options, including issuing an injunction. RCW 34.05.574(1)(b); *see also Rios v. Washington Dep't. of Labor & Indus.*, 145 Wn.2d 483, 508, 39 P.3d 961 (2002); *Dodge City Saloon, Inc. v Washington State Liquor Control Bd*., 168 Wn. App. 388, 395, 288 P.3d 343 (2012); *Whidbey Environmental Action Network v. Island County*, 122 Wn. App. 156, 165, n.16, 93 P.3d 885 (2004).

Petitioners have demonstrated that the Emergency Rule is invalid. Accordingly, to prevent the substantial harm Petitioners and the public have sustained and will continue to sustain as a result of the Rule, pursuant to RCW 34.05.574(1)(b), the Court should enter a permanent injunction enjoining Respondents from implementing and enforcing the Rule.

---

[11] Petitioners propounded substantial discovery on Respondents to, *inter alia*, obtain any and all evidence Respondents may contend supports the Emergency Rule. Respondents objected to Petitioners' discovery and refused to produce any documents other than the rule-making record, which they already were required to do. *See* RCW 34.05.566(1). Respondents should, therefore, be limited to the rule-making record in defending the Emergency Rule in this action.

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D. This Court should supplement the record with Petitioners' additional evidence.

RCW 34.05.562 provides in pertinent part:

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
>
> (b) Unlawfulness of procedure or of decision-making process; or
>
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

Petitioners submit that their supplemental evidence satisfies the test for when a court may receive additional evidence under RCW 34.05.562, and their request to supplement the rule-making record should, therefore, be granted.

Petitioners contend that the Commissioner lacked good cause to adopt the Emergency Rule on an emergency basis and that the Rule is arbitrary and capricious. Respondents disagree with both contentions. Those issues are, therefore, disputed. Moreover, the dispute over good cause falls readily within RCW 34.05.562(1)(b) as it involves whether the Commissioner was lawfully entitled to employ the emergency rule-making procedure or was instead required to proceed by regular rule-making. Moreover, the dispute over whether the Emergency Rule is arbitrary and capricious self-evidently involves material facts in rule making and thus comes within the ambit of RCW 34.05.562(1)(c).

Petitioners' supplemental evidence consists of Exhibits 1-3 and 6-12 to the Anderson Declaration and the Mullet Declaration. Much of this evidence previously was offered and considered without objection in connection with Petitioners' prior motion for a preliminary injunction.

Exhibits 1 and 2 to the Anderson Declaration (which were offered and considered previously by this Court) are 2021 Washington Senate Bill 5010, banning the use of credit

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scoring for personal lines of insurance, and the Bill History of SB 5010. Exhibit 3 (also offered and considered previously) contains excerpts of the transcript of the public hearing on SB 5010 held before the Senate Committee on Business Financial Services and Trade on January 14, 2021, in particular, the testimony of OIC actuary Eric Slavich.

As discussed above, Petitioners contend that the Emergency Rule arose out of the Commissioner's failure to get SB 5010 passed, and not out of a bona fide emergency resulting from actuarial unfair discrimination allegedly caused by credit scoring. Exhibits 1 and 2 simply provide the content and history of SB 5010. Exhibit 3 demonstrates that actuarial unfair discrimination was not a reason that the OIC offered in support of SB 5010, and indeed, that the OIC recognized that credit scoring was actuarially sound. These facts tend to show that actuarial unfair discrimination was a pretext for the Emergency Rule and not the true reason for its adoption. The exhibits therefore satisfy both RCW 34.05.562(1)(b) and (c).

Exhibits 6-10, which also were submitted previously, are not really evidence at all. They are instead copies of the state and federal proclamations and CARES Act provisions that Respondents relied upon to demonstrate good cause for emergency rule-making. They are provided for the Court's convenience. Similarly, Exhibits 10-12 are amendments to those same state and federal proclamations, all issued prior to adoption of the Emergency Rule, and are also submitted for the Court's convenience.

The other supplemental evidence is Senator Mullet's Declaration. Senator Mullet makes clear that at no time during their legislative efforts did Respondents suggest that they had the regulatory authority to suspend the use of credit history. Nor did Respondents ever suggest that action was necessary to address an emergency, that any emergency even existed, or that credit scoring was unfairly discriminatory in the actuarial sense that Respondents claim in this litigation. Senator Mullet's declaration is powerful evidence that the Emergency Rule, adopted so soon after SB 5010's demise, was not supported by good cause (thus satisfying RCW

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34.05.562(1)(b), pertaining to unlawful procedure) and was arbitrary and capricious because it was not genuinely intended to address actuarial unfair discrimination allegedly resulting from insurers' use of credit scoring (thus satisfying RCW 34.05.562(1)(c), relating to material facts in rulemaking).

Petitioners' supplemental evidence satisfies RCW 34.05.562, and the Court should consider it in connection with the Petitioners' motion for summary judgment and for entry of a permanent injunction.

IV. CONCLUSION

For the foregoing reasons, Petitioners' motion for summary judgment, for entry of a permanent injunction, and to supplement the record should be granted.

DATED this 14th day of June, 2021.

DUANE MORRIS, LLP

By */s/ Damon N. Vocke*
Damon N. Vocke, NY Bar No. 5659933
Admitted pro hac vice
1540 Broadway
New York, New York 10036-4086

CARNEY BADLEY SPELLMAN, P.S.

By */s/ Jason W. Anderson*
Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA 30512
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010

Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via electronic service to the following:

Marta DeLeon Suzanne Becker OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON 1125 Washington St. SE / P.O. Box 40100 Olympia, WA 98504 laura.chadwick@atg.wa.gov marta.deleon@atg.wa.gov GCEEF@atg.wa.gov suzanne.becker@atg.wa.gov Deana.Sullivan@atg.wa.gov	Damon N. Vocke, DUANE MORRIS LLP 1540 Broadway New York, New York 10036-4086 dnvocke@duanemorris.com MBHolton@duanemorris.com RMLepinskas@duanemorris.com
Joseph D. Hampton BETTS PATTERSON MINES One Convention Place 701 Pike Street, Suite 1400 Seattle, Washington 98101-3297 jhampton@bpmlaw.com dmarsh@bpmlaw.com	Vanessa Wells HOGAN LOVELLS US LLP 4085 Campbell A venue, Suite 100 Menlo Park, California 94025 vanessa.wells@hoganlovells.com

DATED this 14th day of June, 2021.

/s/ Patti Saiden
Patti Saiden, Legal Assistant

☐ EXPEDITE
☒ Hearing is set
Date: September 3, 2021
Time: 9:00 a.m.
Judge/Calendar: Mary Sue Wilson

☐ No hearing is set

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, Petitioners, v. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON, Respondents.	NO. 21-2-00542-34 DECLARATION OF JASON W. ANDERSON IN SUPPORT OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT ON THEIR CLAIM FOR DECLARATORY RELIEF, FOR A PERMANENT INJUNCTION, AND TO SUPPLEMENT THE RECORD

JASON W. ANDERSON declares as follows:

1. I am an attorney at the law firm Carney Badley Spellman, P.S., and am admitted to practice law in the state of Washington. Carney Badley Spellman represents Petitioners in this action, the American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents and Brokers of Washington.

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2. Attached hereto as Exhibit 1 is a true and correct copy of the original version of Senate Bill 5010, introduced on January 11, 2021.

3. Attached hereto as Exhibit 2 is a true and correct copy of the official Bill History of Senate Bill 5010 issued by the Washington State Legislature.

4. Attached hereto as Exhibit 3 is a true and correct copy of excerpts of a certified transcript of the public hearing held on Senate Bill 5010 before the Senate Committee on Business, Financial Services, and Trade on January 14, 2021.

5. Attached hereto as Exhibit 4 is a true and correct copy of an Emergency Rule-Making Order signed by the Insurance Commissioner for the State of Washington, Mike Kreidler, on March 22, 2021. Attached to the Order is a true and correct copy of new sections WAC 284-24A-088 and WAC 284-24A-089, which were created by the Order.

6. Attached hereto as Exhibit 5 is a true and correct copy of the Index of Administrative Record served by Respondents on May 26, 2021.

7. Attached hereto as Exhibit 6 is a true and correct copy of Proclamation 20-05 issued by the Governor of the State of Washington on February 29, 2020.

8. Attached hereto as Exhibit 7 is a true and correct copy of Proclamation 20-19 issued by the Governor of the State of Washington on March 18, 2020.

9. Attached hereto as Exhibit 8 is a true and correct copy of Proclamation 20-49 issued by the Governor of the State of Washington on April 14, 2020.

10. Attached hereto as Exhibit 9 is a true and correct copy of a Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, issued on March 13, 2020.

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11. Attached hereto as Exhibit 10 is a true and correct copy of Sections 3513, 4021 and 4022 of the federal CARES Act.

12. Attached hereto as Exhibit 11 is a true and correct copy of a Notice of Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, issued on February 24, 2021.

13. Attached hereto as Exhibit 12 is a true and correct copy of Proclamation 20-49.14 issued by the Governor of the State of Washington on March 16, 2021.

14. Attached hereto as Exhibit 13 is a true and correct copy of Proclamation 20-19.6 issued by the Governor of the State of Washington on March 18, 2021.

15. Attached hereto as Exhibit 14 is a true and correct copy of a blank CR-103E Form.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 14th day of June, 2021, at Seattle, Washington.

/s/ Jason W. Anderson
Jason W. Anderson, WSBA No. 30512

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via electronic service to the following:

Marta DeLeon Suzanne Becker OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON 1125 Washington St. SE / P.O. Box 40100 Olympia, WA 98504 laura.chadwick@atg.wa.gov marta.deleon@atg.wa.gov GCEEF@atg.wa.gov suzanne.becker@atg.wa.gov Deana.Sullivan@atg.wa.gov	Damon N. Vocke, DUANE MORRIS LLP 1540 Broadway New York, New York 10036-4086 dnvocke@duanemorris.com MBHolton@duanemorris.com RMLepinskas@duanemorris.com
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DATED this 14th day of June, 2021.

/s/ Patti Saiden
Patti Saiden, Legal Assistant

Exhibit 1

2021 Washington Senate Bill No. 5010, Washington Sixty-Seventh Legislature - 2021 Regular Session

WASHINGTON BILL TEXT

TITLE: Prohibiting the use of credit scores to determine rates for personal lines of insurance.

VERSION: Introduced
January 11, 2021
Das, Randall

SUMMARY: AN ACT Relating to prohibiting the use of credit scores to determine rates for personal lines of insurance; amending RCW 48.18.547, 48.18.610, and 48.19.035; adding a new section to chapter 48.19 RCW; creating a new section; repealing RCW 48.18.545; and providing effective dates.

TEXT:

Z-0091.2

SENATE BILL 5010

State of Washington

67th Legislature

2021 Regular Session

By Senators Das and Randall; by request of Insurance Commissioner and Office of the Governor

Prefiled 12/10/20

AN ACT Relating to prohibiting the use of credit scores to determine rates for personal lines of insurance; amending RCW 48.18.547, 48.18.610, and 48.19.035; adding a new section to chapter 48.19 RCW; creating a new section; repealing RCW 48.18.545; and providing effective dates.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. The use of credit scoring to calculate rates for personal lines of insurance is unfair and has a disproportionate economic impact on the poor and communities of color in our state. Consequently, no insurer engaged in writing personal lines of insurance including property and casualty coverage shall, in connection with underwriting of those lines of insurance, refuse to issue or renew a private insurance policy based upon an individual's credit information or history including, but not limited to, a numerical credit-based insurance score or other credit rating of an applicant or insured. Furthermore, no insurer shall file rates for personal lines of insurance based upon credit information including, but not limited to, a numerical credit-based insurance score or other credit rating of an applicant or insured.

Sec. 2. RCW 48.18.547 and 2006 c 8 s 211 are each amended to read as follows:

(1) For the purposes of this section:

(a) "Affiliate" has the same meaning as in RCW 48.31B.005(1).

(b) "Claim" means a demand for monetary damages by a claimant.

(c) "Claimant" means a person, including a decedent's estate, who is seeking or has sought monetary damages for injury or death caused by medical malpractice.

(d) "Tier" ((~~has the same meaning as in RCW 48.18.545(1)(h)~~)) **means a category within a single insurer into which insureds with substantially similar insuring, risk or exposure factors, and expense elements are placed for purposes of determining rate or premium**.

(e) "Underwrite" or "underwriting" means the process of selecting, rejecting, or pricing a risk, and includes each of these activities:

(i) Evaluation, selection, and classification of risk, including placing a risk with an affiliate insurer that has higher rates and/or rating plan components that will result in higher premiums;

(ii) Application of classification plans, rates, rating rules, and rating tiers to an insured risk; and

(iii) Determining eligibility for:

(A) Insurance coverage provisions;

(B) Higher policy limits; or

(C) Premium payment plans.

(2) During each underwriting process, an insurer may consider the following factors only in combination with other substantive underwriting factors:

(a) An insured has inquired about the nature or scope of coverage under a medical malpractice insurance policy;

(b) An insured has notified their insurer about an incident that may be covered under the terms of their medical malpractice insurance policy, and that incident does not result in a claim; or

(c) A claim made against an insured was closed by the insurer without payment. An insurer may consider the effect of multiple claims if they have a significant effect on the insured's risk profile.

(3) If any underwriting activity related to the insured's risk profile results in higher premiums as described under subsection (1)(e)(i) and (ii) of this section or reduced coverage as described under subsection (1)(e)(iii) of this section, the insurer must provide written notice to the insured, in clear and simple language, that describes the significant risk factors which led to the underwriting action. The commissioner must adopt rules that define the components of a risk profile that require notice under this subsection.

Sec. 3. RCW 48.18.010 and 2016 c 121 s 1 are each amended to read as follows:

(1) An insurer may include contractual benefits based on customer satisfaction as part of an insurance policy. The insurer must file the policy or endorsement for approval as required by RCW 48.18.100. The contractual benefits may include sums of money provided or credited to a policyholder if the policyholder is dissatisfied with the service provided by their insurer. A sum that is provided to or credited to a policyholder as part of an approved contractual benefit based on customer satisfaction is not

"premium" for the purposes of RCW 48.18.170. A policy premium reduced by such a credit will be taxed on the full cost of the premium before application of the customer satisfaction credit.

(2) This section applies only to personal insurance as defined in RCW ((~~48.18.545(1)(g)~~)) **48.19.035(1)(d)**.

Sec. 4. RCW 48.19.035 and 2004 c 86 s 1 are each amended to read as follows:

(1) For the purposes of this section:

(a) "Affiliate" has the same meaning as defined in RCW 48.31B.005(1).

(b) "Consumer" means an individual policyholder or applicant for insurance.

(c) "Credit history" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, or credit capacity that is used or expected to be used, or collected in whole or in part, for the purpose of serving as a factor in determining personal insurance premiums or eligibility for coverage. ((~~(d) "Insurance score" means a~~)) **Credit history includes, but is not limited to, any** number or rating that is derived from an algorithm, computer application, model, or other process that is based in whole or in part on credit history.

((~~(e)~~)) **(d)** "Personal insurance" means:

(i) Private passenger automobile coverage;

(ii) Homeowner's coverage, including mobile homeowners, manufactured homeowners, condominium owners, and renter's coverage;

(iii) Dwelling property coverage;

(iv) Earthquake coverage for a residence or personal property;

(v) Personal liability and theft coverage;

(vi) Personal inland marine coverage; and

(vii) Mechanical breakdown coverage for personal auto or home appliances.

(2)((~~(a)~~)) Credit history shall not be used to determine personal insurance rates, premiums, or eligibility for coverage ((~~unless the insurance scoring models are filed with the commissioner. Insurance scoring models include all attributes and factors used in the calculation of an insurance score. RCW 48.19.040(5) does not apply to any information filed under this subsection, and the information shall be withheld from public inspection and kept confidential by the commissioner. All information filed under this subsection shall be considered trade secrets under RCW 48.02.120(3). Information filed under this subsection may be made public by the commissioner for the sole purpose of enforcement actions taken by the commissioner.~~

~~(b) Each insurer that uses credit history or an insurance score to determine personal insurance rates, premiums, or eligibility for coverage must file all rates and rating plans for that line of coverage with the commissioner. This requirement applies equally to a single insurer and two or more affiliated insurers. RCW 48.19.040(5) applies to information filed under this subsection except that any eligibility rules or guidelines shall be withheld from public inspection under RCW 48.02.120(3) from the date that the information is filed and after it becomes effective.~~

~~(3) Insurers shall not use the following types of credit history to calculate a personal insurance score or determine personal insurance premiums or rates:~~

~~(a) The absence of credit history or the inability to determine the consumer's credit history, unless the insurer has filed actuarial data segmented by demographic factors in a manner prescribed by the commissioner that demonstrates compliance with RCW 48.19.020;~~

~~(b) The number of credit inquiries;~~

~~(c) Credit history or an insurance score based on collection accounts identified with a medical industry code;~~

~~(d) The initial purchase or finance of a vehicle or house that adds a new loan to the consumer's existing credit history, if evident from the consumer report; however, an insurer may consider the bill payment history of any loan, the total number of loans, or both;~~

~~(e) The consumer's use of a particular type of credit card, charge card, or debit card; or~~

~~(f) The consumer's total available line of credit; however, an insurer may consider the total amount of outstanding debt in relation to the total available line of credit.~~

~~(4) If a consumer is charged higher premiums due to disputed credit history, the insurer shall rerate the policy retroactive to the effective date of the current policy term. As rerated, the consumer shall be charged the same premiums they would have been charged if accurate credit history was used to calculate an insurance score. This subsection applies only if the consumer resolves the dispute under the process set forth in the fair credit reporting act and notifies the insurer in writing that the dispute has been resolved~~)).

((~~(5)~~)) **(3)** The commissioner may adopt rules to implement this section.

((~~(6) This section applies to all personal insurance policies issued or renewed on or after June 30, 2003.~~))

NEW SECTION. Sec. 5. A new section is added to chapter 48.19 RCW to read as follows:

If an insurer's filed rates and rating rules for personal insurance use credit history:

(1) On or after January 1, 2022, the commissioner shall disapprove an insurer's filing of rates and rating rules for any type of personal insurance that uses credit history to determine its rates unless:

(a) The filing has the effect of removing credit history from the rates and rating rules for that type of insurance; or

(b) The insurer previously submitted a filing to remove the use of credit history from its rates and rating rules for that type of insurance and the commissioner approved that filing.

(2) Prior to January 1, 2023, if an insurer's filed rates and rating rules for personal insurance use credit history, the insurer must submit a filing to remove the use of credit from its rates and rating rules.

(3) Effective January 1, 2023, insurers must not use credit history to determine premiums for personal insurance policies issued or renewed.

NEW SECTION. Sec. 6. RCW 48.18.545 (Underwriting restrictions that apply to personal insurance -Credit history or insurance score -Rules) and 2002 c 360 s 1, as now existing or hereafter amended, are each repealed, effective January 1, 2023.

NEW SECTION. Sec. 7. Sections 2 through 4 of this act take effect January 1, 2023.

--- END ---

Exhibit 2

SB 5010 - 2021-22

Prohibiting the use of credit scores to determine rates for personal lines of insurance.

Sponsors: Das, Randall, Billig, Carlyle, Conway, Dhingra, Hasegawa, Hunt, Keiser, Kuderer, Liias, Lovelett, Nobles, Nguyen, Pedersen, Robinson, Rolfes, Saldaña, Stanford, Van De Wege, Wilson, C.

By Request: Insurance Commissioner, Office of the Governor

Bill History

2021 REGULAR SESSION

Dec 10	Prefiled for introduction.
Jan 11	First reading, referred to Business, Financial Services & Trade.
Jan 14	Public hearing in the Senate Committee on Business, Financial Services & Trade at 8:00 AM.
Feb 15	Executive action taken in the Senate Committee on Business, Financial Services & Trade at 9:00 AM. **BFST - Majority; 1st substitute bill be substituted, do pass.** Minority; without recommendation. Passed to Rules Committee for second reading.
Feb 17	Placed on second reading by Rules Committee.
Mar 17	Senate Rules "X" file.

Exhibit 3

Senate Business Financial Services and Trade

Committee 01-14-2021

Transcription of Video File

Video Runtime: 1:53:46

(Beginning of video recording.)

SENATOR MULLET: -- Senator Hasegawa. It's 8:01. We will go ahead and start the public hearing for the Business, Financial Services, and Trade, the breakfast committee that meets at 8:00 a.m. every Tuesday and Thursday. Doesn't actually provide any breakfast for anybody. But I guess if we were to advertise the breakfast, we would have a lot more people be on the committee. But we actually don't give out any food.

So the public hearing today is on Senate Bill 5010, prohibiting the use of credit scores to determine rates for personal lines of insurance. Senator Das is here to explain her bill. But we'll first have Kellee Gunn give a staff briefing.

MS. GUNN: Good morning, Chair Mullet, Members of the Committee. For the record, Kellee Gunn, staff to this committee. Before you is Senate Bill 5010, an act relating to prohibiting the use of credit scores to determine rates for personal lines of insurance.

Personal lines of insurance include your homeowner's insurance policy and your auto insurance policy but include some other lines, and a complete list is in your bill report. The bill before you prohibits the use of credit history to determine rates

or premiums for personal insurance policies issued or renewed effective January 1st, 2023.

There is a little bit of a phase-in to this in that insurers cannot file any rates, including credit history, as of January 1st, 2022. For background, credit history is any information provided by a consumer reporting agency on a consumer's credit worthiness, credit standing or credit capacity. It is using credit scores in insurance scores.

The use of credit history in insurance scores differs by insurer. Under current Washington State Law, credit history may only be used to determine the insurance score if the scoring method isn't filed with Office of the Insurance Commissioner.

Additionally, credit history may only be used to deny personal insurance in combination with other substantive underwriting factors and there are limits in state law to how credit history may currently be used in determining rates and eligibility for insurance.

These limits include medical bills, types of credit, and the number of credit inquiries. So those prohibited currently from being used to deny insurance coverage or determine premiums or rates.

SENATOR MULLET: And how long -- Kellie, how

long have those limits been in place?

MS. GUNN: I think it was the early 2000s, mid-2000s, I want to say 2005, but I'd have to double check.

SENATOR MULLET: Okay.

MS. GUNN: But with that, there's a fiscal available, and I'm available for any questions, any other questions.

SENATOR MULLET: I haven't looked at a fiscal. Was there any fiscal --

MS. GUNN: Yeah, they're estimating about 89,000 for the biennium.

SENATOR MULLET: Okay. Yeah, okay. Senator Das. Are there any other questions --

MS. GUNN: Thank you.

SENATOR MULLET: -- for Kellee before we go to Senator Das? Okay. Senator Das, go ahead.

SENATOR DAS: Thank you, Mr. Chair, Members of the Committee, Happy New Year to you all. It's so great to see all of you. I am already missing being on this committee and wish you guys all well as you do the important work of this committee.

I wanted to share, you know, briefly why I'm really passionate about this bill and very excited to support this bill moving forward. As some of you may

timer for now, and I will start the timer halfway through if it looks like we're not going to be able to get to everybody. But you can go ahead, John and Eric.

MR. NOSKI: All right. Thank you, Chair Mullet, Members of the Committee. My name is John Noski, and the legislative liaison for the Office of the Insurance Commissioner, and I am here to testify in support of Senate Bill 5010, prohibiting the use of credit scores to determine rates for personal lines of insurance. I am joined today by my colleague, Eric Slavich, the OIC's lead actuary for property and casualty insurance.

SENATOR MULLET: You guys timed that well. He showed up right when you said his name.

MR. NOSKI: We didn't even rehearse. So OIC and Governor request legislation promotes economic fairness and racial equity at no cost to the general fund, and this is an issue of state-wide significance impacting both rural and urban communities.

Most people are not aware that their credit scores are used to determine how much they pay for insurance. Insurers rely on rate-setting formulas that include an individuals' credit information to determine how much they pay for critical and often

mandatory insurance. How much it impacts one's premium is not publicly available information.

The insurance industry's use of credit scoring is inherently unfair. Studies show that drivers in our state with lower credit scores pay almost 80 percent more than those with excellent credit scores. And we also know that someone with a DUI and good credit can pay less than someone with excellent driving record but poor credit.

Increasingly, people in urban and rural communities are struggling with their finances, and the pandemic has not made things any easier on them financially. People with lower incomes and communities of color have been hit the hardest by the pandemic.

Economically vulnerable communities are disproportionately penalized with higher rates for reasons that are often out of their control, for reasons that have no bearing on things like how safe of a driver they are, for example.

And historic red-lining is a factor in credit scoring that cannot be overlooked. Though the industry does not use rates as a factor in setting rates, racial inequities are embedded in the credit system. The industry has argued that once credit is a

reflection of their personal responsibility and that people who are responsible with their money should pay lower rates.

However, being economically disadvantaged does not mean people are less responsible. In many cases, we know they have encountered financial difficulties from hardships, including unemployment or natural disasters or medical expenses. For many, the impact is felt for generations.

Some do not start out with the same economic resources as others, none of which is a reflection of irresponsible behaviors or justification for being penalized with higher insurance rates.

We have an opportunity with this proposal to put this unfair practice to an end. And on behalf of Commissioner Kreidler, I ask for your support. And now, I want to turn it over to my colleague, Eric Slavich, for his expertise.

SENATOR MULLET: Okay. Eric?

MR. SLAVICH: Chairman Mullet and Members of the Business, Financial Services, and Trade Committee. I'm Eric Slavich, and I'm the lead property and casualty actuary here at the Office of Insurance Commissioner. I supervise the unit that reviews insurance company rate filings for products like auto

and homeowners' insurance. I'm here to testify on Senate Bill 5010.

As an actuary, I understand why insurers use credit to help set their premium rates. Actuarily, there is a correlation between credit scores and insurance claims. But as legislators, you must decide if the rating factor is justified. Does the correlation matter more than its impact on society?

If it's true that one's credit score is closely connected to one's race and I believe that it is, you must determine if using credit for insurance rating is really in the public's interest and consider the long-term consequences to society of allowing insurers to use this tool.

As a regulator, I want insurers to use rating factors that are best for the market and society as a whole. First, insurers should use factors that are clearly and logically linked to insurance claims so that consumers understand why they're used.

Second, consumers should understand what they need to do to get a lower premium. For example, you know that if you get into an accident or get traffic tickets, your premiums will go up. So maybe you drive a little safer, and that is good public policy since it encourages safer driving and could actually reduce

CERTIFICATE

I, Wendy Sawyer, do hereby certify that I was authorized to and transcribed the foregoing recorded proceedings and that the transcript is a true record, to the best of my ability.

DATED this 1st day of April, 2021.

WENDY SAWYER, CDLT

Exhibit 4

RULE-MAKING ORDER
EMERGENCY RULE ONLY

CR-103E (October 2017)
(Implements RCW 34.05.350 and 34.05.360)

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: March 22, 2021
TIME: 12:45 PM

WSR 21-07-103

Agency: Office of the Insurance Commissioner

Effective date of rule:
Emergency Rules
☒ Immediately upon filing.
☐ Later (specify) _____

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?
☐ Yes ☒ No If Yes, explain:

Purpose: Temporarily prohibiting the use of credit history to determine premiums and eligibility for coverage in private automobile, homeowners, and renter's insurance products.

Insurance Commissioner Matter Number: R 2021-02

Citation of rules affected by this order:
New: WAC 284-24A-088, 284-24A-089
Repealed:
Amended:
Suspended:

Statutory authority for adoption: RCW 48.02.060, 48.18.480, 48.19.020, 48.19.035, 48.19.080

Other authority: None

EMERGENCY RULE
Under RCW 34.05.350 the agency for good cause finds:
☒ That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
☐ That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding: The Commissioner is tasked with ensuring that insurance rates are not excessive, inadequate, or unfairly discriminatory, and with enacting rules that ensure the use of credit history and credit history factors in setting insurance premiums is not excessive, inadequate, or unfairly discriminatory.

Insurance companies which use credit-based insurance scoring claim that credit scoring is a predictive tool to identify risk of loss from a specific consumer. This credit-based insurance score is then used to determine premiums charged to each consumer.

On February 29, 2020, the Governor of the State of Washington issued Proclamation 20-05, proclaiming a State of Emergency throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States. On March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) the President of the United States declared a national emergency concerning the novel coronavirus disease (COVID–19) outbreak in the United States. Addressing the state of emergency caused by the coronavirus pandemic has required difficult steps that have had a severe financial impact on large groups within our state.

In part to mitigate the financial impacts of the COVID 19 pandemic to individual households, on March 27, 2020, the President of the United States signed the CARES Act (P.L. 116-136). Section 4021 of the CARES Act addresses credit reporting during the pandemic. The CARES Act requires financial institutions to report consumers

as current if they were not previously delinquent or, for consumers that were previously delinquent, not to advance the level of delinquency, for credit obligations for which the furnisher makes payment accommodations to consumers affected by COVID-19 and the consumer makes any payments the accommodation requires. Section 4022 of the CARES Act requires certain lenders to offer forbearance options to borrowers, and imposed a moratorium on foreclosures for certain home loans. In addition, section 3513 of the CARES Act specifically addresses the furnishing of federally-held student loans for which payments are suspended. This provision results in all non-defaulted federally-held student loans being reported as current.

In addition, the Governor of the State of Washington has issued several emergency proclamations limiting state agencies from charging late fees and penalties, and placing a moratorium on garnishment actions (Emergency Proclamation 20-49, and subsequent amendments) and evictions (Emergency Proclamation 20-19, and subsequent amendments). The critical consumer protections included in these proclamations have also had the effect of preventing creditors from taking actions that are otherwise reportable on a consumer's credit history.

The result of the CARES Act is that all credit bureaus are collecting a credit history that is objectively inaccurate for some consumers and therefore results in an unreliable credit score being assigned to them. Consequently, this untrustworthy credit score degrades any predicative value that may be found in a consumer's credit-based insurance score.

The Commissioner finds that the current protections to consumer credit history at the state and federal level have disrupted the credit reporting process. This disruption has caused credit-based insurance scoring models to be unreliable and therefore inaccurate when applied to produce a premium amount for an insurance consumer in Washington state. This makes the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020.

There is evidence that the negative economic impacts of the pandemic have disproportionately fallen on people of color. Therefore, when the CARES Act protections are eliminated, and negative credit information can be fully reported again, credit histories for people of color will have been disproportionately eroded by the pandemic.

Remaining consumer credit protections in the CARES Act will expire after the national state of emergency. When the CARES Act fully expires, a large volume of negative credit corrections will flood consumer credit histories. This flood of negative credit history has not been accounted for in the current credit scoring models. Without data to demonstrate that the predictive ability of credit scoring models based on pre-pandemic credit and claims histories is unchanged, the predicative ability of current credit scoring models cannot be assumed. This will make the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020.

It is impossible to know precisely when the state and federal states of emergency will end. Insurance companies must have an alternative to the currently unreliable credit scoring models they have in place before the protections of the CARES Act end. Therefore, it is necessary to immediately implement changes to the use of credit scoring.

Note: If any category is left blank, it will be calculated as zero. No descriptive text.

Count by whole WAC sections only, from the WAC number through the history note. A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	____	Amended	____	Repealed	____
Federal rules or standards:	New	____	Amended	____	Repealed	____
Recently enacted state statutes:	New	____	Amended	____	Repealed	____

The number of sections adopted at the request of a nongovernmental entity:

	New	____	Amended	____	Repealed	____

The number of sections adopted on the agency's own initiative:

	New	2	Amended	____	Repealed	____

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

	New	____	Amended	____	Repealed	____

The number of sections adopted using:

Negotiated rule making:	New	____	Amended	____	Repealed	____
Pilot rule making:	New	____	Amended	____	Repealed	____
Other alternative rule making:	New	2	Amended	____	Repealed	____

Date Adopted: March 22, 2021	**Signature:** Mike Kreidler
Name: Mike Kreidler	
Title: Insurance Commissioner	

New section: WAC 284-24A-88 **Findings and intent of temporary prohibition**

(1) The Commissioner is tasked with ensuring that insurance rates are not excessive, inadequate, or unfairly discriminatory, and with enacting rules that ensure the use of credit history and credit history factors in setting insurance premiums is not excessive, inadequate, or unfairly discriminatory.

(2) Insurance companies which use credit-based insurance scoring claim that credit scoring is a predictive tool to identify risk of loss from a specific consumer. This credit-based insurance score is then used to determine premiums charged to each consumer.

(3) On February 29, 2020, the Governor of the State of Washington issued Proclamation 20-05, proclaiming a State of Emergency throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States. On March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) the President of the United States declared a national emergency concerning the novel coronavirus disease (COVID–19) outbreak in the United States. Addressing the state of emergency caused by the coronavirus pandemic has required difficult steps that have had a severe financial impact on large groups within our state.

(4) In part to mitigate the financial impacts of the COVID 19 pandemic to individual households, on March 27, 2020, the President of the United States signed the CARES Act (P.L. 116-136). Section 4021 of the CARES Act addresses credit reporting during the pandemic. The CARES Act requires financial institutions to report consumers as current if they were not previously delinquent or, for consumers that were previously delinquent, not to advance the level of delinquency, for credit obligations for which the furnisher makes payment accommodations to consumers affected by COVID-19 and the consumer makes any payments the accommodation requires. Section 4022 of the CARES Act requires certain lenders to offer forbearance options to borrowers, and imposed a moratorium on foreclosures for certain home loans. In addition, section 3513 of the CARES Act specifically addresses the furnishing of federally-held student loans for which payments are suspended. This provision results in all non-defaulted federally-held student loans being reported as current.

(5) In addition, the Governor of the State of Washington has issued several emergency proclamations limiting state agencies from charging late fees and penalties, and placing a moratorium on garnishment actions (Emergency Proclamation 20-49, and subsequent amendments) and evictions (Emergency Proclamation 20-19, and subsequent amendments). The critical consumer protections included in these proclamations have also had the effect of preventing creditors from taking actions that are otherwise reportable on a consumer's credit history.

(6) The result of the CARES Act is that all credit bureaus are collecting a credit history that is objectively inaccurate for some consumers and therefore results in an unreliable credit score being assigned to them. Consequently, this untrustworthy credit score degrades any predicative value that may be found in a consumer's credit-based insurance score.

(7) The Commissioner finds that the current protections to consumer credit history at the state and federal level have disrupted the credit reporting process. This disruption has caused credit-based insurance scoring models to be unreliable and therefore inaccurate when applied to produce a premium amount for an insurance consumer in Washington state. This makes the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020.

(8) There is evidence that the negative economic impacts of the pandemic have disproportionately fallen on people of color. Therefore, when the CARES Act protections are eliminated, and negative credit information can be fully reported again, credit histories for people of color will have been disproportionately eroded by the pandemic.

(9) Remaining consumer credit protections in the CARES Act will expire after the national state of emergency. When the CARES Act fully expires, a large volume of negative credit corrections will flood consumer credit histories. This flood of negative credit history has not been accounted for in the current credit scoring models. Without data to demonstrate that the predictive ability of credit scoring models based on pre-pandemic credit and claims histories is unchanged, the predicative ability of current credit scoring models cannot be assumed. This will make the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020.

(10) It is impossible to know precisely when the state and federal states of emergency will end. Insurance companies must have an alternative to the currently unreliable credit scoring models they have in place before the protections of the CARES Act end. Therefore, it is necessary to immediately implement changes to the use of credit scoring.

New section: WAC 284-24A-89 **Temporary prohibition of use of credit history**

(1) Not withstanding any other provision of this chapter, this section applies to all personal insurance pertaining to private passenger automobile coverage, renter's coverage, and homeowner's coverage issued in the state of Washington while this rule is effective.

(2) The insurance commissioner finds that as a result of the broad negative economic impact of the coronavirus pandemic, the disproportionately negative economic impact the coronavirus pandemic has had on communities of color, and the disruption to credit reporting caused by both the state and federal consumer protections designed to alleviate the economic impacts of the pandemic, for private passenger automobile coverage, renter's coverage, and homeowner's coverage issued in the state of Washington, the use of insurance credit scores results in premiums that are excessive, inadequate, or unfairly discriminatory within the meaning of RCW 48.19.020 and RCW 48.18.480.

(3) For all private passenger automobile coverage, renter's coverage, and homeowner's coverage issued in the state of Washington, insurers shall not use credit history to determine personal insurance rates, premiums, or eligibility for coverage.

(4) For purposes of this section, insurers shall not use credit history to place insurance coverage with a particular affiliated insurer or insurer within an overall group of affiliated insurance companies.

(5) In order to comply with this section, insurers subject to this rule may substitute any insurance credit score factor used in a rate filing with a neutral rating factor.
(a) For purposes of this section, "neutral factor" means a single constant factor calculated such that, when it is applied in lieu of insurance-score-base rating factors to all policies in an insurer's book of business, the total premium for the book of business is unchanged.
(b) For purposes of this section, insurers may, but are not required to, implement the neutral factor by peril or coverage.

(6) Insurers may not include rate stability rules in filings submitted to comply with this section.

(7) The prohibitions in this rule shall apply to all new policies effective and existing policies processed for renewal on or after June 20, 2021. Each insurer must submit rate filings to amend its current rating plans with the insurance commissioner for all insurance policies covered by this rule by May 6, 2021. If the policy application form refers to the use of consumer credit information, an amended form filing must also be submitted by May 6, 2021. The amendments should be limited to the changes required by this rule.

(8) This rule takes effect immediately. To the extent this rule is adopted as a permanent rule it shall remain in effect for three years following the day the national emergency concerning the novel coronavirus disease (COVID–19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) terminates, or the day the Governor's Proclamation 20-05, proclaiming a State of Emergency throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States expires, whichever is later.

Exhibit 5

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PROFESSIONAL INSURANCE AGENTS WASHINGTON, and INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON, and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, Petitioners, vs. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in His official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON Respondents.	**Civil Cause No. 21-2-00542-34** **TRANSMITTAL OF ADMINISTRATIVE RECORD**

TO: **Linda Myhre-Enlow**
Clerk of the Court
Thurston County Superior Court
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Olympia, WA 98502
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Attached to this Transmittal of Administrative Record is a copy of the original record of the administrative injunction proceeding, Civil Cause No. 21-2-00542-34, total number of pages: 1,019 which I certify is a true and accurate record of the emergency rule-making file.

The record includes the following:

INDEX OF ADMINISTRATIVE RECORD
In chronological order of date filed, oldest to most recent, pursuant to LCR 79 (j)(1)(a)

Document Name	Page numbers
I. Background File	00001-00992
1. Internet publication, " Legislation to ban the use of credit scoring in insurance," J. Noski, Printed to .PDF, n.d.	00001-00002
2. Document, "Statutes Authorizing Use of Credit History to Determine Rates"	00003-00017
3. Report to the 79th Legislature, "Use of Credit Information by Insurers in Texas," Texas Department of Insurance, *December 30, 2004*	00018-00041
4. Report, "Credit Scoring and Insurance: Costing Consumers Billions and Perpetuating the Economic Racial Divide," by National Consumer Law Center and CEJ, *June 2007*	00042-00073

5. Report, "AUTOMATED INJUSTICE: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in their Credit Reports," by National Consumer Law Center, *January 2009*	00074-00121
6. Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003. Federal Trade Commission, *December 2012*	00122-00169
7. Report, "The Use of Credit Scores by Auto Insurers: Adverse Impacts on Low- and Moderate-Income Drivers," S. Brobeck, J. Hunter, T. Feltner, Consumer Federation of America, Published *December 2013*	00170-00177
8. Publication, "On Being a Data Skeptic," by C. O'Neil, *n.d.,2014*	00178-00203
9. Consumer Response Annual Report, January 1-December 31, 2016, Consumer Financial Protection Bureau, *March 2017*	00204-00253
10. Publication, "An Auto Insurance Lifeline for Safe-Driving, Lower-Income Marylanders" By D. Heller, MPA, ABELL Foundation, *November 2019*	00254-00281
11. Consumer Report, "Credit Scores and car insurance: How unfair pricing practices discriminate against millions of drivers," Root Inc., dropthescore.com, *n.d.,2020.*	00282-00300
12. Document, "Facts About the CARES ACT and Credit Scoring," (Word .doc converted to .pdf), *n.d.,2020.*	00301-00304
13. Table, "Compendium of Credit Scores Studies & Articles," *n.d. 2020*	00305-00314
14. H.R. 748, 116th Congress of the United States of America, 2nd Session, *January 3, 2020*	00315-00649
15. Letter, J. Hunter and B. Birnbuam to Commissioner, CFA and CEJ, *March 30, 2020*	00650-00654
16. Press release, "Auto Insurance Premium Relief Update: More Insurers to Return Premium As Refunds and Credits Top $7 Billion Through May," by CEJ & CFA, *April 23, 2020*	00655-00658
17. Bulletin Notice, "Regarding all Insurers Writing Auotomobile Insurance, Personal and Commercial, within the Commonwealth; Notice 2020-07" PA Bulletin Doc. 20-583. *April 25, 2020*	00659-00660
18. Report, "Personal Auto Insurance Premium Relief in the Covide-19 Era," by the Center for Economic Justice (CEJ) and the Consumer Federation of America (CFA), *May 2020*	00661-00685
19. Draft News Release, "Kreidler alerts consumers to new credit scoring protections during coronavirus pandemic," OIC Public Affairs, *May 1, 2020*	00686-00687
20. Press release, "Progressive Insurance Rakes in $800 Million COVID-19 Windfall," by CEJ & CFA, *July 17, 2020*	00688-00691
21. Press release, "Consumers Still Being Overcharged For Auto Insurance As the Pandemic Continues to Reduce Claims," by CEJ & CFA, *August 6, 2020*	00692-00697
22. Press release, "Auto Insurers Reap Tens of Billions in COVID Windfall Profits Due to Reduction in Miles Driven and Crashes," by CEJ & CFA, *September 22, 2020*	00698-00700
23. Internet Article, "Three Charts Show A K-Shaped Recovery," by C. Jones, Forbes, *October 24, 2020*	00701-00705
24. Press release, "Auto Insurance Refunds Needed As New Data Show Crashes Remain Well Below Normal Due to Pandemic; 23% Fewer Accidents in September and October," by CEJ & CFA, *December 22, 2020*	00706-00715
25. Rule LCB File, "Approved Regulation of the Commissioner of Insurance" No. R087-20, December 29, 2020	00716-00721

26. H.R. 1319, 116th Congress of the United States of America, 2nd Session *January 3, 2021*	00722-00963
27. Press release, "Insurance Companies Charge 79% More to Safe Drivers in Washington State Due to Low Credit Scores; State Farm Nearly Triples Premium for Good Drivers with Credit Problems," by CEJ & CFA, *January 12, 2021*	00964-00969
28. Internet Article, "What Does a K-Shaped Recovery Mean for the Economy?" by K. Zubkova, Leverage Analytics and Insights, *January 26, 2021*	00970-00977
29. Internet Article, "Americans are struggling, but you'd never know it from their credit scores," by J. Dickler, CNBC, *February 25, 2021*	00978-00987
30. Internet Article, "US Auto Insurer Outsized Profits to Normalize as Claims Rise in 2021," Fitch Wire, *March 4, 2021*	00988-00992
II. Rule Text File	00993-00995
31. OIC Emergency Rule R20021-02 "New section: WAC 284-24A-88 Findings and intent of temporary prohibition" *(Word .doc converted to .PDF for Bates numbering), nd 2021*	00993-00995
III. CR 103 E File	00996-01012
32. Memorandum, D. Forte to A. Butler, "CR-103E: Establishing a new webpage" (*Word .doc converted to .PDF for Bates numbering) March 22, 2021*	00996-00998
33. Rule-Making Order (Emergency Rule Only), re: CR 103-E *(Word .doc converted to .PDF for Bates numbering), March 22, 2021*	00999-01001
34. Rule-Making Order (Emergency Rule Only), re: CR 103-E, *filed March 22, 2021*	01002-01007
35. Rule-Making Order (Emergency Rule Only), re: CR 103-E, *filed March 22, 2021*, with: • WSR 21-07-103 Attachment: "New section: WAC 284-24A-88 Findings and intent of temporary prohibition"	01008-01010 01011-01012
IV. Rule-Making Docket, re: RCW 34.05.315 *Filed March 22, 2021*	01014-01015
V. Internet content page, OIC FAQ Sheet, re: WAC 284-24A-088, 284-24A-089, *March 23, 2021*	01016-01019

DATED AND CERTIFIED this 26th day of May, 2021.

MIKE KREIDLER
Insurance Commissioner

By:

/s/ Rebekah Carter
Rebekah Carter
Hearings Unit Paralegal

Exhibit 6

JAY INSLEE
Governor

STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • www.governor.wa.gov

PROCLAMATION BY THE GOVERNOR

20-05

WHEREAS, On January 21, 2020, the Washington State Department of Health confirmed the first case of the novel coronavirus (COVID-19) in the United States in Snohomish County, Washington, and local health departments and the Washington State Department of Health have since that time worked to identify, contact, and test others in Washington State potentially exposed to COVID-19 in coordination with the United States Centers for Disease Control and Prevention (CDC); and

WHEREAS, COVID-19, a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person; and

WHEREAS, The CDC identifies the potential public health threat posed by COVID-19 both globally and in the United States as "high", and has advised that person-to-person spread of COVID-19 will continue to occur globally, including within the United States; and

WHEREAS, On January 31, 2020, the United States Department of Health and Human Services Secretary Alex Azar declared a public health emergency for COVID-19, beginning on January 27, 2020; and

WHEREAS, The CDC currently indicates there are 85,688 confirmed cases of COVID-19 worldwide with 66 of those cases in the United States, and the Washington State Department of Health has now confirmed localized person-to-person spread of COVID-19 in Washington State, significantly increasing the risk of exposure and infection to Washington State's general public and creating an extreme public health risk that may spread quickly; and

WHEREAS, The Washington State Department of Health has instituted a Public Health Incident Management Team to manage the public health aspects of the incident; and

WHEREAS, The Washington State Military Department, State Emergency Operations Center, is coordinating resources across state government to support the Department of Health and local officials in alleviating the impacts to people, property, and infrastructure, and is assessing the magnitude and long-term effects of the incident with the Washington State Department of Health; and

WHEREAS, The worldwide outbreak of COVID-19 and the effects of its extreme risk of person-to-person transmission throughout the United States and Washington State significantly impacts the life and health of our people, as well as the economy of Washington State, and is a public disaster that affects life, health, property or the public peace.

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a State of Emergency exists in all counties in the state of Washington, and direct the plans and procedures of the Washington State Comprehensive Emergency Management Plan be implemented. State agencies and departments are directed to utilize state resources and to do everything reasonably possible to assist affected political subdivisions in an effort to respond to and recover from the outbreak.

As a result of this event, I also hereby order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General to address the circumstances described above, to perform such duties as directed by competent authority of the Washington State Military Department in addressing the outbreak. Additionally, I direct the Washington State Department of Health, the Washington State Military Department Emergency Management Division, and other agencies to identify and provide appropriate personnel for conducting necessary and ongoing incident related assessments.

Signed and sealed with the official seal of the state of Washington this 29th day of February, A.D., Two Thousand and Twenty at Olympia, Washington.

By:

/s/
Jay Inslee, Governor

BY THE GOVERNOR:

/s/
Secretary of State

Exhibit 7

JAY INSLEE
Governor

STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • www.governor.wa.gov

PROCLAMATION BY THE GOVERNOR
AMENDING PROCLAMATION 20-05

20-19
Evictions

WHEREAS, on February 29, 2020, I issued Proclamation 20-05, proclaiming a State of Emergency for all counties throughout Washington State as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States and confirmed person-to-person spread of COVID-19 in Washington State; and

WHEREAS, as a result of the continued worldwide spread of COVID-19, its significant progression in Washington State, and the high risk it poses to our most vulnerable populations, I have subsequently issued amendatory Proclamations 20-06, 20-07, 20-08, 20-09, 20-10, 20-11, 20-12, 20-13, 20-14, 20-15, 20-16, 20-17, and 20-18, exercising my emergency powers under RCW 43.06.220 by prohibiting certain activities and waiving and suspending specified laws and regulations; and

WHEREAS, the COVID-19 disease, caused by a virus that spreads easily from person to person which may result in serious illness or death and has been classified by the World Health Organization as a worldwide pandemic, continues to broadly spread throughout Washington State; and

WHEREAS, the COVID-19 pandemic is expected to cause a sustained global economic slowdown, which is anticipated to cause an economic downturn throughout Washington State with layoffs and reduced work hours for a significant percentage of our workforce due to substantial reductions in business activity impacting our commercial sectors that support our state's economic vitality, including severe impacts to the large number of small businesses that make Washington State's economy thrive; and

WHEREAS, many in our workforce expect to be impacted by these layoffs and substantially reduced work hours are anticipated to suffer economic hardship that will disproportionately affect low and moderate income workers resulting in lost wages and potentially the inability to pay for basic household expenses, including rent; and

WHEREAS, the inability to pay rent by these members of our workforce increases the likelihood of eviction from their homes, increasing the life, health, and safety risks to a significant percentage of our people from the COVID-19 pandemic; and

WHEREAS, under RCW 59.12 (Unlawful Detainer) and RCW 59.18 (Residential Landlord Tenant Act) tenants seeking to avoid default judgment in eviction hearings need to appear in court in order to avoid losing substantial rights to assert defenses or access legal and economic assistance; and

WHEREAS, the Washington State Legislature has established a housing assistance program in Chapter 43.185 RCW pursuant to its findings in RCW 43.185.010 "that it is in the public interest to establish a continuously renewable resource known as the housing trust fund and housing assistance program to assist low and very low-income citizens in meeting their basic housing needs"; and

WHEREAS, a temporary moratorium on evictions throughout Washington State at this time will help reduce economic hardship and related life, health, and safety risks to those members of our workforce impacted by layoffs and substantially reduced work hours or who are otherwise unable to pay rent as a result of the COVID-19 pandemic; and

WHEREAS, the worldwide COVID-19 pandemic and its progression in Washington State continue to threaten the life and health of our people as well as the economy of Washington State, and remain a public disaster affecting life, health, property or the public peace; and

WHEREAS, the Washington State Department of Health (DOH) continues to maintain a Public Health Incident Management Team in coordination with the State Emergency Operations Center and other supporting state agencies to manage the public health aspects of the incident; and

WHEREAS, the Washington State Military Department Emergency Management Division, through the State Emergency Operations Center, continues coordinating resources across state government to support the DOH and local health officials in alleviating the impacts to people, property, and infrastructure, and continues coordinating with the DOH in assessing the impacts and long-term effects of the incident on Washington State and its people.

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a state of emergency continues to exist in all counties of Washington State, that Proclamations 20-05 and all amendments thereto remain in effect, and that Proclamation 20-05 is amended to temporarily prohibit residential evictions statewide until April 17, 2020, as provide herein.

I again direct that the plans and procedures of the Washington State Comprehensive Emergency Management Plan be implemented throughout State government. State agencies and departments are directed to continue utilizing state resources and doing everything reasonably possible to support implementation of the Washington State Comprehensive Emergency Management Plan and to assist affected political subdivisions in an effort to respond to and recover from the COVID-19 pandemic.

I continue to order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General to address the circumstances described above, to perform such duties as directed by competent authority of the Washington State Military Department in addressing the outbreak. Additionally, I continue to direct the DOH, the Washington State Military Department Emergency Management Division, and other agencies to identify and provide appropriate personnel for conducting necessary and ongoing incident related assessments.

ACCORDINGLY, based on the above noted situation and under the provisions of RCW 43.06.220(1)(h), and to help preserve and maintain life, health, property or the public peace, effective immediately and until April 17, 2020, I hereby prohibit the following activities related to residential evictions by all residential landlords operating residential rental property in Washington State:

1. Residential landlords are prohibited from serving a notice of unlawful detainer for default payment of rent related to such property under RCW 59.12.030(3).

2. Residential landlords are prohibited from issuing a 20-day notice for unlawful detainer related to such property under RCW 59.12.030(2), unless the landlord attaches an affidavit attesting that the action is believed necessary to ensure the health and safety of the tenant or other individuals.

3. Residential landlords are prohibited from initiating judicial action seeking a writ of restitution involving a dwelling unit if the alleged basis for the writ is the failure of the tenant or tenants to timely pay rent. This prohibition includes, but is not limited to, an action under Chapters 59.12 or RCW 59.18 RCW.

4. Local law enforcement is prohibited from serving or otherwise acting on eviction orders that are issued solely for default payment of rent related to such property. Nothing in this Proclamation is intended to prohibit local law enforcement from acting on orders of eviction issued for other reasons, including but not limited to waste, nuisance or commission of a crime on the premises.

Terminology used in these prohibitions shall have the meaning attributed in Chapter 59.18 RCW.

Violators of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5).

Signed and sealed with the official seal of the state of Washington on this 18th day of March, A.D., Two Thousand and Twenty at Olympia, Washington.

By:

/s/
Jay Inslee, Governor

BY THE GOVERNOR:

/s/
Secretary of State

Exhibit 8

JAY INSLEE
Governor

STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • www.governor.wa.gov

PROCLAMATION BY THE GOVERNOR
AMENDING PROCLAMATION 20-05

20-49
Garnishments and Accrual of Interest

WHEREAS, on February 29, 2020, I issued Proclamation 20-05, proclaiming a State of Emergency for all counties throughout Washington State as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States and confirmed person-to-person spread of COVID-19 in Washington State; and

WHEREAS, as a result of the continued worldwide spread of COVID-19, its significant progression in Washington State, and the high risk it poses to our most vulnerable populations, I have subsequently issued amendatory Proclamations 20-06 through 20-48 exercising my emergency powers under RCW 43.06.220 by prohibiting certain activities and waiving and suspending specified laws and regulations; and

WHEREAS, the COVID-19 disease, caused by a virus that spreads easily from person to person which may result in serious illness or death and has been classified by the World Health Organization as a worldwide pandemic, continues to broadly spread throughout Washington State; and

WHEREAS, the COVID-19 pandemic is causing a sustained global economic slowdown, and an economic downturn throughout Washington State with unprecedented numbers of layoffs and reduced work hours for a significant percentage of our workforce due to substantial reductions in business activity impacting our commercial sectors that support our state's economic vitality, including severe impacts to the large number of small businesses that make Washington State's economy thrive; and

WHEREAS, many of our workforce who have been impacted by these layoffs and substantially reduced work hours are suffering economic hardship that disproportionately affects low and moderate income workers resulting in lost wages that reduces their ability to pay for basic household expenses, including groceries and rent; and

WHEREAS, garnishment of wages or other income, including CARES Act stimulus payments, to collect judgments for consumer debt, as authorized under RCW 6.27, and the mounting interest on that debt, as authorized under RCW 4.56.110(1) and (5), will further reduce the ability of people impacted by the economic downturn to pay for basic household expenses, thereby increasing life, health and safety risks to a significant percentage of our people from the COVID-19 pandemic; and

WHEREAS, judgment creditors, directly or through others acting on their behalf, may initiate and pursue garnishment of wages and other income to collect judgments for consumer debt pursuant to RCW 6.27, and RCW 6.01.060(2) defines "consumer debt" as: "[A]ny obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money,

property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes. Consumer debt includes medical debt"; and

WHEREAS, a temporary moratorium on garnishments of wages and other income to collect judgments for consumer debt throughout Washington State at this time will help reduce economic hardship and related life, health, and safety risks to those members of our workforce impacted by layoffs and substantially reduced work hours or who are otherwise unable to pay for basic household expenses as a result of the COVID-19 pandemic; and

WHEREAS, the worldwide COVID-19 pandemic and its progression in Washington State continues to threaten the life and health of our people as well as the economy of Washington State, and remains a public disaster affecting life, health, property or the public peace; and

WHEREAS, the Washington State Department of Health continues to maintain a Public Health Incident Management Team in coordination with the State Emergency Operations Center and other supporting state agencies to manage the public health aspects of the COVID-19 emergency; and

WHEREAS, the Washington State Military Department Emergency Management Division, through the State Emergency Operations Center, continues coordinating resources across state government to support the Washington State Department of Health and local health officials in alleviating the impacts to people, property, and infrastructure, and continues coordinating with the Department of Health in assessing the impacts and long-term effects of the incident on Washington State and its people.

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a state of emergency continues to exist in all counties of Washington State, that Proclamations 20-05 and all amendments thereto remain in effect, and that Proclamation 20-05 is amended to temporarily prohibit certain garnishments statewide until 11:59 PM on May 14, 2020, as provided herein.

I again direct that the plans and procedures of the *Washington State Comprehensive Emergency Management Plan* be implemented throughout State government. State agencies and departments are directed to continue utilizing state resources and doing everything reasonably possible to support implementation of the *Washington State Comprehensive Emergency Management Plan* and to assist affected political subdivisions in an effort to respond to and recover from the COVID-19 pandemic.

I continue to order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General to address the circumstances described above, to perform such duties as directed by competent authority of the Washington State Military Department in addressing the outbreak. Additionally, I continue to direct the Washington State Department of Health, the Washington State Military Department Emergency Management Division, and other agencies to identify and provide appropriate personnel for conducting necessary and ongoing incident related assessments.

FURTHERMORE, based on the above situation and under the provisions of RCW 43.06.220(2)(g), I also find that allowing garnishments to collect judgments for consumer debt and accrual of post-judgment interest on such judgments and that strict compliance with the following statutory provisions would risk the life, health and safety of people who are impacted by the economic downturn throughout Washington State and are unable to pay for basic household needs, and would

prevent, hinder, or delay the response to the COVID-19 pandemic State of Emergency under Proclamation 20-05 and therefore, the following statutory provisions specified below are hereby waived and suspended in their entirety, until 11:59 PM on May 14, 2020:

1. RCW 6.27.020(1) and (2)
2. RCW 6.27.060
3. RCW 6.27.070(1)
4. RCW 6.27.080(2) and (3)
5. RCW 6.27.110(1) and (2)
6. RCW 6.27.120(1)
7. RCW 6.27.130(1) and (3)
8. RCW 4.56.110(1) and (5)

FURTHERMORE, based on the above noted situation and under the provisions of RCW 43.06.220(1)(h), and to help preserve and maintain life, health, property or the public peace, effective immediately and until 11:59 PM on May 14, 2020, I hereby prohibit the waivers and suspensions listed above from being applied to any judgment creditor, directly or through others acting on their behalf, except for the garnishment of wages and other income to collect judgments for consumer debt as defined in RCW 6.01.060(2), and for the accrual of post-judgment interest on judgments for consumer debt.

Violators of this of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5).

Signed and sealed with the official seal of the state of Washington on this 14th day of April, A.D., Two Thousand and Twenty at Olympia, Washington.

By:

/s/
Jay Inslee, Governor

BY THE GOVERNOR:

/s/
Secretary of State

Exhibit 9

PROCLAMATIONS

Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak

Issued on: March 13, 2020

★ ★ ★

In December 2019, a novel (new) coronavirus known as SARS-CoV-2 ("the virus") was first detected in Wuhan, Hubei Province, People's Republic of China, causing outbreaks of the coronavirus disease COVID-19 that has now spread globally. The Secretary of Health and Human Services (HHS) declared a public health emergency on January 31, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to COVID-19. I have taken sweeping action to control the spread of the virus in the United States, including by suspending entry of foreign nationals seeking entry who had been physically present within the prior 14 days in certain jurisdictions where COVID-19 outbreaks have occurred, including the People's Republic of China, the Islamic Republic of Iran, and the Schengen Area of Europe. The Federal Government, along with State and local governments, has taken preventive and proactive measures to slow the spread of the virus and treat those affected, including by instituting Federal quarantines for individuals evacuated from foreign nations, issuing a declaration pursuant to section 319F-3 of the Public Health Service Act (42 U.S.C. 247d-6d), and releasing policies to accelerate the acquisition of personal protective equipment and streamline bringing new diagnostic capabilities to laboratories. On March 11, 2020, the World Health Organization announced that the COVID-19 outbreak can be characterized as a pandemic, as the rates of infection continue to rise in many locations around the world and across the United States.

The spread of COVID-19 within our Nation's communities threatens to strain our Nation's healthcare systems. As of March 12, 2020, 1,645 people from 47 States have been infected with the virus that

causes COVID-19. It is incumbent on hospitals and medical facilities throughout the country to assess their preparedness posture and be prepared to surge capacity and capability. Additional measures, however, are needed to successfully contain and combat the virus in the United States.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 *et seq.*) and consistent with section 1135 of the Social Security Act (SSA), as amended (42 U.S.C. 1320b-5), do hereby find and proclaim that the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020. Pursuant to this declaration, I direct as follows:

Section 1. Emergency Authority. The Secretary of HHS may exercise the authority under section 1135 of the SSA to temporarily waive or modify certain requirements of the Medicare, Medicaid, and State Children's Health Insurance programs and of the Health Insurance Portability and Accountability Act Privacy Rule throughout the duration of the public health emergency declared in response to the COVID-19 outbreak.

Sec. 2. Certification and Notice. In exercising this authority, the Secretary of HHS shall provide certification and advance written notice to the Congress as required by section 1135(d) of the SSA (42 U.S.C. 1320b-5(d)).

Sec. 3. General Provisions. (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this thirteenth day of March, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fourth.

DONALD J. TRUMP

Exhibit 10

be required to begin before the date that is 1 full fiscal year after the date that is the end of the qualifying emergency.

(b) TERMINATION DATE.—

(1) IN GENERAL.—The authority provided under this section to grant a loan deferment under subsection (a) shall terminate on the date on which the qualifying emergency is no longer in effect.

(2) DURATION.—Any provision of a loan agreement or insurance agreement modified by the authority under this section shall remain so modified for the duration of the period covered by the loan agreement or insurance agreement.

(c) REPORT.—Not later than 180 days after the date of enactment of this Act, and every 180 days thereafter during the period beginning on the first day of the qualifying emergency and ending on September 30 of the fiscal year following the end of the qualifying emergency, the Secretary shall submit to the authorizing committees (as defined in section 103 of the Higher Education Act of 1965 (20 U.S.C. 1003)) a report that identifies each institution that received assistance under this section.

(d) FUNDING.—There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, $62,000,000 to carry out this section.

SEC. 3513. TEMPORARY RELIEF FOR FEDERAL STUDENT LOAN BORROWERS.

(a) IN GENERAL.—The Secretary shall suspend all payments due for loans made under part D and part B (that are held by the Department of Education) of title IV of the Higher Education Act of 1965 (20 U.S.C. 1087a et seq.; 1071 et seq.) through September 30, 2020.

(b) NO ACCRUAL OF INTEREST.—Notwithstanding any other provision of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.), interest shall not accrue on a loan described under subsection (a) for which payment was suspended for the period of the suspension.

(c) CONSIDERATION OF PAYMENTS.—Notwithstanding any other provision of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.), the Secretary shall deem each month for which a loan payment was suspended under this section as if the borrower of the loan had made a payment for the purpose of any loan forgiveness program or loan rehabilitation program authorized under part D or B of title IV of the Higher Education Act of 1965 (20 U.S.C. 1087a et seq.; 1071 et seq.) for which the borrower would have otherwise qualified.

(d) REPORTING TO CONSUMER REPORTING AGENCIES.—During the period in which the Secretary suspends payments on a loan under subsection (a), the Secretary shall ensure that, for the purpose of reporting information about the loan to a consumer reporting agency, any payment that has been suspended is treated as if it were a regularly scheduled payment made by a borrower.

(e) SUSPENDING INVOLUNTARY COLLECTION.—During the period in which the Secretary suspends payments on a loan under subsection (a), the Secretary shall suspend all involuntary collection related to the loan, including—

(1) a wage garnishment authorized under section 488A of the Higher Education Act of 1965 (20 U.S.C. 1095a) or section 3720D of title 31, United States Code;

(2) a reduction of tax refund by amount of debt authorized under section 3720A of title 31, United States Code, or section 6402(d) of the Internal Revenue Code of 1986;

(3) a reduction of any other Federal benefit payment by administrative offset authorized under section 3716 of title 31, United States Code (including a benefit payment due to an individual under the Social Security Act or any other provision described in subsection (c)(3)(A)(i) of such section); and

(4) any other involuntary collection activity by the Secretary.

(f) WAIVERS.—In carrying out this section, the Secretary may waive the application of—

(1) subchapter I of chapter 35 of title 44, United States Code (commonly known as the "Paperwork Reduction Act");

(2) the master calendar requirements under section 482 of the Higher Education Act of 1965 (20 U.S.C. 1089);

(3) negotiated rulemaking under section 492 of the Higher Education Act of 1965 (20 U.S.C. 1098a); and

(4) the requirement to publish the notices related to the system of records of the agency before implementation required under paragraphs (4) and (11) of section 552a(e) of title 5, United States Code (commonly known as the "Privacy Act of 1974"), except that the notices shall be published not later than 180 days after the date of enactment of this Act.

(g) NOTICE TO BORROWERS AND TRANSITION PERIOD.—To inform borrowers of the actions taken in accordance with this section and ensure an effective transition, the Secretary shall—

(1) not later than 15 days after the date of enactment of this Act, notify borrowers—

(A) of the actions taken in accordance with subsections (a) and (b) for whom payments have been suspended and interest waived;

(B) of the actions taken in accordance with subsection (e) for whom collections have been suspended;

(C) of the option to continue making payments toward principal; and

(D) that the program under this section is a temporary program.

(2) beginning on August 1, 2020, carry out a program to provide not less than 6 notices by postal mail, telephone, or electronic communication to borrowers indicating—

(A) when the borrower's normal payment obligations will resume; and

(B) that the borrower has the option to enroll in income-driven repayment, including a brief description of such options.

SEC. 3514. PROVISIONS RELATED TO THE CORPORATION FOR NATIONAL AND COMMUNITY SERVICE.

(a) ACCRUAL OF SERVICE HOURS.—

(1) ACCRUAL THROUGH OTHER SERVICE HOURS.—

(A) IN GENERAL.—Notwithstanding any other provision of the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4950 et seq.) or the National and Community Service Act of 1990 (42 U.S.C. 12501 et seq.), the Corporation for National and Community Service shall allow an individual described in subparagraph (B) to accrue other service hours

(2) REIMBURSEMENT OF AMOUNTS.—An amount equal to the expenses of the Oversight Commission shall be promptly transferred by the Secretary and the Board of Governors of the Federal Reserve System, from time to time upon the presentment of a statement of such expenses by the Chairperson of the Oversight Commission, from funds made available to the Secretary under this subtitle to the applicable fund of the House of Representatives and the contingent fund of the Senate, as appropriate, as reimbursement for amounts expended from such account and fund under paragraph (1).

SEC. 4021. CREDIT PROTECTION DURING COVID–19.

Section 623(a)(1) of the Fair Credit Reporting Act (15 U.S.C. 1681s–2(a)(1)) is amended by adding at the end the following:

"(F) REPORTING INFORMATION DURING COVID–19 PANDEMIC.—

"(i) DEFINITIONS.—In this subsection:

"(I) ACCOMMODATION.—The term 'accommodation' includes an agreement to defer 1 or more payments, make a partial payment, forbear any delinquent amounts, modify a loan or contract, or any other assistance or relief granted to a consumer who is affected by the coronavirus disease 2019 (COVID–19) pandemic during the covered period.

"(II) COVERED PERIOD.—The term 'covered period' means the period beginning on January 31, 2020 and ending on the later of—

"(aa) 120 days after the date of enactment of this subparagraph; or

"(bb) 120 days after the date on which the national emergency concerning the novel coronavirus disease (COVID–19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) terminates.

"(ii) REPORTING.—Except as provided in clause (iii), if a furnisher makes an accommodation with respect to 1 or more payments on a credit obligation or account of a consumer, and the consumer makes the payments or is not required to make 1 or more payments pursuant to the accommodation, the furnisher shall—

"(I) report the credit obligation or account as current; or

"(II) if the credit obligation or account was delinquent before the accommodation—

"(aa) maintain the delinquent status during the period in which the accommodation is in effect; and

"(bb) if the consumer brings the credit obligation or account current during the period described in item (aa), report the credit obligation or account as current.

"(iii) EXCEPTION.—Clause (ii) shall not apply with respect to a credit obligation or account of a consumer that has been charged-off.".

SEC. 4022. FORECLOSURE MORATORIUM AND CONSUMER RIGHT TO REQUEST FORBEARANCE.

(a) DEFINITIONS.—In this section:

(1) COVID–19 EMERGENCY.—The term "COVID–19 emergency" means the national emergency concerning the novel coronavirus disease (COVID–19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.).

(2) FEDERALLY BACKED MORTGAGE LOAN.—The term "Federally backed mortgage loan" includes any loan which is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from 1- to 4- families that is—

(A) insured by the Federal Housing Administration under title II of the National Housing Act (12 U.S.C. 1707 et seq.);

(B) insured under section 255 of the National Housing Act (12 U.S.C. 1715z–20);

(C) guaranteed under section 184 or 184A of the Housing and Community Development Act of 1992 (12 U.S.C. 1715z–13a, 1715z–13b);

(D) guaranteed or insured by the Department of Veterans Affairs;

(E) guaranteed or insured by the Department of Agriculture;

(F) made by the Department of Agriculture; or

(G) purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

(b) FORBEARANCE.—

(1) IN GENERAL.—During the covered period, a borrower with a Federally backed mortgage loan experiencing a financial hardship due, directly or indirectly, to the COVID–19 emergency may request forbearance on the Federally backed mortgage loan, regardless of delinquency status, by—

(A) submitting a request to the borrower's servicer; and

(B) affirming that the borrower is experiencing a financial hardship during the COVID–19 emergency.

(2) DURATION OF FORBEARANCE.—Upon a request by a borrower for forbearance under paragraph (1), such forbearance shall be granted for up to 180 days, and shall be extended for an additional period of up to 180 days at the request of the borrower, provided that, at the borrower's request, either the initial or extended period of forbearance may be shortened.

(3) ACCRUAL OF INTEREST OR FEES.—During a period of forbearance described in this subsection, no fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract, shall accrue on the borrower's account.

(c) REQUIREMENTS FOR SERVICERS.—

(1) IN GENERAL.—Upon receiving a request for forbearance from a borrower under subsection (b), the servicer shall with no additional documentation required other than the borrower's attestation to a financial hardship caused by the COVID–19

emergency and with no fees, penalties, or interest (beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract) charged to the borrower in connection with the forbearance, provide the forbearance for up to 180 days, which may be extended for an additional period of up to 180 days at the request of the borrower, provided that, the borrower's request for an extension is made during the covered period, and, at the borrower's request, either the initial or extended period of forbearance may be shortened.

(2) FORECLOSURE MORATORIUM.—Except with respect to a vacant or abandoned property, a servicer of a Federally backed mortgage loan may not initiate any judicial or non-judicial foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale for not less than the 60-day period beginning on March 18, 2020.

SEC. 4023. FORBEARANCE OF RESIDENTIAL MORTGAGE LOAN PAYMENTS FOR MULTIFAMILY PROPERTIES WITH FEDERALLY BACKED LOANS.

(a) IN GENERAL.—During the covered period, a multifamily borrower with a Federally backed multifamily mortgage loan experiencing a financial hardship due, directly or indirectly, to the COVID–19 emergency may request a forbearance under the terms set forth in this section.

(b) REQUEST FOR RELIEF.—A multifamily borrower with a Federally backed multifamily mortgage loan that was current on its payments as of February 1, 2020, may submit an oral or written request for forbearance under subsection (a) to the borrower's servicer affirming that the multifamily borrower is experiencing a financial hardship during the COVID–19 emergency.

(c) FORBEARANCE PERIOD.—

(1) IN GENERAL.—Upon receipt of an oral or written request for forbearance from a multifamily borrower, a servicer shall—

(A) document the financial hardship;

(B) provide the forbearance for up to 30 days; and

(C) extend the forbearance for up to 2 additional 30 day periods upon the request of the borrower provided that, the borrower's request for an extension is made during the covered period, and, at least 15 days prior to the end of the forbearance period described under subparagraph (B).

(2) RIGHT TO DISCONTINUE.—A multifamily borrower shall have the option to discontinue the forbearance at any time.

(d) RENTER PROTECTIONS DURING FORBEARANCE PERIOD.—A multifamily borrower that receives a forbearance under this section may not, for the duration of the forbearance—

(1) evict or initiate the eviction of a tenant from a dwelling unit located in or on the applicable property solely for nonpayment of rent or other fees or charges; or

(2) charge any late fees, penalties, or other charges to a tenant described in paragraph (1) for late payment of rent.

(e) NOTICE.—A multifamily borrower that receives a forbearance under this section—

(1) may not require a tenant to vacate a dwelling unit located in or on the applicable property before the date that

Exhibit 11

BRIEFING ROOM

Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic

FEBRUARY 24, 2021 • PRESIDENTIAL ACTIONS

NOTICE

CONTINUATION OF THE NATIONAL EMERGENCY CONCERNING THE CORONAVIRUS DISEASE 2019 (COVID-19) PANDEMIC

On March 13, 2020, by Proclamation 9994, the President declared a national emergency concerning the coronavirus disease 2019 (COVID-19) pandemic. The COVID-19 pandemic continues to cause significant risk to the public health and safety of the Nation.

For this reason, the national emergency declared on March 13, 2020, and beginning March 1, 2020, must continue in effect beyond March 1, 2021. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency declared in Proclamation 9994 concerning the COVID-19 pandemic.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,
February 24, 2021.

Exhibit 12

STATE OF WASHINGTON
OFFICE OF GOVERNOR JAY INSLEE

PROCLAMATION BY THE GOVERNOR AMENDING AND EXTENDING PROCLAMATIONS 20-05 and 20-49, et seq.

20-49.14
Garnishments

WHEREAS, on February 29, 2020, I issued Proclamation 20-05, proclaiming a State of Emergency for all counties throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States and confirmed person-to-person spread of COVID-19 in Washington State; and

WHEREAS, as a result of the continued worldwide spread of COVID-19, its significant progression in Washington State, and the high risk it poses to our most vulnerable populations, I have subsequently issued several amendatory proclamations, exercising my emergency powers under RCW 43.06.220 by prohibiting certain activities and waiving and suspending specified laws and regulations; and

WHEREAS, the COVID-19 disease, caused by a virus that spreads easily from person to person which may result in serious illness or death and has been classified by the World Health Organization as a worldwide pandemic, continues to broadly spread throughout Washington State; and

WHEREAS, the number of cases of COVID-19 in Washington State and the associated deaths have continued, demonstrating the ongoing, present, and persistent threat of this lethal disease; and

WHEREAS, the COVID-19 pandemic continues to cause a sustained global economic slowdown, and an economic downturn throughout Washington State with unprecedented numbers of layoffs and reduced work hours for a significant percentage of our workforce due to substantial reductions in business activity impacting our commercial sectors that support our State's economic vitality, including severe impacts to the large number of small businesses that make Washington State's economy thrive; and

WHEREAS, to prevent or reduce economic hardship and related life, health, and safety risks to those members of our workforce impacted by layoffs and substantially reduced work hours or who are otherwise unable to pay for basic household expenses as a result of the COVID-19 pandemic, I issued Proclamation 20-49, to temporarily waive and suspend statutes and regulations related to the collection of judgments for consumer debt; and

WHEREAS, under the provisions of RCW 43.06.220(4), the statutory waivers and suspensions of Proclamation 20-49, et seq., have been periodically extended by the leadership of the Washington State Senate and House which I acknowledged and similarly extended the prohibitions therein in subsequent sequentially numbered proclamations; and

WHEREAS, on January 15, 2021, under the provisions of RCW 43.06.220(4), the statutory waivers and suspensions of Proclamation 20-49, et seq., were extended by Senate Concurrent Resolution 8402 until the termination of the state of emergency pursuant to RCW 43.06.210, or until rescinded, whichever occurs first; and

WHEREAS, on March 11, 2021, President Joseph Biden signed into effect a significant federal supplemental COVID-19 financial relief package that includes federal payments to individuals designed to relieve the financial burdens resulting from the now full year-long global pandemic; and

WHEREAS, the worldwide COVID-19 pandemic and its progression in Washington State continue to threaten the life and health of our people as well as the economy of Washington State and remain a public disaster affecting life, health, property or the public peace; and

WHEREAS, the Washington State Department of Health continues to maintain a Public Health Incident Management Team in coordination with the State Emergency Operations Center and other supporting state agencies to manage the public health aspects of the COVID-19 emergency; and

WHEREAS, the Washington State Military Department Emergency Management Division, through the State Emergency Operations Center, continues coordinating resources across state government to support the Washington State Department of Health and local health officials in alleviating the impacts to people, property, and infrastructure, and continues coordinating with the Department of Health in assessing the impacts and long-term effects of the incident on Washington State and its people.

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52, and 43.06 RCW, do hereby proclaim that a State of Emergency continues to exist in all counties of Washington State, that Proclamation 20-05 and all amendments thereto remain in effect as otherwise amended, and that Proclamations 20-49, et seq., are amended to preclude garnishment of all federal COVID-19 relief deposited into accounts specifically in response to the ongoing COVID-19 pandemic. This proclamation shall remain in effect until termination of the COVID-19 State of Emergency or until rescinded, whichever occurs first.

FURTHERMORE, except as otherwise prohibited or limited by state or federal law, the statutory waivers and suspensions of Proclamations 20-49, et seq., which operate to prohibit garnishments for consumer debt in certain circumstances, (a) are not applicable to bank account funds other than federal payments of any kind issued in response to the COVID-19 pandemic and state and federal unemployment payments; and (b) are not applicable to garnishments for continuing liens on earnings (wages), and have not been applicable to garnishments for continuing liens on earning

since May 27, 2020. All other provisions in Proclamation 20-49 et seq., remain in full force and effect.

I again direct that the plans and procedures of the *Washington State Comprehensive Emergency Management Plan* be implemented throughout State government. State agencies and departments are directed to continue utilizing state resources and doing everything reasonably possible to support implementation of the *Washington State Comprehensive Emergency Management Plan* and to assist affected political subdivisions in an effort to respond to and recover from the COVID-19 pandemic.

I continue to order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General to address the circumstances described above, to perform such duties as directed by competent authority of the Washington State Military Department in addressing the outbreak. Additionally, I continue to direct the Washington State Department of Health, the Washington State Military Department Emergency Management Division, and other agencies to identify and provide appropriate personnel for conducting necessary and ongoing incident related assessments.

Violators of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5).

Signed and sealed with the official seal of the state of Washington on this 16th day of March, A.D., Two Thousand and Twenty-One at Olympia, Washington.

By:

/s/
Jay Inslee, Governor

BY THE GOVERNOR:

/s/
Secretary of State

Exhibit 13

STATE OF WASHINGTON
OFFICE OF GOVERNOR JAY INSLEE

PROCLAMATION BY THE GOVERNOR
EXTENDING AND AMENDING 20-05 AND 20-19, et seq.

20-19.6

Evictions and Related Housing Practices

WHEREAS, on February 29, 2020, I issued Proclamation 20-05, proclaiming a State of Emergency for all counties throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States and confirmed person-to-person spread of COVID-19 in Washington State; and

WHEREAS, as a result of the continued worldwide spread of COVID-19, its significant progression in Washington State, and the high risk it poses to our most vulnerable populations, I have subsequently issued several amendatory proclamations, exercising my emergency powers under RCW 43.06.220 by prohibiting certain activities and waiving and suspending specified laws and regulations; and

WHEREAS, the COVID-19 disease, caused by a virus that spreads easily from person to person which may result in serious illness or death and has been classified by the World Health Organization as a worldwide pandemic, continues to broadly spread throughout Washington State; and

WHEREAS, the COVID-19 pandemic is causing a sustained global economic slowdown, and an economic downturn throughout Washington State with unprecedented numbers of layoffs and reduced work hours for a significant percentage of our workforce due to substantial reductions in business activity impacting our commercial sectors that support our State's economic vitality, including severe impacts to the large number of small businesses that make Washington State's economy thrive; and

WHEREAS, many of our workforce expected to be impacted by these layoffs and substantially reduced work hours are anticipated to suffer economic hardship that will disproportionately affect low and moderate income workers resulting in lost wages and potentially the inability to pay for basic household expenses, including rent; and

WHEREAS, the inability to pay rent by these members of our workforce increases the likelihood of eviction from their homes, increasing the life, health and safety risks to a significant percentage of our people from the COVID-19 pandemic; and

WHEREAS, tenants, residents, and renters who are not materially affected by COVID-19 should and must continue to pay rent, to avoid unnecessary and avoidable economic hardship to landlords, property owners, and property managers who are economically impacted by the COVID-19 pandemic; and

WHEREAS, under RCW 59.12 (Unlawful Detainer), RCW 59.18 (Residential Landlord-Tenant Act), and RCW 59.20 (Manufactured/Mobile Home Landlord-Tenant Act) residents seeking to avoid default judgment in eviction hearings need to appear in court in order to avoid losing substantial rights to assert defenses or access legal and economic assistance; and

WHEREAS, on May 29, 2020, in response to the COVID-19 pandemic, the Washington Supreme Court issued Amended Order No. 25700-B-626, and ordered that courts should begin to hear non-emergency civil matters. While appropriate and essential to the operation of our state justice system, the reopening of courts could lead to a wave of new eviction filings, hearings, and trials that risk overwhelming courts and resulting in a surge in eviction orders and corresponding housing loss statewide; and

WHEREAS, the Washington State Legislature has established a housing assistance program in RCW 43.185 pursuant to its findings in RCW 43.185.010 "that it is in the public interest to establish a continuously renewable resource known as the housing trust fund and housing assistance program to assist low and very low-income citizens in meeting their basic housing needs;" and

WHEREAS, it is critical to protect tenants and residents of traditional dwellings from homelessness, as well as those who have lawfully occupied or resided in less traditional dwelling situations for 14 days or more, whether or not documented in a lease, including but not limited to roommates who share a home; long-term care facilities; transient housing in hotels and motels; "Airbnb's"; motor homes; RVs; and camping areas; and

WHEREAS, due to the impacts of the pandemic, individuals and families have had to move in with friends or family, and college students have had to return to their parents' home, for example, and such residents should be protected from eviction even though they are not documented in a lease. However, this order is not intended to permit occupants introduced into a dwelling who are not listed on the lease to remain or hold over after the tenant(s) of record permanently vacate the dwelling ("holdover occupant"), unless the landlord, property owner, or property manager (collectively, "landlord") has accepted partial or full payment of rent, including payment in the form of labor, from the holdover occupant, or has formally or informally acknowledged the existence of a landlord-tenant relationship with the holdover occupant; and

WHEREAS, a temporary moratorium on evictions and related actions throughout Washington State at this time will help reduce economic hardship and related life, health, and safety risks to those members of our workforce impacted by layoffs and substantially reduced work hours or who are otherwise unable to pay rent as a result of the COVID-19 pandemic; and

WHEREAS, as of March 2021, current information suggests that at least 76,000 tenants in Washington will be unable to pay their rent in the near future, reflecting the continued financial precariousness of many in the state. According to the state's unemployment information, significantly more people are claiming unemployment benefits in Washington now versus a year ago. This does not account for the many thousands of others who are filing claims with separate programs such as Pandemic Unemployment Assistance and Pandemic Emergency Unemployment Compensation: in December 2020, nearly 275,000 new and ongoing claims for unemployment-related assistance were filed; and

WHEREAS, a temporary moratorium on evictions and related actions will reduce housing instability, enable residents to stay in their homes unless conducting essential activities, employment in essential business services, or otherwise engaged in permissible activities, and will promote public health and safety by reducing the progression of COVID-19 in Washington State; and

WHEREAS, I issued Proclamations 20-25, 20-25.1, 20-25.2,and 20 25.3 (Stay Home – Stay Healthy), and I subsequently issued Proclamation 20-25.4 ("Safe Start – Stay Healthy" County-By-County Phased Reopening), wherein I amended and transitioned the previous proclamations' "Stay Home – Stay Healthy" requirements to "Safe Start – Stay Healthy" requirements, prohibiting all people in Washington State from leaving their homes except under certain circumstances and limitations based on a phased reopening of counties as established in Proclamation 20-25.4, et seq., and according to the phase each county was subsequently assigned by the Secretary of Health; and

WHEREAS, when I issued Proclamation 20-25.4 on May 31, 2020, I ordered that, beginning on June 1, 2020, counties would be allowed to apply to the Department of Health to move forward to the next phase of reopening more business and other activities; and by July 2, 2020, a total of five counties were approved to move to a modified version of Phase 1, 17 counties were in Phase 2, and 17 counties were in Phase 3; and

WHEREAS, on July 2, 2020, due to the increased COVID-19 infection rates across the state, I ordered a freeze on all counties moving forward to a subsequent phase, and that freeze remained in place while I worked with the Department of Health and other epidemiological experts to determine appropriate strategies to mitigate the increased spread of the virus, and those strategies included dialing back business and other activities; and

WHEREAS, on July 23, 2020, in response to the statewide increased rates of infection, hospitalizations, and deaths, I announced an expansion of the Department of Health's face covering requirements and several restrictions on activities where people tend to congregate; and

WHEREAS, on October 6, 2020, due to the increased COVID-19 infection rates across the state, I announced that all counties would remain in their current reopening phases as a result of the continuing surge in COVID-19 cases across the state; and

WHEREAS, positive COVID-19-related cases and hospitalizations steadily rose from early September 2020, through early January, 2021, and the number of COVID-19 cases and COVID-19-related hospitalizations continue to put our people, our health system, and our economy in a precarious position; and

WHEREAS, when I issued Proclamation 20-19.3 on July 24, 2020, the Washington State Department of Health reported at least 51,849 confirmed cases of COVID-19 with 1,494 associated deaths; and as of March 15, 2020, there are at least 330,367 confirmed cases with 5,149 associated deaths; and

WHEREAS, the worldwide COVID-19 pandemic and its progression in Washington State continues to threaten the life and health of our people as well as the economy of Washington State, and remains a public disaster affecting life, health, property or the public peace; and

WHEREAS, the Washington State Department of Health continues to maintain a Public Health Incident Management Team in coordination with the State Emergency Operations Center and other supporting state agencies to manage the public health aspects of the incident; and

WHEREAS, the Washington State Military Department Emergency Management Division, through the State Emergency Operations Center, continues coordinating resources across state government to support the Washington State Department of Health and local health officials in alleviating the impacts to people, property, and infrastructure, and continues coordinating with the Department of Health in assessing the impacts and long-term effects of the incident on Washington State and its people.

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a State of Emergency continues to exist in all counties of Washington State, that Proclamation 20-05 and all amendments thereto remain in effect, and that Proclamations 20-05 and 20-19, et seq., are amended to temporarily prohibit residential evictions and temporarily impose other related prohibitions statewide until 11:59 p.m. on June 30, 2021, as provided herein.

I again direct that the plans and procedures of the *Washington State Comprehensive Emergency Management Plan* be implemented throughout State government. State agencies and departments are directed to continue utilizing state resources and doing everything reasonably possible to support implementation of the *Washington State Comprehensive Emergency Management Plan* and to assist affected political subdivisions in an effort to respond to and recover from the COVID-19 pandemic.

I continue to order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General to address the circumstances described above, to perform such duties as directed by competent authority of the Washington State Military Department in addressing the outbreak. Additionally, I continue to direct the Washington State Department of Health, the Washington State Military Department Emergency Management Division, and other agencies to

identify and provide appropriate personnel for conducting necessary and ongoing incident related assessments.

ACCORDINGLY, based on the above noted situation and under the provisions of RCW 43.06.220(1)(h), and to help preserve and maintain life, health, property or the public peace, except where federal law requires otherwise, effective immediately and until 11:59 p.m. on June 30, 2021, I hereby prohibit the following activities related to residential dwellings and commercial rental properties in Washington State:

- Landlords, property owners, and property managers are prohibited from serving or enforcing, or threatening to serve or enforce, any notice requiring a resident to vacate any dwelling or parcel of land occupied as a dwelling, including but not limited to an eviction notice, notice to pay or vacate, notice of unlawful detainer, notice of termination of rental, or notice to comply or vacate. This prohibition applies to tenancies or other housing arrangements that have expired or that will expire during the effective period of this Proclamation. This prohibition does not apply to emergency shelters where length of stay is conditioned upon a resident's participation in, and compliance with, a supportive services program. Emergency shelters should make every effort to work with shelter clients to find alternate housing solutions. This prohibition applies unless the landlord, property owner, or property manager (a) attaches an affidavit to the eviction or termination of tenancy notice attesting that the action is necessary to respond to a significant and immediate risk to the health, safety, or property of others created by the resident; or (b) provides at least 60 days' written notice of the property owner's intent to (i) personally occupy the premises as the owner's primary residence, or (ii) sell the property. Such a 60-day notice of intent to sell or personally occupy shall be in the form of an affidavit signed under penalty of perjury, and does not dispense landlords, property owners, or property managers from their notice obligations prior to entering the property, or from wearing face coverings, social distancing, and complying with all other COVID-19 safety measures upon entry, together with their guests and agents. Any eviction or termination of tenancy notice served under one of the above exceptions must independently comply with all applicable requirements under Washington law, and nothing in this paragraph waives those requirements.

- Landlords, property owners, and property managers are prohibited from seeking or enforcing, or threatening to seek or enforce, judicial eviction orders involving any dwelling or parcel of land occupied as a dwelling, unless the landlord, property owner, or property manager (a) attaches an affidavit to the eviction or termination of tenancy notice attesting that the action is necessary to respond to a significant and immediate risk to the health, safety, or property of others created by the resident; or (b) shows that at least 60 days' written notice were provided of the property owner's intent to (i) personally occupy the premises as the owner's primary residence, or (ii) sell the property. Such a 60-day notice of intent to sell or personally occupy shall be in the form of an affidavit signed under penalty of perjury.

- Local law enforcement are prohibited from serving, threatening to serve, or otherwise acting on eviction orders affecting any dwelling or parcel of land occupied as a dwelling, unless the eviction order clearly states that it was issued based on a court's finding that (a) the individual(s) named in the eviction order is creating a significant and immediate risk to the health, safety, or property of others; or (b) at least 60 days' written notice were provided of the property owner's intent to (i) personally occupy the premises as the owner's primary residence, or (ii) sell the property. Local law enforcement may serve or otherwise act on eviction orders, including writs of restitution that contain the findings required by this paragraph.

- Landlords, property owners, and property managers are prohibited from assessing, or threatening to assess, late fees for the non-payment or late payment of rent or other charges related to a dwelling or parcel of land occupied as a dwelling, and where such non-payment or late payment occurred on or after February 29, 2020, the date when a State of Emergency was proclaimed in all counties in Washington State.

- Landlords, property owners, and property managers are prohibited from assessing, or threatening to assess, rent or other charges related to a dwelling or parcel of land occupied as a dwelling for any period during which the resident's access to, or occupancy of, such dwelling was prevented as a result of the COVID-19 outbreak.

- Except as provided in this paragraph, landlords, property owners, and property managers are prohibited from treating any unpaid rent or other charges related to a dwelling or parcel of land occupied as a dwelling as an enforceable debt or obligation that is owing or collectable, where such non-payment was as a result of the COVID-19 outbreak and occurred on or after February 29, 2020, and during the State of Emergency proclaimed in all counties in Washington State. This includes attempts to collect, or threats to collect, through a collection agency, by filing an unlawful detainer or other judicial action, withholding any portion of a security deposit, billing or invoicing, reporting to credit bureaus, or by any other means. **This prohibition does not apply to a landlord, property owner, or property manager who demonstrates by a preponderance of the evidence to a court that the resident was offered, and refused or failed to comply with, a re-payment plan that was reasonable based on the individual financial, health, and other circumstances of that resident; failure to provide a reasonable re-payment plan shall be a defense to any lawsuit or other attempts to collect.**

- Nothing in this order precludes a landlord, property owner, or property manager from engaging in customary and routine communications with residents of a dwelling or parcel of land occupied as a dwelling. "Customary and routine" means communication practices that were in place prior to the issuance of Proclamation 20-19 on March 18, 2020, but only to the extent that those communications reasonably notify a resident of upcoming rent that is due; provide notice of community events, news, or updates; document a lease violation without threatening eviction; or are otherwise consistent with

this order. Within these communications and parameters, it is permissible for landlords, property owners and property managers to provide information to residents regarding financial resources, including coordinating with residents in applying for rent assistance through the state's Emergency Rent Assistance Program (ERAP) or an alternative state rent assistance program, and to provide residents with information on how to engage with them in discussions regarding reasonable repayment plans as described in this order.

- Except as provided in this paragraph, landlords, property owners, and property managers are prohibited from increasing, or threatening to increase, the rate of rent for any dwelling or parcel of land occupied as a dwelling. This prohibition does not apply to a landlord, property owner, or property manager who provides (a) advance notice of a rent increase required by RCW 59.20.090(2) (Manufactured/Mobile Home Landlord-Tenant Act), or (b) notice of a rent increase specified by the terms of the existing lease, provided that (i) the noticed rent increase does not take effect until after the expiration of Proclamation 20-19, et seq., and any modification or extension thereof, and (ii) the notice is restricted to its limited purpose and does not contain any threatening or coercive language, including any language threatening eviction or describing unpaid rent or other charges. Unless expressly permitted in this or a subsequent order, under no circumstances may a rent increase go into effect while this Proclamation, or any extension thereof, is in effect. Except as provided below, this prohibition also applies to commercial rental property if the commercial tenant has been materially impacted by the COVID-19, whether personally impacted and is unable to work or whether the business itself was deemed non-essential pursuant to Proclamation 20-25 or otherwise lost staff or customers due to the COVID-19 outbreak. This prohibition does not apply to commercial rental property if rent increases were included in an existing lease agreement that was executed prior to February 29, 2020 (pre-COVID-19 state of emergency).

- Landlords, property owners, and property managers are prohibited from retaliating against individuals for invoking their rights or protections under Proclamations 20-19 et seq., or any other state or federal law providing rights or protections for residential dwellings. Nothing in this order prevents a landlord from seeking to engage in reasonable communications with tenants to explore re-payment plans in accordance with this order.

- The preceding prohibitions do not apply to operators of long-term care facilities licensed or certified by the Department of Social and Health Services to prevent them from taking action to appropriately, safely, and lawfully transfer or discharge a resident for health or safety reasons, or a change in payer source that the facility is unable to accept, in accordance with the laws and rules that apply to those facilities. Additionally, the above prohibition against increasing, or threatening to increase, the rate of rent for any dwelling does not apply to customary changes in the charges or fees for cost of care (such as charges for personal care, utilities, and other reasonable and customary operating expenses), or reasonable charges or fees related to COVID-19 (such as the costs of PPE and testing), as long as these charges or fees are outlined in the long-term care facility's

notice of services and are applied in accordance with the laws and rules that apply to those facilities, including any advance notice requirement.

Terminology used in these prohibitions shall be understood by reference to Washington law, including but not limited to RCW 49.60, RCW 59.12, RCW 59.18, and RCW 59.20. For purposes of this Proclamation, a "significant and immediate risk to the health, safety, or property of others created by the resident" (a) is one that is described with particularity; (b) as it relates to "significant and immediate" risk to the health and safety of others, includes any behavior by a resident which is imminently hazardous to the physical safety of other persons on the premises (RCW 59.18.130 (8)(a)); (c) cannot be established on the basis of the resident's own health condition or disability; (d) excludes the situation in which a resident who may have been exposed to, or contracted, the COVID-19, or is following Department of Health guidelines regarding isolation or quarantine; and (e) excludes circumstances that are not urgent in nature, such as conditions that were known or knowable to the landlord, property owner, or property manager pre-COVID-19 but regarding which that entity took no action.

FURTHERMORE, it is the intent of this order to prevent a potential new devastating impact of the COVID-19 outbreak – that is, a wave of statewide homelessness that will impact every community in our state. To that end, this order further acknowledges, applauds, and reflects gratitude to the immeasurable contribution to the health and well-being of our communities and families made by the landlords, property owners, and property managers subject to this order.

ADDITIONALLY, it is also the intent of this order to extend state emergency rent assistance programs and to incorporate the newly approved federal rental assistance funding. The goal is to continue to provide a path for eligible tenants to seek rental assistance, but to now also allow landlords, property owners, and property managers to initiate an application for rental assistance. This process should be collaborative, and I encourage the nonprofit and philanthropic communities to continue their support of programs that help educate and inform both parties of the benefits of these rental assistance programs. Although a new program may need to be created for the newly approved federal rental assistance, all counties should consider the existing program in King County as a model for creating this path for landlords and property owners and property managers.

ADDITIONALLY, I want to thank the vast majority of tenants who have continued to pay what they can, as soon as they can, to help support the people and the system that are supporting them through this crisis. The intent of Proclamation 20-19, et seq., is to provide relief to those individuals who have been impacted by the COVID-19 crisis. Landlords and tenants are expected to communicate in good faith with one another, and to work together, on the timing and terms of payment and repayment solutions that all parties will need in order to overcome the severe challenges that COVID-19 has imposed for landlords and tenants alike. I strongly encourage landlords and tenants to avail themselves of the services offered at existing dispute resolution centers to come to agreement on payment and repayment solutions.

MOREOVER, as Washington State begins to emerge from the current public health and economic crises, I recognize that courts, tenants, landlords, property owners, and property

managers may desire additional direction concerning the specific parameters for reasonable re-payment plans related to outstanding rent or fees. This is best addressed by legislation, and I invite the state Legislature to produce legislation as early as possible during their next session to address this issue. I stand ready to partner with our legislators as necessary and appropriate to ensure that the needed framework is passed into law.

Violators of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5).

Signed and sealed with the official seal of the state of Washington on this 18th day of March, A.D., Two Thousand and Twenty-One at Olympia, Washington.

By:

/s/
Jay Inslee, Governor

BY THE GOVERNOR:

/s/
Secretary of State

Exhibit 14

CODE REVISER USE ONLY

RULE-MAKING ORDER
EMERGENCY RULE ONLY

CR-103E (December 2017)
(Implements RCW 34.05.350 and 34.05.360)

Agency:

Effective date of rule:
Emergency Rules
☐ Immediately upon filing.
☐ Later (specify) _____

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?
☐ Yes ☐ No If Yes, explain:

Purpose:

Citation of rules affected by this order:
New:
Repealed:
Amended:
Suspended:

Statutory authority for adoption:

Other authority:

EMERGENCY RULE
Under RCW 34.05.350 the agency for good cause finds:
☐ That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
☐ That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

Note: If any category is left blank, it will be calculated as zero. No descriptive text.

Count by whole WAC sections only, from the WAC number through the history note. A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	____	Amended	____	Repealed	____
Federal rules or standards:	New	____	Amended	____	Repealed	____
Recently enacted state statutes:	New	____	Amended	____	Repealed	____

The number of sections adopted at the request of a nongovernmental entity:

New ____ Amended ____ Repealed ____

The number of sections adopted on the agency's own initiative:

New ____ Amended ____ Repealed ____

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New ____ Amended ____ Repealed ____

The number of sections adopted using:

Negotiated rule making: New ____ Amended ____ Repealed ____

Pilot rule making: New ____ Amended ____ Repealed ____

Other alternative rule making: New ____ Amended ____ Repealed ____

Date Adopted:	**Signature:** Place signature here
Name:	
Title:	

☐ EXPEDITE
☒ Hearing is set
Date: August 27, 2021
Time: 9:00 a.m.
Judge/Calendar: Mary Sue Wilson

☐ No hearing is set

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, Petitioners, v. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON, Respondents.	NO. 21-2-00542-34 DECLARATION OF JASON W. ANDERSON IN SUPPORT OF PETITIONERS' RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO STRIKE DECLARATIONS NOT IN THE AGENCY RECORD

JASON W. ANDERSON declares:

1. I am a lawyer with Carney Badley Spellman, P.S., and am admitted to practice law in Washington. I am one of the attorneys of record for Petitioners, the American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents and Brokers of Washington.

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

2. Attached as **Exhibit 1** is a true and correct copy of the transcript of the April 23, 2021 hearing on Petitioners' Motion for Preliminary Injunction.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 24th day of August, 2021, at Seattle, Washington.

/s/ Jason W. Anderson
Jason W. Anderson, WSBA No. 30512

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via electronic service to the following:

Marta DeLeon Suzanne Becker OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON 1125 Washington St. SE / P.O. Box 40100 Olympia, WA 98504 laura.chadwick@atg.wa.gov marta.deleon@atg.wa.gov GCEEF@atg.wa.gov suzanne.becker@atg.wa.gov Deana.Sullivan@atg.wa.gov	Damon N. Vocke, DUANE MORRIS LLP 1540 Broadway New York, New York 10036-4086 dnvocke@duanemorris.com MBHolton@duanemorris.com RMLepinskas@duanemorris.com
Joseph D. Hampton BETTS PATTERSON MINES One Convention Place 701 Pike Street, Suite 1400 Seattle, Washington 98101-3297 jhampton@bpmlaw.com dmarsh@bpmlaw.com	Vanessa Wells HOGAN LOVELLS US LLP 4085 Campbell A venue, Suite 100 Menlo Park, California 94025 vanessa.wells@hoganlovells.com

DATED this 24th day of August, 2021.

/s/ Patti Saiden
Patti Saiden, Legal Assistant

EXHIBIT 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION,	)	
Petitioner,	)	
vs.	)	SUPERIOR COURT
	)	NO. 21-2-00542-34
STATE OF WASHINGTON, OFFICE OF THE INSURANCE COMMISSIONER,	)	
Respondent.	)	

THE HONORABLE MARY SUE WILSON PRESIDING

Report of proceedings
April 23, 2021
2000 Lakeridge Drive SW
Olympia, Washington

Court Reporter
Ralph H. Beswick, CCR
Certificate No. 2023
1606 12th Avenue SW
Olympia, Washington

A P P E A R A N C E S

For the Petitioner: Damon Vocke
Duane Morris
1540 Broadway
New York, NY 10036-4086

For the Respondent: Marta DeLeon
Assistant Attorney General
PO Box 40100
Olympia, WA 98504-0100

THE COURT: Good morning, everybody. Please be seated. All right. Judge Wilson here. My camera is very fuzzy. It wasn't that way for the earlier hearings. I'm going to ask the clerk if she can figure out how to fix that. So hang on a second, everybody. I appreciate your patience.

It came into focus. I'm not sure how that happened. All right. So Judge Wilson here in courtroom 102 at Thurston County Superior Court together with the court reporter and a clerk. Nobody else has joined us in person. As you all know, we've arranged and encouraged remote participation using Zoom so that we can minimize bringing people into the courthouse.

This case is on the docket eleven o'clock for a motion for preliminary injunction. I have some preliminary matters including a request from the media to film and live stream. I'll address that in a moment. Before I do, I would like to have counsel introduce themselves. So for the petitioners, Mr. King, will you be speaking for the petitioners today?

MR. KING: Actually, Your Honor, I will not. The presentation on behalf of the petitioners will be made by Mr. Damon Vocke who is appearing *pro hoc* this morning.

THE COURT: All right. Mr. Vocke, can you go ahead and say hello so I can confirm that we can all hear you.

MR. VOCKE: Yes, Your Honor. Thank you very much. My name is Damon Vocke. I represent the petitioners and movants in this matter, American property -- APPIA, PIA of Washington and the IIAWB. We are seeking a preliminary injunction this morning. Thank you.

THE COURT: Thank you.

And Ms. DeLeon, did I say that right?

MS. DELEON: Yes, Your Honor.

THE COURT: All right. And --

MS. DELEON: Marta DeLeon, assistant attorney general appearing on behalf of the Insurance Commissioner Mike Kreidler and the Office of the Insurance Commissioner.

THE COURT: Thank you. And do I have an individual from TVW, either Mike Bay or Roxy Boggio? All right. Is there somebody here besides the two people I indicated from TVW? All right.

So the court's request is that if you're not speaking with the court that you put your video off so I can focus on the speakers. As you all know, sometimes the audio is impacted with the Zoom application. In order to have a meaningful hearing the court needs to be able to ensure that everybody can hear each other and you can always hear the court. So invite you, if you have trouble hearing, to turn your video on and get my attention immediately so we can fix the issue. We do have a court reporter taking

everything down. That's our official court record.

The court administration did receive notice from TVW, the vice president of programming Mr. Bay earlier this week, that he or somebody from his staff would be appearing and requesting permission to video the proceeding and live stream it on TVW. Of course, we presume access to the media, but before we grant access, we invite any objections. So I'll ask one more time whether anybody from TVW is here, and if not, we'll just proceed to the details of the issue before the case.

All right. And I see somebody named Dan. Are you able to turn off -- are you going to speak to the court or are you able to turn off your video and just be an observer? Observers are welcome, but it's distracting to the court if you're not going to address the court. All right.

Mr. Porter, I see you're there from KIRO News. Can you hear me? It's Judge Wilson.

KIRO: Yes, Judge Wilson, and thank you. Since TVW did not respond, we basically have the same request that TVW has and would like to record the hearing if we may.

THE COURT: Okay. So I have a request from Mr. Porter from KIRO News requesting to record the proceeding. As I said before he was on screen, we presume access to the media, but first we ask whether anybody's objecting. If so, I would ask for proposed restrictions

because if I were to consider a limitation, I need to make sure that those are narrowly tailored.

So first I will ask whether -- I'm sorry. Ms. Loren Alkazar. Okay. Thank you. I'm asking if you're not addressing the court and you're an observer make sure that your audio's off, that you're on mute so that your feedback doesn't interfere with us.

So I'm going to ask first whether either of the lawyers representing the parties to this case have any objection, and after that, if there are no objections from the parties, then I will invite whether anybody else participating has an objection to the media providing coverage today.

Mr. Vocke.

MR. VOCKE: I have no objection, Your Honor. Thank you.

THE COURT: And I'm sorry. Was it VOE KEY or VOCK KEY?

MR. VOCKE: VOE KEY. Thank you very much.

THE COURT: Ms. Deleon.

MS. DELEON: No objection, Your Honor.

THE COURT: Is there anybody else present that has an objection to the media participating today and videotaping and potentially broadcasting? Okay. Seeing no objection, the court will grant the request.

I see that there's a person Denise connecting to audio. If you're an observer only, I'd ask that you label yourself as an observer and turn off your video.

The next procedural and last procedural I have, unless the parties have something that I don't know about, is whether there is still an objection regarding the brief. There was a brief submitted. The state argued that the petitioner's brief was over-length. There was a corrected brief submitted. Because of the court's schedule, the court reset this out one week.

Ms. Deleon, is the state still objecting to the petitioner's brief?

MS. DELEON: No, Your Honor, not given the additional time.

THE COURT: Thank you.

Any other procedural issue either of you would like to address to the court?

Okay. I'd like to --

MS. DELEON: No, Your Honor.

THE COURT: I'd like to thank both parties. I appreciate very much the speed that you got judge's copies to the court. We have a suspension of judge's copies because of the pandemic, but for a case with so many documents it was really helpful, and I know you got a late request, and they arrived very quickly. So thank you to

both offices for making sure that I had all the materials to prepare for today.

Without anything else, I would invite each of the parties to plan on ten minutes. I'll have a little bit of grace at the end if I ask a lot of questions. And I do want to indicate two questions that I have for the parties to address at some point in your argument as we start, and the two questions start with: I didn't see in either of your briefing a discussion of the record when the court is considering an emergency rule in the context of a preliminary injunction. If this was a regular rule challenge, we would have the rule record that's specified in the APA. You both submitted declarations supporting your positions. So at some point in your argument I'd like you to address whether you agree that those declarations amount to the record or whether I should think about the rule record in some other way. So that's question number one to include in your argument.

And then question number two: This is a bit inside baseball, and I apologize if my question shows that I'm not an expert in the nuances of insurance rate-setting and regulation, but as I understand it in Washington each company files statements that indicate how they're setting rates, and those formulas, if you will, are protected as trade secrets. So when you all discuss them or your

experts discuss them, they're discussed generally. One of the key issues I see in this case is what the companies are to do under the emergency rule, is it simply substituting previously used credit score for a neutral factor, and is that simple or not simple. The company's say it's not simple. The insurance commissioner says it's simple; submit one page that says that change. As I get from the declarations, you can't get into the specifics about how these formulas are set, and they are set differently by each company. So my question, with all that background, is first of all, feel free to in your arguments tell me that I've misunderstood something about how it works, but if the credit score is a primary driver of a company's particular formula, explain to me how the rule and the frequently asked question guidance document makes that a simple endeavor or not a simple endeavor to simply stop using the credit score. So those are the two areas I'm interested in.

I'm going to pause for a moment before I start with Mr. Vocke. I see Mr. DeLong on the screen. If you could tell me if you're here for the eleven o'clock case or something else. Mr. DeLong.

MR. DELONG: This is Michael DeLong from Consumer Federation of America here for the (indiscernible).

THE COURT: Thank you. If you could turn off your

video because Mr. Vocke will be representing your interests. I would like all parties who are not a lawyer addressing the court to have your video off so I can keep focused on the speakers.

Ms. Gilery, this is Judge Wilson. And I know that your case was addressed earlier today. Your hearing was set at nine o'clock. I am not -- you're on mute. I am not able to address your matter right now because I need the time from eleven to twelve for the present case. So I'm going to indicate that the hearing was at nine and we didn't see you here. The parents did appear. And because the parents confirmed that there is an active dependency case for the child, I'm dismissing your case today.

NON-PARTICIPANT: Okay. So what does that mean?

THE COURT: It means that the nonparental custody case is over because the child is no longer in your custody and it's not appropriate for me to address it under the nonparental custody law. Okay. Thank you for being here, but remember it's always important to appear on the time that your hearing is set for.

NON-PARTICIPANT: I was just confused on my behalf because I do have an have an attorney in Pierce County too so I was just confused on my behalf if I had to be there or not.

THE COURT: Thank you, Ms. Gilery.

Mr. Vocke, do you have any procedural issues you want to raise or are you ready to go?

NON-PARTICIPANT: (Indiscernible).

THE COURT: You may turn off if you'd like. I need everybody else to mute.

Mr. Vocke, go ahead.

MR. VOCKE: Yes, Your Honor. Thank you very much. It's an honor and pleasure to present to the court in Thurston County. Thank you for your time and attention.

Clearly you've read the papers and are educated on the issues. What we have here is an extraordinary effort by a state agency to override and contravene, nullify existing law that's been in place for 19 years which allows insurance companies to use credit history as a component in the rate-setting that they have in (indiscernible) homeowners and renters insurance. There is a contrived emergency here in our opinion, with all due respect, because the basis for the predicate for the emergency, as our opposition would argue, are emergency declarations including President Trump's declaration in March of 2020 and the adoption of the CAREs Act March 27th, 2020, that somehow now suddenly on March 22, 2021, a year later plus, there has to be an emergency rule put in place that overrides and invalidates existing statutory law. That is on its face per se invalid and illegal and unsupportable.

That is the key takeaway here with regard to this request for preliminary injunction.

This has been a longstanding practice. The commissioner has attempted at least three times now, in 2001, 2002, 2010, and most recently in the earlier part of this year 2021, to obtain approval by the legislature to nullify, override and discount existing law with regard to the use of credit history. Credit history, as their own witnesses admit, is a distinct risk factor where there is a correlation between credit history and expected losses in insurance. That is not in dispute in this case.

What is in dispute in this case is whether the commissioner has the right and opportunity to override and nullify effectively statutory law that's been on the books since 2002. That clearly in and of itself requires this court to find that we have a likelihood to prevail on the merits of this case in terms of the preliminary injunction. We're not getting to the merits just yet, but that's what's going on.

We have a long history. We have public statements from the commissioner, and in the affidavits, that he seeks to have a permanent ban on the use of credit history, which by the way, is utilized in at least 47 states and the District of Columbia because of the actuarial correlation. He comes up with this argument that it's not about invidious or

insidious discrimination, which everybody would agree is improper; it's about an actuarial definition of the term "unfair discrimination" which is (indiscernible) treat similar risks in a dissimilar fashion.

What he's attempted to do with this emergency rule by banning the use of credit history on very short-term basis is fundamentally disrupt how businesses is done and has been done for 19 years with the imprimatur of the state legislature of the State of Washington which just considered this very issue which he lobbied very hard to pass which would ban the use of credit history to eliminate that as a legitimate risk factor. Instead of what he claims would be unfair discrimination, we have exactly the opposite in the way he defines it. We would have unfair discrimination in that in the undisputed, unchallenged evidence in this case -- and to your first question, we would agree the record is comprised of the affidavits that have been submitted. The OIC, the Office of the Insurance Commissioner, has not challenged, not contested, not disputed the affidavits that have been put forward that show from various companies that over one million Washington residents will pay higher rates because of this emergency rule. Okay. Even from the companies -- the limited number of companies that have submitted affidavits, that's about five hundred thousand policyholders by itself

from four different company affidavits that are going to see double-digit rate increases solely because the commissioner, Mr. Kreidler, seeks to eliminate the use of something that is sanctioned and authorized by the legislature, which is credit history. And he wants to do it on an emergency basis. He wants to do it on an emergency basis because he's lobbied time and time again to seek the legislature to override its prior authorization. And he's failed on at least three occasions. And in the most recent one, his own chief actuary testified on January 14, 2021, that there is an actuarial correlation between credit history and expected losses. And he, Mr. Slavich -- and this is in the record in his affidavit -- did not say that there isn't any kind of unfair discrimination in an actuarial sense, because he said that there was; he said it's a policy question. This is something we want as a societal issue as he presented to the senate committee of the state legislature of the State of Washington. That's a policy question. And they failed.

So two weeks later after the time expired to adopt that bill, Commissioner Kreidler adopts an emergency regulation that has a May 6th deadline that requires a fundamental reconstruction of how business is done in the state of Washington with regard to credit history, and then by June 20 he's expecting all companies to comply with that with

regard to existing policies and renewal policies that are going to go on for six to twelve months beyond that.

As Your Honor knows if you've read the papers, and I'm sure you have, there's a 120-day limitation on an emergency rule. That 120 days is just not going to apply here because those policies are going to go on far beyond the 120-day period. Moreover, the commissioner has made it clear, and it's in the affidavits of his own principal Mr. Noski, which is attached as an exhibit to the opposition, that he seeks a permanent ban on the use of credit history. That's precisely what he's attempted to get the legislature to do, and he's failed again, 2001, 2002, 2010 and 2021. And now he is openly saying "I want a permanent ban on that."

The problem with that request -- and he can have his opinions and view points. That's fine. But he's a regulator and he has to follow the law. The law says that insurance companies are permitted to use credit history in their rate calculations.

THE COURT: All right. So let me ask you a question about that. Let's say I take the state's argument that failed legislation doesn't inform the issue of what does the statute mean. Let's just say I haven't made a decision on that, but my question is I'm looking at 48.19.035(2)(a), and it says "Credit history shall not be used to determine

. . . insurance rates . . . unless the . . . scoring models are filed with the commissioner." And then there's other detail. And the state's argument is the authority to rule-make, particularly to address other statutory provisions that prohibit unfair discrimination is what the commissioner did here, which is adopt a rule that is addressing unfair discrimination.

So my legal question for you, Mr. Vocke, independent of the record, is do you think 48.19.035(2)(a) is an absolute statement that says as long as you file your scoring models, credit history can be used, or in the right set of facts do you agree that the commissioner has the power to rule-make to address unfair discrimination in the setting of rates?

MR. VOCKE: Two responses to that question, Your Honor. Number one, the statute is very clear and unequivocal (indiscernible) controlling law here says --

THE COURT: You're quiet. It's hard to hear you.

MR. VOCKE: Okay. Can you hear me now?

THE COURT: Still a little quieter than when you were earlier talking, and I'm sure it's hard on the court reporter. Just do what you can.

MR. VOCKE: I haven't moved. So apologies.

THE COURT: That's better. That's better.

MR. VOCKE: So two response to your question.

That's a very good question. State law by the legislature in 48.19.035 explicitly allows the use of credit history, unconditionally, unequivocally, if those rate scores are filed with the Department of Insurance. And by the way, there's a regulation that specifically says that their actuaries will review those rate filings to determine whether there is unfair discrimination. There is already a process in place to do that which the commissioner seeks to ban across the board without condition for all insurance companies across all of these personal lines, ban it unconditionally. And not only am I going to ban it, I'm going to seek a permanent rule for at least three years, and his own staff member has said he wants to ban it permanently, indefinitely. So the state law is what it is. Whether we agree or disagree with it, we have to follow the state legislative mandate which has been in place for 19 years. Insurance companies file their rates. If they get approval, they can use them.

As to your second question on unfair discrimination, the evidence that we've presented to the court shows that contrary to the speculative statements about unfair discrimination -- and by the way, the commissioner's backtracked. He said it's really about underserved communities, but then he said "I'm not seeking to advance that argument here. It's all about actuarial

correlations." The undisputed evidence here is that there is an actuarial correlation, and there is no harm, and the prospect of harm with respect to the CARES Act adopted over a year ago is somewhere deep into the future. The *Wall Street Journal* issued an article just (indiscernible) saying there are all kinds of spikes in coronavirus, contagion, variants, all kinds of countries are going on check-downs and so forth, and that they are saying (indiscernible) and it could be some time in the future. There's no immanency that we're justified in emergency rule here.

The unfair discrimination, Your Honor, with all due respect, isn't what he's claiming. It's the fact that, undisputed, we will have at least well over a million Washington residents that but for this emergency regulation are going to pay double-digit increases in their auto, homeowners and renters insurance. There's no question about it. And there's no dispute on that issue. They have not said one thing to contest that basic fundamental proposition. So there will be unfair discrimination, which is that we're going to arbitrarily take away what they have admitted is a statistically accurate correlation between the credit history and expected losses. We're going to take it away, and then immediately by May 6th you have to make filings, and by June 20 you've got to have all your

policies out there that take that risk factor out. And over a million -- just on auto policies -- and we look at the affidavits, the affidavits of four companies show that five hundred thousand Washington residents are going to pay significantly more in their rates than they do now without any change in circumstances whatsoever.

THE COURT: So I'm going to stop you, Mr. Vocke. You've used about 13 minutes. I added time with my question. I'm going to give you two minutes to wrap up, and then we'll go to the state. Go ahead.

MR. VOCKE: Yeah. I just would say that fundamentally we're looking at a preliminary injunction here. We're not asking the court to rule on the ultimate merits. But we have very short-term deadlines for the industry to make revolutionary, radical, drastic and extreme changes to how they do business in accordance with existing statutory law. That is improper, number one.

Number two, there is no emergency. The commissioner is fabricating an emergency because he couldn't get it done in the legislature. What he seeks to do with the emergency rule he's tried and tried and tried again. Nothing's changed since March 2020, a year ago from where we are today. And there's no evidence that there's any end in sight with regard to the CARES Act protections, which, by the way, has a 120-day safe harbor. So even if it expires,

the predictions are by late July we'll have 70 some percent vaccinated in the US. We have another 120-day period at best before the CARES Act expires. The commissioner should pursue formal rulemaking that encourages open debate, discussion, submission of evidence, but not try to cram this down by way of an emergency order that requires fundamental radical changes in how insurance companies do business at significant cost. The affidavits show that at least 10,000 hours of personnel time will be required from at least four companies. If you extrapolate that to the industry, the undisputed evidence shows we have at least 12 to 82 million dollars of expense that will be incurred, and if you find, Your Honor, this is invalid ultimately on the merits, that can't be recouped. That cannot be recouped.

But the takeaway here, the biggest issue here is that credit history is allowed by statutory law. Despite the efforts of the commissioner to change it, that is the law in the state of Washington, and that is why this court should enter a preliminary injunction until the court has an opportunity to judge this case on the merits. Thank you.

THE COURT: Thank you, Mr. Vocke.

Ms. Deleon, I'll let you know when you're at ten minutes and give you a little extra time given your opponent got a little extra time. Go ahead, please.

MS. DELEON: Thank you, Your Honor. Marta DeLeon, assistant attorney general and counsel to the Washington State Insurance Commissioner.

Your Honor, the pandemic created a unique circumstance that has required a unique response. Petitioners have failed to meet their burden of demonstrating that the commissioner's chosen response to protect the public from the financial cliff that they face when the protections of the pandemic ends fails to comply with the requirements of Washington law.

First, they failed to demonstrate under 34.05.570 that the -- that they are likely to prevail on demonstrating that the emergency rule exceeds the commissioner's statutory authority, that it fails to comply with the emergency rulemaking proceedings, and in 34.05.350, or that the rule is arbitrary and capricious.

In addition, the speculation of the enormous cost of compliance is belied by the fact that some carriers have already done submitting their amended rate filings, and those filings have already been I proved.

Most importantly, the balance of equities in this case weighs in favor of insuring that those who are the most severely impacted by the pandemic are protected from the financial cliff that they face if the current state and federal protections that are causing their credit histories

to be objectively inaccurate are removed. For these reasons their petitioner's motion for preliminary injunction should be denied.

You asked, Your Honor, a question about the record and what is in the appropriate record. Certainly the rulemaking file is part of the appropriate record, but under the APA, particularly in emergency rulemaking, additional information can be supplemented in the record, and so the declarations that are on file from the commissioner are certainly an appropriate addition or an appropriate addition or an appropriate component of the record for this court to consider.

THE COURT: What is the record? You said the rulemaking file. Is that the explanation when the emergency rule's adopted and the rule itself or is there more that I don't have that's the record that you referenced? What is the rulemaking file?

MS. DELEON: The rulemaking file certainly includes the CR-103E and the (indiscernible) explanatory statement. And so the additional affidavits that contain citations (indiscernible) additional studies and information about the K-shaped recovery of the economy are also appropriately part of the record.

THE COURT: I just wanted to make sure I have -- you referenced a concise explanatory statement. I'm familiar

with what those documents look like. I don't remember where that was. Maybe I missed it.

MS. DELEON: I believe that is attached to Mr. Forte's declaration.

THE COURT: Okay.

MS. DELEON: Along with the rule itself.

THE COURT: Thank you. Continue, please.

MS. DELEON: The commissioner -- I would like to address a few of the relevant facts (indiscernible). The commissioner certainly does not contest that he has been pursuing legislation that would permanently ban credit scoring and intends to do so in the future, and while that is factually accurate, it is legally irrelevant in this case.

What is relevant is the basis for the commissioner's emergency rule, and in the commissioner's CR-103E he cites to several concerns that form the basis for this emergency rule. He cites to evidence of individuals who are more severely impacted or most severely impacted by the pandemic, that K-shaped recovery that's also discussed in (indiscernible) declaration and the declaration of Mr. Birnbaum. Both -- both of those declarations in their supporting documents demonstrate that while some individuals have fared well under the pandemic and average credit scores may have maintained during the pandemic,

there is a group of people who have been severely disadvantaged economically as a result of the pandemic, and those are the individuals who are the most likely to have deferments that are preventing their credit scores or their credit histories from being accurately reported right now. Those are the individuals who are most likely to be facing eviction or foreclosure when the state protections and -- in addition to the federal protections under the CARES Act. Those are the individuals whose credit history currently are inaccurate, but also whose credit histories will reflect significant negative credit impact and significant negative credit events when the protections of state and federal law evaporate after the end of the pandemic, and those are the individuals that the commissioner is the most interested in ensuring are protected.

The carriers do not contest the K-shaped recovery or the K-shaped impact of the pandemic, nor do they contest that many individuals who are currently enrolled in their plans who are currently policyholders have experienced or are currently taking advantage of those protections. They don't contest that there are no individuals in -- no individual policyholders in Washington State that do not have -- that do not have inaccurate credit histories as a result of these protections, nor do they contest that the CARES Act and state emergency protections will evaporate

with the end of the pandemic.

In addition, while it is certain that no one can fully predict the end of the pandemic, it is important to note as (indiscernible) Snyder noted in her declaration that at the time the emergency rule was adopted, every county in Washington State was in phase three. The vaccine rollout was well on its way. So the end of the pandemic, particularly in Washington State, is coming. It's within sight. Now, there will be some setbacks, but at the time the emergency rule was adopted, things were looking as though they were rapidly progressing towards the end of the pandemic, and because no one can know for certain when the pandemic will end, no one can say for certain that these protections in the CARES Act and in state provisions will remain in place for any particular period of time. But it is certain that something needs to be done to address the impending economic cliff that many consumers are facing if credit scoring is continued to allow to be used in personal lines.

Looking at these facts, it is clear that this unique set of circumstances prompted the rule that's at issue here and that that rule does not exceed the commissioner's authority under the insurance code or under the emergency rule provisions of the APA. First, it's important to note that the commissioner has general rulemaking authority to

(indiscernible) the entire code, not just the credit -- or the credit scoring provisions in 48.19.035. His authority must be interpreted against his -- the insurance code as a whole, not only the credit scoring provision, and that includes the requirement that insurance credit -- that insurance rates not be expensive, inadequate or unfairly discriminatory. There's no question that right now credit histories are required to be inaccurate for some consumers because some information cannot be reported under the CARES Act and cannot be conducted -- some activities cannot be conducted under state provisions. So there's no question that negative history and negative credit events are not being reported on credit histories that are used across the industry.

And that inaccurate -- that use of inaccurate credit history creates a significant problem for actuarial purposes in creating discriminatory rates. Individuals who have negative or delinquent accounts from a year ago are being treated differently than individuals who have the delinquent accounts now because the protections of the CARES Act didn't exist when some of those delinquencies were incurred. One of the supplements -- yes, Your Honor.

THE COURT: So I have a question I just want you to clarify. It's partly in response to petitioner's argument that the commissioner has evolved into its explanation. Am

I understanding correctly that the rule document, the rule and the explanation for the rule, says that there is two things of concern, and one is while the pandemic protections continue that shield some credit issues from use, there's different treatment of those that had pre-existing low credit scores for similar issues that current folks who are having the issues are protected. So that's right now. And the second issue is when the protections go away, all of a sudden we have a flood of the individuals who had protections no longer have protections so their rates go up. Are those the two different things that the insurance commissioner is addressing with this emergency rule?

MS. DELEON: That is correct, Your Honor. Those are the different concerns and emergencies the commissioner is addressing. And those are both cited in the CR-103E explanatory statement, perhaps not quite as carefully articulated, but the commissioner notes in that explanatory statement that there are currently inaccuracies in credit history information that are objective inaccuracies making those credits histories unreliable and inherently discriminatory because they are treating similarly situated individuals differently. In addition, he notes --

THE COURT: I just want to move you along to the question I asked at the very beginning to both of you, and

that was my understanding from digestion of this topic is that the formulas that individual companies use to set rates vary between companies and that they use the credit score as one factor. I can't see them because they're trade secrets. Insurance commissioner office people review them case by case. But does the impact to rate holders or policyholders vary depending on whether the only factor is the credit score or whether that's a small factor? Your affidavits from your folks say all they have to do is do a cover sheet that replaces the credit factor with a neutral factor making it sound simple to me, but I'm not sure how I judge that when I don't have the details of any rate-setting because they're protected. Can you address that topic.

MS. DELEON: Yes, Your Honor. The insurance commissioner has endeavored to make this as simple a process as possible and has endeavored to give carriers not only discretion but -- and flexibility but also specific answers to questions in their (indiscernible) of how to implement this rule. The actual changing of the rates is not (indiscernible) as complicated as some of the carriers have indicated. There's actually two sets of documents that are filed for most of these personal lines. The first is a credit-scoring model that creates a insurance credit score. And that credit-scoring model is a proprietary

trade secret confidential, and what specific credit history factors are used and how those factors are weighted is unique -- somewhat unique for each carrier. So those credit-scoring models are what develop the credit -- the insurance credit score. Then there are the rate filings that take into account many additional circumstances, driving record, location, types of coverage, and those rate filings set actual premium. They take the insurance credit score developed by the credit scoring model and apply it to the additional rating factors that are used by each company. And those -- that -- those -- that combination of the insurance credit score from the credit-scoring model and the additional factors considered in the rate filing or the rating document are what determine your actual premium.

So what the insurance company has asked carriers to do is substitute the insurance credit score for a neutral factor. But he's given them flexibility if that doesn't work for a particular carrier. There are some carriers that use credit scoring only to create discounts. There are some carriers that use insurance credit scores to develop the base premium, and depending on how carriers use insurance credit scoring, that will depend on how they need to modify their filings. For some carriers it will be more complicated; for others it may be less complicated or not particularly complicated at all. Because it varies by

carrier, it will vary -- the impact or the complication will vary as well. But the commissioner has endeavored to allow carriers to remove that neutral factor, remove that credit scoring piece with a neutral factor and leave in place the remaining rating -- rate filings. So it's not --

THE COURT: Ms. Deleon, I'm going to have you wrap up in two minutes, and then, Mr. Vocke, you'll have two minutes for rebuttal. Go ahead Ms. Deleon.

MS. DELEON: Thank you, Your Honor. Because this rule is not based on an imagined or nonexistent emergency but is based on real actions that are having real impacts on consumers right now and real inaccuracies in credit history, this rule -- not only does the commissioner have good cause, but the commissioner has not been arbitrary and capricious in implementing this rule. There's been a great deal of concern over the fact that the commissioner is temporarily suspending otherwise permitted activity. However, petitioners have not cited a single statute that says in specific circumstances, and particularly emergency circumstances, otherwise legal activity can never be suspended by an emergency rule.

The unique circumstances of the pandemic have led to a unique situation where credit histories are objectively inaccurate for some people, meaning that the credit-scoring models used by carriers cannot insure that people,

like-situated individuals, are treated the same resulting in a necessarily discriminatory insurance pricing for people across Washington. Because this current discrimination is happening now and cannot be remedied except for suspending the use of these inaccurate credit histories, this emergency rule is necessary.

But the balance of equities also weighs in favor of ensuring that this rule is allowed to be kept in place and is kept in place -- is enforced right now so that insurers -- excuse me -- so that policy holders who are facing the financial cliff of this K-shaped pandemic recovery are protected as soon as state and federal protections expire. While some of the federal protections may last for another 120 days after the pandemic, state protections will not, and we have no way of knowing if the end of the pandemic will be the end of June or the end of September. And so consumers need protections in place before the pandemic is over. For these reasons the commissioner believes his rule was properly exercised as part of his authority to implement rates -- implement rules affecting rates and ensuring that rates were not discriminatory and was properly justified by good cause to protect the general welfare of the Washington public. For these reasons we ask that the petitioner's preliminary injunction be denied.

THE COURT: Thank you, Ms. Deleon.

Mr. Vocke, go ahead, please.

MR. VOCKE: Yes. (Indiscernible) not asking for a permanent injunction.

THE COURT: Mr. Vocke, start again. And sorry. I don't know if it's your end or my end, but you were pretty quiet so I need you to project extra loud towards your microphone.

MR. VOCKE: I'm (indiscernible) okay?

THE COURT: That's a little bit better.

MR. VOCKE: Okay. (Indiscernible) closer to my computer.

There's no -- the key reaction to (indiscernible) Ms. Deleon is that there's no emergency. We've had these acts in place for over a year, and their own witnesses have testified, and I'll talk about the affidavit of Mr. Forte who says in paragraph ten "It is uncertain when the consumer credit reporting requirements found in the CARES Act will expire, and it is unclear how future credit history reports will address the CARES Act modification of credit history." That's their own witness. They don't know. This is all speculation. And when they say that there's going to be a cliff or a flood or a tsunami, we look at their own witness.

Ms. Myrum, Candice Myrum who's in legislative affairs who spent 15 years working on workers' compensation claims,

she says that this would trigger a flood of negative credit history without (indiscernible). Just because you say it, it doesn't mean it's so. She has no credentials, no expertise, no basis to make these unsupported, conclusory statements about what the emergency is and the cliff that they keep referring to. There's no evidence, Your Honor, about this Armageddon that's literally imminent tomorrow. We're talking about an emergency rule. The commissioner can pursue formal rulemaking and we can talk about all of these issues in an informed, vigorous, open and transparent and democratic way rather than having an emergency rule that requires the entire industry to fundamentally revamp the way they do business that they've done for 19 years consistent with existing statutory law in the state of Connecticut.

And Mr. Slavich, the only actuary they put forward, the chief actuary of the Department of Insurance, has said in paragraph seven "Insurers do not have a uniform approach to using a consumer's credit information to determine insurance premiums." He says it right there. There's no need for a blanket, omnibus, across-the-board, fits-all-sizes ban on credit history on an emergency basis. Nothing has changed as he testified before the State of Washington senate committee just in January of this year, and he didn't mention anything about an emergency or the

CARES Act or the need to adopt an emergency regulation that would nullify existing statutory law. And I'll stop there.

THE COURT: Thank you. I appreciate that.

I know it's always difficult to be pushed along on time, but we often have time limits in court. So appreciate the lawyers and their very good presentations. I am going to proceed to a decision. Obviously this is a complex area of the law so I'm going to start with an overview of what the argument is and the issues that the court needs to decide.

So this is the petitioner's request for a preliminary injunction, and I don't think there's a dispute between the parties on the analytical framework the court brings. The court considers whether there's a clear legal and equitable right here, and that generally involves the court assessing the likelihood of success on the merits. It's not an ultimate determination on the merits, but it's an advanced look with the arguments.

So the arguments today about the emergency rule exceeding statutory authority, being inconsistent with the statute, that there is not an emergency that justifies using the emergency rulemaking process, and the argument that the rule is arbitrary and capricious given what's in the record, all of those go to the court's assessing likelihood of success on the merits. Then the court, if I find a likelihood of success on the merits, proceeds to the

rest of the analysis which is assessing whether there is a well-grounded fear of immediate invasion of a right and whether there is actual and substantial harm to the parties that are required to comply with the agency action, and finally, the court considers and balances the parties' interests and considers any impact to the public or the public interest.

I am going to start with the key arguments from the petitioner so I can confirm that I've digested them and they're part of my thinking. The key arguments include the argument that there is not an emergency and there needs to be an emergency in order to dispense with the usual public notice and comment process required for agency rulemaking. There's also the argument that there is statutory authority to use credit in rate-setting, in insurance policy rate-setting that can't be amended by or deviated from by agency rule. There is a related argument that the insurance commissioner has unsuccessfully attempted to obtain through the legislative process a statutory amendment that bars the use of credit scoring in insurance and has been unsuccessful so the argument is that that impacts the issue of what he can do through rulemaking, and then there is the argument that the record, the information and the evidence supports the petitioner's arguments and doesn't support the insurance commissioner's arguments, and

in fact the allegations that some of the commissioner's witnesses support what the petitioners are saying, in particular confirmation that they agree there is an actuarial correlation between credit history and numbers and frequency of insurance claims. So those are the arguments that I consider the key arguments that I've been thinking about in this specific context.

In terms of the question of whether the commissioner has authority through rulemaking, I'm not talking about emergency yet, but authority to enact rules that would address unfair discrimination, the court believes there is that authority, and in fact, I think petitioners agree that in a particular instance on a case-by-case basis there's already a regulation that authorizes specific review of rates. So in the starting point, despite there being statutes that say that credit history can be used if the formula is filed, that doesn't mean that the agency doesn't have authority or the commissioner doesn't have the authority to rule-make and address unfair discrimination or excessive rates, et cetera, that are prohibited elsewhere. So the commissioner is authorized to enact rules to effectuate any part of the code. That's found in 48.02.060, and the code includes prohibitions on unfair discrimination between insureds with like risks. That's found in 48.18.480. And rate standards shall not be

excessive, inadequate or unfairly discriminatory. That's found in 48.19.020.

So ultimately then I read 48.19.035, that allows credit history scores to be used. I conclude that that statute authorizes the use of credit history, but if you read it together with the other statutes cited, that is unless the methods used are excessive, inadequate or unfairly discriminatory, and the commissioner does have the general authority to rule-make to address those issues. On the general question of whether a rule like what we see today is beyond the authority of the commissioner, I think as to the likelihood of success, the commissioner would win on that.

Drilling down to the next level, the question is what has been done in this emergency rule, is it inconsistent with the statute to essentially amount to a repeal of the statute. And again, I have to consider the statute in the context of the other statutes and read that it is stated in the negative, which is from this court's perspective not a guarantee of the use, but it may be used if you follow the process, and, implied to this court, comply with all other requirements including not being excessive or discriminatory.

To the argument that Mr. Kreidler has been to the legislature three or more times to obtain a legislative ban

and he hasn't been successful, the court believes that the case law tells the court not to read anything into the failure of a bill to move, that that doesn't command a particular legislative intent. So the legislative intent I derive from reading the insurance statute as a whole, and I've already concluded that a rule on this topic is possible, and now more specifically the question is when this emergency rule specifically says for a short window we're going to stop using credit scores for these specific types of policy rates, the question is: Is that a repeal of a statute? The court finds that in terms of likelihood of success on the merits it is not a repeal or inconsistent with the statute.

This, again, doesn't get to the record yet. So then the record informs whether there's good cause for an emergency rule and whether the rule is arbitrary and capricious. Again, those are both considered at this juncture with the court considering likelihood of success, not an ultimate decision on the merits.

The question of good cause for protection of the general welfare, which is what the commissioner cites, the court has to consider whether there's good cause to dispense with the usual notice and comment rulemaking precess before enacting the rule on an immediate basis. And the commissioner cites both the current status that we're a

year into the pandemic and the prospect that sometime in the near future, we don't know when, the protections of the pandemic will be lifted and there will be an automatic change in various people's credit scores, and the people who have suffered the most during the pandemic would immediately have negative credit that they didn't have during the pandemic to the extent that they were protected by the CARES Act and the state emergency actions.

Much is made about we don't know when the pandemic is going to end. I think that's accurate. But the question is whether there's good cause to dispense with notice and comment rulemaking which generally takes at a minimum four to six months to go from start to finish. And the court finds that in terms of likelihood of success on the merits, the prospect cited about the improvements in the pandemic situation at the time the emergency rule was enacted, that those are legitimate considerations for avoiding the change upon the pandemic expiring. The companies argue that there's going to be four months to catch up, and the court considered whether because an emergency rule could be enacted as soon as the CARES Act lifted the emergency and you were in that four-month window that that's part of the analysis, but that's not undermining of a conclusion on the likelihood of success on the merits that there is good cause for an emergency.

So considering the statute and the cases cited, and we only really have the Ninth Circuit California case that isn't exactly on point, the court finds from a likelihood of success on the merits there is good cause for an emergency rule.

Finally, the arbitrary and capricious is looking at the record, and with as much time as I had to look through both detailed analyses from both of the experts, I don't think that what the commissioner's office people were saying to the legislature is the same thing as what they're saying now. I don't think that they're mutually exclusive. So to the extent that the statement was made that there has been historically an actuarial connection between credit scores and claims, I don't think that's inconsistent with their opinions offered based upon their experience that with a pandemic doing a couple of things, and for one, it's impacting communities, low economic communities significantly, and two, to the extent that there were credit events from the start of the pandemic to now, those individuals are having or have the opportunity to have their credit scores considered good and not factored in, but upon the lifting of the pandemic it will shift, the court finds that there is sufficient evidence in the record at this juncture for the court to say, again, likelihood of success on the merits, that it's not arbitrary and

capricious what the agency describes as the impact disproportionate between two like policyholders, one who had poor credit before the pandemic and continues to have that credit accounted for in their premium setting and another who had the same poor credit post-pandemic starting and has had the protections of the CARES Act. In my view that's sufficient evidence in the record to withstand an arbitrary and capricious review at this juncture.

So with that conclusion, I could stop, and that is I could stop and say that the plaintiffs have not carried their burden of showing that they have a clear legal and equitable right because I've found at least on the view from this step in the proceeding that they're not likely to succeed on the merits. But I will say that I thought about the other standards, and I do think that there is harm shown by both parties in their evidence. It's basically competing harm for the change to different groups of people. And in terms of balancing the parties' interest and the public's interest the court presumes the agency's rules, even emergency rules, are valid, and the stated purpose of implementing the act and preventing disproportionate impacts or unfair discrimination in the rate-settings is something that is in the public interest.

So with that, the court finds that there is not a sufficient showing, applying all the standards, to grant

the preliminary injunction. That's not a final decision on the merits. This case can go forward to the next phase. But I am not enjoining the implementation of the emergency rule at this juncture.

I apologize if I didn't cover every issue that was raised. I tried to highlight the key issues. I did spend extensive time reviewing the declarations from both parties, and they were helpful. So with that, I believe one of you gave me a proposed order, and if so, I will address that in a moment.

Questions, Mr. Vocke. Mr. Vocke, I can't hear you. Still can't hear you. I'm sorry. Okay. I think I heard you say "thank you."

Ms. Deleon, any questions? And were you the one that gave me a proposed order? I think I saw a proposed order, but if I have it, I've misplaced it.

MS. DELEON: We did submit a proposed order, Your Honor. We do not have any questions, but if you do not have it, we will certainly -- we can certainly circulate it to you.

THE COURT: Was it a proposed order filed in Odyssey in the last couple of days?

MS. DELEON: It was not -- well, it was filed with our response.

THE COURT: Okay. So filed on April 14th?

MS. DELEON: I believe so, Your Honor.

THE COURT: So I'm opening it up and pulling it open and wanting to see if it has any problematic statements. I've found an April 14th that was submitted by the petitioners. Okay. Yours was submitted on April 13th. I'll ask, if you both have a copy of that, if you have any proposed edits. Otherwise, I will indicate that you both participated via Zoom and sign the order this afternoon.

Mr. Vocke, do you have the two-page proposed order denying petitioner's motion for preliminary injunction?

MR. VOCKE: I'm sure I do, but I don't have it right at my fingertips, Your Honor. Sorry about that.

THE COURT: Ms. Deleon.

MS. DELEON: I do, Your Honor. I have it in front of me, and I --

THE COURT: Are you --

MS. DELEON: I of course have no objections to it.

THE COURT: Is there anything that occurred today in terms of presentation that you think I need to add to it?

MS. DELEON: I don't believe so, Your Honor. It is -- it is a fairly simple order, and I think that --

THE COURT: I will say in the first paragraph where it says what I considered, it doesn't have the reply brief that the petitioners filed so I'll add that to it. It does basically say that I heard argument from counsel and made

the conclusion that I've just made with the legal standard that's set forth. So I don't think it's a lot of detail.

Mr. Vocke, my plan is to go ahead and sign it so we'll have that order with today's date on it in case there's any next steps that anybody wants to take.

Do you have any questions?

MR. VOCKE: I do not, Your Honor. Thank you.

THE COURT: Thank you, everybody, for the well-presented argument, and also, again, I appreciate you getting binders to the court for review. The court's now in recess. Thank you.

(A recess was taken.)

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, RALPH H. BESWICK, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

1. I reported the proceedings stenographically;

2. This transcript is a true and correct record of the proceedings to the best of my ability, except for any changes made by the trial judge reviewing the transcript;

3. I am in no way related to or employed by any party in this matter, nor any counsel in the matter; and

4. I have no financial interest in the litigation.

Dated this 29th day of April, 2021

RALPH H. BESWICK, CCR
Official Court Reporter
Certificate No. 2023
1606 12th Avenue SW
Olympia, WA 98502
Fax: (360) 754-4060
beswicr@co.thurston.wa.us

☐ EXPEDITE
☒ Hearing is set
Date: September 3, 2021
Time: 9:00 a.m.
Judge/Calendar: Mary Sue Wilson

☐ No hearing is set

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, Petitioners, v. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON, Respondents.	NO. 21-2-00542-34 DECLARATION OF SENATOR MARK MULLET

I, Mark Mullet, declare based on personal knowledge that the following is true:

1. I am a Democratic member of the Washington State Senate representing the 5th Legislative District. I serve as the Chair of the Senate Business, Financial Services and Trade Committee, formerly the Financial Institutions, Economic Development and Trade Committee. This committee has jurisdiction over legislation related to the insurance industry.

2. I am familiar with the Emergency Rule adopted by the Insurance Commissioner for the State of Washington, Mike Kreidler, on March 22, 2021, which temporarily prohibits the use of credit history to determine premiums and eligibility for coverage for private automobile, homeowners, and renters insurance. I am also familiar with

the Court's order of April 23, 2021 denying petitioners' motion for a preliminary injunction to enjoin implementation and enforcement of the Emergency Rule.

3. As a result of the Court's decision, which I believe was erroneous, I contacted counsel for the petitioners to offer any appropriate assistance. I believe that the Emergency Rule, which bans a practice expressly permitted under Washington law, constitutes an improper usurpation of legislative authority by Commissioner Kreidler. In addition, I believe that the Commissioner's adoption of the Emergency Rule was not based upon an actual emergency, but rather, was in response to the failure to pass Senate Bill 5010 during the 2021 legislative session. SB 5010, introduced at the Commissioner's request, would have banned the use of credit history in Washington to determine premiums and eligibility for coverage for personal insurance, such as private automobile, homeowners, and renters insurance.

4. On June 10, 2020, I received a text message from staff members of the Office of the Insurance Commissioner ("OIC") advising me that the OIC had a bill proposal that staff wished to discuss with me. I had a conversation with OIC staff on June 11 and was informed that the OIC wished to propose a bill to ban the use of credit scoring in pricing and underwriting personal insurance. Neither in the text message nor at any time during this call did staff say that a ban was necessary to address an emergency or that the Covid-19 pandemic was a reason for the OIC's proposed bill.

5. On October 7, 2020, OIC staff contacted members of my committee seeking support for legislation to be introduced in the upcoming legislative session prohibiting the use of credit history in personal insurance in Washington. OIC's explanation in support of the bill related entirely to social justice considerations. There was no mention of the pandemic as a reason for the bill, and there was no suggestion that the bill was necessary to address any emergency.

6. On December 10, 2020, Senator Mona Das (representing the 47th Legislative District) pre-filed SB 5010 for introduction. I wanted to provide relief to those in economic

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distress but was concerned about the impact banning the use of credit history could have on the Washington insurance market and on the insurance premiums of millions of Washington residents. Seeking a possible alternative to SB 5010 that would help those in need, but with less dramatic consequences for the Washington insurance market, I requested that committee staff draft language that would provide relief to insureds experiencing "extraordinary life circumstances," such as a lost job. Earlier, Representative Steve Kirby of the Washington House of Representatives (Representative Kirby serves as Chair of the House Committee on Consumer Protection and Business) had asked his staff to do the same thing.

7. A hearing on SB 5010 was held before my committee on January 14, 2021. At no time during this hearing, or to my knowledge at any other time in connection with SB 5010, did anyone from the OIC assert that SB 5010 was necessary to address an emergency or anything related to the Covid-19 pandemic. Nor did anyone from the OIC assert that use of credit history in insurance was unfairly discriminatory in the actuarial sense, namely that it led to differences in premiums charged that did not correspond to expected losses. In fact, OIC's Chief Actuary, Eric Slavich, testified at the January 14 hearing that there is an actuarial correlation between credit history and losses. Rather, SB 5010 was again touted by its sponsors as a social justice measure, and it was up to us as legislators to determine whether those social concerns justified banning an actuarially sound insurance practice. Indeed, I consider policy choices of this kind to be uniquely the province of democratically-elected legislatures.

8. On January 22, 2021, Representative Kirby introduced in the House of Representatives House Bill 1351, which would have required insurers to provide reasonable relief from insurance rates and underwriting rules to consumers whose credit histories had been negatively impacted by extraordinary life events such as loss of a job or death of a close relative. HB 1351 would have provided meaningful assistance to those in need without causing massive disruption to the Washington insurance market. Nevertheless, OIC and

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Commissioner Kreidler opposed the bill.

9. A hearing on HB 1351 was held before the House Consumer Protection and Business Committee on February 1, 2021. The bill was unanimously approved by the committee on February 4, 2021, and it was my understanding that HB 1351 had sufficient support to pass on the House floor. However, Commissioner Kreidler successfully urged House leaders to keep the bill from being brought to an up or down vote on the floor, even though the bill would have directly benefited consumers. The Commissioner's actions have left Washington as the only state in the country that does not provide relief to consumers from extraordinary life events.

10. From late January through mid-February, I had separate informal discussions with committee staff, OIC staff, and industry stakeholders regarding possible amendments to SB 5010. On February 9, 2021, OIC staff proposed a compromise on SB 5010 that would allow insurers to use credit history but would also limit its impact. Later that day, I met with Commissioner Kreidler in the hope of reaching a definitive agreement, but he refused to honor the compromise that his own staff had proposed. At no time during this meeting, or to my knowledge at any other time in connection with SB 5010, did Commissioner Kreidler claim that use of credit history was unfairly discriminatory in the actuarial sense. Nor did the Commissioner assert that SB 5010 was meant to address any kind of emergency resulting from use of credit history or that any emergency existed. It would have been difficult to give weight to any such claim given the many months OIC and the Commissioner spent trying to pass a total ban on credit history and rejecting viable legislative alternatives.

11. Notwithstanding the Commissioner's unwillingness to engage constructively, I continued my efforts to achieve a solution. These efforts led to introduction of Substituted Senate Bill 5010. SSB 5010 would have continued to allow insurers to use credit history, but for a period of three years would have permitted such use only in cases where doing so resulted in lower premiums for the insured. In this way, SSB 5010 would have protected

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Washington insureds whose credit scores were negatively affected by the pandemic. Nevertheless, Commissioner Kreidler adamantly opposed SSB 5010.

12. My committee approved SSB 5010. Furthermore, my vote count on the Senate floor made clear to me that SSB 5010 had sufficient support to pass on the floor. But just as he had requested House leaders not to allow HB 1351 to come to a vote on the House floor, Commissioner Kreidler successfully urged Senate leaders to prevent SSB 5010 from coming to an up or down vote on the Senate floor, even though the bill would have directly benefitted consumers. As a result, SSB 5010 was not voted on by the March 9, 2021 deadline for bills to receive an up or down vote during the legislative session.

13. On March 10, Commissioner Kreidler issued a press release arguing that original SB 5010 could still move forward, but later that day, the Senate and House majority leaders made clear that this would not happen.

14. On March 22, 2021, the Commissioner adopted the Emergency Rule, which immediately banned the use of credit history for 120 days, and expressed the clear intention to extend the ban for three years. I found the Commissioner's action shocking, in blatant defiance of the legislative will and a violation of the separation of powers. At no time during their efforts to obtain a legislative ban on the use of credit history did the Commissioner or the OIC ever state or suggest to me that they had the authority through regulatory action to prohibit for any period of time use of credit history in insurance, which is, of course, authorized by statute in the State of Washington. It is highly offensive that the Commissioner would proceed in this manner so soon after his failure to obtain a legislative ban on use of credit history and his refusal to consider any alternative proposals that would have provided immediate and meaningful relief to consumers. Washington law empowers the Commissioner to implement Washington's insurance statutes, not to nullify, suspend, or amend them. But that is exactly what the Commissioner has done and intends to do.

15. Equally shocking to me is any conclusion that there was any emergency which

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justified proceeding by emergency rule rather than the normal rule-making process. At no time since the OIC first approached me in June 2020 about a possible ban on use of credit history through the day that SB 5010 died in March 2021, did the Commissioner or any representative of OIC claim to me that immediate action on use of credit history was necessary to avoid some kind of an imminent emergency. I have no doubt that the Commissioner would have proclaimed that action was needed to address an emergency if he had had a good faith basis for saying so. That he did not speaks volumes to me about the artificial nature of the purported emergency the Commissioner now asserts exists.

16. I believe that the Emergency Rule was adopted when it was only because of the Commissioner's failure to pass SB 5010 and his rejection of viable legislative alternatives. That reason, and no other, explains the timing of his actions.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Senator Mark Mullet

Dated: May 20, 2021

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☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: October 8, 2021
Time: 1:30 P.M.
Judge: Mary Sue Wilson

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervener NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

Case No. 21-2-00542-34

THE INSURANCE COMMISSIONER'S OPPOSITION TO SUMMARY JUDGEMENT AND OPPOSITION TO EXPANDING THE AGENCY RECORD

I. INTRODUCTION

The state of emergency caused by the COVID-19 pandemic has presented unparalleled challenges to state agencies in virtually every aspect of their work. From how to actually do the important work they have been tasked with, to how to balance the regulation of industries critical to our economy and the need to protect consumers in new and dramatically shifting circumstances, the pandemic has forced agencies, like the Office of the Insurance Commissioner, to make difficult decisions. This case is no exception. In response to the

continuing turmoil of the pandemic, federal and state measures were adopted to prevent the reporting of certain information in individual credit histories. As a result of these state and federal laws, the use of credit histories now results in unfair discrimination between similarly situated policyholders and applicants, violating RCW 48.19.020. Moreover, as a result of the challenging circumstance of the pandemic, the assumptions insurers have relied upon about the correlation between credit histories and insurance risk are inherently suspect. Allowing credit histories to continue to be used in setting insurance rates will cause even more financial harm for those worst hit by the pandemic.

Because the current use of credit histories results improper discrimination, the Commissioner has established that he has good cause for adopting the emergency rule at the time it was adopted in order to protect the general welfare of Washington residents who are entitled to be free of improper discrimination in how their insurance rates are set. Further, at the time this rule was implemented, the Commissioner had good cause to believe that this rule needed to be implemented before the state and federal laws shielding the reporting of accurate credit history were repealed, because that repeal, and subsequent use of accurate credit histories, would be financially harmful to those most severely impacted by the pandemic. For these reasons, the Commissioner's Emergency Rule should be affirmed.

Respondent, Insurance Commissioner Mike Kreidler, (Commissioner), and the Office of the Insurance Commissioner (OIC), through their attorneys of record, ROBERT W. FERGUSON, Attorney General, MARTA U. DELEON, Assistant Attorney General, and SUZANNE BECKER, Assistant Attorney General, offer this consolidated response opposing the Motions for Summary Judgement submitted by Petitioners American Property Casualty Insurance Association, Professional Insurance Agents Of Washington, Independent Insurance Agents And Brokers Of Washington, and Intervener National Association Of Mutual Insurance Companies (collectively, "Petitioners"), and opposing the attempts by the Petitioners to expand

the agency record to include information that is not necessary to decide material issues before this Court in this petition for judicial review.

II. STATEMENT OF FACTS

A. The Insurance Commissioner's Rule Making Authority

The Washington Legislature has long recognized that "[t]he business of insurance is one affected by the public interest . . . ." RCW 48.01.030. In order to protect this public interest, Legislature has delegated the enforcement of the Washington State Insurance Code, Title 48 RCW, to the Washington State Insurance Commissioner. RCW 48.02.060(2). The Insurance Commissioner has been vested with "authority expressly conferred upon him or her by or reasonably implied from the provisions of this code." RCW 48.02.060(1). This includes general rulemaking authority to enforce the provisions of the Insurance Code. RCW 48.02.060(3)(a). More specifically, the Legislature has delegated to the Commissioner the authority to review rates and rating methodologies to ensure that rates are not "excessive, inadequate, or unfairly discriminatory," and to promulgate rules to ensure that is the case. RCW 48.19.020. *See also* RCW 48.18.480, RCW 48.19.080, RCW 48.19.370. Further, the Commissioner has express authority to adopt rules affecting the use of insurance credit scoring. RCW 48.19.035. In the case of a declared state of emergency, such as the one that state has been operating under for over a year, the Commissioner has been delegated authority to issue certain emergency orders. RCW 48.02.060(4). Under the Administrative Procedure Act (APA), Chapter 34.05 RCW, the Legislature has also delegated to the Commissioner the authority to adopt emergency rules that temporarily forgo the notice and rule making process, when an agency for good cause finds immediate adoption is necessary to protect the general welfare. RCW 34.05.350(1)(a).

On March 22, 2021, pursuant to this legislatively delegated authority, the Commissioner issued an emergency rule temporarily banning the use of credit histories in setting insurance rates. The Commissioner's Emergency Rule is the subject of this petition for judicial review.

B. Use of Credit History in Setting Insurance Premiums

Although the use of credit history in setting insurance premiums is widespread in property and casualty insurance, it is not unfettered. "Credit history" is the communication of "any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, or credit capacity that is used or expected to be used, or collected in whole or in part, for the purpose of serving as a factor in determining personal insurance premiums or eligibility for coverage." RCW 48.19.035(1)(c). An "insurance score," also sometimes called and "insurance credit score" is a "number or rating that is derived from an algorithm, computer application, model, or other process that is based in whole or in part on credit history." RCW 48.19.035(1)(d).

The Legislature has limited insurers' ability to use individual credit history information in setting premiums. First, insurers must comply with the requirements of RCW 48.19.035, other applicable provisions of the Insurance Code, and any rules promulgated by the Commissioner. RCW 48.19.035(5). An insurer's methodology for using various pieces of a consumer's credit history must be documented and submitted as an insurance credit scoring model. RCW 48.19.035(2)(a). Insurance credit scoring models are deemed proprietary trade secrets because each insurer uses credit histories in different ways. *Id*. Prior to the current pandemic, the Commissioner determined that insurers could demonstrate that a credit scoring model complies with RCW 48.19.020 by providing a multivariate analysis with their insurance credit scoring model, and any subsequent modifications. WAC 284-24A-045. However, current insurance credit scoring models presume the relative accuracy of the available consumer credit histories. *See* Declaration of Eric Slavich in Opposition to Motion Summary Judgment (Slavich Dec.) at 5. The current state and federal laws designed to alleviate the impact of the pandemic have prevented accurate credit history reporting, and thus has interfered with the reliability of current insurance credit scoring models.

C. The Impact of the Pandemic on Credit Histories and Credit Scoring Models

The economic interruptions caused by the pandemic have been felt broadly, but also unevenly. AR 701-05, 970-77. For some, the pandemic has brought an improved financial outlook. AR 980-981. For some, the pandemic has caused tremendous economic strain. AR 701-05. When Congress adopted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), (P.L. 116-136, 116th Congress, Mar. 27, 2020), it included several provisions designed to protect consumers from the most difficult financial impacts of the pandemic. AR 315-649. Section 4021 of the CARES Act requires that financial institutions report consumers as current if consumers obtain an accommodation that constitutes less than the full payment. AR 523. Section 4022 of the CARES Act requires certain lenders to offer forbearance options to borrowers, and imposed a moratorium on foreclosures for certain home loans. AR 524. Section 3513 of the CARES Act results in all non-defaulted federally-held student loans being reported as current, even if payments are late. AR 438. In addition, several provisions of various state emergency orders have placed a moratorium on garnishment actions (Emergency Proclamation of the Governor 20-49[1], April 14, 20202, and subsequent amendments) and evictions (Emergency Proclamation by the Governor 20-19[2], July 24, 2020, and subsequent amendments).

The impact of these various federal and state requirements is that for some consumers, negative credit history information cannot be reported as a matter of law. Therefore, for some consumers their credit history information is likely to be inaccurate. While this inaccurate credit history may benefit consumers in some ways, the use of inaccurate credit history results in consumers who are similarly situated in terms of their negative credit histories no longer being

[1] Available at: https://www.governor.wa.gov/sites/default/files/proclamations/20-49%20-%20COVID-19%20Garnishment.pdf. Subsequent amendments are available at: https://www.governor.wa.gov/office-governor/official-actions/proclamations.

[2] Available at: https://www.governor.wa.gov/sites/default/files/proclamations/20-19%20-%20COVID-19%20Moratorium%20on%20Evictions%20%28tmp%29.pdf. Subsequent amendments are available at: https://www.governor.wa.gov/office-governor/official-actions/proclamations.

treated the same. For example, consumers whose negative credit history was generated before the pandemic have all of their negative credit history reported, and incorporated into their insurance score. But, by operation of law, consumers with similar negative credit histories that developed after the pandemic, have some components of their credit history shielded, resulting in the disparate treatment of similarly situated policy holders, in violation of RCW 48.19.020.

The insurance credit scoring models and the analysis submitted by insurers to support their models rest on the assumption that the relationship between a consumer's credit information and expected claim costs does not vary unpredictably over time. Slavich Dec. at 3. When sudden, large, unexpected changes to consumers' credit histories occur, as has been the case during the pandemic, it is logical to conclude that the relationship between credit and claim costs observed in an insurer's historical data would no longer be a reliable indicator of present risk. *Id*. The bigger the disruption to the consumer credit environment, the less reliable an analysis based on historical data prior to the disruption would be. Slavich Dec. at 3. The pandemic, and the State and Federal laws passed in response to the Pandemic, have been a significant change that severs the ability of credit histories to predict claims data. AR 652-53;706-715; Slavich Dec. at 12.

D. The Commissioner's Emergency Rule

The primary thrust of the emergency rule is to target unfair discrimination caused by the use of inaccurate credit histories on current credit rating methodologies, which violates RCW 48.19.020. The Commissioner found:

> . . . current protections to consumer credit history at the state and federal level have disrupted the credit reporting process. This disruption has caused credit based insurance scoring models to be unreliable and therefore inaccurate when applied to produce a premium amount for an insurance consumer in Washington state. This makes the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020.

AR 1012.

This rule was immediately necessary because the use of inaccurate data was resulting in unfair discrimination in three critical property and casualty lines of insurance: auto insurance, homeowners insurance, and renters insurance. As a result, this actuarially unfair discrimination

affects the public interest, and this the general welfare, of insurance consumers immediately.

In addition, to the need to end current discrimination between similarly situated consumers, the Commissioner found that implementing changes to the use of credit histories in setting insurance was critical to accomplish before the end of the current credit history protections. The Commissioner found that when the credit history reporting shields expire:

> . . . a large volume of negative credit correction will flood consumer credit histories. This flood of negative credit history has not been accounted for in the current credit scoring models. Without data to demonstrate that the predictive ability of credit scoring models based on pre-pandemic credit and claims histories is unchanged, the predicative ability of current credit scoring models cannot be assumed. This will make the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020.

AR 1012. In addition, the Commissioner found that:

> the negative economic impacts of the pandemic have disproportionately fallen on people of color. Therefore, when the CARES Act protections are eliminated, and negative credit information can be fully reported again, credit histories for people of color will have been disproportionately eroded by the pandemic.

Id. Further, the Commissioner was aware that carriers would need time to update and adjust their IT systems in order to fully implement changes in their rating systems. This lead-up time is part of the reason the timelines of the rule were established the way they were. Slavich Dec. at 7. The deadlines in this rule sought to balance the need for carriers to take time to make changes with immediate need to end the discriminatory credit rating practices.

Several articles and studies have indicated the diverging, or "K shaped" recovery of the pandemic. AR at 701-705; 970-977. Without the protections of the emergency rule in place, those most devastated by the pandemic will be subsidizing the insurance policies of those whose financial outlook has improved as a result of the pandemic.

E. Other Pandemic Work

Although the Commissioner's Emergency Rule did not follow the typical notice and comment rulemaking process, it did not happen in a vacuum. Almost as soon as the CARES Act was implemented, the Commissioner began receiving information and complaints that insurers, particularly property and casualty insurers, were not doing enough to help consumers, despite

the windfalls property and casualty insurers were experiencing as a result of the pandemic. AR 988-922. The Commissioner received several suggestions for how to address the perceived iniquities in the property and casualty insurance markets. AR 650-654. In some cases, the Commissioner has been able to address issues fairly quickly. For example, the Commissioner issued an emergency order requiring that insurers extend graces periods for premium payments. Insurance Commissioner Emergency Order No. 20-03.[3] The Commissioner also issued an emergency order extending the time consumers had to claim depreciation payments. Insurance Commissioner Emergency Order No. 20-05.[4]

But concerns about property and casualty insurers have not been the only issues the Commissioner has had to wrestle with over the pandemic. In addition, the Commissioner was forced to address issues raised in other lines of insurance, such as health insurance. Throughout the pandemic, the Commissioner has issued six emergency orders concerning health coverage. *See* Insurance Commissioner Emergency Orders Nos. 20-01, 20-02, 20-04, 20-06.[5] In addition, the Commissioner continued to attempt to address the fair regulation of the insurance industry through emergency rules to allow more flexibility insurance producer licensing activities. WSR 20-09-1126, WSR 20-110-0211. All of these activities addressing the pandemic were in addition to the regular work of the agency.

Part of the continuing work of the OIC was the 2021 legislative session. For the 2021 legislative session, the Commissioner approached Sen. Das to advance agency request legislation that would have permanently eliminated the use of credit scoring. Declaration of Jon Noski in Opposition to Motion for Summary Judgement (Noski Dec.) at 2. Unfortunately, Sen. Mullet, the chair of the committee considering this agency request legislation, was more focused on pro-

[3] Available at: https://www.insurance.wa.gov/sites/default/files/documents/emergency-order-20-03_0.pdf

[4] Available at: https://www.insurance.wa.gov/sites/default/files/2020-04/emergency-order-20-05-final.pdf

[5] Available at: https://www.insurance.wa.gov/technical-assistance-advisories-and-emergency-orders

industry alternatives that ultimately the Commissioner could not, and did not agree to. Noski Dec. at 2-3.

One alternative suggested by Sen. Mullet, which has been adopted in a minority of states, was the "Extraordinary Life Circumstances" proposal. This proposal would have given insurance companies nearly unfettered discretion to ignore the rates filed with the Insurance Commissioner, and treat individual consumers however the company chose. Rather than protect consumers, this alternative would have created an unchecked opportunity for rampant discrimination between similarly situated individual policy holders. The Commissioner considered the numerous legislative proposals and amendments to address the use of credit histories in setting insurance premiums, and his staff provided what technical assistance they could with various proposals. Noski Dec. at 2-3. Ultimately, however, the Commissioner could not support Sen. Mullet's proposals gutting the consumer protections of the original agency request legislation, and so the legislation died in committee. Noski Dec. at 3.

In addition, the Commissioner also considered alternatives proposed by other jurisdictions. AR 659-660; 716-721. However, the Commissioner, in his discretion, ultimately determined that the rule in its current form, was the most appropriate way to address his concerns about the discrimination occurring as a result of the change in state and federal requirements affecting credit history reporting, and to protect those who had been the most severely financially impacted by the pandemic.

III. STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). The court will "consider facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party." *Afoa v. Port of Seattle*, 160 Wn.. App. 234, 238, 247 P.3d 482, 484–85 (2011), *aff'd,* 176 Wash. 2d 460, 296 P.3d 800 (2013) citing *Marks v.Washington Ins. Guar. Ass'n ,* 123 Wn..App. 274, 277, 94 P.3d

352 (2004)

In a petition for judicial review, the burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1)(a). In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: the rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious. RCW 34.05.570(2)(c). The validity of a rule is determined as of the time the agency took the action adopting the rule. *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 148 Wn. 2d 887, 906, 64 P.3d 606, 616 (2003). The agency rule-making file serves as the record for review, though it is not necessarily the exclusive basis for agency action on the rule. RCW 34.05.370(1), (4). *Id.*

IV. ARGUMENT

Under the APA, the court may declare a rule invalid only if it finds that "[t]he rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious." RCW 34.05.570(2)(c). Taking all reasonable inferences from the record in the light most favorable to the Commissioner, Petitioners cannot satisfy their burden to demonstrate that the Emergency Rule is invalid under RCW 34.05.570(2)(c).

Looking at the Legislature's broad delegation of authority to the Insurance Commissioner, the Commissioner's emergency rule is well within his general rate-making authority and his express rule making authority related to credit scoring. Because the Commissioner has shown good cause why the immediate adoption of the rule was necessary to protect the general welfare of the insurance purchasing public, particularly those most financially devastated by the pandemic, the emergency rule was adopted in compliance with the statutory requirements of the emergency rule process provided in RCW 34.05.350. Further, the Emergency Rule is not arbitrary or capricious simply because he did not use the methodology

espoused by carriers and preferred by a single legislator. Rather, the Commissioner clearly considered multiple options and alternatives to the adoption of the current Emergency Rule. Further, to the extent Sen. Mullet's and Ms. Watkins' declarations are needed to settle disputed issues of material fact, they defeat summary judgment. To the extent they do not address material disputed facts, they do not satisfy the requirements for expanding the Agency record. Because Petitioners have failed to satisfy their burden to demonstrate that the Commissioner's rule is invalid under RCW 34.05.570(2)(c), their motions for Summary Judgment, and their Petitions for Judicial Review must be denied.

A. The Emergency Rule is Well Within the Scope of the Commissioner's Statutory Authority

The Court presumes that administrative rules adopted pursuant to a legislative grant of authority are valid, and will uphold such rules if they are reasonably consistent with the controlling statute. *Washington Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn. 2d 637, 646, 62 P.3d 462 (2003), *Campbell v. Dep't of Soc. and Health Servs.,* 150 Wn.2d 881, 892, 83 P.3d 999 (2004). The burden is on the party challenging the validity of the rule. *Washington Public Ports Ass'n v. Dep't. of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003); RCW 34.05.570(1)(a). An administrative rule is only invalid if "the rule exceeds the statutory authority of the agency . . . ." RCW 34.05.570(2)(c). *See also Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn. 2d 571, 580, 311 P.3d 6 (2013). Administrative rules must be written within the framework and policy of the applicable statutes. *Id*. So long as the rule is " 'reasonably consistent with the controlling statute[s]' an agency does not exceed its statutory authority". *Id.* at 580 (internal citations omitted). This includes the interpretation of the agency's statutes as a whole. *Washington State Hosp. Ass'n v. Dep't of Health*, 183 Wn. 2d 590, 596, 353 P.3d 1285 (2015); *Swinomish Indian Tribal Cmty.*, 178 Wn. 2d at 580-81. "This court assumes the legislature does not intend to create inconsistent statutes. 'Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme . . . which maintains the

integrity of the respective statutes.'" *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008) (internal citations omitted).

The Insurance Code, when read as a whole, gives broad authority to the Commissioner to regulate insurance, and to enforce the provisions of the Insurance Code, and to adopt rules enforcing the provision of the Insurance Code. RCW 48.02.060(1), (3)(a). The Commissioner has the authority to review rates and rating methodologies to ensure that rates are not "excessive, inadequate, or unfairly discriminatory," and to promulgate rules to ensure that is the case. RCW 48.19.020, RCW 48.02.060. *See also* RCW 48.18.480, RCW 48.19.370. This authority is consistent with his authority to establish rules to implement the limited authority insurers have to use credit scoring. RCW 48.19.035.

In fact, contrary to Petitioner's argument, neither RCW 48.18.545 nor RCW 48.19.020 grant broad discretion to insurers to use credit histories in setting premiums. Rather, they impose significant limitations on how insurers use credit histories, and obligate insurers to submit their rating plans and credit scoring methodologies to the Insurance Commissioner. RCW 48.19.035(2)(a). The fact that insurance scoring models and rates using those models must be filed with the Commissioner necessarily implies that the Commissioner has authority to reject those filings that violate RCW 48.19.020, and other provisions of Chapter 48.19 RCW. Additionally, filings under RCW 48.19.035 are required to comply with RCW 48.19.040. RCW 48.19.035(2)(b). RCW 48.19.040 requires that "Every such filing shall indicate the type and extent of the coverage contemplated and must be accompanied by sufficient information to permit the commissioner to determine whether it meets the requirements of this chapter [Chapter 48.19 RCW]." RCW 48.19.040(2). This includes the requirements of RCW 48.19.020. It is therefore reasonable to imply that as part of his responsibility to adopt rules to "implement" RCW 48.19.035, the Commissioner can adopt rules that bar certain uses of credit histories in setting insurance premiums, when those uses violate other provisions of the rate filing statutes.

Therefore, the fact that the Commissioner is required to "implement" RCW 48.19.035 does not mean that he cannot, when necessary, limit how certain insurers use credit histories when that use would frustrate or violate other provisions of Chapter 48.19 RCW.

Petitioners ask this court to rewrite RCW 48.19.035 as an expansive grant that eliminates the application of any other statutory rule making authority of the Commissioner. But RCW 48.19.035 cannot be read in a vacuum to restrict the ability of the Commissioner to adopt rules prohibiting improper discrimination in setting insurance rates as he has done with the emergency rule here. Nowhere does the language of RCW 48.19.035 exempt carriers that adopt credit scoring models from the obligation to ensure their rates are not excessive, inadequate, or unfairly discriminatory. Nor does RCW 48.19.035(5) prevent the Commissioner from effectuating the requirements of RCW 48.19.020 as he implements RCW 48.19.035.

Contrary to Petitioners claims, the Commissioner is not repealing or "suspending" RCW 48.19.035. He has temporarily suspended certain conduct by carriers in light of state and federal requirements that are frustrating the Legislature's understood intent to allow limited uses of credit histories, when those uses otherwise comply with the provisions of Chapter 48.19 RCW.

Petitioners also claim the fact that the Legislature failed to pass a complete ban on credit scoring necessarily means the Commissioner lacks authority to issue this emergency rule. But the legislation proposed by the Commissioner was a complete ban on the use of credit histories in setting rates on all property and casualty insurance. The Commissioner's temporary rule only limits the use of credit histories in setting insurance rates in three lines of property and casualty insurance that most directly affect consumers. The original version of the Commissioner's request legislation was a permanent ban. This limit on insurance carriers, is only for a period of three years from the end of the state of emergency that triggered these unique conditions. Finally, the Emergency Rule allows carriers to replace the use of credit histories in their rating manuals, with a neutral factor, rather than forcing insurers to entirely rewrite their underwriting practices to exclude the use of credit histories. The use of this neutral factor approach will allow companies

to reinstitute their credit scoring models when the Emergency Rule (or a subsequent notice and comment rule) expires.

More importantly, the failure of agency request legislation that has been rewritten to cater to the industry, says nothing about the Commissioner's existing statutory rulemaking authority. As a general principle, the court is loath to ascribe any meaning to the Legislature's failure to pass a bill into law. *State v. Cronin*, 130 Wn. 2d 392, 399-400, 923 P.2d 694 (1996) citing *Spokane Cnty. Health Dist. v. Brockett,* 120 Wn.2d 140, 839 P.2d 324 (1992); *In re Personal Restraint of Andress*, 147 Wn. 2d 602, 611, 56 P.3d 981 (2002). *E.g., Brockett,* 120 Wn.2d at140 This is especially true where nothing in the language of the proposed bill, or the legislative history presented by the Plaintiffs includes any discussion of the Commissioner's existing rule making authority, and the possibility of an emergency rule was never raised before the legislature while the failed legislation was before them.

Petitioners also attempt to concoct a claim that the Commissioner has violated a constitutional provision under RCW 34.05.570(2)(c) because he purportedly invaded the Legislature's prerogative by adopting the emergency rule, thus violating the separation of powers doctrine. But the Commissioner's actions were based squarely on the statutory authority the Legislature has delegated to the Commissioner, to enforce the provisions of the Insurance Code, to implement the rating provisions in Chapter RCW 48.19, and the express authority to implement RCW 48.19.035, consistent with RCW 48.19.020. Other than Senator Mullet's personal opinion about the Commissioner's authority, Petitioners cite no statement by the Legislature indicating that the Commissioner's authority under RCW 48.19.020, RCW 48.19.370, or RCW 48.02.060 are limited, or inapplicable to rules based on RCW 48.19.035. Nor do they cite to any legal precedent limiting the Insurance Commissioner's authority to ensure that the use of credit histories is consistent with RCW 48.19.020. Because the emergency rule is well within the Commissioner's statutory authority to promulgate rules, and is necessary to give full effect to all of the provisions of the Insurance Code in the unique circumstances

caused by the pandemic, Petitioners have failed their burden to demonstrate that the Commissioner's Emergency Rule exceeds his authority.

B. OIC Had Good Cause to Enact the Emergency Rule

In addition to being well within the Commissioner's authority within the Insurance Code, the rule was adopted consistent with the emergency rule provisions of the APA. RCW 34.05.350. The APA plainly allows state agencies to adopt rules on an emergency basis if, for good cause, an agency finds that immediate adoption of a rule is necessary to preserve the general welfare. RCW 34.05.350(1). There are safeguards in the APA to involve the public in a timely manner as the agency may not adopt similar emergency rules in sequence unless the agency has filed notice of its intent to adopt the rule as a permanent rule, therefore limiting how long the notice and comment period for standard rulemaking may be deferred. RCW 34.05.350(2).

As used in the APA, good cause must be based on a real need to preserve the general welfare, it cannot be "artificial or fabricated". *State v. MacKenzie*, 114 Wash. App. 687, 698–99, 60 P.3d 607, 613–14 (2002). This is similar to the good cause standard used by the court in other contexts. See *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn.. App. 412, 422, 204 P.3d 944, 949 (2009) (To establish good cause for a protective order in discovery" APA, the party must show that specific prejudice or harm will result… Unsubstantiated allegations of harm will not suffice.); *Korte v. Emp't Sec. Dep't,* 47 Wn..App. 296, 302, 734 P.2d 939 (1987) (In the context of the Employment Security statute, "good cause must be based upon existing facts as contrasted to conjecture."). While Petitioners cite to *Mauzy v Gibbs*, this has limited persuasiveness here. *Mauzy v. Gibbs*, 44 Wash. App. 625, 631, 723 P.2d 458, 461 (1986). *Mauzy* is based on the 1986 APA that did not include the "good cause" requirement that was added in a 1988 amendment. *See* RCW 34.04.030 and H.B. 1515, 1988 Wash Sess. Laws. The "good cause" requirement appears to replace any "emergent and persuasive" standard as outlined in *Mauzy*. Therefore once the emergency is determined to be real and not fabricated, it is then within the discretion of the agency on whether to engage in emergency rulemaking and the trial

court should not substitute its judgment for the wisdom of the regulation for that of the agency. *MacKenzie*, 114 Wn. App. at 687.

There is an immediate risk to the general welfare as the pandemic and the CARES Act restrictions on the reporting of credit history information have had an uneven impact on similarly situated consumers. This uneven impact is a real, current, and evolving future risk to the general welfare. While Petitioners highlight other instances where federal and state law may change what is reported as part of a credit score, this argument misses the point. These laws are implemented uniformly across all similar consumers. The emergency rule is reacting to the irregular impact that the CARES Act and state orders limiting the reporting of certain credit history information are having on similarly situated individual consumers. Further, Petitioners also confuse the Commissioner's often-stated belief that the use of credit scoring can result in systemic discrimination and the past-proposed legislative amendments with the basis for the emergency rule. These are two different issues. The pandemic and the CARES Act are having an unprecedented impact on consumers in ways that are not born uniformly by similarly situated consumers. This is the needed "critical consumer protection" that is the basis for the emergency rule. Finally, Petitioners have also alleged that RCW 48.02.060(4) limits the Commissioner's authority to issue emergency rules to only the four categories listed there. However RCW 48.02.060(4) only speaks to the Insurance Commissioner's emergency *order* authority. The Commissioner's emergency *rule* that Petitioners are contesting was promulgated under RCW 48.02.060(3)(a) and RCW 34.05.350. Taking the facts in the record in the light most favorable to the Commissioner, there is an ongoing and future harm to the general welfare, and emergency rule procedures in RCW 34.5.350 are both warranted and were complied with in adopting this rule.

Where there is no Washington case law construing provisions of the Washington APA, federal precedent may serve as persuasive authority. *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.. 2d 161, 179, 979 P.2d 374, 383 (1999), *as amended on denial of*

reconsideration (Sept. 22, 1999) However, federal decisions are generally only "persuasive authority when construing state acts which are similar to the federal act." *Inland Empire Distribution Sys., Inc. v. Utilities & Transp. Comm'n*, 112 Wn..2d 278, 283, 770 P.2d 624, 626 (1989). While Petitioners cite to the Federal Administrative Procedure Act (Federal APA) and cases interpreting it, the Federal APA differs significantly from Washington's APA in several important ways.

Under the Federal APA, notice and comment periods do not apply when "the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C.A. § 553(b)(B). This language is very broad, and the federal courts have determined that the "good cause" exception is to be "narrowly construed and only reluctantly countenanced," with its use limited to "emergency situations". *Util. Solid Waste Activities Grp. v. E.P.A.*, 236 F.3d 749, 754 (D.C. Cir. 2001). It is also possible for a regulation to be permanently adopted without notice and hearing when an agency finds "good cause". 5 U.S.C.A. § 553; *Mauzy v. Gibbs*, 44 Wn.. App. 625, 633, 723 P.2d 458, 463 (1986). However, because RCW 34.05.350 is *already* an emergency rule, it should not be held to an even higher standard than the Federal APA by first starting with its narrow "public health, safety, or general welfare" standard, and then interpreting this language even more narrowly. Further, Washington's APA contains procedural safeguards requiring that an emergency rule be in effect for only one hundred and twenty days without initiating permanent rulemaking with full public participation as required by the APA. RCW 34.05.350. Therefore, the Federal APA differs significantly from the Washington APA, and its case law narrowly interpreting a broad standard with few procedural safeguards is not persuasive in this instance.

As another example of this difference, in *California v. Azar*, the court limited the term "good cause" to apply only to situations where an emergency is adopted to preserve "life, property, or public safety," *California v. Azar,* 911 F. 3d 558, 576 (2018). However, the Washington APA permits emergency orders also to protect the "general welfare."

RCW 34.05.530(1)(a). Petitioners have not cited any authority defining "general welfare" to be only applicable to prevent harm to life, property, or public safety. Therefore the *Azar* case has little persuasive authority here. Further, the Legislature has determined that insurance affects the public interest. RCW 48.01.030. Therefore, it is not unreasonable, where violations of insurance provisions are apparent, and caused by unique and extraordinary circumstances, that an emergency rule be permitted to protect the public's interest and the general welfare by ensuring insurance products are not unfairly discriminatory.

Petitioners claim there can be no emergency because the Commissioner waited too long to take action. But there is no requirement in the APA that mandates an agency can only engage in emergency rulemaking within a certain period of time of the start of the emergency. While the timing may be part of the analysis of whether an actual risk to the public health safety or general welfare exists, the courts have permitted agencies leeway in the discretion on when to engage in emergency rulemaking. For example, in *State v Mackenzie*, the state toxicologist issued an emergency rule *after* engaging in regular rulemaking, in order to update a rule inadvertently left out of the prior rulemaking process. *State v. MacKenzie*, 114 Wash. App. 687, 698–99, 60 P.3d 607, 613–14 (2002). Similarly, the federal courts have also permitted agencies to engage in emergency rulemaking long after the initial occurrence of the risk to the public health and safety. *Hawaii Helicopter Operators Ass'n v. F.A.A.*, 51 F.3d 212, 214 (9th Cir. 1995) In *Hawaii Helicopter Operators Ass'n*, the air fatalities leading to the basis for the1994 emergency rulemaking occurred between 1991 and 1994, a three year period. The federal courts have also held that the when considering the timing of agency actions, the "complexity of statutory scheme and magnitude of responsibility placed upon agency [are] relevant in determining whether [an] agency properly invoked "good cause" exception". *Universal Health Servs. of McAllen, Inc. Subsidiary of Universal Health Servs., Inc. v. Sullivan*, 770 F. Supp. 704, 720 (D.D.C. 1991), *aff'd sub nom. Universal Health Servs. of McAllen, Inc. v. Sullivan*, 978 F.2d 745 (D.C. Cir. 1992). Here, while the initial impact of the pandemic and CARES Act dates to

March 2020, these early days of the pandemic were also full of previously unseen uncertainty, urgency on many fronts, and difficulty. A delay during the pandemic, where many other issues were vying for a finite amount of agency attention, should not be fatal to the finding of a real emergency.

Petitioners cite to *United States v. Johnson*, to argue that even a seven-month delay is too long, where there was a circuit split on this emergency rule, where the Fourth, Seventh and Eleventh Circuits held that there was "good cause" to bypass notice and comment, while the Fifth, Sixth and Ninth Circuits rejected this argument. *United States v. Johnson*, 632 F.3d 912, 927–28 (5th Cir. 2011). The Eleventh Circuit specifically rejected that the seven-month delay meant that the agency had failed to demonstrate good cause, because if such delays are counted, then "An agency could never demonstrate good cause since delay is inevitably built in as the agency brings its expertise to bear on the issue." *United States v. Dean*, 604 F.3d 1275, 1282 (11th Cir. 2010). Therefore, "the question is whether further delay will cause harm". *Id*. Here, the Commissioner brought the expertise of OIC to the impact of the pandemic and the CARES Act on the use of credit scores, and the future harm once the CARES Act was no longer in place. These are both novel issues and complex ones, and the analysis has taken place during a global pandemic with many other emergency actions that were taken by the agency during this time.

Petitioners have also alleged that RCW 48.02.060(4) limits the Commissioner's authority to issue emergency rules to only the four categories listed there. However RCW 48.02.060(4) only speaks to the Insurance Commissioner's emergency *order* authority. But the Commissioner's emergency *rule* was not promulgated under RCW 48.02.060(4). The emergency *rule* Petitioners are contesting was promulgated under RCW 48.02.060(3)(a) and RCW 34.05.350. The Commissioner's emergency rules are not limited to the topics listed in RCW 48.02.060(4). The Commissioner has the statutory authority to issue an emergency rule regardless of the existence of a state of emergency in the State of Washington, and has authority

to issue an emergency rule on any topic for which he can issue a standard rule, if the requirements of RCW 34.05.350 are satisfied.

Petitioners cite no authority that holds that agencies are required to adopt an emergency rule as a first option, or at the first moment an agency learns a potential emergency exists. Imposing a strict time sensitive component to APA emergency rulemaking procedures will force agencies to engage in knee-jerk emergency rulemaking for fear of being accused of not moving quickly enough. This has the potential to eliminate an agency's ability to take the time necessary to assess whether an emergency is real and not artificial or fabricated. Considering the incredible uncertainty over the last year caused by the pandemic, the timing of the emergency rule is not remarkable or unreasonable. This has been a year of firsts as agencies recognize and react to myriad impacts from the pandemic, many agencies have had to triage their efforts. As Petitioners note, the Commissioner initially chose to focus his efforts on permanently eliminating the use of insurance credit scoring. When that was unsuccessful, he used his authority to take a different, temporary, and narrower approach to address the discriminatory rating caused by the protections of the CARES Act.

If this rule is not in place when the CARES Act expires, consumers in the most financially vulnerable position will be forced to pay more for vital, and in some cases mandatory, insurance policies that protect not only insureds, but also fellow drivers, banks, and landlords that rely on auto, homeowners, and rental insurance being in place. If financially vulnerable consumers are priced out of the market by drastically reduced credit scores, this will impact the public, not just the policyholders. Therefore the impact on the general welfare from these events is both ongoing and imminent. The Commissioner has for good cause found this emergency rule was necessary to protect the general welfare.

C. The Rules are Not Arbitrary and Capricious as the Emergency is Not Fabricated

An emergency rule will be upheld if the health, safety, or general welfare justification stated by the agency in its CR 103e filing is not arbitrary or capricious, that is, if the emergency

is "not artificial or fabricated." *State v. MacKenzie*, 114 Wn. App. 687, 698, 60 P.3d 607 (2002). If the emergency is present, the trial court should not substitute its judgment for the wisdom of the regulation for that of the agency. *Id.* (citing *Brannan v. Dep't of Labor & Indus*., 104 Wn.2d 55, 60, 700 P.2d 1139 (1985)). A rule is arbitrary and capricious if it is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Washington Indep. Tel. Ass'n v. Washington Utils. & Transp. Comm'n*, 148 Wn. 2d 887, 905-06, 64 P.3d 606 (2003) " 'Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.'" *Id.* Further, it is within the discretion of the agency what specific procedures of the APA the agency chooses to use. *Hillis v. Dep't of Ecology*, 131 Wn. 2d 373, 400, 932 P.2d 139 (1997). Emergency rulemaking is permitted at any point an emergency exists, it does not have to be the first approach tried by an agency. *Id*.

NAMIC claims the OIC's findings in the CR 103E are flawed because they fail to cite to specific studies like the one Ms. Watkins, their hired expert, believes are necessary. NAMIC Brief at 14. But the APA does not require citation to specific documents in the agency's finding. Instead, it requires that the agency Record contain sufficient information to support the findings of the Agency. The only place where the APA requires "citations" in a rule file is when the agency is making a list available of locations where data relied upon by the Agency can be found by the public. RCW 34.05.370(2)(f).

The federal cases cited by Petitioners for the claim that a rule is arbitrary and capricious where the agency fails to cite to the record are inapposite. In *Islander East Pipeline Co., LLC v. Connecticut Dept. of Environmental Protection,* (482 F.3d 79, 102 (2006)), the court found that the record contained competing studies that countered the Agency's decision, and were not addressed by the agency. In *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., (463 U.S. 29, 52, 103 S.Ct. 2856, 2871 (1983)), the agency failed to separately consider or discuss a safety component before recinding a previously adopted safety standard. In both cases,

the process at issue was a standard notice and comment rulemaking, where the agency failed to address the contradicting facts before it.

Here, the OIC found that "the current protections to consumer credit history at the state and federal level have disrupted the credit reporting process." This is true by operation of law. The CARES Act and state emergency orders do result in inaccurate credit histories to be reported, because they plainly prohibits some negative credit history from being reported. AR 523, 524, 438. The Commissioner also found that, "This disruption has caused credit based insurance scoring models to be unreliable and therefore inaccurate when applied to produce a premium amount for an insurance consumer in Washington state." AR 1012. Again, this is logically reasonable. No study is needed to show that when the information that is input into a formula or algorithm is objectively inaccurate for some individuals, the resulting output from that algorithm is also inaccurate. Slavich Dec. at 6. However, there is evidence that consumer credit histories are being buoyed by the shielding requirements of the CARES Act. AR 978-987. Therefore, the Commissioner logically concludes that the shielding of information from some, but not all, consumer credit histories "makes the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020." AR 1012.

While NAMIC's expert urges this Court to substitute her own opinion that the Commissioner must conduct a study to determine if credit scoring is generally a reliable method overall, the Commissioner's rule is concerned about the impact on individual consumers. NAMIC's expert does counter the Commissioner's conclusion that as a result of state and federal credit protections, the negative credit histories of some consumers are not being reported, and therefore, the credit histories used by insurers are not fully accurate. NAMIC attempts to claim that these histories cannot be inaccurate where the information that is absent is absent by operation of law. But this actually proves the Commissioner's point. By operation of law, information that insurers presume will be reported as credit history information is not reported.

And insurer credit scoring models presume that the credit histories they use will contain the information that current law prohibits from being reported. Unfortunately for NAMIC, insurance credit scoring models do not presume that the law will eliminate the credit history information the model relies on to set premiums. They also do not assume that the law will shield credit history information for some consumers, but not all.

APCIA, in contrast, turns to the sole opinion of Senator Mullet to claim that the Commissioner's rule can only be fabricated, and thus arbitrary and capricious, because the OIC never discussed a potential emergency with him. But Senator Mullet's declaration does not demonstrate that he ever asked about a potential emergency. *See* Noski Dec. at 2. Further, while Senator's opinion is that the need for immediate action is fabricated, he points to no statement by the Commissioner or OIC staff as the basis for this assumption. Essentially, Senator Mullet's opinion about the Commissioner's motivation is drawn entirely from his assumption that the Commissioner would have discussed a possible emergency with him, and that the Emergency Rule would not have been necessary if the Commissioner's request legislation had been approved. But the Commissioner had no reason or obligation to discuss potential action he believed to be within his already existing statutory authority with any member of the legislature. Nor is it clear that the emergency rule would not have been necessary had the Commissioner's request legislation been approved. Noski Dec. at 3.

Regardless, the Commissioner clearly considered several possible options for addressing this emergency, both in the proposals put before the legislature, and in the alternatives contained in the record. That he chose an option that the industry and Senator Mullet disagree with does not make the emergency rule arbitrary or capricious.

D. The Agency Record Should Not Be Expanded.

A party seeking to expand the agency record under RCW 34.05.562 bears the burden to show one of the narrow categories allowing supplementation or the record applies. *See Samson v. City of Bainbridge Island,* 149 Wn. App. 33, 64-66, 202 P.3d 334 (2009). RCW 34.05.562(1)

allows the agency record to be expanded only if:

> . . . it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> (b) Unlawfulness of procedure or of decision-making process; or
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

However, summary judgment is only appropriate where there is no genuine issue as to any material fact. CR 56(c). Therefore if the declarations of Sen. Mullet and Ms. Watkins are needed to determine disputed material facts related to the Commissioner's motivation in adopting the rule, or the types of evidence the Commissioner should rely on, these declarations defeat summary judgment. If, as Petitioners contend, the material facts are not in dispute, these declarations, both of which contain facts that are disputed by the Commissioner, are inappropriate additions to the agency record.

Further, under the APA, the declarations of Senator Mullet and Ms. Watkins are not needed by the Court to determine the lawfulness of the agency decision making process, or facts material to the emergency rule making. Ms. Watkins declaration, while offering her opinion of how the Commissioner should evaluate the reliability of credit histories as a general matter, does not dispute the Commissioner's actual finding that as a result of state and federal laws, individual credit histories are not fully reported, resulting in some similarly situated consumers being disparately treated. Further, while she offers an alternative to the Commissioner's emergency rule (conducting a study of the impact of the state and federal credit shielding provisions), she does not point to any legal requirement that a study be conducted first. As noted by the OIC's actuary, a study is not necessary where intervening law has clearly changed the information available to insurers. Slavich Dec. at 6. Further, neither Ms. Watkins declaration, nor the type of study she suggests were available to the Commissioner at the time the Emergency Rule was adopted. What was available, and is in the agency record, was information that although credit scores remain stable, and are even improving for some, those scores are buoyed by federal requirements shielding negative credit history information. AR 978-987.

Senator Mullet's declaration creates multiple disputed issues of fact. First, it misrepresents the OIC's conduct during the legislative session. As Mr. Noski notes, the OIC never agreed to support the Senator's pro-industry proposals. Noski Dec. at 3. Further, contrary to Sen. Mullet's declaration, many of his proposals would have caused greater likelihood of consumer harm than consumer good. *Id*. at 2. Senator Mullet opines (incorrectly) on the Commissioner's previously existing statutory rulemaking authority, and leaps, without support, to the conclusion that the Commissioner's stated basis for the emergency rule is fabricated simply because Senator Mullet was not aware of its existence and because of the timing of the agency emergency rule. But as Mr. Noski notes, it is possible that this emergency rule may have been necessary, even if the Commissioner's request legislation had been adopted. Noski Dec. at 3. In short, the declarations of Ms. Watkins and Senator Mullet, while colorful, albeit disputed, contextual additions to a motion for summary judgment, do not meet the high threshold to warrant inclusion in the record the agency record should have been considered at the time the Emergency Rule was adopted.

V. CONCLUSION

For the forgoing reasons, the motions for summary judgment, and to expand the agency record, and the petition for judicial review, should be denied.

DATED this 24th day of September, 2021.

ROBERT W. FERGUSON
Attorney General

MARTA U. DELEON, WSBA #35779
Assistant Attorney General
SUZANNE BECKER, WSBA #40546
Attorneys for the Washington State Office of the Insurance Commissioner

DECLARATION OF SERVICE

I declare that I sent for service a true and correct copy of the ***Insurance Commissioner's Opposition to Summary Judgment and Expansion of the Agency Record***; ***Declaration of Eric Slavich in Opposition to Motion for Summary Judgment***; ***Declaration of Jon Noski in Opposition to Motion for Summary Judgment*** on all parties or their counsel of record on the date below as follows:

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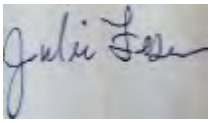
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of September, 2021 at Olympia, Washington.



JULIE FESER
Legal Assistant

☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: October 8, 2021
Time: 1:30 P.M.
Judge: Mary Sue Wilson

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervener NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

Case No. 21-2-00542-34

DECLARATION OF ERIC SLAVICH IN OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT

I, Eric Slavich, declare as follows:

1. I am the lead property and casualty actuary in the Rates, Forms, and Provider Networks division of the Washington State Office of the Insurance Commissioner [OIC]. I have been in that position for four years.

2. I began my actuarial career at the OIC in 1998, starting at the actuarial analyst I level. I was promoted four times, holding positions as an actuarial analyst II, actuarial analyst

III, and actuary 2 before reaching my current position.

3. I have been an Associate of the Casualty Actuarial Society and Member of the American Academy of Actuaries since 2012. I have a bachelor's degree in mathematics and a bachelor's degree in physics, both from the University of Washington.

4. As part of my current duties with the OIC, I am responsible for supervising the unit that reviews property and casualty insurance rate filings, including the rate filings required by the emergency rule. I am the primary point of contact for insurers with questions about those rate filings. Along with the staff who report to me, I developed filing instructions for insurers to follow when submitting filings in compliance with the emergency rule. I contributed to the writing of the emergency rule itself.

5. Insurers do not have a uniform approach toward using a consumer's credit information to determine insurance premiums, which makes it difficult to make generalizations about the impact of the emergency rule. Insurers are required to submit an insurance scoring model filing that shows how elements of a credit report are combined, sometimes with non-credit information, to generate an "insurance score" for a consumer (RCW 48.19.035(2)(a)). Some insurers create their own insurance scoring models, while other insurers use models created by third-party vendors. Insurance scoring models vary in at least three important respects: First, some models include only credit elements, while some include non-credit information (such as the driver's history of filing insurance claims). Second, the models use different types of information from the consumer's credit report. Third, the formulas used to combine the various elements into a single score are different, so that even if two models did use some of the same credit elements, those elements would typically be weighted differently. In separate rate filings, insurers show how these insurance scores are used to calculate premiums. The way insurers account for credit information in rate filings varies as well. Some insurers file a single table of credit-based insurance scoring factors. Others might file distinct tables of factors that vary by coverage (for example, bodily injury coverage versus collision coverage in auto insurance) or

peril (such as wind versus fire in homeowners insurance). Some insurers use more complex treatments of credit, with credit-based insurance scoring factors that depend on multiple other rating characteristics. For example, the credit-based insurance scoring factors might vary by coverage and driver age.

6. Insurers are required to provide statistical support for their proposed credit-based insurance scoring factors using multivariate analyses (WAC 284-24A-050). These analyses use the insurer's historical data about policyholders to demonstrate the correlation between credit-based insurance scores and expected claim costs (i.e., how likely is a given consumer to file a claim, and how large would any such claims likely be?). One assumption underlying these analyses is that the relationship between a consumer's credit information and expected claim costs does not vary unpredictably over time. If an insurer's analysis uses data from the period 2013 to 2018, for example, it does not automatically follow that the relationship between credit and claims costs observed in that data would necessarily be the same as the relationship between credit and actual claim costs for the insurer in 2021. Insurers often attempt to account for these variations over time by including a time-based control variable in their multivariate analyses. However, this approach would not account for sudden, large, unexpected changes to consumers' credit information. Thus, if there were such a change to consumers' credit histories, the relationship between credit and claim costs observed in an insurer's historical data would no longer be exactly the same as the relationship that would be observed in the present. It is reasonable to assume that the bigger the disruption to the consumer credit environment, the less accurate an analysis based on historical data prior to the disruption would be.

7. Besides credit, insurers currently use several other factors when calculating premiums. Among the types of information used by some insurers are: Home value; roof material type and age; driver age; gender; marital status; accident history (both at-fault and not-at-fault); moving violations; claims history; whether a youthful driver is a "good" student; whether a youthful driver is a distant student; whether a driver over 55 has taken an approved accident

prevention course; the number of vehicles compared to the number of drivers; characteristics of the consumer's prior insurance policy (such as bodily injury limits, the length of any lapse in coverage, and whether the prior insurer was a preferred, standard, or non-standard insurer); whether the consumer is purchasing multiple types of policies from the insurer; whether premium is paid up-front or in installments; whether the policyholder is a homeowner; how long in advance of the policy effective date the policy was purchased; length of tenure with the insurer; length of residency at the same location; the policyholder's education level; make, model, and year of an insured vehicle; garaging location or home location; whether the vehicle or home is used for business; annual mileage; and usage-based/telematics rating (in which an electronic device monitors a driver's driving behavior in real time and transmits the data to the insurer automatically).

8. When an insurer adds a new rating factor to its rating plan, there is a possibility this will cause unfair discrimination in violation of RCW 48.18.480 and RCW 48.19.020. But removing a rating factor cannot result in unfair discrimination the way that adding a rating factor can. With respect to premium rates, unfair discrimination occurs when an insurer charges different premiums to substantially similar risks. The question of whether an insurer's action is unfairly discriminatory only needs to be asked if the insurer is somehow treating two insureds differently. Thus, when an insurer wishes to add a new rating factor to its rating plan, the insurer must show that premium differences related to this new factor are fairly discriminatory. In the insurance context, fairly discriminatory means that premium differences between classifications are consistent with differences in the costs by classification the insurer will bear. A classification that is expected to file twice as many claims might be charged twice as much premium. In rate filings, insurers provide statistical support and actuarial analysis to show that rating factors are fairly discriminatory. Removing a rating factor, such as credit-based insurance scoring factors, does not result in unfair discrimination, since removing a rating factor results in treating groups of policyholders the same, not differently.

9. The use of credit-based insurance scoring factors could result in unfairly discriminatory premiums if the credit information used by the insurer is inaccurate or incomplete. For example, consider two consumers who each have failed to make a payment on a certain type of loan. Suppose one of the two consumers was granted an accommodation by the consumer's lender, such as that permitted under the CARES Act. The account for the consumer with the accommodation under the CARES Act is reported as current, while the other consumer was not granted such an accommodation and therefore has a credit report with a delinquency. Assuming the two consumers are otherwise substantially similar, it would be unfairly discriminatory to charge the two consumers different premiums.

10. On January 14, 2021, I testified in a hearing of the Senate Business, Financial Services and Trade Committee about Senate Bill 5010. In that testimony, I acknowledged that there is a statistical correlation between credit scores and insurance claim costs. However, it is possible to imagine changes to the credit reporting system that could reduce or eliminate that statistical correlation. For example, if every lender stopped reporting late payments, delinquencies, and collections referrals, the correlation between credit information and insurance claim costs would be weakened. The strength of the correlation must obviously depend on the accuracy of the data included in consumer credit reports. Any change to credit reporting procedures that reduces the accuracy of credit data weakens the correlation between credit and claims costs. Some provisions of the CARES Act will make credit reports less accurate, by forcing lenders to report some accounts as current, when those same accounts would have been reported as delinquent in the past.

11. Following a dramatic change to the consumer credit environment, it would take multiple years before insurers were able to adjust their credit-based rating factors to be accurate in the presence of the new environment. Insurers typically examine multiple years of historical data when determining their credit-based rating factors. The process of collecting the data, auditing it, performing the necessary statistical analyses, and filing this information with the OIC

further delays the process. Data insurers use to support credit-based factors in their filings typically spans several years with the most recent year's data being at least one year old, and often older. After a dramatic change to the consumer credit environment, it is thus reasonable to expect that it would take multiple years before insurers could take the necessary steps to determine actuarially sound credit-based rating factors.

12. Given that consumer credit reports became less accurate due to the CARES act, insurers' existing credit-based rating factors became less accurate. For insurance rating purposes, there are three important aspects to consider when considering this change to credit-based rating factors: (i) whether the correlation between credit history and insurance losses changed; (ii) if so, how much did the correlation between credit history and insurance losses change; and (iii) whether the changes to the credit data might result in unfair discrimination for individual consumers. Regarding the first point, the answer is clearly "yes." Any change to data sources used to calculate credit-based insurance scores, and thus premiums, would impact the correlation between credit history and insurance losses to some degree. Regarding the second point, as discussed above, insurers would require several years to accumulate enough data to determine the extent of the change and to make appropriate revisions to their rating factors. But even if the changes were not material enough to render existing rating factors inaccurate, it does not take any actuarial analysis to determine that individual consumers would be unfairly discriminated against due to the changes in credit data reporting (as discussed under paragraph 9 above).

13. The 2008 Great Recession is not a good comparison to the current situation in at least one important way; during the Great Recession, there were no laws mandating the inaccurate reporting of consumer credit information.

14. The emergency rule requires insurers to remove the impact of credit information from their premium calculations, while making the minimal other revisions necessary so that the insurer does not experience any overall premium change for its book of business. The rule is intended to be flexible enough to account for the various ways insurers handle credit in premium

calculations. The rule describes how to calculate a "neutral factor" but does not require this approach, stating that insurers "may" substitute a neutral factor in lieu of its credit-based rating factors. The rule also states that insurers may apply neutral factors that vary by coverage or by peril. This wording is meant to accommodate insurers that currently have rating plans with credit-base rating factors that vary by coverage or by peril.

15. The OIC published guidance (the "FAQ,") to aid insurers in complying with the emergency rule. I was the primary author of the FAQ. The FAQ includes instructions designed to simplify the filings required by the emergency rule. For example, OIC is not expecting or requiring insurers to remove existing rating rules related to credit; instead, insurers are instructed to provide a new page that supersedes the existing credit-based rating rules. This simplification is meant to make it easier for insurers to file the necessary changes and easier for OIC to review those filings.

16. The FAQ was developed with the Emergency Rule, as a way to ensure that carriers had the practical guidance they needed to implement the rule in a timely manner.

17. Insurers rely on computer software to calculate premiums for policies as they renew and to quote premiums for new business applicants. When concluding the review of a rate filing, a final step in the process is determining the effective date for a filing. From discussing final effective dates with filers, I understand that insurers often need to have a filing approved from two months up to several months in advance of the filing's effective date. This lead time is necessary for the insurer to be able to program the changes to its software. OIC considered this information when determining when to file and implement the emergency rule.

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED in Olympia, Washington this 23rd day of September, 2021.

Eric Slavich

ERIC SLAVICH
Lead Property and Casualty Actuary for the
Office of the Insurance Commissioner

☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: October 8, 2021
Time: 1:30 P.M.
Judge: Mary Sue Wilson

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervener NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

Case No. 21-2-00542-34

DECLARATION OF JON NOSKI IN OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT

I, Jon Noski, declare as follows:

1. I am over the age of 18 and make this Declaration based on my personal knowledge and I am competent to testify to the facts set forth herein.

2. I am employed by the Washington State Office of the Insurance Commissioner ("Insurance Commissioner" or "OIC") as a Legislative Liaison in the Policy and Legislative Affairs Division. I have held this position since June 8, 2020.

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3. I have over 11 years of legislative experience for the State of Washington. Prior to my employment with the OIC, I worked in multiple other state agencies.

4. It is one of my primary responsibilities to have conversations with legislators and legislative staff about OIC's ongoing legislative priorities.

5. OIC did work closely with Senator Das to propose request legislation during the 2021 legislation session that would ban the use of credit scoring in all person lines of insurance. The bill was introduced at SB 5010. That bill ultimately did not pass.

6. I spoke with numerous legislators and legislative staff during the 2021 legislative session. None of the legislative discussions about SB 5010 concerned the Commissioner's authority to temporarily suspend the use of credit scores if there is no way for credit scoring models to obtain accurate information.

7. Statements made in paragraph nine of Senator Mullet's declaration are incorrect. Washington is not the only state that has not adopted the 'Extraordinary Life Circumstances' legislation. Only 21 states have adopted this measure that is promoted by the industry through the industry-backed National Council of Insurance Legislators (NCOIL). Senator Mullet's fixation on the NCOIL legislation is not germane to the emergency rule. Our concerns and reasons for opposing this legislation (HB 1351 and SB 5409) were repeatedly related to Sen. Mullet and to other members of the Legislature.

8. The primary concern with Sen. Mullet's 'Extraordinary Life Circumstances' legislation as written, is that is grants insurers the ability to make subjective exceptions to their rating procedures on a case-by-case basis. These bills effectively eliminate the Commissioner's oversight and ability to ensure fairness and consistency in how insurers are treating consumers, and actually invites unchecked discrimination, by codifying the industry's ability to treat consumers in any manner they choose, with no check on their discretion. In short, the known risks of the NCOIL legislation outweighs the questionable benefits.

9. Paragraph ten of Sen. Mullet's declaration also contains inaccurate statements.

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The amendment to SB 5010 that came out of the Business, Financial Services & Trade committee was not the work of OIC. This was industry drafted language. Commissioner Kreidler did not refuse to honor a compromise, as claimed, because one had not been reached. OIC staff worked diligently with Senator Mullet to address various other suggested amendments but at no point had an agreement on any version as a final negotiation been reached. This was made clear in emails to both Senator Mullet and Senator Billig.

10. Commissioner Kreidler did however permit staff to work with Senator Mullet to provide technical assistance in the hopes that it would keep SB 5010 alive and moving in the legislative process. This was a proposal that, in its original form, had the support of every member of the Senate Democrats. It was the chair of the committee who effectively killed the bill when OIC would not agree to an industry drafted amendment as its final form. Senator Mullet mischaracterizes the OIC's good faith attempts to work with him. Each amended draft of SB 5010 supported by Sen. Mullet moved further from something Commissioner Kreidler could support. The Commissioner's legislative staff, including myself, conveyed multiple times that the substitute amendment failed to address the racial equity and economic fairness priorities that were the primary reason for running the original bill.

11. The OIC, like other state agencies, has worked to respond to the needs of the public relating to the pandemic swiftly when it has become aware of those actual or imminent impacts. Therefore, even if SB 5010 passed in its original form, it is likely the OIC still would have determined this emergency rule was necessary, given the length of time it would take for SB 5010 to become effective.

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 21 day of September, 2021, at Tumwater, Washington.

Jon Noski
Legislative Liaison
Policy & Legislative Affairs Division

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☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: August 27, 2021
Time: 9:00 A.M.
Judge: Mary Sue Wilson

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervener NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

Case No. 21-2-00542-34

OFFICE OF THE INSURANCE COMMISSIONER'S MOTION TO STRIKE DECLARATIONS NOT IN THE AGENCY RECORD

I. INTRODUCTION

The Administrative Procedure Act, Chapter 34.05 RCW (APA) limits the Court's review of agency action to the agency record. RCW 34.05.558. Reliance on supplemental materials is only permitted after the Court determines that the additional records satisfy the requirements of RCW 34.05.562. Here, Petitioners American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents

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and Brokers of Washington (collectively "APCIA") and Intervener National Association of Mutual Insurance Companies (NAMIC) have both submitted motions for summary judgment supported by declarations that are not part of the agency record on review. Neither NAMIC nor APCIA sought permission to expand the agency record prior to filing these declarations. Instead, APCIA and NAMIC have both asked the court to consider expanding the record on the same day they ask the court to consider the merits of their claims. However, this timing forces the OIC to substantively respond to these additional records, even if this Court ultimately rejects the request to expand the record. This will also force the Court to substantively consider the additional records as it prepares to hear the merits of the petition for judicial review, even if the Court ultimately determines that those additional records are not properly a part of the record on review. Further, the submissions by APCIA and NAMIC do not satisfy the requirements of RCW 34.05.562.

For these reasons, Respondents, Insurance Commissioner Mike Kreidler, (Commissioner), and the Office of the Insurance Commissioner (OIC), through their attorneys of record, ROBERT W. FERGUSON, Attorney General, MARTA U. DELEON, Assistant Attorney General, and SUZANNE BECKER, Assistant Attorney General, move to strike the improperly submitted declarations and the improperly timed motion to supplement the record filed by NAMIC. The Commissioner also asks the Court to strike the declarations submitted by APCIA and the portions of APCIA's motion for summary judgment dedicated to expanding the agency record. In addition, the OIC asks the court to strike the motions to expand the record filed by NAMIC and APCIA as those motions will be moot following the Court's decision on this motion to strike.

II. STATEMENT OF FACTS

On June 14, 2021, NAMIC filed *Petitioner Intervenor National Association Of Mutual Insurance Companies' Motion For Summary Judgme*nt (NAMIC Summary Judgment) and *Petitioner Intervenor National Association Of Mutual Insurance Companies' Motion To*

Supplement The Record (NAMIC Motion). Also on June 14, APCIA filed *Petitioners' Motion For Summary Judgment On Their Claim For Declaratory Relief, For A Permanent Injunction, And To Supplement The Record* (APCIA Motion). These motions have been scheduled to be heard on September 17, 2021. In their motions, both NAMIC and APCIA rely on declarations and records that are not part of the agency record that was submitted to this Court by the OIC as required under the APA.

NAMIC's Summary Judgment includes the *Declaration Of Nancy Watkins In Support Of Petitioner Intervenor National Association Of Mutual Insurance Companies' Motion For Summary Judgment* (Watkins Decl.), as the sole attachment to the *Declaration Of Joseph D. Hampton In Support Of Petitioner Intervenor National Association Of Mutual Insurance Companies' Brief In Support Of Motion To Supplement.* Ms. Watkins purportedly "was retained by NAMIC to address "[w]hat would need to happen to evaluate whether/how the pandemic caused credit-based insurance scoring [ ] models to be unreliable and inaccurate for purposes of ratemaking." NAMIC Motion at 2. Her declaration largely disputes or questions the conclusions the OIC has made concerning whether or not the use of credit history has become unfairly discriminatory. She does not state or demonstrate that the use of credit based insurance scoring was not impacted by the pandemic. She does not contest the Commissioner's main conclusion if carriers are allowed to use credit histories to determine insurance premiums, they would be charging different rates to individuals with similar credit history information, because some consumers have credit history information that was insulated from negative credit history reporting due to the CARES Act, and others did not. Instead, she concludes that "The Washington State Office of the Insurance Commissioner (OIC) has not shown a quantitative study demonstrating the impact the pandemic has had, or may have, on the distribution of CBIS or the relationship to insurance losses." Watkins Decl. at 4. In her opinion, the OIC must have or conduct this quantitative study to justify its conclusion that rates based on credit histories are unfairly discriminatory. Watkins Decl. at 5. In addition, Ms. Watkins questions the wisdom of

the OIC's emergency rule by addressing possible impacts of the rule. Watkins Decl. at 19-20. Ms. Watkins does not address whether individual consumers have been treated in an unfairly discriminatory manner as a result of the credit history reporting restrictions in the CARES Act. Ms. Watkins does not address the impact that removing the history reporting restrictions in the CARES Act and various Emergency Orders issued by the state will have on the accuracy of assessing the risk level of individual consumers who were the worst impacted by the pandemic. Ms. Watkins does not address the lawfulness of the emergency rule adoption process in RCW 34.05.350.

In support of its own motion, APCIA's attached the *Declaration Of Jason W. Anderson In Support Of Petitioners' Motion For Summary Judgment On Their Claim For Declaratory Relief, For A Permanent Injunction, And To Supplement The Record* (Anderson Decl.) and the *Declaration Of Senator Mark Mullet* (Mullet Decl.). The Anderson Declaration consists primarily of copies of statutes and emergency orders, and even documents already filed with the Court, that the OIC largely does not object to on the grounds that they would properly be the subject of judicial notice. However, the OIC does object to the inclusion of Exhibits 1-3 of the Anderson Declaration:

Exhibit 1 - the original Senate Bill 5010, introduced on January 11, 2021.

Exhibit 2 - the Bill History of Senate Bill 5010 issued by the Washington State Legislature.

Exhibit 3 - Excerpts of a transcript of the public hearing held on Senate Bill 5010 before the Senate Committee on Business, Financial Services, and Trade on January 14, 2021.

While these records address failed agency request legislation, they do not address the emergency rule process, or any fact material to the Commissioner's emergency rule justification. Rather, they merely reiterate the already admitted fact that the rule was adopted after agency request legislation failed. They further reiterate that the OIC understands why carriers have

historically used credit scores. But these records do not address the emergency rule, or how the pandemic, and laws addressing the pandemic, have impacted the use of credit history.

The Mullet Declaration consists of Senator Mullet's description[1] of the events that led to the failure of the Washington State Legislature to pass legislation that would permanently ban the use of credit history in setting insurance rates, and his own justifications for industry favored alternatives that he endorsed. Mullet Decl. at 1-5. In addition, Sen. Mullet offers his personal opinion of the basis for Commissioner's enactment of the rule, and his personal opinion of the proper interpretation of the Commissioner's statutory authority. Mullet Decl. at 5. He also identifies information that was not shared with him. Mullet Decl. at 6. But Sen. Mullet does not dispute that the emergency rule process is a valid rulemaking process under the APA, or address any *material* disputed fact.

None of the disputed documents and declarations offered by NAMIC and APCIA assert that the emergency rule process itself is unlawful. Instead, they support NAMIC and APCIA's request that this Court substitute its own judgement for the Commissioner's in determining whether current state and federal credit history reporting restrictions have created a situation that causes the use of credit history in setting insurance rates to result in improper discrimination. Because these declarations are documents the Commissioner did not, and was not required, to consider, and do not point to any material fact that is not required to be determined on the agency record, they should be stricken.

III. ARGUMENT

The Washington Administrative Procedure Act (APA), Chapter 34.05 RCW, governs judicial review procedures of final agency actions. RCW 34.05.510. In a rule challenge, the agency's rule-making file serves as the record for judicial review. *Musselman v. Department of Social and Health Services*, 132 Wn. App. 841, 853, 134 P.3d 248, 254 (2006). The rule-making

[1] The OIC does not concede that Senator Mullet's description of these facts is accurate or supported by the email exchanges between OIC staff and members of the Legislature and their staff.

file is required to contain copies of all public notices relating to the rule-making process, transcripts of any public meetings, copies of any comments received, a concise statement explaining the need for the rule, and any other material the agency considered. *Musselman*, 132 Wn. App. at 853.

A party seeking to expand the agency record under RCW 34.05.562 bears the burden to show one of the narrow categories allowing supplementation or the record applies. *See Samson v. City of Bainbridge Island,* 149 Wn. App. 33, 64-66, 202 P.3d 334 (2009). RCW 34.05.562(1) sets forth clear standards for admitting new evidence for judicial review:

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
> (b) Unlawfulness of procedure or of decision-making process; or
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

The courts have repeatedly found that the APA allows supplementation of the agency record with new evidence only under "highly limited circumstances," and the proposed new evidence must fit "squarely" within one of the statutory exceptions set forth in RCW 34.05.562(1). *Samson*, 149 Wn. App. at 64-66; *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005); *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 110 Wn. App. 498, 518, 41 P.3d 1212 (2002).

NAMIC and APCIA do not argue that the OIC was an improper decision making body under RCW 34.05.562(1)(a). Instead, they claim the declarations are needed to demonstrate the unlawfulness of the OIC procedure or decision-making process, or to decide material facts that are not required to be determined on the agency record. But NAMIC and APCIA have failed to demonstrate that this Court should allow the Watkins Declaration, the Mullet Declaration, or Exhibits 1-3 of the Anderson Declaration to be included in the record on either of these grounds.

A. The Declarations Do Not Address The Lawfulness Of The Emergency Rule Process

NAMIC and APCIA have alleged their proffered declarations are necessary to demonstrate the "unlawfulness of procedure or of decision-making process," but have failed to allege that the emergency rule process is unlawful. In *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, 11 Wn. App. 2d 1040, 2019 WL 6699975, at *4 (2019), the court determined the Superior Court had properly rejected an attempt to supplement the record under RCW 34.05.562(1)(b) where the petitioner failed to claim "that the evidence is necessary to decide whether the procedure used or the decision-making process of the Board violated due process, the APA, or another statute or regulation governing the Board's procedure." *Id.* Both NAMIC and APCIA assert that the Commissioner wrongly concluded that there is an emergency that warrants the use of the emergency rule process, but neither attempt to challenge the emergency rule process under RCW 34.05.350 as invalid. Nor do any of the disputed declarations speak to the validity of the emergency rule process. The disputed documents in the Anderson Declaration do not speak to the emergency rule at all. They deal exclusively with the legislative process surrounding a piece of failed legislation. While the Sen. Mullet's Declaration attempts to contradict the Commissioner's determination of an emergency based on his own opinion of the Commissioner's true intention, he does not challenge the emergency rule process as one that is unlawful. The Watkins Declaration does not address the emergency nature of the rule, or the process of the rule adoption at all.

At most, the declarations challenge the Commissioner's conclusions that he is justified in invoking the valid emergency rule process. APCIA attempts to claim that whether the Commissioner's conclusions that the emergency rule process was justified, is sufficient to bring their additional evidence under the ambit of RCW 34.05.562(1)(b). However, what they are actually challenging is whether the Commissioner's conclusions that the rule qualified for the lawful emergency rule process in RCW 34.05.350 is supported by sufficient evidence. While the Watkins Declaration offers an alternative process for determining whether the use of credit

history is reliable, it does not demonstrate or even allege, that the Commissioner's conclusion, that individuals with similar credit histories are not being treated the same as a result of state and federal laws. Because the Watkins Declaration does not even address the impact on individual consumers that is the Commissioner's emergency justification, it cannot speak to whether that justification is supported in the record.

Similarly, APCIA has wholly failed to demonstrate why Sen. Mullet's opinion of the Commissioner's authority, or his opinion of the Commissioner's motivation, are even relevant in this proceeding. It is the courts, not individual legislators, that are tasked with the interpretation of state laws. Further, the courts give deference in interpreting statutes to the agencies that enforce those statutes, not individual legislators. *Puget Soundkeeper Alliance v. State, Dept. of Ecology*, 102 Wn. App. 783, 786–87, 9 P.3d 892, 894 (2000) ("We review their legal decisions de novo, giving substantial weight to the agency's interpretation of the statutes it administers. An agency's interpretation of a statute is not binding on the court, but we will uphold it if it is a plausible construction."). APCIA has not offered any justification for why the opinion of a single legislator interpreting the law, or opining on underlying motivations is relevant to the whether the legal requirements of the law have been met.

B. The Declarations Do Not Address Material Facts *Not* Required To Be Determined On The Agency Record

RCW 34.05.350 actually requires that "The agency's finding and a concise statement of the reasons for its finding shall be incorporated in the order for adoption of the emergency rule or amendment filed with the office of the code reviser under RCW 34.05.380 and with the rules review committee." RCW 34.05.350(1). Therefore, the agency's justification is required to be included in the agency record. Further, RCW 34.05.370 provides that the agency rule file must include citations to, or the actual sources of, "data, factual information, studies, or reports on which the agency relies in the adoption of the rule." RCW 34.05.370(f). Therefore, emergency rulemaking context, where notice and comment is not required, the courts are tasked with

determining that agency's actual basis for making its decision is supported in the record, not whether it employed alternative methods proposed by the entities it regulates.

NAMIC claims the declaration of Ms. Watkins is necessary to determine whether the OIC's emergency rule was arbitrary and capricious because it did not decide or consider issues NAMIC and Ms. Watkins believes the OIC should have considered. But there is no authority NAMIC cites to for the proposition that the Commissioner's decision is not required to be determined on the Agency record. Further, although Ms. Watkins identifies an alternative way of justifying the Commissioner's findings, NAMIC does not point to any legal requirement to consider or incorporate the type of study Ms. Watkins recommends in her declaration.

It would be different if NAMIC or APCIA had pointed to any particular type of evidence the OIC is required to consider in adopting this rule. But they have not cited to any statute or rule that requires the OIC to conduct any study, let alone the study Ms. Watkins describes when the OIC adopted the emergency rule. Because the OIC's reasons for adoption of the emergency rule must be included in the record, the material facts surrounding the OIC's decision must also be contained in the records.

As for the Mullet Declaration, it does not contain any factual information that is relevant, let alone material, to this inquiry. At best, the Mullet Declaration imputes an impure underlying motivation to the Commissioner's decision to adopt the emergency rule at issue based on Sen. Mullet's opinion. But it wholly fails to introduce material facts that counter the stated legal justification provided in the agency record, or dispute that actual factual basis asserted by the Commissioner for the emergency rule. Namely, it wholly ignores the Commissioner's justification that if the use of credit histories is currently allowed, improper discrimination between individual consumers will continue to occur while state and federal laws prevent full reporting of credit histories. More importantly, the Mullet Declaration does not identify any factual dispute that the Commissioner is not required to include in the agency record, and that this Court is not required to determine on the agency record.

IV. CONCLUSION

The emergency rule process is a valid process for agencies to employ under the APA. None of the proffered declarations allege that the process is improper. Nor do any of the proffered declarations contain material facts related to issues that are *not* required to be included in the agency record. All that the declarations offer are alternative opinions about the Commissioner's real justification, and alternative methods for evaluating the problem the emergency rule was designed to address. While the emergency rule process necessarily limits the input of various groups, it does not alter the requirement that the agency's decision must be justified in the agency record. For these reasons we respectfully request that the Court strike the declarations of Ms. Watkins, Sen. Mullet, and the identified exhibits of Mr. Anderson's declaration be stricken, and the references to these declarations in the pending motions for summary judgment be stricken.

DATED this 17th day of August, 2021.

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DECLARATION OF SERVICE

I declare that I sent for service a true and correct copy of this document on all parties or their counsel of record on the date below as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17th day of August, 2021 at Olympia, Washington.

DEANA G. SULLIVAN
Legal Assistant

☐ EXPEDITE
☒ Hearing is set
Date: August 27, 2021
Time: 9:00 a.m.
Judge/Calendar: Mary Sue Wilson

☐ No hearing is set

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, Petitioners, v. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON, Respondents.	NO. 21-2-00542-34 PETITIONERS' RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO STRIKE DECLARATIONS NOT IN THE AGENCY RECORD

Petitioners, American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents and Brokers of Washington, respectfully submit this Response in Opposition to the Motion of Respondents, the Office of the Insurance Commissioner of the State of Washington ("OIC") and Insurance Commissioner, Mike Kreidler (the "Commissioner"), to strike certain evidence submitted by the Petitioners in support of their pending motion for summary judgment.

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I. INTRODUCTION

Petitioners have moved for summary judgment on their claim for declaratory relief and for a permanent injunction to enjoin Respondents from implementing and enforcing an emergency rule that the Commissioner adopted on March 22, 2021 (the "Emergency Rule"). The Emergency Rule suspended for 120 days insurers' use of consumers' credit histories to determine rates, premiums, or eligibility for coverage (sometimes called "credit scoring") with respect to all private passenger automobile, renters, and homeowners insurance issued in Washington. The Commissioner adopted the Emergency Rule about one year after the federal and state measures that he asserts gave rise to the emergency necessitating the Rule, but less than two weeks after his most recent effort to convince the Washington Legislature to ban the use of credit histories failed. On July 15, 2021, the Emergency Rule was extended for another 120 days, pending adoption of a permanent rule.

Two grounds for Petitioners' summary judgment motion are that (1) the Emergency Rule violates the constitutional separation of powers and (2) the Commissioner exceeded his statutory authority in adopting the Emergency Rule. These present purely questions of law. But there are two other grounds, and they present questions of fact: (1) the Commissioner lacked the good cause required by Washington's Administrative Procedure Act ("APA") to adopt the Emergency Rule as an emergency measure and (2) the Emergency Rule is arbitrary and capricious. In support of those grounds, in conjunction with their motion for summary judgment, Petitioners moved to offer certain evidence not contained in the administrative record that Respondents submitted to the Court on May 26, 2021. *See* Petitioners' Motion for Summary Judgment on Their Claim for Declaratory Relief, for a Permanent Injunction, and to Supplement the Record at 23-25.

Notwithstanding Petitioners' clear showing in their motion that admission and consideration of the supplemental evidence is proper, Respondents have moved to strike Exhibits 1-3 to the Declaration of Jason W. Anderson in Support of Petitioners' Motion for

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Summary Judgment on Their Claim for Declaratory Relief, for a Permanent Injunction, and to Supplement the Record ("Anderson SJ Declaration") and to strike the Declaration of Senator Mark Mullet (the "Mullet Declaration"), also submitted in support of the motion for summary judgment. As demonstrated below, there are multiple grounds for considering this evidence, and Respondents' motion to strike should be denied.

II. STATEMENT OF FACTS

On April 7, 2021, Petitioners moved for entry of a preliminary injunction enjoining implementation and enforcement of the Emergency Rule. In opposition to that motion, Respondents submitted the following evidence, the bulk of which is not in the administrative record that Respondents submitted on May 26, 2021:

1. Declaration of Candice Myrum, with three attached exhibits;
2. Declaration of Birny Birnbaum, with three attached exhibits;
3. Declaration of David Forte, with two attached exhibits;
4. Declaration of Eric Slavich, with attached exhibit; and
5. Declaration of Jon Noski.

At the April 23, 2021 hearing held on the preliminary injunction motion, the Court inquired about the propriety of considering the various declarations submitted in support of and in opposition to entry of a preliminary injunction. *See* Exhibit 1 to Declaration of Jason W. Anderson ("Anderson Dec.") at 8. In response, Respondents' counsel stated:

> You asked, Your Honor, a question about the record and what is in the appropriate record. Certainly, the rulemaking file is part of the appropriate record, but under the APA, *particularly in emergency rulemaking*, additional information can be supplemented in the record, and so the declarations that are on file from the commissioner are certainly an appropriate addition . . . or an appropriate component of the record for this court to consider.

Anderson Dec. Ex. 1 at 22 (emphasis added). Despite this prior recognition that submission and consideration of supplemental evidence is particularly appropriate in the context of emergency

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rulemaking, Respondents have now moved to strike supplemental evidence that the Petitioners have submitted in connection with their motion for summary judgment to demonstrate the invalidity of the Emergency Rule.[1]

III. ARGUMENT

A. The Motion to Strike is improper.

As a threshold matter, the Motion to Strike should be denied because it is not the proper vehicle to challenge Petitioners' supplemental evidence. In *Cameron v. Murray*, 151 Wn. App. 646, 214 P.3d 150 (2009), the superior court granted defendants' motion to strike certain evidence that plaintiff had submitted in response to defendants' motion for summary judgment. The appellate court determined that the motion should not have been granted. As it explained:

> [M]aterials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal. Thus, it is misleading to denominate as a "motion to strike" what is actually an objection to the admissibility of evidence that could have been preserved in a reply brief rather than by a separate motion.

Id. at 658.

As in *Cameron*, Respondents' motion to strike is an improper vehicle to assert objections to the supplemental summary judgment evidence that Petitioners have offered. Respondents can and should make any arguments against admission of that evidence in their brief responding to Petitioners' pending motion for summary judgment, for entry of a permanent injunction and to supplement the record.[2] That process also will afford the Court a fuller understanding of the significance of the supplemental evidence when deciding whether

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[1] Although Respondents have filed a single motion to strike, their motion is in essence two motions, one directed at the supplemental evidence that Petitioners have submitted in support of their pending motion for summary judgment and a separate motion directed at the different supplemental evidence submitted by Petitioner in Intervention, National Association of Mutual Insurance Companies ("NAMIC"), in support of NAMIC's separate motion for summary judgment. Accordingly, Petitioners respectfully request that they and NAMIC each be afforded 10 minutes at oral argument to respond to Respondents' contentions.

[2] It is apparent from their motion that Respondents are aware of, but dissatisfied with, this approach. Yet, they have given no reason for the special treatment they seek by proceeding through a motion strike.

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to consider it. Finally, regardless how this Court ultimately decides admissibility, in no event should it strike from the record Petitioners' supplemental evidence or any portion of Petitioners' summary judgment filings that discuss that evidence.

B. Petitioners' supplemental evidence satisfies RCW 34.05.562.

The APA, in RCW 34.05.562, authorizes the superior court to receive additional evidence in certain circumstances:

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
>
> (b) Unlawfulness of procedure or of decision-making process; or
>
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

Petitioners contend that the Commissioner lacked good cause to adopt the Emergency Rule on an emergency basis and that, as a result, the Rule is invalid. Petitioners further contend that the Emergency Rule is arbitrary and capricious. Respondents disagree with both positions. The issues are, therefore, disputed. Moreover, the dispute over good cause falls squarely within RCW 34.05.562(1)(b) as it requires this Court to determine whether the Commissioner's use of the emergency rule-making process was lawful, or instead, Respondents were legally required to proceed by regular rule-making.

In addition, although no Washington court has addressed whether the APA's good cause requirement involves factual or legal issues, in other contexts, Washington courts have held that good cause presents a mixed question of fact and law. *Rasmussen v. Employment Sec. Dep't*, 98 Wn.2d 846, 850, 658 P.2d 1240 (1983); *Pederson v. Employment Sec. Dep't*, 188 Wn. App. 667, 676, 352 P.3d 195 (2015); *Wells v. Employment Sec. Dep't*, 61 Wn. App. 306, 310, 809 P.2d 1386 (1991). Further, courts interpreting the federal APA's good cause requirement have

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noted that it presents issues of fact. *See, e.g., Mobil Oil Corp. v. Department of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1984); *Hedge v. Lyng*, 689 F. Supp. 877, 882 (D. Minn. 1987). Thus, if Petitioners' supplemental evidence offers evidence of material facts relevant to the disputed issue of good cause, that evidence satisfies RCW 34.05.562(1)(c).

Similarly, the arbitrary and capricious standard involves questions of fact. *Van Sant v. City of Everett,* 69 Wn. App. 641, 647, 849 P.2d 1276 (1993). Accordingly, if Petitioners' supplemental evidence offers evidence of material facts relevant to that disputed issue, that will satisfy RCW 34.05.562(1)(c).

The supplemental evidence that Respondents seek to strike consists of Exhibits 1-3 to the Anderson SJ Declaration and the Mullet Declaration. Much of this evidence previously was offered and considered without objection in connection with Petitioners' motion for a preliminary injunction.

Exhibits 1 and 2 to the Anderson SJ Declaration (which were offered and considered previously) are 2021 Washington Senate Bill 5010, banning the use of credit scoring for personal lines of insurance, and the Bill History of SB 5010. Exhibit 3 (also offered and considered previously) contains excerpts of the transcript of the public hearing on SB 5010 held before the Senate Committee on Business Financial Services and Trade on January 14, 2021, in particular, the testimony of OIC actuary Eric Slavich.

Petitioners contend that the Emergency Rule arose out of the Commissioner's failure to get SB 5010 passed, not out of a *bona fide* emergency resulting from actuarial unfair discrimination allegedly caused by the use of credit scoring. Exhibits 1 and 2 provide context by showing the content and history of SB 5010. Exhibit 3 demonstrates that Respondents identified no emergency to support passage of SB 5010, that actuarial unfair discrimination was not a reason that the OIC offered in support of SB 5010, and indeed, that the OIC recognized that credit scoring was actuarially sound. The exhibits therefore offer evidence of material facts

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that tend to show that good cause for utilizing the emergency rule-making process was lacking and that actuarial unfair discrimination was a pretext for the Emergency Rule, not the reason for its adoption. The exhibits therefore satisfy RCW 34.05.562(1)(b) in that they demonstrate that Respondents' use of the emergency rule-making process to adopt the Emergency Rule was unlawful. Similarly, the exhibits satisfy RCW 34.05.562(1)(c) because they offer evidence of material facts that tend to prove that good cause was lacking. Furthermore, the exhibits offer evidence of material facts that tend to show that the Emergency Rule was arbitrary and capricious because the Rule was the result of the Commissioner's legislative failure, not actuarial unfair discrimination.

The other evidence that Respondents seek to strike is the Declaration of Senator Mark Mullet. After this Court's decision on Petitioners' motion for a preliminary injunction, Senator Mullet came forward on his own accord to set the record straight regarding Respondents' conduct in connection with their eight-month legislative efforts to ban the use of credit history in insurance, efforts that persisted until less than two weeks before the Commissioner adopted the Emergency Rule. Mullet Declaration ¶ 3. Senator Mullet chairs the senate committee that considered SB 5010, and he interacted extensively with Respondents in connection with that bill. Senator Mullet makes clear that at no time during their legislative efforts did Respondents suggest that they had the regulatory authority to suspend the use of credit history. Nor did the Respondents ever suggest that action was necessary to address an emergency, that any emergency even existed, or that credit scoring was unfairly discriminatory in the actuarial sense that Respondents claim in this litigation. Mullet Declaration ¶¶ 1, 10, 14-16. Senator Mullet's declaration is powerful evidence that the Emergency Rule, adopted so soon after SB 5010's demise, was not supported by good cause (thus satisfying RCW 34.05.562(1)(b), pertaining to unlawful procedure as well as RCW 34.05.562(1)(c), relating to material facts in rulemaking) and was arbitrary and capricious because the Rule does not genuinely address actuarial unfair

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discrimination allegedly resulting from insurers' use of credit scoring (thus also satisfying RCW 34.05.562(1)(c)).

Respondents argue that Senator Mullet's declaration should not be considered because he improperly purports to interpret state law and offers "opinions" about Respondents' motivation for promulgating the Emergency Rule. Respondents' Brief ("Resp. Br.") at 8. This grossly mischaracterizes the Mullet Declaration, which consists primarily of Senator Mullet's account of the history of Senate Bill 5010, his interactions with Respondents with respect to that bill and related matters, and the Senator's inferences from those interactions regarding the reasons that the Emergency Rule was adopted (which fall squarely within ER 701). *See* Mullet Declaration ¶¶ 4-7, 10-12, 14-16. The relevance of this evidence to issues presented by the Motion for Summary Judgment is undeniable.

Petitioners' supplemental evidence readily satisfies RCW 34.05.562, and the Court should consider it.

C. The Court should reject Respondents' implausible interpretations of RCW 34.05.562.

Respondents argue that Petitioners' supplemental evidence does not satisfy RCW 34.05.562(1)(b) because Petitioners do not contend that the emergency rule process is unlawful. Resp. Br. at 7. In other words, according to Respondents, unless Petitioners are broadly challenging the lawfulness of the emergency rule process generally, rather than contending that use of the process was unlawful in the particular instance at issue, they cannot satisfy RCW 34.05.562(1)(b). This implausible reading of the statute would effectively nullify it as a mechanism for permitting the consideration of supplemental evidence, as it is the rare case indeed in which a claimant could contend in good faith that a procedure codified in the APA was generally unlawful.

Moreover, the authority Respondents cite to support their interpretation actually demonstrates that RCW 34.05.562(1)(b) applies here. In *Responsible Shoreline Management*

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v. City of Bainbridge Island, 11 Wn. App. 2d 1040, 2019 WL 6699975 at *4 (2019) (unpublished, nonbinding), the court indicated that the provision applies when the supplemental evidence offered demonstrates that the procedure used or the decision-making process violates due process, the APA, or another statute governing procedure. That is precisely what Petitioners' supplemental evidence demonstrates as it shows that, in violation of the APA, Respondents unlawfully adopted the Emergency Rule using emergency procedures rather than the regular rule-making process that they were legally obligated to employ. A clearer case for application of RCW 34.05.562(1)(b) is difficult to imagine.

Respondents' interpretation of RCW 34.05.562(1)(c) is equally specious. That provision permits supplemental evidence regarding "[m]aterial facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record." Notwithstanding the use of the disjunctive term "or," Respondents suggest that the phrase "not required to be determined on the agency record" modifies, not only "other proceedings" but also "rule making" and "brief adjudications." Resp. Br. at 8-9. And because, argue the Respondents, they were obligated by law to include in the order adopting the emergency rule the determination of good cause and a statement of the reasons for that determination, the determination was required to be included in the agency record, and RCW 34.05.562(1)(c) therefore does not apply. *Id.*

But under established principles of statutory interpretation, the Court will "presume that the word 'or' does not mean 'and' and that a statute's use of the word 'or' is disjunctive to separate phrases unless there is a clear legislative intent to the contrary." *Riofta v. State*, 134 Wn. App. 669, 682, 142 P.3d 193 (2006); *see also HJS Development, Inc. v. Pierce County,* 148 Wn. 2d 451, 473 n. 95. 61 P.3d 1141 (2003) ("[o]rdinarily, the word 'or' does not mean 'and' unless there is clear legislative intent to the contrary"). Accordingly, absent clear

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legislative intent to the contrary, the phrase "not required to be determined on the agency record" modifies only "other proceedings" and *not* "rule making" or "brief adjudications." Respondents have made no effort to demonstrate a clear legislative intention to exempt RCW 34.05.562(1)(c) from the customary interpretation of "or" as disjunctive.

Respondents' proposed construction of RCW 34.05.562(1)(c) runs afoul of another bedrock principle of statutory interpretation – that courts will interpret statutes "to give effect to all language, so as to render no portion meaningless or superfluous." *State v. Ervin*, 169 Wn. 2d 815, 823, 239 P.3d 354 (2010) (citation and quotation marks omitted). Respondents' posited interpretation violates this rule, because if the phrase "not required to be determined on the agency record" applies to "rule making" and "brief adjudications" in addition to "other proceedings" the language "rulemaking, brief adjudications, or other proceedings" would be rendered superfluous, as the effective meaning of the RCW 34.05.562(1)(c) under this construction would be simply "material facts not required to be determined on the agency record." The only way to avoid rendering the inclusion of "rule making" "brief adjudications" and "other proceedings" superfluous is to interpret the phrase "not required to be determined on the agency record" as applying *only* to "other proceedings." Thus, as with RCW 34.05.562(1)(b), Respondents' proposed interpretation of RCW 34.05.562(1)(c) is strained, implausible and contrary to law.

But even if Respondents' proffered construction were correct, Petitioners' supplemental evidence still would satisfy RCW 34.05.562(1)(c). As Petitioners already have shown, their supplemental evidence pertains to material facts that relate to the disputed issues of good cause and whether the Emergency Rule is arbitrary and capricious. And although Respondents were required to find good cause, they were not required to determine the *specific facts* set forth in Petitioners' supplemental evidence. And Respondents were not required to make any findings regarding whether the Emergency Rule is arbitrary and capricious and certainly no findings

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corresponding to the specific facts in Petitioners' supplemental evidence. Thus, Petitioners' supplemental evidence satisfies RCW 34.05.562(1)(c) even under Respondents' cramped interpretation of that provision.

The Petitioners' supplemental evidence readily satisfies RCW 34.05.562(1)(b) and 34.05.562(1)(c), and the Respondents' Motion to Strike should be denied.

IV. CONCLUSION

For the foregoing reasons, Respondents' Motion to Strike should be denied.

DATED this 24th day of August, 2021.

DUANE MORRIS, LLP

By */s/ Damon N. Vocke*
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Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via electronic service to the following:

Marta DeLeon Suzanne Becker OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON 1125 Washington St. SE / P.O. Box 40100 Olympia, WA 98504 laura.chadwick@atg.wa.gov marta.deleon@atg.wa.gov GCEEF@atg.wa.gov suzanne.becker@atg.wa.gov Deana.Sullivan@atg.wa.gov	Damon N. Vocke, DUANE MORRIS LLP 1540 Broadway New York, New York 10036-4086 dnvocke@duanemorris.com MBHolton@duanemorris.com RMLepinskas@duanemorris.com
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DATED this 24th day of August, 2021.

/s/ Patti Saiden
Patti Saiden, Legal Assistant

☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: August 27, 2021
Time: 10:30 A.M.
Judge: Mary Sue Wilson

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervener NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

Case No. 21-2-00542-34

OFFICE OF THE INSURANCE COMMISSIONER'S REPLY TO MOTION TO STRIKE DECLARATIONS NOT IN THE AGENCY RECORD

I. INTRODUCTION

Under the Administrative Procedure Act (APA), the temporary emergency rule process limits the record the agency, and the courts, are required to consider. The oppositions filed by Petitioners American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents and Brokers of Washington (collectively "APCIA") and Intervener National Association of Mutual Insurance Companies (NAMIC)

essentially argue that the record this Court reviews must be supplemented by the disputed declarations of Ms. Watkins and Sen. Mullet because the OIC failed to consider their opinions or address their claims in the emergency rule process. But by definition, the emergency rule process does not require that an agency consider all opinions, or address all detractors. Rather, the emergency rule process requires agencies to assert and justify the basis for their temporary decisions in the agency record. Consideration of materials outside the agency record is only permitted after the Court determines that the additional records satisfy the requirements of RCW 34.05.562. Neither APCIA nor NAMIC sought permission to supplement the records prior to filing the disputed declarations. Further, the disputed declarations do not satisfy the requirements of RCW 34.05.562. Neither response demonstrates that the justification of an emergency rule is not required to be determined on the agency record, including whether the Commissioner's stated basis for adoption of the emergency rule is valid and supported.

For these reasons, the Office of the Insurance Commissioner's Motion To Strike Declarations Not In The Agency Record should be granted and the portions of APCIA's motion for summary judgment dedicated to expanding the agency record and the motions to expand the record filed by NAMIC should be stricken.

II. ARGUMENT

NAMIC and APCIA do not contest that generally in a rule challenge under the APA, the Court's review of agency action is limited to the agency record. RCW 34.05.558. Only under the limited exceptions found in RCW 34.05.562 is the court permitted to expand the agency record. New evidence is only permitted on judicial review when:

> (1) it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> . . .
> (b) Unlawfulness of procedure or of decision-making process; or
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1).

None of these requirements of RCW 34.05.562 apply in this case.

A. The Watkins Declaration Fails To Address The Lawfulness Of The Agency Procedure Or Decision-Making Process

The Watkins Declaration speaks to the wisdom of the OIC's course of action, not to the validity of the stated basis for the emergency rule. The basis for the emergency rule cited by the OIC is that as a result of state and federal measures that limit the reporting of certain negative credit history events, substantially similarly situated individuals, individuals with similar negative credit history events (such as account payment delinquencies), are being treated dissimilarly in violation of RCW 48.19.020. It is the *current* treatment of similarly situated individuals that justified the OIC's decision to act on an emergency rule basis, rather than to wait for notice and comment rule making.

The exclusive subject of the Watkins Declaration-the wisdom of the OIC's method of addressing the emergency, not the existence of the emergency. NAMIC itself states that the Watkins declaration is necessary to address whether "evidence of the types of facts and analyses that would be necessary for OIC to reach a conclusion that use of CBIS as an insurance rating factor is no longer predictive of insurance losses and is therefore "unfairly discriminatory." Petitioner Intervenor National Association of Mutual Insurance Companies' Opposition to the Office of the Insurance Commissioner's Motion To Strike Declarations Not In the Agency Record ("NAMIC Response") at 5-6. The stated purpose of the Watkins Declaration is to determine "What would need to happen to evaluate whether/how the pandemic caused credit-based insurance scoring (CBIS) models to be unreliable and inaccurate for purposes of ratemaking?" Watkins Dec. at 4. Despite NAMIC's claims, nothing in the Watkins Declaration "demonstrates—that there is no evidence supporting OIC's assertion that under the CARES Act and state law, similarly situated persons are being treated differently." *See* NAMIC Response at 8. The Watkins Declaration does not address this issue at all. At most, the Watkins acknowledges that at least 2.4% of accounts reviewed in a study that is part of the agency record,

are receiving some form of accommodation. Watkins Dec. at 15. But the Watkins Declaration contains no mention of the number of individuals with similar negative credit histories that are not receiving accommodation because their negative credit experience occurred before the CARES Act, or allege that there are no people whose negative credit history is identical those whose negative credit events are not currently being reported. The Watkins Declaration does not address or challenge the commissioner's actual stated basis for the need to adopt the rule on an emergency basis. Therefore, it does not speak to the lawfulness of the agency's use of the emergency rule procedure.

Nor does the Watkins Declaration demonstrate that the OIC's decision-making process was arbitrary or capricious. It merely asserts the studies NAMIC believes the OIC should have conducted prior to the adoption of the rule. But neither NAMIC, nor the Watkins Declaration point to any statutory requirement to conduct such studies in an emergency rule context. Nor do they point to a requirement to consider NAMIC's expert's opinion in an emergency rule context. NAMIC will have its opportunity to present its experts opinion of the types of studies the OIC should rely on in the standard rule making process that is required for this emergency rule to remain in place. RCW 34.05.350(2) But the existence of an expert opinion that was not provided to the agency at the time an emergency rule was adopted, cannot demonstrate that an emergency rule was "arbitrary and capricious", where consideration of such expert opinions is not required in the emergency rule context.

B. APCIA's Declarations Concerning The Legislative Process Are Speculative or Irrelevant, And Therefore Not Material To The Adoption Of The Emergency Rule

The courts afford little weight to legislative testimony when determining the legislative intent of a statute. *Wilmot v. Kaiser Aluminum & Chem. Co*., 118 Wn.2d 46, 64, 821 P.2d 18 (1991); *North Coast Air Services, Ltd. v. Grumman Corp*., 111 Wn.2d 315, 326–27, 759 P.2d 405 (1988) (giving "little weight" to remarks before a legislative committee as being too speculative to impart the motivation behind legislation.). If comments before the Legislature

about a proposed statute are unhelpful in determining the motivation behind proposed legislation, they are even less helpful in determining the motivation behind a rule adopted through a completely different branch of government, in a completely separate proceeding. Even so, APCIA asks the Court to accept one legislator's opinion about comments that were *not* made before the Legislature as having some bearing on the validity of the OIC's stated justification for the need for an emergency rule. But Sen. Mullet's declaration does not cite to a single statement by the Commissioner or any member of the OIC stating that no emergency exists. Instead, Sen. Mullet's declaration focuses on the *lack* of any statement throughout an entirely separate and legislative process as evidence of the Commissioner's true intent behind the adoption of an agency emergency rule. Sen. Mullet's opinion of the OIC's true intent is wholly speculative. As such, it is irrelevant in determining whether the OIC's stated basis for the emergency rule is "fabricated."

Further, none of the information submitted by APCIA about the legislative process concerning failed legislation is "material" to OIC's emergency rule. Neither the disputed exhibits to the Anderson Declaration, nor any part of the Mullet Declaration, address the impact of the CARES Act on credit histories, or the records and rationale provided by the OIC in support of the rule. Rather, the Mullet Declaration attempts to smear the OIC as merely retaliating for the failure of the legislation. But Sen. Mullet's opinion of the OIC's true intent is speculative, and not helpful or necessary to determine any disputed issues in this case.

C. The Validity Of The Emergency Rule, And The Agency's Basis For The Rule, Are Required To Be Determined On The The Agency Record

Under the APA, the admission of additional evidence outside of the agency record is extremely limited. Additional evidence is admissible "only if it relates to the validity of the agency action and is needed to decide disputed issues regarding improper agency action, unlawfulness of procedure, or material facts not required to be determined on the agency record." *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 110 Wn. App. 498,

518, 41 P.3d 1212(2002), *aff'd,* 149 Wn. 2d 17, 65 P.3d 319 (2003); RCW 34.05.562. Under RCW 34.05.562(1) and RCW 34.05.570(1)(b), the validity of a rule is determined as of the time the agency took the action adopting the rule. *Washington Indep. Tel. Ass'n*, 148 Wn. 2d at 906. For these reasons, factual disputes under the APA are intended to be determined on the agency record absent extraordinary circumstances. Neither NAMIC nor APCIA dispute that RCW 34.05.350 actually requires that "The agency's finding and a concise statement of the reasons for its finding shall be incorporated in the order for adoption of the emergency rule or amendment filed with the office of the code reviser under RCW 34.05.380 and with the rules review committee." RCW 34.05.350(1). Nor do they dispute that RCW 34.05.370 provides that the agency rule file must include citations to, or the actual sources of, "data, factual information, studies, or reports on which the agency relies in the adoption of the rule." RCW 34.05.370(f).

Even so, APCIA claims that the term "or" in RCW 34.05.562(1)(c), must be interpreted to disconnect the phrase "other proceedings not required to be determined on the agency record" from the rest of the language of RCW 34.05.562(1)(c). First, this is contrary to how the courts have interpreted this statute. The Washington State Supreme Court has summarized RCW 34.05.562(1)(c) as applying both the phrase "material facts" at the beginning of the section, and the phrase "not required to be determined on the agency record" at the end of the section as applying to all three scenarios of "rule making, brief adjudications, or other proceedings." *Washington Indep. Tel. Ass'n*., 148 Wn. 2d at 518. Second, this is contrary to the legislative intent clearly expressed throughout the rest of the APA, particularly in RCW 34.05.530 and RCW 34.05.570, which require that the justification and supporting documentation for an agency rule to be contained in the agency record. APCIA's interpretation of RCW 34.05.562(1)(c) would allow additional evidence whenever there is a disputed issue related to a rule, and would effectively deem rulemaking challenges exempt from the requirements of RCW 34.05.530 and RCW 34.05.570. This would allow for almost unlimited expansion of the record at the Superior Court, in clear conflict with the clear legislative intent in

RCW 34.05.558, and well settled law finding that the expansion of the record should only be permitted in highly limited circumstances. *Samson v. City of Bainbridge Island,* 149 Wn. App. 33, 64-66, 202 P.3d 334 (2009); *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005); *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 110 Wn. App. 498, 518, 41 P.3d 1212 (2002).

APCIA cites to multiple Employment Security Department cases to argue that because "good cause" under the APA is a mixed question of law and fact, the disputed declarations should be admitted. Similarly, APCIA cites to cases on the federal Administrative Procedure Act to support the assertion that questions of "good cause" involve questions of fact. All of these cases miss the point. Any factual question to be resolved is still one to be resolved on the basis of the agency record. As noted by the court in *Mobil Oil Corp*, "[t]he question thus becomes whether, as a matter of fact, FEA's finding of good cause is supported by the *administrative record*." *(*Emphasis added*) Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983). Otherwise, simply alleging that a factual dispute exists would permit a supplementation of the agency record. That is not what is contemplated by RCW 34.05.562.

D. *Cameron v. Murray* Is Inapposite In An Agency Rule Challenge Under The APA

Although APCIA and NAMIC have styled their filings as Motions for Summary Judgement, this matter is a petition for judicial review under RCW 34.05.570. It is governed by different rules that the negligence action at issue in *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009). Both NAMIC and APCIA site *Cameron* to claim that this motion to strike is improper in response to a motion for summary judgment. But unlike summary judgment motions in other contexts, the Court of Appeals has affirmed granting motions to strike in the context of motions for summary judgment to determine the merits of APA actions. *Willman v. Washington Utilities and Transp. Com'n*, 122 Wn. App. 194, 204, 93 P.3d 909 (2004). This is because the APA does not allow the parties to expand the record on review unless the court has approved that expansion. *See* RCW 34.05.562. In fact, unlike the superior court record in a

typical summary judgment decision, the Courts of Appeal will not consider the superior court record unless the Court has allowed the agency record to be expanded under RCW 34.05.562. *Willman*, 122 Wn. App. at 203, ("An appellate court reviewing agency action 'sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency."

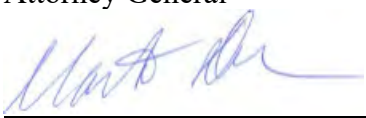
Even in a rule challenge, where no adjudicative process has happened below, the APA still limits the record to be considered to the agency record, unless the Court finds that the requirements of RCW 34.05.562 have been met, and the additional evidence addresses issues related to the lawfulness of the agency process or decision, or material disputed facts. Even then, the expansion of the agency record is a matter of discretion for the Court. Only if the Court determines that additional evidence is *needed* to determine disputed issues is additional evidence appropriate. Where the court has not been asked to make that determination prior to submission of evidence not in the agency record, a motion to strike is an appropriate in an APA matter, and is appropriate here.

III. CONCLUSION

For the forgoing reasons, the OIC respectfully request that the Court strike the declarations of Ms. Watkins, Sen. Mullet, and the identified exhibits of Mr. Anderson's declaration, and the references to these declarations in the pending motions for summary judgment be stricken.

DATED this 25th day of August, 2021.

ROBERT W. FERGUSON
Attorney General



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DECLARATION OF SERVICE

I declare that I sent for service a true and correct copy of this document on all parties or their counsel of record on the date below as follows:

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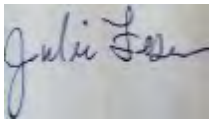
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of August, 2021 at Olympia, Washington.



JULIE FESER
Legal Assistant

☐ EXPEDITE
☒ Hearing is set
Date: October 8, 2021
Time: 1:30 p.m.
Judge/Calendar: Mary Sue Wilson

☐ No hearing is set

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PROFESSIONAL INSURANCE AGENTS OF WASHINGTON, and INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON, and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

NO. 21-2-00542-34

REPLY OF PETITIONERS APCIA, ET AL. IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON THEIR CLAIM FOR DECLARATORY RELIEF, FOR A PERMANENT INJUNCTION AND TO SUPPLEMENT THE RECORD

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I. INTRODUCTION

In their Opposition to Summary Judgment ("Opp."), Respondents[1] fail to differentiate between Petitioners' motion for summary judgment and the separate motion for summary judgment of Petitioner-Intervenor National Association of Mutual Insurance Companies ("NAMIC"). The two motions are far from identical, and much of Respondents' Opposition is, therefore, irrelevant to Petitioners' motion. The inevitable result of Respondents' approach is a confusing presentation that obscures rather than clarifies the issues the Court must decide.

Respondents' Opposition fails to rebut Petitioners' showing in their motion that:

1) Respondents lacked the authority to promulgate the Emergency Rule suspending insurers' use of consumers' credit histories to determine rates, premiums, or eligibility for coverage with respect to all private passenger automobile, renters, and homeowners insurance; and

2) Respondents lacked the good cause required by statute to adopt the Emergency Rule without observing the requirements of notice and opportunity to comment. *See* Petitioners' Motion ("Pet. Mtn.") at 11-21.[2] The Court should grant Petitioners' motion for summary judgment on their claim for declaratory relief and permanently enjoin implementation and enforcement of the Emergency Rule.

II. AUTHORITY AND ARGUMENT

A. Because a regulator may not constitutionally suspend a statute, the Emergency Rule is invalid, and summary judgment should be granted.

Respondents do not dispute that whether the Insurance Commissioner had the authority to adopt the Emergency Rule is a question of law. Pet. Mtn. at 13. But they fail to acknowledge that only the Legislature may constitutionally enact, suspend, and repeal laws. *Diversified Inv. P-ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989). By statute,

[1] Unless otherwise indicated, capitalized terms not defined herein have the same meaning as in Petitioners' motion.

[2] Respondents also fail to demonstrate that the Emergency Rule is not arbitrary and capricious. *See* Pet. Mtn. at 21-22. *See also* Reply of Petitioner-Intervenor NAMIC, which Petitioners adopt by reference.

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"[a]n insurer *may use credit history* to deny personal insurance" in combination with other substantive underwriting factors. RCW 48.18.545(4) (emphasis added); *see also* RCW 48.19.035(2)(a) (authorizing use of credit history to determine personal insurance rates, premiums, or eligibility for coverage, provided that insurance scoring models are filed with the Commissioner). The Emergency Rule states that "[f]or all private passenger automobile coverage, renter's coverage, and homeowner's coverage issued in the state of Washington, insurers *shall not use credit history* to determine personal insurance rates, premiums, or eligibility for coverage." WAC 284-24A-89(3) (emphasis added). The only possible conclusion is that the Emergency Rule suspends, for as long as it remains in effect (currently, over six months and counting), the statutory authorization to use credit history. Under *Diversified*, the Commissioner is constitutionally prohibited from exercising such authority, and the Emergency Rule is, therefore, invalid as a matter of law.

Respondents admit that the Emergency Rule is suspensive in its effect but argue that it suspends only the *conduct* that the statutes authorize, not the statutes themselves. Opp. at 13. This is a distinction without a difference. Were the Court to accept this illusory distinction, the constitutional prohibition against suspending statutes would be emasculated, as regulators could entirely evade the prohibition merely by drafting a regulation that suspends the effect of a statute, or any conduct it authorizes, rather than the statute itself. The implications for regulatory overreach are staggering.

Respondents also suggest that the Emergency Rule is valid because the scope of its prohibition on use of credit history is purportedly narrower than the statutory authorization of such use. Opp. at 13-14. This contention is risible. The Emergency Rule applies to every single one of the hundreds of property and casualty insurers doing business in Washington, to multiple lines of business, and to hundreds of thousands of insurance policies held by millions of

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Washington consumers. There is nothing remotely limited about the scope of the Emergency Rule and certainly nothing that would allow it to pass constitutional muster.

Finally, Respondents recycle the argument that the overall statutory scheme of the Insurance Code gives the Commissioner broad authority to adopt regulations such as the Emergency Rule to ensure compliance with all provisions of the Code. Opp. at 11-14. Whatever force this argument may have to support a less restrictive regulation governing the use of credit history, it cannot justify the unconstitutional Emergency Rule. The Commissioner may have authority to regulate the use of credit history to address the purported concerns identified in the Rule and in this litigation,[3] but that authority simply does not, indeed cannot, include the power to suspend a statute duly passed by the Legislature.[4]

The Emergency Rule is an unconstitutional exercise of a power that belongs solely to the Legislature. The Rule is, therefore, invalid as a matter of law. Petitioners' motion for summary judgment and for entry of a permanent injunction should be granted.[5]

B. Summary judgment is appropriate because the Commissioner lacked good cause to adopt the Emergency Rule.

1. The Court should apply the good cause standard rigorously.

Both Washington's APA and the federal APA require "good cause" to dispense with notice and comment when adopting a regulation. *Compare* RCW 34.05.350 *with* 5 U.S.C. § 553(b)(3)(B). Respondents acknowledge that no Washington decision explicates "good cause" as used in RCW 34.05.350. They also acknowledge that federal precedent interpreting

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[3] As demonstrated in Petitioners' motion (*see* p. 16), putting aside the constitutional issue, the Commissioner's statutory *emergency* authority is quite limited and does not include the power to issue the Emergency Rule. *See* RCW 48.02.060. Respondents continue to insist that this provision applies only to orders that the Commissioner may enter, not rules, but 1) Respondents cite no legal authority to support this contention; and 2) the actual title of the Emergency Rule is "Rule-Making Order." *See* Anderson Dec. Ex. 4.

[4] Respondents contend that the Commissioner's failure to persuade the Legislature to pass a permanent ban on use of credit history does not mean that he lacked the authority to adopt the Emergency Rule. Opp. at 13-14. But Petitioners do not make that argument.

[5] Respondents do not dispute that if summary judgment is granted, entry of a permanent injunction is appropriate.

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similar provisions of the federal APA may serve as persuasive authority in the absence of pertinent Washington case law. Opp. at 16-17.[6] Finally, Respondents recognize that federal decisions explicating good cause hold that it should be narrowly construed and reluctantly countenanced. Opp. at 17. *See also, e.g., California v. Azar*, 911 F.3d 558, 575-76 (9th Cir. 2018). Yet Respondents urge the Court to reject this application of good cause in the closely-related context of the federal APA and instead apply good cause more leniently, as they say is done in the sharply different context of civil discovery. Opp. at 15, 17-19.

Respondents offer two specious arguments to support this contention. First, Respondents assert that because, under the federal APA, a *permanent* rule may be adopted for good cause without notice and comment, the federal good cause standard necessarily is applied stringently, and that under Washington's APA, which permits only emergency rules of limited duration to be adopted for good cause, a more deferential application of the standard is appropriate. Opp. at 17. But Respondents cite no authority stating or suggesting that the rigor with which the federal good cause standard is applied is in any way based on this consideration. To the contrary, the rules at issue in *Azar* were interim in nature, and indeed, were set to expire imminently. *See Azar*, 911 F.3d at 568–69.

Second, Respondents assert that, under the federal APA, notice and comment may be circumvented when the agency for good cause "finds…that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Respondents characterize this language as "very broad," necessitating a stringent application of the good cause requirement. By contrast, Respondents say, the language of Washington's APA is "narrow," limiting application of good cause to circumstances involving "public health, safety, or general welfare," thus justifying a more lenient approach to good cause. Opp. at 17. But in the very next

[6] Indeed, when enacting Washington's APA, the Legislature specifically instructed Washington courts to "interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts." RCW 34.05.001.

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paragraph, Respondents contend that the identical language of the Washington APA is *broader* than the reach of the federal APA because Washington's good cause standard can apply to preserve the "general welfare," while the federal APA, Respondents say, does not. Opp. at 17-18. This inconsistency lays bare the fallacy of Respondents' claimed distinction.

Federal authority rigorously applying the federal APA's good cause requirement is persuasive precedent. Petitioners respectfully submit that this Court should follow it and apply rigorous scrutiny to Respondents' contention that the Commissioner had good cause to dispense with notice-and-comment rulemaking.

2. There is no genuine issue of material fact that good cause did not exist to adopt the Emergency Rule.

To validly adopt the Emergency Rule, the Commissioner had to find, for good cause, "[t]hat immediate adoption . . . of [the Rule was] necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest." RCW 34.05.350(1)(a). Respondents acknowledge that an artificial or fabricated emergency cannot satisfy the good cause requirement. Opp. at 20-21.

Respondents insist that there was an actual emergency. They contend that "[t]he primary thrust of the emergency rule is to target unfair discrimination caused by the use of inaccurate credit histories on current credit rating methodologies[.]" According to Respondents, "[t]his rule was immediately necessary because the use of inaccurate data was resulting in unfair discrimination in three critical property and casualty lines of insurance: auto insurance, homeowners insurance, and renters insurance." In addition, Respondents say, "the Commissioner found that implementing changes to the use of credit history in setting insurance

was critical to accomplish before the end of the current credit history protections."[7] Opp. at 6-7. Petitioners have established the following undisputed facts which demonstrate that this claimed emergency was fabricated:

1. During the entire 8-month period that Respondents worked to convince the Legislature to pass a permanent ban on use of credit history, they did not claim that an emergency existed. *See* Mullet Dec. ¶¶ 4-5, 7, 10, 15.

2. During the entire 8-month period that Respondents worked to convince the Legislature to pass a permanent ban on use of credit history, they made no mention of the purported actuarial unfair discrimination they subsequently claimed justified the Emergency Rule. *See* Mullet Dec. ¶¶ 7, 10.

3. When the Emergency Rule was adopted, the federal and state actions that Respondents claim caused the emergency had been in effect for approximately one year. *See* Pet. Mtn. at 19.[8]

4. The Emergency Rule was promulgated less than two weeks after Respondents' final failure to convince the Legislature to pass a permanent ban. *See* Pet. Mtn. at 5.

5. At the time the Emergency Rule was adopted, the earliest the credit history protections upon which Respondents relied to adopt the Rule could have ended was four months after the date the Rule was adopted, and whenever those protections would have ended, Respondents would have had at least four months' notice before the expiration would have taken effect. *See* Pet. Mtn. at 20 (discussing the CARES Act).

Respondents do not, because they cannot, dispute any of these facts.[9] Instead, citing no supporting evidence, Respondents assert that they were very busy addressing myriad difficult issues during the early months of the pandemic and argue that they should not be penalized if it took time to evaluate and address the claimed emergency that necessitated the Emergency

[7] Respondents have consistently failed to be clear about which pandemic relief end-dates they believe justified immediate adoption of the Emergency Rule. Respondents finally have acknowledged that only the expiration date of the credit history protections is relevant to that issue. Opp. at 7. These protections are found solely in the CARES Act, and it is only their end-date that is relevant.

[8] Respondents mischaracterize the significance of this undisputed fact as it relates to Petitioners' motion. Opp. at 18. Petitioners do not contend that the one-year delay in adopting the Emergency Rule, by itself, entirely precludes the possibility of a *bona fide* emergency. But even Respondents acknowledge that the lapse of time is relevant to whether an actual emergency existed. *Id.* It is Petitioners' position that this undisputed fact, coupled with the others cited herein, demonstrate that there was no actual emergency.

[9] Respondents attempt to smear Senator Mullet and take issue with certain aspects of his declaration but no aspect that is germane to Petitioners' motion for summary judgment.

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Rule. Opp. at 7-8, 18-20. But the evidence is undisputed that Respondents spent eight months, starting in June 2020, trying to pass a permanent ban an insurers' use of credit history and were able to adopt the Emergency Rule less than two weeks after their legislative efforts failed. Pet. Mtn. at 5-9.[10]

The only reasonable inference to draw from the uncontested facts set forth above is that the purported emergency justifying the Emergency Rule was fabricated and merely a pretext for adopting the Rule after Respondents' legislative efforts had failed. Any contrary inference from these facts is not reasonable and therefore cannot defeat summary judgment. *See Marshall v. AC & S Inc*., 56 Wn. App 181, 184, 782 P.2d 1107 (1989). There is simply no supportable alternative explanation for the Emergency Rule, or its timing. Petitioners' motion for summary judgment and for entry of a permanent injunction should be granted.

3. The Emergency Rule is invalid and summary judgment should be granted even under Respondents' formulation of good cause.

If this Court is reluctant to conclude, despite the formidable evidence marshalled by Petitioners, that the Commissioner conjured an emergency as a pretext to adopt the Emergency Rule, still, even under Respondents' formulation of the good cause standard, there was no good cause to adopt the Rule and summary judgment should be granted.

Respondents urge the Court to adopt the good cause standard applied in the civil discovery context. Opp. at 15. To establish good cause for a protective order under the principal decision Respondents cite, the movant must show that specific prejudice or harm will result if an order is not entered; unsubstantiated allegations of harm are insufficient. *McCallum v. Allstate Prop. & Cas. Ins. Co*., 149 Wn. App. 412, 422, 204 P.3d 944 (2009). Applying that standard here, Respondents must provide evidence substantiating that specific harm would have

[10] Respondents also contend that, even if the Legislature had passed a permanent ban on credit history, the Emergency Rule still may have been necessary. Opp. at 23, 25. The relevance of this contention to any summary judgment issue is unclear. Moreover, Respondents' assertion is nothing more than rank speculation, which cannot defeat summary judgment. *See Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301, 449 P.3d 640 (2019).

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resulted had the Emergency Rule not been adopted. Moreover, because Respondents contend that the Emergency Rule was necessary to protect the "general welfare" (Opp. at 15-16), the evidence of harm must be sufficient to demonstrate that the general welfare was implicated by the supposed emergency and that immediate adoption of the Rule was necessary to protect the general welfare.

The purported evidence that Respondents offer to demonstrate that use of credit history resulted in actuarial unfair discrimination consists of portions of the Declaration of Eric Slavich in Opposition to Motion for Summary Judgment ("Slavich Dec.") and two pieces in the administrative record prepared by the Consumer Federation of America ("CFA"). Opp. at 6. The most relevant portion of the Slavich Declaration, found at ¶ 9, states a concern in purely hypothetical terms:

> The use of credit-based insurance scoring factors *could result* in unfairly discriminatory premiums if the credit information used by the insurer is inaccurate or incomplete. For example, consider two consumers who each have failed to make a payment on a certain type of loan. *Suppose* one of the two consumers was granted an accommodation by the consumer's lender, such as that permitted under the CARES Act. The account for the consumer with the accommodation under the CARES Act is reported as current, while the other consumer was not granted such an accommodation and therefore has a credit report with a delinquency. *Assuming the two consumers are otherwise substantially similar*, it would be unfairly discriminatory to charge the two consumers different premiums.

(Emphasis added.) This unsupported hypothetical cannot substitute for evidence. Respondents offer no evidence that this hypothetical situation ever had actually occurred when the Emergency Rule was adopted, let alone any evidence that it had occurred to such an extent, or had such an effect, that the general welfare was implicated.[11] As such, it is an unsubstantiated allegation of harm.

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[11] Respondents are correct that "general welfare" as used in the APA is not defined. It is self-evident, however, that, to be necessary to preserve the general welfare, an emergency rule must address an emergency that is widespread. The dictionary definition of "general" supports this. *See* Merriam-Webster Online Dictionary

(Footnote continued next page)

Respondents try to excuse their lack of evidence by contending that the unfair discrimination which they say exists results by "operation of law" and as the logical result of the credit protections of the CARES Act. Opp. at 22. But this is simply more speculation based on Respondents' unsubstantiated views of the impact of the CARES Act on credit reporting and credit ratings and the effect and extent of that impact on insurers' credit scoring models.

As for the two CFA pieces, the first addresses actuarial unfair discrimination purportedly resulting from insurers' use of credit history during the pandemic, but of a kind exactly opposite to the type postulated by Respondents. Specifically, the CFA piece posits that unfair discrimination will result from *declines* in consumers' credit ratings, caused by the pandemic, that will have no relationship to insurers' actual risk exposure. AR at 652-53. Respondents, on the other hand, speculate that actuarial unfair discrimination has resulted from the cited credit history protections because those protections have artificially *prevented* credit scores from declining. Opp. at 5-6, 16, 22; Slavich Dec. ¶ 9. Thus, the piece does not support the existence of the particular form of unfair discrimination that Respondents claim justifies the Emergency Rule.

The other CFA piece addresses an issue entirely unrelated to insurers' use of credit histories—whether auto insurers should be required to refund premiums to their insureds because of their lower risk exposure resulting from the effect of pandemic-related restrictions on driving patterns. AR at 706–15. This piece offers no support for the existence of the hypothesized actuarial unfair discrimination at issue here.

Finally, even if the Court somehow concludes that Respondents have demonstrated to an extent sufficient to withstand summary judgment the widespread existence of their postulated form of actuarial unfair discrimination, still, there was no good cause to adopt the

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(defining "general" as "involving, applicable to, or affecting the whole"). Respondents have utterly failed to meet this standard.

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Emergency Rule. Respondents assert that the timing of the Rule was necessary to ensure that it was in place prior to expiration of the CARES Act credit history protections. Opp. at 7. But, as Petitioners have shown, under no circumstances would Respondents have had less than *four months*' notice prior to expiration. *See* Pet. Mtn. at 20. When the Commissioner adopted the Emergency Rule, then, there was no need to promulgate the rule without providing notice and an opportunity for public comment. Summary judgment is appropriate.

C. The Court should permit supplementation of the record.

Respondents argue that the Court may supplement the record to consider the Mullet Declaration only if it is needed to determine disputed material facts, in which case summary judgment must be denied. Opp. at 11, 24-25. Respondents are wrong. Senator Mullet's declaration is necessary to establish material facts supporting summary judgment that are shown to be undisputed *only by virtue of the declaration itself* and Respondents' failure to offer contrary evidence. This manner of use falls well within RCW 34.05.562.

III. CONCLUSION

For the foregoing reasons, and those discussed in their motion, Petitioners' motion for summary judgment on their claim for declaratory relief, for entry of a permanent injunction, and to supplement the record should be granted.

DATED this 1st day of October, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via electronic service to the following:

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DATED this 1st day of October, 2021.

/s/ Patti Saiden
Patti Saiden, Legal Assistant

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Exhibit E

☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: September 3, 2021
Time: 9:00 a.m.
Judge/Calendar:
The Honorable Mary Sue Wilson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PROFESSIONAL INSURANCE AGENTS OF WASHINGTON, and INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON, and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, Petitioners, vs. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON, Respondents.	NO. 21-2-00542-34 PETITIONER INTERVENOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES' OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

At stake in this case is whether an administrative agency can adopt an "emergency" regulation *without* notice-and-comment, *without* citing any record evidence to support its position, and *without* any explanation for its failure to respond to the claimed "emergency" for almost a year. The answer is no.

For decades, insurers in Washington have considered credit information as one factor when determining a consumer's insurance rate. This practice is called credit-based insurance scoring, or CBIS. The Office of Insurance Commissioner (OIC) has repeatedly attempted to persuade the Legislature to prohibit CBIS, and each time it has failed—most recently just months ago. OIC nevertheless adopted emergency regulations banning CBIS. According to OIC, because Congress and the Governor have adopted laws that prohibit or prevent the reporting of certain adverse credit information during the pandemic, CBIS is no longer accurate, which leads to "unfair discrimination" between consumers. OIC also claims, confusingly, that once those COVID-related protections are lifted, CBIS will *also* lead to "unfair discrimination" because, then, there will be no prohibition on reporting that same information.

This Court should grant summary judgment and declare OIC's emergency regulations unlawful. OIC failed to comply with the most basic requirements of administrative law. OIC cannot proceed through emergency rulemaking when it had a *year* to seek comments and issue a reasoned decision, and it has failed to cite any "emergent and persuasive" reasons for its emergency rulemaking. *Mauzy v. Gibbs*, 44 Wn. App. 625, 631, 723 P.2d 458 (1986). OIC's actions are also arbitrary and capricious: It does not cite any record evidence to support its conclusions, which are internally contradictory. The emergency regulations are plainly contrary to statutory text, which states that insurers *may* consider certain kinds of credit information, and they violate basic principles of separation of powers: The Legislature has determined that

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insurers may use CBIS, and OIC lacks authority to override that decision.

National Association of Mutual Insurance Companies (NAMIC) brings this motion for summary judgment. The Administrative Procedure Act (APA) exists for a reason: to ensure executive branch transparency and accountability. OIC made no attempt to meet its obligations to the public. The emergency regulations are invalid.

II. STATEMENT OF FACTS

A. State And Federal Oversight Of Consumer Reports

A consumer report includes information about a consumer's creditworthiness, which "is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . credit or insurance to be used primarily for personal, family, or household purposes," among other reasons. 15 U.S.C. § 1681a(d)(1).

Congress restricts the information that can be included in consumer reports. For example, Congress prohibits information about bankruptcies more than 10 years old, civil suits and arrests more than 7 years old, paid tax liens more than 7 years old, accounts placed for collection more than 7 years ago, and certain other adverse information. *Id.* § 1681c(a). Congress changes these requirements from time to time. In 2018, for instance, Congress prohibited information about veterans' medical debt that is less than one year old, veterans' medical debt that is fully paid or settled (even if previously delinquent), and defaulted student loans, if the consumer enters a loan rehabilitation program. *Id.* §§ 1681c(a)(7)-(8); 1681s-2(a)(1)(E). State law also prohibits reporting certain information, including arrest records and other adverse information more than 7 years old. RCW 19.182.040(1). The FTC oversees consumer reporting agencies to prevent unfair practices. *See* FTC, *Consumer Reports: What Information Furnishers Need To Know* (Jan. 2021), *available at* https://bit.ly/2Sk1V7G.

In response to the COVID-19 pandemic, Congress passed the CARES Act in March

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2020. The CARES Act requires loan furnishers to report loans as current if the consumer meets the terms of a loan accommodation. *See* 15 U.S.C. § 1681s-2(a)(1)(F). That provision expires 120 days after the President declares an end to the COVID-19 national emergency. *See id.* § 1681s-2(a)(1)(F)(i)(II)(bb). The CARES Act also places a moratorium on mortgage foreclosures and allows forbearance of certain mortgage payments. *Id.* § 9056(b). Those protections have been repeatedly extended and may be extended through the end of the year.[1] In addition, the CARES Act suspends payments for certain federal student loans through September 30, 2020, *see* Pub. L. No. 116-136, § 3513, which the President extended to September 30, 2021. The Governor also enacted pandemic relief measures in early 2020, placing a moratorium on garnishments and evictions. *See* Emergency Proclamations 20-49 and 20-19.

OIC enacted several emergency orders and took other emergency action in early 2020 to address the pandemic—but it *did not* issue regulations regarding CBIS at that time. *See* OIC, *Technical assistance advisories and emergency orders* (last visited June 14, 2021), available *at* https://bit.ly/3g8fTD2.

B. Credit-Based Insurance Scoring (CBIS)

Insurance companies charge different insurance rates to different consumers, based on the insurance risk posed by the consumer. By statute, insurance rates may not be "excessive," "inadequate," or "unfairly discriminatory." RCW 48.19.020. To determine whether insurance rates are "excessive" or "inadequate," OIC considers the overall premium the insurer has calculated to cover projected costs and expenses plus a reasonable profit for the entire state for the period of the rate (e.g., one year). *See* Declaration of Nancy Watkins (Watkins Dec.) ¶¶ 20-

[1] *See* News Release, Fed. Hous. Fin. Agency, *FHFA Extends COVID-19 Forbearance Period and Foreclosure and REO Eviction Moratoriums* (Feb. 25, 2021), https://bit.ly/2SuxhbZ; Aly J. Yale, The Mortgage Reports, *No foreclosures until 2022? CFPB seeks to extend foreclosure moratorium* (Apr. 15, 2021), https://bit.ly/3xgnk0m.

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21.[2] Dividing that overall premium by number of risks produces a "base rate," which is the rate the insurer would charge if all policyholders paid the same premium. Because policyholders present different risks, however, insurers do not charge all policyholders the same premium; they distribute the total premium over all policies according to risk. This is accomplished through a "rating plan" with "rating factors" that determine what each insured pays based on relative risk. Each rating factor has "classifications" corresponding to the level of risk. Classifications do not attempt to project losses for each individual; they instead group insureds together based on risk classifications that have been studied and found to be predictive of insurance losses for those falling within the group defined by the classification criteria. *See id.* ¶¶ 21-28. It is this process—and regulatory review of the rating plan—that ensures that rates *fairly differentiate* based on risk, and are not, therefore, "unfairly discriminatory." *Id.*; *see Spanish Speaking Citizens' Found., Inc. v. Low*, 85 Cal. App. 4th 1179, 1227, 103 Cal. Rptr. 2d 75 (2000).

To give a simple example, a private passenger auto insurance company may use Driver Safety Record as a rating factor. The insurer would develop separate risk classifications for that factor, based on available records of accidents and traffic citations. *See* Watkins Dec. ¶¶ 24-25.[3] Insureds within a classification indicating higher risk (e.g., multiple citations or accidents) would be in a higher classification and would end up with higher rates when that factor is applied to the base rate. Whether a group of insureds present higher or lower risk is based on actual loss data, not assumptions. In this example, insurers do not just assume that drivers with multiple traffic citations or accidents are riskier to insure; they correlate the classification criteria to loss data. Rating plans are applied to determine the final rates charged to different insureds using multiple

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[2] NAMIC is filing a concurrent motion to supplement the record with this declaration under RCW 34.05.562(1)(b).

[3] Not all speeding or unsafe drivers are stopped, and of those stopped not all are cited. And not all accidents are reported. Despite these inherent imperfections in the classification scheme, the Driver Safety Record factor is still predictive of insurance losses, and it is used for that reason. *See* Watkins Dec. ¶¶ 24-25.

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rating factors. For private passenger auto, these factors might include the driver's safety record, years of driving experience, annual miles driven, geographical area, and a CBIS risk factor. The impact of all of these factors is considered in the final premium. While there are different actuarial methodologies that can be used for this purpose, OIC regulations require insurers to use a "multivariate analysis," which is a statistical technique for simultaneously considering multiple factors, if using CBIS as a rating factor. *See* WAC 284-24A-045, 284-24A-050; Watkins Dec. ¶ 47. The final premium for each policy reflects the appropriate rate based on the policy's risk classification as to every factor. Rates are considered to fairly differentiate, and not to be unfairly discriminatory, when this analysis is applied. *See* Watkins Dec. ¶ 26; WAC 284-24A-045 (stating that insurer can show its rating plan is not unfairly discriminatory by using a multivariate analysis).

CBIS models are used in this analysis because they have a strong correlation to risk of loss. *See* Watkins Dec. ¶ 29. States have considered the policy implications of using CBIS, and an overwhelming majority have enabled or allowed the use of CBIS. *See id.* ¶ 30. Washington chose to allow CBIS, with specific statutory limits on which credit records can be considered. *See* RCW 48.19.035, 48.18.545. The Legislature delegated to OIC the authority to adopt regulations *to implement* these statutes, *see* RCW 48.19.035(5), which OIC did, contemporaneously with enactment of the statutes, *see* WAC Chapter 284-24A.

C. OIC Opposition To CBIS And Adoption Of The Emergency Regulations

Insurance Commissioner Mike Kreidler (Commissioner) has sought to end CBIS for the past 20 years. In 2002, he requested House Bill 2544, which would have banned using CBIS as a basis for denying, cancelling, or refusing to renew personal insurance policies. HB 2544, 2002 Reg. Sess. The Legislature rejected that bill and passed HB 2544, enacting RCW 48.18.545 and RCW 48.19.035. Laws of 2002, ch. 360, §§ 1-4. The latter provision states that insurers "may" consider certain types of credit information when determining insurance rates. *Id.* § 2(2). In

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2010, the Commissioner requested Senate Bill 6252, which would have banned the use of credit history for insurance rating. *See* SB 6252, 2010 Reg. Sess. That bill failed, too. In 2021, the Commissioner requested Senate Bill 5010, which would have prohibited the use of CBIS for rating personal insurance as of 2023. SB 5010, 2021 Reg. Sess. That bill has not passed.

On March 22, 2021—less than two weeks after Senate Bill 5010 failed to advance and just days short of a year after the CARES Act passed—the Commissioner issued regulations WAC 284-24A-088 and 284-24A-089 without notice-and-comment through emergency rulemaking. Those regulations have two components, with different justifications. First, the regulations ban CBIS as of June 20, 2021, for automobile, renter's, and homeowners insurance. WAC 284-24A-089(7). The Commissioner seeks to justify this requirement by stating that "[t]he result of the CARES Act is that all credit bureaus are collecting a credit history that is objectively inaccurate for some consumers," and that "[t]his disruption has caused credit-based insurance scoring models to be unreliable and therefore inaccurate," which "makes the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020." Declaration of Joseph D. Hampton in Support of NAMIC's Motion for Summary Judgment (Hampton Dec.) Ex. 1 at 2. Second, the regulations would ultimately ban CBIS for three years after the President declares an end to the COVID-19 national emergency, or the Governor declares an end to the state emergency, whichever is later. WAC 284-24A-089(8). The Commissioner seeks to justify this requirement by stating that "[w]hen the CARES Act fully expires, a large volume of negative credit corrections will flood consumer credit histories," and "[w]ithout data to demonstrate that the predictive ability of credit scoring models based on pre-pandemic credit and claims histories is unchanged, the predictive ability of current credit scoring models cannot be assumed," which "will make the use of currently filed credit based insurance scoring models unfairly discriminatory." WAC 284-24A-088(9).

The Commissioner did not cite any data or record evidence to support those conclusions.

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Nor did the Commissioner explain his delay in enacting these "emergency" regulations roughly a year after the CARES Act and the Governor's orders. The Commissioner stated that because it "is impossible to know precisely when the state and federal states of emergency will end," and "[i]nsurance companies must have an alternative to the currently unreliable credit scoring models they have in place before the protections of the CARES Act end," "it is necessary to immediately implement changes to the use of credit scoring." WAC 284-24A-088(10).

The American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents and Brokers of Washington filed suit seeking an injunction and declaratory relief. This Court denied a motion for preliminary injunctive relief. This Court granted the stipulated petition of National Association of Mutual Insurance Companies (NAMIC) to intervene, and NAMIC now moves for summary judgment.

III. ISSUE PRESENTED

Whether emergency regulations WAC 284-24A-088 and WAC 284-24A-089 violate administrative procedures, are arbitrary and capricious, exceed OIC's statutory authority, and are contrary to constitutional separation of powers.

IV. AUTHORITY AND ARGUMENT

Under CR 56(c), summary judgment should be granted if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hartley v. State*, 103 Wn. 2d 768, 774, 698 P.2d 77 (1985) (internal quotation marks omitted). A regulation is invalid as a matter of law if it "violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious." *Wash. State Hosp. Ass'n v. Wash. State Dep't of Health*, 183 Wn. 2d 590, 595, 353 P.3d 1285 (2015) (internal quotation marks omitted). Here, each of those is true, and the Court should declare the regulations void.

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See Mahoney v. Shinpoch, 107 Wn. 2d 679, 689, 732 P.2d 510 (1987) (affirming summary judgment against state agency for failure to comply with the APA).

A. The Emergency Regulations Violate Statutory Rulemaking Procedures.

The APA "sets forth the procedures by which [state] agencies are accountable to the public and their actions subject to review by the courts." *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (internal quotation marks omitted). "Procedural requirements" can "often seem" like a "useless formality." *Id.* at 1909 (internal quotation marks omitted). But those requirements "serve[ ] important values of administrative law," including promoting "agency accountability" by "ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority." *Id.* (internal quotation marks omitted).

The Washington Legislature enacted those principles in RCW 34.05.350, which permits agencies to adopt emergency rules—and thus bypass the notice-and-comment procedure that promotes agency accountability—*only* if the agency "for good cause finds" that "immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon the adoption of a permanent rule would be contrary to the public interest." RCW 34.05.350(1)(a). A regulation adopted on an emergency basis that does not meet those requirements is "invalid." *Mauzy*, 44 Wn. App. at 632. When interpreting Washington's APA, the court looks to both state and federal cases for guidance. *See* RCW 34.05.001 ("the courts should interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions"); *Muckleshoot Indian Tribe v. Wash. Dep't of Ecology*, 112 Wn. App. 712, 721, 50 P.3d 668 (2002). The agency is not entitled to deference with respect to whether it has "good cause." *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).

1. OIC Cannot Show "Good Cause" Where It Waited Months To Act.

If an agency has sufficient time to address an "emergency" through notice-and-comment

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rulemaking—but chooses not to do so—it cannot show "good cause." *See United States v. Johnson*, 632 F.3d 912, 929 (5th Cir. 2011). As the Fifth Circuit explained in *Johnson*, an agency cannot show "good cause" where it fails to act "promptly." *Id.* There, the agency did not publish " 'emergency' regulations" for "seven months" after new legislation, giving the agency enough time to complete "[f]ull notice-and-comment procedures." *Id.* The court held that given the delay, the agency could not establish "good cause," emphasizing that "the good cause exception should not be used to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them." *Id.* (internal quotation marks omitted).

The same is true here: OIC waited almost exactly a year after the CARES Act and the Governor's orders. That is longer than the seven months in *Johnson*, which the court held was too long to meet the "good cause" requirement. OIC cannot circumvent the requirements of the APA simply because it finds them inconvenient; after waiting nearly a year to act, it was required to proceed through notice-and-comment rulemaking. Indeed, OIC promptly issued many other orders in response to the pandemic, yet it did not act promptly on this issue.

2. OIC Has Not Established "Truly Emergent And Persuasive Reasons" To Forgo Notice-And-Comment Rulemaking.

An agency must provide "truly emergent and persuasive" reasons for forgoing notice-and-comment rulemaking, and OIC has not done that here. *Mauzy*, 44 Wn. App. at 631. As a member of the Washington Bar Association Task Force that proposed the relevant provision of the APA explained, "[b]ecause of the importance of the notice and comment process, the [emergency rulemaking] provision ***should be construed strictly against the agency***. Washington courts have carefully scrutinized agency findings of emergency in the past and, given the rule of construction stated in 34.05.001 of the Washington Act, it is expected that this attitude will continue." William R. Andersen, The 1988 Washington Administrative Procedure Act—an Introduction, 64 Wash. L. Rev. 781, 796 (1989) (footnotes omitted and emphasis added). The

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federal courts agree that the "good cause" exception to notice-and-comment rulemaking should be "narrowly construed" because it "is antithetical to the structure and purpose of" administrative rulemaking "for an agency to implement a rule first, and then seek comment later." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (internal quotation marks omitted); *see Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) (" 'good cause' exception is to be 'narrowly construed and only reluctantly countenanced' " (citation omitted)).

OIC has not met that high hurdle. The decision by Congress and the Governor to adopt laws that impact credit reporting is not an "emergency." Both state and federal authorities frequently change credit reporting requirements, and OIC has never declared an "emergency" in the past. For example, in 2018, Congress prohibited reporting certain information about veterans' medical debt and student loan debt. *See* 15 U.S.C. § 1681c(a)(7)-(8), Pub. L. No. 115-174, § 302, 132 Stat. 1296, 1333; 15 U.S.C. § 1681s-2(a)(1)(E), Pub. L. No. 115-174, § 602, 132 Stat. 1296, 1366. OIC did not declare an "emergency" then, and it still has not done so. Nor did OIC declare an "emergency" after the CARES Act was passed. Instead, it waited a *year* to ban CBIS—and even then, only after it failed to enact its preferred policy through the legislative process. The fact that credit reporting laws frequently change, but OIC has never declared an "emergency" in the past, significantly undercuts its claimed emergency here.

And there is no emergency: At most, as a result of the CARES Act and the Governor's orders, a small number of consumers may have *better* credit histories and thus may qualify for *better* insurance rates.[4] That is not an "emergency." Anything but: OIC describes the CARES Act and similar state laws as "critical consumer protections." Hampton Dec. Ex. 1 at 2. That is not a justification for banning CBIS on an emergency basis while those laws remain in place.

[4] A better credit history does not necessarily correlate with a better insurance rate, given the many factors that go into insurance rating, and the fact that insurers consider only certain types of credit history.

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OIC has similarly not demonstrated that a "crisis situation" exists with respect to the repeal of the CARES Act and related state laws at some point in the future—which would reflect a return to the *status quo prior to the pandemic*. Indeed, when Congress, the President, and the Governor lift pandemic-related laws, it will reflect their determination that it is in the "general welfare" to return to the pre-pandemic regime. Returning to the status quo after the pandemic is over is not an "emergency." Further undermining its claimed "emergency," the Commissioner asked the Legislature in SB 5010 to ban CBIS ***as of 2023***; if the Commissioner truly thought there was an emergency, it would have asked the Legislature to ban CBIS immediately.

Equally important, the emergency regulations are not reacting to a *current* emergency. They are reacting to what OIC anticipates will be an "emergency" *in the future*. Permitting an agency to adopt an emergency regulation without even knowing if it will be necessary violates basic principles of administrative rulemaking and leads to rushed and ill-informed decisionmaking. OIC claims that it needs to act now because it does not know when the "floodgates" might open on credit information, but several provisions of the CARES Act expire 120 days after the President's declaration of a national emergency ends. *See* 15 U.S.C. § 1681s-2(a)(1)(F)(i)(II)(bb). That leaves OIC four months to act, in the unlikely event that the President declared an end to the national emergency without any warning. Here, OIC required insurers to comply with its emergency regulations in just 90 days, demonstrating that OIC has ample time to act *after* the President declares an end to the national emergency. Other provisions of the CARES Act have explicit deadlines, giving OIC an opportunity to address their expiration, if Congress or the President fails to renew them. *See supra* p. 3. OIC did not claim that it must immediately address the Governor's repeal of orders prohibiting garnishments and evictions; nor would such a claim be credible. State law does not permit immediate evictions or garnishments without legal proceedings, so the repeal of the Governor's orders would not immediately impact consumer credit—even in the unlikely event that the Governor repealed those orders without

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warning. There is simply no reason, much less a "truly emergent and compelling reason," to permit OIC to proceed without notice-and-comment under the circumstances here.

NAMIC urges the Court to consider the broader context of these emergency regulations. The Commissioner has asked the Legislature multiple times to repeal the statute permitting CBIS and failed every time. Indeed, he failed just a few months ago, when the Legislature had the opportunity to consider whether CBIS was appropriate *in light of the pandemic*. If there were a true "emergency," the Legislature has had more than a year to act. *See Sherman v. Kissinger*, 146 Wn. App. 855, 860 n.1, 195 P.3d 539 (2008) (taking into account that the "legislature considered, but did not adopt, a bill"); *Sim v. Wash. State Parks & Recreation Comm'n*, 94 Wn. 2d 552, 555, 617 P.2d 1028 (1980) (refusing to extend agency's authority where it is "often requested of the legislature, but as yet ungranted"); *see also State v. Wilbur*, 110 Wn. 2d 16, 23, 749 P.2d 1295 (1988). After failing in the Legislature, OIC did not initiate notice-and-comment rulemaking. It instead acted by emergency edict, without any meaningful administrative record or evidence to support its position or claimed emergency. It is clear that OIC's goal is to end the use of CBIS, and it is using the pandemic as an excuse to achieve that policy end without complying with ordinary requirements for administrative rulemaking.

It is not "in the public interest" to "suspend notice and comment" in these circumstances. *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018). Notice-and-comment serves "the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster[s] reasoned decisionmaking." *Id.* Those "premises apply with full force to this case." *Id.* "This is not a situation of acute health or safety risk requiring immediate administrative action." *Id.* Allowing insurance rates to *remain the same* for a few months while the agency conducts notice-and-comment rulemaking is hardly an emergency.

3. OIC Failed To Make Findings Of Fact On Its Claimed Emergency.

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Even if all of that were not a problem, to proceed by emergency rulemaking, an agency must make "finding of facts" to support its claimed emergency that "provide an adequate basis for judicial review." *Mauzy*, 44 Wn. App. at 631. An agency's "sound declaration of policy" that does "not reflect a crisis situation" is not sufficient. *Id.* (internal quotation marks omitted).

The emergency regulations here plainly do not meet that standard. OIC did not make *any* findings of fact that there is an emergency. OIC instead "finds" that the credit reporting process has been disrupted, WAC 284-24A-088(7), and that this disruption "results in premiums that are excessive, inadequate, or unfairly discriminatory," WAC 284-24A-089(2). Even if those "findings" could be characterized as "findings of fact," they reflect OIC's views that CBIS should no longer be used; they are not findings of fact that there is "a crisis situation" justifying the resort to emergency procedures.

Even if OIC had made findings of fact that there is an emergency, however, OIC does not cite *any evidence at all* to support its claimed emergency—preventing this Court from reviewing the basis for OIC's conclusions and rendering the regulations unlawful. OIC does not cite studies, for example, showing that CBIS currently fails to distinguish between consumers with substantially different insuring risks. Nor does it cite studies that once the CARES Act is repealed—and consumer reports return to the status quo—that CBIS will fail to distinguish between consumers with substantially different insurance risks. To the contrary, OIC *admits* that any impact "cannot be assumed," Hampton Dec. Ex. 1 at 2, while disregarding its burden to conduct factfinding rather than make assumptions. Emergency rulemaking is highly disfavored; agencies cannot *assume* an emergency without providing any basis for this Court to review that determination. Because the emergency regulations fail to comply with fundamental procedural requirements, the Court can—and should—invalidate them on that basis alone.

B. The Emergency Regulations Are Arbitrary And Capricious.

"[A]gency action is arbitrary and capricious if it is willful and unreasoning and taken

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without regard to the attending facts or circumstances." *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn. 2d 887, 904, 64 P.3d 606 (2003). The "validity of a rule is determined as of the time the agency took the action adopting the rule." *Id.* at 906. When evaluating agency action, the "reviewing court must consider the relevant portions of the rule-making file and the agency's explanations for adopting the rule," *id.*, to determine whether the agency's decision is "supported by evidence in the record," *Puget Sound Harvesters Ass'n v. Wash. State Dep't of Fish & Wildlife*, 182 Wn. App. 857, 875, 332 P.3d 1046 (2014). Agency action is "arbitrary and capricious where [an] agency's findings [are] too conclusory to show consideration of the facts and circumstances." *Probst v. State Dep't of Retirement Sys.*, 167 Wn. App. 180, 192, 271 P.3d 966 (2012) (citation omitted). Applying that standard here, OIC's actions are arbitrary and capricious: OIC cites no evidence to support its conclusions, which are internally contradictory and fail to consider important aspects of the problem.

1. OIC's Findings Are Conclusory And Unsupported By Record Evidence.

The emergency regulations are arbitrary and capricious because OIC does not cite any record evidence to support its conclusions. *See* Watkins Dec. ¶¶ 32-44. OIC states that the CARES Act makes some consumers' credit history "objectively inaccurate" and "results in an unreliable credit score being assigned to them." Hampton Dec. Ex. 1 at 2. But it does not cite any studies to support that conclusion. OIC states that the CARES Act "has caused credit-based insurance scoring models to be unreliable and therefore inaccurate." *Id.* But it does not cite any analysis to support that conclusion, either. OIC states that "when the CARES Act protections are eliminated . . . credit histories for people of color will have been disproportionately eroded." *Id.* It does not cite any studies to support that conclusion. Nor does it cite any analysis to support its statement that once the CARES Act protections expire, "a large volume of negative credit corrections will flood consumer credit histories." *Id.* Indeed, the CARES Act allows lenders to offer accommodations, such as payment plans or extended loan terms, which may *prevent*

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negative credit information going forward. *See* 15 U.S.C. § 1681s-2(a)(1)(F). OIC states that "the [predictive] ability of current credit scoring models cannot be assumed," WAC 284-24A-088(9), but OIC has the obligation to proceed based on facts, not assumptions, and does not cite any analysis of that issue. And OIC *admits* that it has not conducted an analysis of the "predictive ability of credit scoring models based on pre-pandemic credit and claims histories" after the CARES Act expires. *Id.*

This Court should declare the emergency regulations invalid because OIC does not cite record evidence to support them. Mere supposition is not enough to clear the arbitrary and capricious hurdle; an agency "must not act cursorily in considering the facts and circumstances surrounding its actions." *Puget Sound Harvesters Ass'n v. Wash. State Dep't of Fish & Wildlife*, 157 Wn. App. 935, 951, 239 P.3d 1140 (2010); *see Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) ("An agency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by substantial evidence." (internal quotation marks omitted)). To the extent OIC lacks data, it should obtain it before issuing an emergency regulation based on conclusory assertions. Indeed, OIC has had an entire year to collect data and analyze these issues, but it has apparently failed to do so. *See* Watkins Dec. ¶¶ 11-12, 34-44 (explaining actuarial analysis necessary to determine impact of changes to credit history on insurance risk). OIC has not said that it is unable to obtain relevant data, nor has it asked for such data through notice-and-comment rulemaking.[5] Given the utter lack of evidentiary support for the emergency regulations, this Court should invalidate them. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1244 (9th Cir. 2001) (agency action arbitrary

[5] OIC has recently announced that it will begin collecting certain data from insurers, but it does not appear to be collecting loss data, so it will be unable to use this data to draw conclusions about the link between CBIS and insurance risk during the pandemic. *See* Watkins Dec. ¶¶ 34-35. And even if OIC were to collect relevant data, such data would not justify the emergency regulations, which were adopted *without* any data to support them.

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and capricious where agency acts on "speculation" that "is not supported by the record").

Even if this Court could uphold the emergency regulations based on mere supposition, however, there is no reason to suppose that the CARES Act or the Governor's orders render credit history "inaccurate" or "unreliable." A credit report is not "inaccurate" or "unreliable" if it excludes information *prohibited by state or federal law* from being included. There is likewise no reason to think that the CARES Act or the Governor's orders render CBIS inaccurate. "Accuracy" in the context of rating factors means predictive of insurance loss, and no rating factor is perfect. *See* Watkins Dec. ¶¶ 22-25; *supra* n.3. (Indeed, if it were possible to perfectly predict each consumer's risk, there would be no insurance—each consumer would pay the amount that covers the damage to their home or auto each year.) Both Congress and the state Legislature change the requirements for credit reports from time to time, and OIC has not introduced any evidence suggesting such changes render CBIS unable to predict insurance risk. OIC has not shown, for instance, that Congress's 2018 changes on reporting veterans' medical debt and student loans made CBIS an inaccurate predictor of loss. Instead, it has conceded that CBIS has been accurate in the past. *See* Hampton Dec. Ex. 2 at 11. Indeed, CBIS scores remained relatively unchanged despite the credit disruptions of the 2008 recession. *See* Watkins Dec. ¶¶ 12, 39. This Court should not accept OIC's *ipse dixit* that the CARES Act and the Governor's orders render CBIS inaccurate. If anything, CBIS may be *more* accurate because Congress and the Governor have counteracted the pandemic's impact on consumer reports.[6]

[6] The affidavits submitted by OIC as part of the injunction proceedings are not part of the administrative record; they are *post hoc* rationalizations that cannot be used to uphold the agency's actions. *See Dep't of Homeland Sec.*, 140 S. Ct. at 1907 ("It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.' " (citation omitted)); *Clean Wis. v. EPA*, 964 F.3d 1145, 1161 (D.C. Cir. 2020) (court may not accept "post hoc rationalizations" for agency action but must rely "on the basis articulated by the agency itself" (internal quotation marks omitted)); *Wash. Indep. Tel. Ass'n*, 148 Wn. 2d at 906 (holding that the "validity of a rule is determined as of the time the agency took the action adopting the rule"). And in any event, none of the affidavits cite data demonstrating that CBIS no longer predicts insurance risk following the adoption of the CARES Act or the Governor's orders. To the extent those declarations argue that CBIS is inaccurate because the pandemic has changed consumer behavior—leading more consumers to stay at home

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OIC has now submitted a purported "record" for its emergency regulation. OIC does not state when it compiled this "record," and it appears to have been created *after* the adoption of the emergency regulations—and thus cannot support those regulations. OIC did not submit the record as part of the injunction proceedings, and at least one document in the "record" is date stamped *after* OIC issued the emergency regulation. *See* Hampton Dec. Ex. 3 (dated May 17, 2021). Even if OIC had compiled the record prior to issuing the emergency regulations, however, OIC did not *rely on* the record to justify its regulations. OIC did not cite a single page of the record, or a document contained in the record, as evidence to support its claimed emergency or its ban on CBIS. This Court may uphold a regulation only "on the basis articulated by the agency itself"—and here OIC did not cite the record at all. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856 (1983). Even if record evidence supports an agency's position, moreover, if the agency "did not cite" that evidence to support its conclusions, the court may not consider it. *Islander E. Pipeline Co., LLC v. Conn. Dep't of Env't Prot.*, 482 F.3d 79, 102-103 (2d Cir. 2006). If that were not the rule, and "the requirements for administrative action" were not "strict and demanding," then "expertise, the strength of modern government, [would] become a monster which rules with no practical limits on its discretion." *Id.* (quoting *State Farm*, 463 U.S. at 48). The emergency regulations here do not meet those strict and demanding standards, rendering them arbitrary and capricious.

2. OIC's Assertion That It Would Have Insufficient Time To Act Is Unreasoned.

OIC's conclusion that it must ban CBIS now because the CARES Act might expire at some point in the future is likewise arbitrary and capricious. OIC states that "[i]t is impossible to

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and decreasing insurance claims—that is not the justification relied on by OIC in its emergency rulemaking. *See Dep't of Homeland Sec.*, 140 S. Ct. at 1907 ("[J]udicial review of agency action is limited to the grounds that the agency invoked when it took the action." (internal quotation marks omitted)); *see* Watkins Dec. ¶ 43.

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know precisely when the state and federal states of emergency will end," and that it "must have an alternative to the currently unreliable credit scoring models they have in place before the protections of the CARES Act end." Hampton Dec. Ex. 1 at 2. Two of the relevant CARES Act provisions, however, expire on specific dates, and the third does not expire until 120 days after the President declares an end to the national emergency. *See supra* p. 3. It thus *will* be clear when the CARES Act protections will end—a point OIC did not acknowledge or take into account, rendering its conclusion on this point arbitrary and capricious. OIC cannot contend that 120 days is too little notice for it to act; OIC gave insurers just 90 days to comply with the emergency regulations here. And it cannot contend that it will have insufficient notice of when other CARES Act provisions expire, given that Congress and the President continue to update the public on the current expiration date of those provisions. *See supra* p. 3.

OIC does not state that it must immediately act in response to changes to state laws, *see* WAC 284-24A-088(9), and such an argument would not be credible. OIC cannot plausibly claim that it is "impossible" to know when the Governor will lift state pandemic protections; OIC is a government agency, and it can ask the Governor that question. The end of the state-law protections, moreover, will not immediately impact consumer reports; other state laws protect consumers from immediate evictions or garnishment of wages. OIC thus acted arbitrarily and capriciously when it failed to supply a sufficient explanation for banning CBIS now because the President or Governor may end COVID-related protections at some point in the future.

3. The Emergency Regulations Are Unreasoned And Internally Contradictory.

OIC's emergency regulations are also arbitrary and capricious because they are unreasoned and internally contradictory. When an agency's decision is unreasoned, or when an agency adopts conflicting reasoning, its actions are arbitrary and capricious. *See Sierra Club v. EPA*, 884 F.3d 1185, 1196 (D.C. Cir. 2018) (agency's "refusal to extend [the] same logic" to two different situations is arbitrary and capricious).

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OIC first claims that certain consumers face unfair discrimination because not all credit information is being reported during the pandemic. *See* Hampton Dec. Ex. 1 at 2. Yet OIC does not address the fact that state and federal laws *already* prohibit the reporting of large swaths of credit information, and the state Legislature further prohibits the use of additional credit information in CBIS. *See* RCW 48.19.035(3). Indeed, OIC approves each insurance plan and thus has already determined that plans that use CBIS are *not* "unfairly discriminatory" even though certain information is excluded by law from consumer reports. *See* WAC 284-24A-035. OIC does not explain, for example, why CBIS is "unfairly discriminatory" when Congress suspended payments on student loans under the CARES Act, but not "unfairly discriminatory" when Congress prohibited reporting defaulted student loans where the consumer has entered a rehabilitation program. *See supra* p. 2. It is arbitrary and capricious to conclude that CBIS is "unfairly discriminatory" solely because some information is not included in consumer reports, when that has always been the case.

OIC next claims that consumers will face unfair discrimination when "negative credit information can be fully reported again." WAC 284-24A-088(8). That conclusion is also arbitrary and capricious. In the same rulemaking, OIC takes the position that it is "unfairly discriminatory" to *not* include adverse information in consumer reports and that it is "unfairly discriminatory" to *include* that information. *See* WAC 284-24A-088(7), (9). And the contradictions do not end there: OIC simultaneously argues that the CARES Act and similar state laws "have disrupted the credit reporting process" such that CBIS cannot be used *and* that the repeal of those very same laws may impact the "[predictive] ability of current credit scoring models" such that CBIS cannot be used. *Id.* OIC cannot have it both ways. Where an agency's reasoning is contradictory, its actions are arbitrary and capricious.

4. OIC Failed To Consider An Important Aspect Of The Problem.

Finally, the emergency regulations are arbitrary and capricious because OIC failed to

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consider important aspects of the problem. *See SecurityPoint Holdings, Inc. v. TSA*, 769 F.3d 1184, 1187 (D.C. Cir. 2014) (holding that emergency regulations are "arbitrary and capricious" where an agency "has entirely failed to consider an important aspect of the problem it faces" (internal quotation marks omitted)); *Dep't of Homeland Sec.*, 140 S. Ct. at 1910-13 (agency action arbitrary and capricious where agency acted "without any consideration whatsoever" of important policy issues (internal quotation marks omitted)).

First, OIC failed to acknowledge—much less address—that the emergency regulations may hurt the *very consumers that Congress and the Governor are seeking to protect*: Those whose credit histories might otherwise be negatively impacted by the pandemic. To the extent the pandemic *does* affect credit histories, and in turn *does* affect insurance rates—a point OIC has not shown—the emergency regulations would hurt those consumers who have better credit as a result of the CARES Act and the Governor's orders. They would also hurt consumers who had weaker credit histories prior to the pandemic, but who may be able to use the CARES Act to improve their credit. *See* 15 U.S.C. § 1681s-2(a)(1)(F)(i)(II)(bb).

Second, OIC fails to discuss the impact of the emergency regulations on consumers with *good* credit scores regardless of the pandemic. Low-risk consumers will see their insurance rates increase because consumer reports can no longer be taken into account when setting insurance rates. For example, the emergency regulations may have a significant impact on older Washingtonians, who may have a better credit history. *See* Watkins Dec. ¶¶ 12, 49. OIC's assertions that CBIS disproportionately impacts communities of color are completely unsupported and appear to be based on biased assumptions. OIC failed to consider, for example, whether some policyholders of color benefit from CBIS usage. It is arbitrary and capricious for OIC to consider the impact on consumers with "negative credit information" without considering the impact on consumers with *positive* credit information. WAC 284-24A-088(8); *see* Hampton Dec. Ex. 4 ¶ 9 (citing one insurer's estimate that almost half its insureds would face rate

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increases as a result of the emergency regulations); *cf. Dep't of Homeland Sec.*, 140 S. Ct. at 1912 (failure to consider impact of administrative action on those who benefitted from the prior regulatory regime is arbitrary and capricious).

Agencies "must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Dep't of Homeland Sec.*, 140 S. Ct. at 1913 (internal quotation marks omitted). Yet OIC did not take into account the reliance interests of consumers who may have purchased automobiles or homes based in part on the insurance rates they believed they would be able to obtain under Washington's CBIS system. Because OIC "was not writing on a blank slate," it "*was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915 (internal quotation marks omitted). It is "arbitrary and capricious to ignore such matters." *Id.* at 1913 (internal quotation marks omitted).

Third, OIC acted arbitrarily and capriciously when it forbade insurers from adjusting other rating factors—which interact with CBIS—to account for the ban on CBIS. *See* Hampton Dec. Ex. 5 at 2. OIC's regulations required insurers to utilize a multivariate analysis in order to use CBIS as a rating factor. *See supra* p. 5. This is a technique for considering the influence of several factors simultaneously. Pulling one factor out, without revamping the rating plan to adjust other factors for the impact of removing one factor that worked cohesively with the others, creates unintended consequences very likely to result in unfairly discriminatory rates. *See* Watkins Dec. ¶¶ 45-51. For these reasons too, the regulations are invalid.

C. OIC Lacks Statutory Authority To Adopt Regulations Prohibiting CBIS.

This Court should invalidate the emergency regulations because they are contrary to administrative procedure and arbitrary and capricious. That is sufficient to dispose of this case. If the Court reaches the issue, however, it should hold that the regulations exceed OIC's statutory authority. OIC cites RCW 48.18.480, 48.19.020, 48.19.080, 48.02.060, and 48.19.035 as the

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basis for its authority. None of those provisions grant OIC the authority to ban CBIS—and 48.19.035 expressly forbids it. "[I]t is for the court to determine the meaning and purpose of a statute," and OIC's "view of the statute" should "not be accorded deference if it conflicts with the statute." *Postema v. Pollution Control Hearings Bd.*, 142 Wn. 2d 68, 77, 11 P.3d 726 (2000).

RCW 48.19.035(3)(d) and (f) plainly state that "an insurer may consider the bill payment history of any loan, the total number of loans, or both" and that "an insurer may consider the total amount of outstanding debt in relation to the total available line of credit" when determining insurance rates. RCW 48.19.035(2)(a) further states that "[c]redit history shall not be used to determine personal insurance rates, premiums, or eligibility for coverage *unless* the insurance scoring models are filed with the commissioner." (emphasis added). This provision expressly allows the use of CBIS *as long as* insurance scoring models are filed with the Commissioner. It is difficult to imagine a more straightforward conflict between a statute, which expressly permits CBIS, and a regulation, which entirely bans its use. In this situation, the regulation is plainly unlawful. *See Edelman v. State ex rel. Pub. Disclosure Comm'n*, 116 Wn. App. 876, 886, 68 P.3d 296 (2003). For that reason alone, the regulation is invalid.[7]

RCW 48.19.020 states that "[p]remium rates for insurance shall not be excessive, inadequate, or unfairly discriminatory," and RCW 48.18.480 provides that "[n]o insurer shall make or permit any unfair discrimination between insureds or subjects of insurance having substantially like insuring, risk, and exposure factors, and expense elements . . . ." OIC asserts that CBIS is "unfairly discriminatory" because certain information is not being reported on consumer reports under current law. *See* Hampton Dec. Ex. 1 at 2. That assertion is flatly

[7] RCW 48.18.545(4) states that "[a]n insurer *may use* credit history to deny personal insurance only in combination with other substantive underwriting factors." (emphasis added). The emergency regulations are contrary to that express statutory provision as well. *See* WAC 284-24A-089(3) (prohibiting insurers from using credit history to determine "eligibility for coverage").

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inconsistent with the statutory scheme. Congress and the state Legislature have *always* prohibited certain information on consumer reports, and those prohibitions change, *see supra* p. 2, yet the state Legislature expressly authorized CBIS. *See* 15 U.S.C. § 1681t (recognizing dual roles of state and federal legislatures over consumer reports). The mere fact that some information is not included in a consumer report does not make CBIS "unfairly discriminatory."

Moreover, it is not "discriminatory," much less "unfairly discriminatory," for insurers to base their insurance rates on credit information reported *in accordance with state and federal law*. It is true that both Congress and the state Legislature make policy decisions about which consumers should have the same credit information. Congress has determined, for instance, that a student who defaulted on student debt but has entered a rehabilitation program should have the same credit information as a person who never defaulted. So too under the CARES Act: Congress has concluded that where a consumer receives an accommodation on a loan, they should have the same credit information as a person who has made timely payments. The fact that Congress and the state Legislature have made policy choices—and continue to make policy choices—does not make CBIS "unfairly discriminatory." The opposite is true: It ensures that insurers, like other businesses that rely on consumer reports, give equal treatment to consumers that *Congress and the state Legislature want to be treated the same*. Using rating factors that comply with state and federal law, moreover, is consistent with actuarial practice; it is what insurers are *supposed* to do, not an example of unfair discrimination. Watkins Dec. ¶ 19.

Importantly, RCW 48.19.035 is a statute specific to the use of CBIS as a rating factor in insurance. It reflects the Legislature's view that CBIS itself is *not* unfairly discriminatory, given that the whole purpose of rating factors is to ensure fair differentiation: a synonym for prohibiting unfair discrimination. OIC cannot claim authority under 48.19.020 to ban CBIS when 48.19.035—the more specific statute addressing CBIS—expressly authorizes it.

RCW 48.19.080 states that OIC may "suspend or modify the requirement of filing as to

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any kind of insurance" and may "make such examination as he or she may deem advisable to ascertain whether any rates affected by such order meet the standard prescribed in RCW 48.19.020." That provision grants OIC authority over filing "requirement[s]." It thus authorizes the OIC to require insurers to take a particular procedural step, such as waiving a filing requirement. *See* WAC 284-24-070, 284-24-120. It does not give OIC power to determine how insurers may *calculate* insurance rates. This Court must look to RCW 48.19.035—the statute addressing CBIS—rather than RCW 48.19.080 to determine whether OIC has authority to ban CBIS.

RCW 48.02.060 does not authorize the emergency regulations. It states that "[w]hen the governor proclaims a state of emergency . . . , the commissioner may issue an order that addresses" four specific issues, RCW 48.02.060(4); the emergency regulations do not address any of those issues. And in any event, RCW 48.02.060 permits OIC to adopt "reasonable rules for effectuating" the Insurance Code, RCW 48.02.060(3)(a); it does not permit OIC to *repeal* RCW 48.19.035, which expressly permits the use of CBIS. The emergency regulations are contrary to the plain text of the governing statutes.

D. The Emergency Regulations Violate Constitutional Separation Of Powers.

OIC is an executive branch agency, and it has no authority to adopt a regulation that contradicts the Legislature's policy. In RCW 48.19.035 and 48.18.545, the Legislature adopted a policy recognizing use of CBIS as predictive of insurance losses, and appropriate for insurance underwriting and rating. The Legislature determined that specific kinds of information could not be used in CBIS, *see* RCW 48.19.035(3), or included in consumer reports, *see* RCW 19.182.040, but it otherwise relied on Congress to determine what information may be included in consumer reports, and thus incorporated into CBIS scores. *See, e.g.*, 15 U.S.C. § 1681c (excluding certain information from consumer reports); *id.* § 1681s-2 (requiring or prohibiting reporting of certain information, including pandemic-related changes to consumer reports). The Legislature

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delegated authority to OIC to *implement* the statute authorizing the use of CBIS in insurance rating. *See* RCW 48.19.035(5). OIC has no authority to declare that CBIS cannot be used at all.

To the extent OIC believes that the value of CBIS as a predictive tool is outweighed by social considerations, or not predictive of insurance losses, or no longer predictive of insurance losses, that is an issue OIC must put to the Legislature for reconsideration of the socioeconomic policy the Legislature adopted. *See Manson Constr. & Eng'g Co. v. State*, 24 Wn. App. 185, 190, 600 P.2d 643 (1979) ("[W]e are not inclined to view favorably an administrative agency's attempt to extend its authority . . . in excess of [the authority] specifically provided by statute."). That is true even if OIC believes that the assumptions underlying CBIS have changed. "When a statute is rendered obsolete by changing conditions, the remedy is for the legislature to amend it; neither an administrative agency nor the courts may read it in a way that the enacting legislature never intended." *Kim v. Pollution Control Hearing Bd.*, 115 Wn. App. 157, 163, 61 P.3d 1211 (2003). An "administrative agency" cannot "alter the plain meaning of a statute to meet changing societal conditions." *Id.* The Legislature has *repeatedly* denied OIC the policy change it seeks by emergency regulation. This Court should not ratify agency authority that is "often requested of the legislature, but as yet ungranted." *Sim*, 94 Wn. 2d at 555.

V. CONCLUSION

For the reasons in this memorandum, NAMIC respectfully requests that the Court grant summary judgment and declare the emergency regulations invalid.

DATED this 14th day of June, 2021.

BETTS, PATTERSON & MINES, P.S.

By _____
Joseph D. Hampton, WSBA #15297
Attorneys for Intervenor National Association of Mutual Insurance Companies

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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on June 14, 2021, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Petitioner Intervenor National Association Of Mutual Insurance Companies' Opening Brief In Support Of Motion For Summary Judgment; and**
- **Certificate of Service.**

Counsel for Petitioners American Prop. Cas. Ins. Ass'n, et al.:	☐	U.S. Mail
	☐	Hand Delivery
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Counsel for Respondents Washington State Office of Insurance Commissioner, and Mike Kreidler, Insurance Commissioner for the State of Washington State Office of Ins. Commn'r:	☐	U.S. Mail
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of June, 2021.

Valerie D Marsh

Valerie D. Marsh

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☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: September 3, 2021
Time: 9:00 a.m.
Judge/Calendar:
The Honorable Mary Sue Wilson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PROFESSIONAL INSURANCE AGENTS OF WASHINGTON, and INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON, and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, Petitioners, vs. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON, Respondents.	NO. 21-2-00542-34 DECLARATION OF JOSEPH D. HAMPTON IN SUPPORT OF PETITIONER INTERVENOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES' OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, Joseph D. Hampton, hereby certify under penalty of perjury, that the following is true and correct and within my personal knowledge:

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1. I am over the age of 18, have personal knowledge of all facts contained in this declaration, and am competent to testify as a witness to those facts.

2. I am an attorney with Betts, Patterson & Mines, P.S., the attorneys of record for Petitioner Intervenor National Association of Mutual Insurance Companies in this matter.

3. Attached hereto as Exhibit 1 is a true and correct copy of the Respondents' March 22, 2021 Emergency Rule Making Order, WSR 21-07-103, which became WAC 284-24A-088 and WAC 284-24A-089.

4. Attached hereto as Exhibit 2 is a true and correct copy of an exhibit to the Declaration of Jason W. Anderson in Support of Petitioner's Motion for Preliminary Injunction, dated April 7, 2021. The exhibit is a true and correct copy of pages 1 through 11, and 94, of the transcript of the Senate Business, Financial Services and Trade Committee's hearing on January 14, 2021. This exhibit, and Mr. Anderson's declaration, were not part of the administrative record compiled by the Office of the Insurance Commissioner, but were rather filed with the court by the Petitioner American Property Casualty Insurance Association.

5. Attached hereto as Exhibit 3 is a true and correct copy of two pages of the rulemaking record provided by the Respondents in this action, specifically, 659 and 660, which is Notice 2020-07, dated April 25, 2020 and issued by the Pennsylvania Insurance Commissioner.

6. Attached hereto as Exhibit 4 is a true and correct copy of the Declaration of Russell Ward in Support of Petitioner's Motion for Preliminary Injunction, dated April 6, 2021, but without its exhibit. This declaration was not part of the administrative record compiled by the Office of the Insurance Commissioner, but was rather filed with the court by the Petitioner American Property Casualty Insurance Association.

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7. Attached hereto as Exhibit 5 is a true and correct copy of a "Frequently Asked Questions" bulletin issued by the Respondents, for implementation of the emergency regulations WAC 284-24A-088 and WAC 284-24A-089, updated through April 13, 2021.

DATED this 14th day of June, 2021, at Seattle, Washington.

Joseph D. Hampton

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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on June 14, 2021, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Declaration Of Joseph D. Hampton In Support Of Petitioner Intervenor National Association Of Mutual Insurance Companies' Opening Brief In Support Of Motion For Summary Judgment; and**
- **Certificate of Service.**

Counsel for Petitioners American Prop. Cas. Ins. Ass'n, et al.:	☐	U.S. Mail
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Counsel for Respondents Washington State Office of Insurance Commissioner, and Mike Kreidler, Insurance Commissioner for the State of Washington State Office of Ins. Commn'r:	☐	U.S. Mail
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of June, 2021.

Valerie D Marsh

Valerie D. Marsh

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EXHIBIT 1

RULE-MAKING ORDER
EMERGENCY RULE ONLY

CR-103E (October 2017)
(Implements RCW 34.05.350 and 34.05.360)

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: March 22, 2021
TIME: 12:45 PM

WSR 21-07-103

Agency: Office of the Insurance Commissioner

Effective date of rule:

Emergency Rules

☒ Immediately upon filing.

☐ Later (specify) _____

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

☐ Yes ☒ No If Yes, explain:

Purpose: Temporarily prohibiting the use of credit history to determine premiums and eligibility for coverage in private automobile, homeowners, and renter's insurance products.

Insurance Commissioner Matter Number: R 2021-02

Citation of rules affected by this order:

New: WAC 284-24A-088, 284-24A-089
Repealed:
Amended:
Suspended:

Statutory authority for adoption: RCW 48.02.060, 48.18.480, 48.19.020, 48.19.035, 48.19.080

Other authority: None

EMERGENCY RULE

Under RCW 34.05.350 the agency for good cause finds:

☒ That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

☐ That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding: The Commissioner is tasked with ensuring that insurance rates are not excessive, inadequate, or unfairly discriminatory, and with enacting rules that ensure the use of credit history and credit history factors in setting insurance premiums is not excessive, inadequate, or unfairly discriminatory.

Insurance companies which use credit-based insurance scoring claim that credit scoring is a predictive tool to identify risk of loss from a specific consumer. This credit-based insurance score is then used to determine premiums charged to each consumer.

On February 29, 2020, the Governor of the State of Washington issued Proclamation 20-05, proclaiming a State of Emergency throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States. On March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) the President of the United States declared a national emergency concerning the novel coronavirus disease (COVID–19) outbreak in the United States. Addressing the state of emergency caused by the coronavirus pandemic has required difficult steps that have had a severe financial impact on large groups within our state.

In part to mitigate the financial impacts of the COVID 19 pandemic to individual households, on March 27, 2020, the President of the United States signed the CARES Act (P.L. 116-136). Section 4021 of the CARES Act addresses credit reporting during the pandemic. The CARES Act requires financial institutions to report consumers

as current if they were not previously delinquent or, for consumers that were previously delinquent, not to advance the level of delinquency, for credit obligations for which the furnisher makes payment accommodations to consumers affected by COVID-19 and the consumer makes any payments the accommodation requires. Section 4022 of the CARES Act requires certain lenders to offer forbearance options to borrowers, and imposed a moratorium on foreclosures for certain home loans. In addition, section 3513 of the CARES Act specifically addresses the furnishing of federally-held student loans for which payments are suspended. This provision results in all non-defaulted federally-held student loans being reported as current.

In addition, the Governor of the State of Washington has issued several emergency proclamations limiting state agencies from charging late fees and penalties, and placing a moratorium on garnishment actions (Emergency Proclamation 20-49, and subsequent amendments) and evictions (Emergency Proclamation 20-19, and subsequent amendments). The critical consumer protections included in these proclamations have also had the effect of preventing creditors from taking actions that are otherwise reportable on a consumer's credit history.

The result of the CARES Act is that all credit bureaus are collecting a credit history that is objectively inaccurate for some consumers and therefore results in an unreliable credit score being assigned to them. Consequently, this untrustworthy credit score degrades any predicative value that may be found in a consumer's credit-based insurance score.

The Commissioner finds that the current protections to consumer credit history at the state and federal level have disrupted the credit reporting process. This disruption has caused credit-based insurance scoring models to be unreliable and therefore inaccurate when applied to produce a premium amount for an insurance consumer in Washington state. This makes the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020.

There is evidence that the negative economic impacts of the pandemic have disproportionately fallen on people of color. Therefore, when the CARES Act protections are eliminated, and negative credit information can be fully reported again, credit histories for people of color will have been disproportionately eroded by the pandemic.

Remaining consumer credit protections in the CARES Act will expire after the national state of emergency. When the CARES Act fully expires, a large volume of negative credit corrections will flood consumer credit histories. This flood of negative credit history has not been accounted for in the current credit scoring models. Without data to demonstrate that the predictive ability of credit scoring models based on pre-pandemic credit and claims histories is unchanged, the predicative ability of current credit scoring models cannot be assumed. This will make the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020.

It is impossible to know precisely when the state and federal states of emergency will end. Insurance companies must have an alternative to the currently unreliable credit scoring models they have in place before the protections of the CARES Act end. Therefore, it is necessary to immediately implement changes to the use of credit scoring.

Note: If any category is left blank, it will be calculated as zero. No descriptive text.

Count by whole WAC sections only, from the WAC number through the history note. A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	____	Amended	____	Repealed	____
Federal rules or standards:	New	____	Amended	____	Repealed	____
Recently enacted state statutes:	New	____	Amended	____	Repealed	____

The number of sections adopted at the request of a nongovernmental entity:

	New	____	Amended	____	Repealed	____

The number of sections adopted on the agency's own initiative:

	New	2	Amended	____	Repealed	____

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

	New	____	Amended	____	Repealed	____

The number of sections adopted using:

Negotiated rule making:	New	____	Amended	____	Repealed	____
Pilot rule making:	New	____	Amended	____	Repealed	____
Other alternative rule making:	New	2	Amended	____	Repealed	____

Date Adopted: March 22, 2021	**Signature:** 
Name: Mike Kreidler	
Title: Insurance Commissioner	

New section: WAC 284-24A-88 **Findings and intent of temporary prohibition**

(1) The Commissioner is tasked with ensuring that insurance rates are not excessive, inadequate, or unfairly discriminatory, and with enacting rules that ensure the use of credit history and credit history factors in setting insurance premiums is not excessive, inadequate, or unfairly discriminatory.

(2) Insurance companies which use credit-based insurance scoring claim that credit scoring is a predictive tool to identify risk of loss from a specific consumer. This credit-based insurance score is then used to determine premiums charged to each consumer.

(3) On February 29, 2020, the Governor of the State of Washington issued Proclamation 20-05, proclaiming a State of Emergency throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States. On March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) the President of the United States declared a national emergency concerning the novel coronavirus disease (COVID–19) outbreak in the United States. Addressing the state of emergency caused by the coronavirus pandemic has required difficult steps that have had a severe financial impact on large groups within our state.

(4) In part to mitigate the financial impacts of the COVID 19 pandemic to individual households, on March 27, 2020, the President of the United States signed the CARES Act (P.L. 116-136). Section 4021 of the CARES Act addresses credit reporting during the pandemic. The CARES Act requires financial institutions to report consumers as current if they were not previously delinquent or, for consumers that were previously delinquent, not to advance the level of delinquency, for credit obligations for which the furnisher makes payment accommodations to consumers affected by COVID-19 and the consumer makes any payments the accommodation requires. Section 4022 of the CARES Act requires certain lenders to offer forbearance options to borrowers, and imposed a moratorium on foreclosures for certain home loans. In addition, section 3513 of the CARES Act specifically addresses the furnishing of federally-held student loans for which payments are suspended. This provision results in all non-defaulted federally-held student loans being reported as current.

(5) In addition, the Governor of the State of Washington has issued several emergency proclamations limiting state agencies from charging late fees and penalties, and placing a moratorium on garnishment actions (Emergency Proclamation 20-49, and subsequent amendments) and evictions (Emergency Proclamation 20-19, and subsequent amendments). The critical consumer protections included in these proclamations have also had the effect of preventing creditors from taking actions that are otherwise reportable on a consumer's credit history.

(6) The result of the CARES Act is that all credit bureaus are collecting a credit history that is objectively inaccurate for some consumers and therefore results in an unreliable credit score being assigned to them. Consequently, this untrustworthy credit score degrades any predicative value that may be found in a consumer's credit-based insurance score.

(7) The Commissioner finds that the current protections to consumer credit history at the state and federal level have disrupted the credit reporting process. This disruption has caused credit-based insurance scoring models to be unreliable and therefore inaccurate when applied to produce a premium amount for an insurance consumer in Washington state. This makes the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020.

(8) There is evidence that the negative economic impacts of the pandemic have disproportionately fallen on people of color. Therefore, when the CARES Act protections are eliminated, and negative credit information can be fully reported again, credit histories for people of color will have been disproportionately eroded by the pandemic.

(9) Remaining consumer credit protections in the CARES Act will expire after the national state of emergency. When the CARES Act fully expires, a large volume of negative credit corrections will flood consumer credit histories. This flood of negative credit history has not been accounted for in the current credit scoring models. Without data to demonstrate that the predictive ability of credit scoring models based on pre-pandemic credit and claims histories is unchanged, the predicative ability of current credit scoring models cannot be assumed. This will make the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020.

(10) It is impossible to know precisely when the state and federal states of emergency will end. Insurance companies must have an alternative to the currently unreliable credit scoring models they have in place before the protections of the CARES Act end. Therefore, it is necessary to immediately implement changes to the use of credit scoring.

New section: WAC 284-24A-89 **Temporary prohibition of use of credit history**

(1) Not withstanding any other provision of this chapter, this section applies to all personal insurance pertaining to private passenger automobile coverage, renter's coverage, and homeowner's coverage issued in the state of Washington while this rule is effective.

(2) The insurance commissioner finds that as a result of the broad negative economic impact of the coronavirus pandemic, the disproportionately negative economic impact the coronavirus pandemic has had on communities of color, and the disruption to credit reporting caused by both the state and federal consumer protections designed to alleviate the economic impacts of the pandemic, for private passenger automobile coverage, renter's coverage, and homeowner's coverage issued in the state of Washington, the use of insurance credit scores results in premiums that are excessive, inadequate, or unfairly discriminatory within the meaning of RCW 48.19.020 and RCW 48.18.480.

(3) For all private passenger automobile coverage, renter's coverage, and homeowner's coverage issued in the state of Washington, insurers shall not use credit history to determine personal insurance rates, premiums, or eligibility for coverage.

(4) For purposes of this section, insurers shall not use credit history to place insurance coverage with a particular affiliated insurer or insurer within an overall group of affiliated insurance companies.

(5) In order to comply with this section, insurers subject to this rule may substitute any insurance credit score factor used in a rate filing with a neutral rating factor.
(a) For purposes of this section, "neutral factor" means a single constant factor calculated such that, when it is applied in lieu of insurance-score-base rating factors to all policies in an insurer's book of business, the total premium for the book of business is unchanged.
(b) For purposes of this section, insurers may, but are not required to, implement the neutral factor by peril or coverage.

(6) Insurers may not include rate stability rules in filings submitted to comply with this section.

(7) The prohibitions in this rule shall apply to all new policies effective and existing policies processed for renewal on or after June 20, 2021. Each insurer must submit rate filings to amend its current rating plans with the insurance commissioner for all insurance policies covered by this rule by May 6, 2021. If the policy application form refers to the use of consumer credit information, an amended form filing must also be submitted by May 6, 2021. The amendments should be limited to the changes required by this rule.

(8) This rule takes effect immediately. To the extent this rule is adopted as a permanent rule it shall remain in effect for three years following the day the national emergency concerning the novel coronavirus disease (COVID–19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) terminates, or the day the Governor's Proclamation 20-05, proclaiming a State of Emergency throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States expires, whichever is later.

EXHIBIT 2

Senate Business Financial Services and Trade

Committee 01-14-2021

Transcription of Video File

Video Runtime: 1:53:46

(Beginning of video recording.)

SENATOR MULLET: -- Senator Hasegawa. It's 8:01. We will go ahead and start the public hearing for the Business, Financial Services, and Trade, the breakfast committee that meets at 8:00 a.m. every Tuesday and Thursday. Doesn't actually provide any breakfast for anybody. But I guess if we were to advertise the breakfast, we would have a lot more people be on the committee. But we actually don't give out any food.

So the public hearing today is on Senate Bill 5010, prohibiting the use of credit scores to determine rates for personal lines of insurance. Senator Das is here to explain her bill. But we'll first have Kellee Gunn give a staff briefing.

MS. GUNN: Good morning, Chair Mullet, Members of the Committee. For the record, Kellee Gunn, staff to this committee. Before you is Senate Bill 5010, an act relating to prohibiting the use of credit scores to determine rates for personal lines of insurance.

Personal lines of insurance include your homeowner's insurance policy and your auto insurance policy but include some other lines, and a complete list is in your bill report. The bill before you prohibits the use of credit history to determine rates

or premiums for personal insurance policies issued or renewed effective January 1st, 2023.

There is a little bit of a phase-in to this in that insurers cannot file any rates, including credit history, as of January 1st, 2022. For background, credit history is any information provided by a consumer reporting agency on a consumer's credit worthiness, credit standing or credit capacity. It is using credit scores in insurance scores.

The use of credit history in insurance scores differs by insurer. Under current Washington State Law, credit history may only be used to determine the insurance score if the scoring method isn't filed with Office of the Insurance Commissioner.

Additionally, credit history may only be used to deny personal insurance in combination with other substantive underwriting factors and there are limits in state law to how credit history may currently be used in determining rates and eligibility for insurance.

These limits include medical bills, types of credit, and the number of credit inquiries. So those prohibited currently from being used to deny insurance coverage or determine premiums or rates.

SENATOR MULLET: And how long -- Kellie, how

long have those limits been in place?

MS. GUNN: I think it was the early 2000s, mid-2000s, I want to say 2005, but I'd have to double check.

SENATOR MULLET: Okay.

MS. GUNN: But with that, there's a fiscal available, and I'm available for any questions, any other questions.

SENATOR MULLET: I haven't looked at a fiscal. Was there any fiscal --

MS. GUNN: Yeah, they're estimating about 89,000 for the biennium.

SENATOR MULLET: Okay. Yeah, okay. Senator Das. Are there any other questions --

MS. GUNN: Thank you.

SENATOR MULLET: -- for Kellee before we go to Senator Das? Okay. Senator Das, go ahead.

SENATOR DAS: Thank you, Mr. Chair, Members of the Committee, Happy New Year to you all. It's so great to see all of you. I am already missing being on this committee and wish you guys all well as you do the important work of this committee.

I wanted to share, you know, briefly why I'm really passionate about this bill and very excited to support this bill moving forward. As some of you may

timer for now, and I will start the timer halfway through if it looks like we're not going to be able to get to everybody. But you can go ahead, John and Eric.

MR. NOSKI: All right. Thank you, Chair Mullet, Members of the Committee. My name is John Noski, and the legislative liaison for the Office of the Insurance Commissioner, and I am here to testify in support of Senate Bill 5010, prohibiting the use of credit scores to determine rates for personal lines of insurance. I am joined today by my colleague, Eric Slavich, the OIC's lead actuary for property and casualty insurance.

SENATOR MULLET: You guys timed that well. He showed up right when you said his name.

MR. NOSKI: We didn't even rehearse. So OIC and Governor request legislation promotes economic fairness and racial equity at no cost to the general fund, and this is an issue of state-wide significance impacting both rural and urban communities.

Most people are not aware that their credit scores are used to determine how much they pay for insurance. Insurers rely on rate-setting formulas that include an individuals' credit information to determine how much they pay for critical and often

mandatory insurance. How much it impacts one's premium is not publicly available information.

The insurance industry's use of credit scoring is inherently unfair. Studies show that drivers in our state with lower credit scores pay almost 80 percent more than those with excellent credit scores. And we also know that someone with a DUI and good credit can pay less than someone with excellent driving record but poor credit.

Increasingly, people in urban and rural communities are struggling with their finances, and the pandemic has not made things any easier on them financially. People with lower incomes and communities of color have been hit the hardest by the pandemic.

Economically vulnerable communities are disproportionately penalized with higher rates for reasons that are often out of their control, for reasons that have no bearing on things like how safe of a driver they are, for example.

And historic red-lining is a factor in credit scoring that cannot be overlooked. Though the industry does not use rates as a factor in setting rates, racial inequities are embedded in the credit system. The industry has argued that once credit is a

reflection of their personal responsibility and that people who are responsible with their money should pay lower rates.

However, being economically disadvantaged does not mean people are less responsible. In many cases, we know they have encountered financial difficulties from hardships, including unemployment or natural disasters or medical expenses. For many, the impact is felt for generations.

Some do not start out with the same economic resources as others, none of which is a reflection of irresponsible behaviors or justification for being penalized with higher insurance rates.

We have an opportunity with this proposal to put this unfair practice to an end. And on behalf of Commissioner Kreidler, I ask for your support. And now, I want to turn it over to my colleague, Eric Slavich, for his expertise.

SENATOR MULLET: Okay. Eric?

MR. SLAVICH: Chairman Mullet and Members of the Business, Financial Services, and Trade Committee. I'm Eric Slavich, and I'm the lead property and casualty actuary here at the Office of Insurance Commissioner. I supervise the unit that reviews insurance company rate filings for products like auto

and homeowners' insurance. I'm here to testify on Senate Bill 5010.

As an actuary, I understand why insurers use credit to help set their premium rates. Actuarily, there is a correlation between credit scores and insurance claims. But as legislators, you must decide if the rating factor is justified. Does the correlation matter more than its impact on society?

If it's true that one's credit score is closely connected to one's race and I believe that it is, you must determine if using credit for insurance rating is really in the public's interest and consider the long-term consequences to society of allowing insurers to use this tool.

As a regulator, I want insurers to use rating factors that are best for the market and society as a whole. First, insurers should use factors that are clearly and logically linked to insurance claims so that consumers understand why they're used.

Second, consumers should understand what they need to do to get a lower premium. For example, you know that if you get into an accident or get traffic tickets, your premiums will go up. So maybe you drive a little safer, and that is good public policy since it encourages safer driving and could actually reduce

CERTIFICATE

I, Wendy Sawyer, do hereby certify that I was authorized to and transcribed the foregoing recorded proceedings and that the transcript is a true record, to the best of my ability.

DATED this 1st day of April, 2021.

WENDY SAWYER, CDLT

EXHIBIT 3

Close Window

NOTICES

INSURANCE DEPARTMENT

COVID-19 Guidance Regarding all Insurers Writing Automobile Insurance, Personal and Commercial, within the Commonwealth; Notice 2020-07

[50 Pa.B. 2239]
[Saturday, April 25, 2020]

In response to the novel coronavirus (COVID-19) pandemic, the Department of Transportation (PennDOT) has issued several pieces of guidance in relation to driver's license expirations. The Insurance Department (Department) is issuing this notice to all insurers writing automobile insurance in this Commonwealth to alert insurers to this guidance as well as to take the opportunity to communicate the Department's expectations of automobile insurers during the COVID-19 pandemic. This notice applies to all insurers writing automobile insurance in this Commonwealth, whether personal or commercial.

In response to concerns from individuals whose driver license may expire during PennDOT license and photo centers closure, PennDOT has issued general guidance in regard to license expirations during this time. As noted by PennDOT:

> Driver licenses, photo ID cards and learner's permits scheduled to expire from March 16, 2020, through March 31, 2020, the expiration date is now extended until May 31, 2020.

PennDOT has noted that this extension applies to driver licenses and commercial driver licenses. PennDOT's guidance, which includes general guidance on many other matters, can be found at https://www.penndot.gov/Pages/Coronavirus.aspx.

The Department is aware that insurers may have products in the market which include exclusions, rates or underwriting rules which apply when a policyholder's license expires. The Department expects that insurers will apply these product features in a manner consistent with PennDOT's guidance as to the expiration of driver licenses. Specifically, the Department notes that policyholder licenses which are set to expire from March 16, 2020, to March 31, 2020, are now extended to May 31, 2020. The Department expects that insurers will apply exclusions, rates or underwriting rules as if the policyholder's license expires May 31, 2020. The extension provided by PennDOT may be subject to revisions and the Department encourages insurers to monitor PennDOT's web site for any guidance on this and other issues.

Beyond PennDOT's guidance, the Department is taking the opportunity to communicate its expectations of insurers during the COVID-19 disruption. As noted in the Department's Notice 2020-04, published at 50 Pa.B. 2242 (April 25, 2020), the Department recognizes that the COVID-19 disruption has posed unique challenges for the insureds and insurers of this Commonwealth. Responses to these challenges require flexibility on the part of the insurance industry. The Department has, and continues to, strongly encourage insurers to work with their policyholders to find unique solutions to problems which may arise during this time. In response to inquiries from insurers and insureds alike, the Department is providing the following guidance to insurers writing automobile insurance in this Commonwealth.

• Beyond the application of exclusions, rates and rules in regard to the license expirations from March 16, 2020, to March 31, 2020, the Department encourages that insurers review all eligibility criteria for discounts such as good driver discounts. Additionally, with the closures of schools and universities in this Commonwealth for an extended period, events which are outside the control of policyholders, insurers should consider these circumstances when applying other discounts such as good student discounts

• On March 26, 2020, the United States Department of Labor released its seasonally adjusted initial jobless claims indicating jobless claims rose to 3,283,000. The Department understands that worker displacement during the COVID-19 disruption may negatively impact insureds' credit scores. Insurers should review the application of credit score in the rates charged to consumers and provide flexibility, where appropriate, to policyholders who may experience a negative credit event during this time. A declining credit score may not be used to increase a premium at renewal.

• The COVID-19 disruption has created practical changes in many consumers lives including a decrease in driving. The Department encourages insurers to review the impact that these changes may have with regard to claims, renewals and other items. The Department anticipates that claims frequency may be impacted by the reduction in insureds' driving. The Department encourages all insurers to review the impact this may have on the rates which are currently charged to insureds, and apply low-mileage discounts, where appropriate.

• Under Governor Tom Wolf's order closing all nonlife sustaining businesses, as of 8 p.m. March 19, 2020, some businesses which would customarily be available during the claims process are currently closed. Businesses such as car dealerships or repair facilities may be closed and the Department encourages flexibility by insurers with limits on rental car coverage and other items which are impacted by the closure of businesses during this time.

The Department understands that many insurers and insureds in this Commonwealth are experiencing disruptions to daily life in many and varying ways and degrees. Insurers should work with policyholders where possible and provide the necessary flexibility needed at this unique time. Insurers are also encouraged to contact the Department to explain the implications of the disruptions caused by the COVID-19 pandemic and to discuss their unique and innovative approaches to these disruptions and discuss what impediments stand in the way.

Individuals with questions about this notice should contact John Lacek, jlacek@pa.gov.

JESSICA K. ALTMAN,
Insurance Commissioner

[Pa.B. Doc. No. 20-583. Filed for public inspection April 24, 2020, 9:00 a.m.]

Bottom

EXHIBIT 4

X Hearing is set
Date April 16, 2021:
Time: 9:00 A.M.
Judge/Calendar: Mary Sue Wilson

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, Petitioner, v. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON, Respondents.	NO. 21-2-00542-34 DECLARATION OF RUSSELL WARD IN SUPPORT OF PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION

Russell Kenneth Ward declares as follows:

1. I am Assistant Vice-President of Underwriting and Product Management of Government Employees Insurance Company and its affiliates (collectively, "Member Company" or "Company"). In addition to being responsible for all product development, product management, pricing and marketing in the state of Washington, I am responsible for the Company's relationship with the Office of the Insurance Commissioner for the State of Washington ("OIC"), and the Insurance Commissioner, Mike Kreidler (the "Commissioner"). I joined the Company in October 2000, and in previous roles have served as the Director of Pricing and Product Management for the states of Washington, Oregon, California, Alaska, Hawaii, Arizona, Nevada, Utah, Idaho, and Montana. In addition, I have also been the Product Manager for the states of Florida, Texas, Virginia, North Carolina, Georgia, Colorado, Tennessee, Iowa, and Kansas. I have represented the Company on various industry

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organizations including the North Carolina Rate Bureau's Automobile Committee and the Automobile Committee of the petitioner, the American Property Casualty Insurance Association ("APCIA"). As part of my work experience at the Company, I have had extensive involvement with its Actuarial, Product Management, Underwriting, Customer Service, Sales, and IT Departments. I obtained a Bachelor of Arts degree in Philosophy, Theology, and Literature and obtained a Masters of Business Administration degree and am a member in good standing of The Institutes, having attained the Chartered Property and Casualty Underwriter designation. This declaration is based on my personal knowledge.

2. The Company is licensed and authorized to conduct business in the state of Washington, with its principal place of business in Chevy Chase, MD. In 2020, the Company wrote just over $633,210,000 in written premium associated with over 413,565 private passenger auto insurance policyholders in Washington.

3. A critical component to a robust and fair marketplace for consumers is establishing premium rates in accordance with lawful risk classifications that correlate with predicted loss exposures. If one or more lawful risk classifications is removed, this undermines the accuracy of risk-based pricing, and thus harms consumers who then pay rates that are less correlated with their individual loss exposures, with lower risk consumers paying higher rates, and higher risk consumers paying lower rates.

4. On March 22, 2021, the Commissioner announced an emergency rule to temporarily prohibit the use of credit history to determine premiums and eligibility for coverage in private passenger automobile, homeowners, and renters insurance products, which is attached as Ex. 1 (referred to herein as the "Emergency Rule"). The Emergency Rule requires that, by May 6, 2021, each insurer must file amendments to its current rate plans for all insurance policies covered by the Emergency Rule, and that, by June 20, 2021, the use of credit history as a component of credit-based insurance scores will be prohibited altogether for all new policies effective and existing policies processed for renewal on and after that date.

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5. The Company has been using credit-based insurance score risk classifications, otherwise known as insurance risk scores (a number or rating derived from a computer application based on credit history) for many years in Washington, beginning in May of 2006. The Company uses these risk classifications in establishing rates in 47 states and the District of Columbia. Insurers (including the Company) use credit-based insurance scores (among various other risk classifications) to determine whether to underwrite and accept a policyholder applicant for coverage, and if so, at what premium. As with the other risk characteristics or loss classifications, credit-based insurance scores are used in the underwriting and rating process because they strongly correlate with and are predictive of future loss costs.

6. Pursuant to and consistent with RCW 48.19.035(2), the Company has filed and obtained approval from the OIC to use credit-based insurance score models in its underwriting and rate-setting practices in Washington for over 14 years, and continues to apply these approved models through the present date. These credit-based insurance scores are actuarially justified and are filed in combination with other rating factors as part of a statistical multivariate analysis consistent with and pursuant to WAC 284-24A-045 and WAC 284-24A-050.

7. The Company evaluates credit-based insurance scores among over 40 distinct risk classifications (*e.g.*, age and marital status) in establishing rates. There is a direct, well-established actuarial correlation between the probability of risk of loss, and each of the risk classifications the Company utilizes in its underwriting and rating processes, including credit-based insurance scores. Established regulations in Washington, specifically WAC 284-24A-045 and WAC 284-24A-050, require each company that utilizes credit-based insurance scores to file a multivariate statistical analysis including the output from the statistical model, the formulas the model uses, all rating factors that are included in the modeling process (including credit-based insurance scores), output from the model such as indicated rates and rating factors, and how the proposed rates and rating factors are related to the multivariate statistical analysis. As a result of this analysis, the Company's ability to properly segment loss probabilities

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associated with risk classifications increases such that the Company can more accurately determine which risks to insure, and what rates should be charged.

8. The removal of any risk classifications presently in use, including credit history as a component of credit-based insurance scores, would detract from the Company's ability to properly evaluate, select and rate its private passenger automobile policyholders based on actuarial correlations between these classifications and the probability of losses.

9. If the Company were required to remove credit-based insurance scores from its rating factors, this would have the imminent effect of increased rates for approximately 47% of all of the Company's policyholders in Washington, even though there would be no actuarial basis for these rate increases except the removal of credit-based insurance scores as risk classifications. As of 2020 census data, there are over 2.8 million households with at least one vehicle in Washington. The impact of removing credit-based insurance scores for private passenger automobile insurance across the state would result in significant market disruption as over a million Washington residents would be facing rate increases as a direct result of this development.

10. For the Company alone, this would result in having approximately 195,100 Washington policyholders with lower risk probabilities and who have 23.3% fewer accidents subsidizing policyholders with higher risk probabilities and who have higher accident frequencies. Rates for lower risk drivers would increase on average by 15.8% or $234 annually, ranging up to a maximum of $7,339; and for higher risk drivers decrease on average by -11.3% or -$207 annually, ranging down to a maximum of -$2,893. This would result in less accurate rates, market inefficiencies and dislocation, and negatively impact the affordability and availability of private passenger automobile insurance in the state of Washington.

11. In spite of the COVID-19 pandemic, credit-based insurance scores have remained stable and predictive of future loss costs both in Washington and across the United States as a whole. Credit-based insurance scores are a predictor of future insurance losses and

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not a predictor of the creditworthiness of any individual. While a financial credit score is a reflection of an individual's credit rating, a credit-based insurance score is a predictor of the likelihood of future automobile or property insurance claims occurring. According to recent publications by both Lexis Nexis (https://lexisnexis.turtl.co/story/credit-and-covid-whitepaper) and Transunion (Credit-Based Insurance Scores and COVID-19: What You Need to Know Publication 20-866765), credit-based insurance scores have not deteriorated for any of the consumer-credit-based insurance score bands. Between March and October 2020, approximately 85% of consumers either remained in the same credit history risk tier or band, or moved to a lower (i.e., more favorable) risk score segment. This appears to be driven, at least in part, by a decrease in credit utilization, a decline in delinquencies, such as accounts sent to collections, and an increase in credit tenure from an aging population and a decline in new account openings.

12. Many states' insurance laws have provisions requiring consideration of extraordinary life circumstance to mitigate or neutralize the impact of credit-based insurance scores when individuals are adversely impacted by extraordinary events such as loss of employment, identity theft, divorce, catastrophic medical diagnosis, etc. Of the remaining states, all but one permit it. Only one state prohibits it—Washington. The Commissioner has opposed and actively advocated against the adoption of an extraordinary life circumstance protection rule or regulation as recently as the 2021 legislative session.

13. To comply with the Emergency Rule, numerous IT systems and operational processes will have to be reconfigured to remove credit-based insurance score risk classifications, involving thousands of hours of employee time encompassing various IT and operational changes. These would include over 1,000 hours of programming IT changes, systems testing, changes to policy forms and documents, changes to rates and rules, changes to filing documentation, training for agents and employees handling customer service questions and endorsements, as well as opportunity costs in not working on other planned items and

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implementations already in progress. This work would have to be commenced immediately given the time and effort required to comply with the May 6 and June 20, 2021, deadlines set forth in the Emergency Rule, resulting in significant tangible expenses and operational disruption. Likewise, if it is later determined (following these extensive efforts required to comply with the Emergency Rule) that credit history risk classifications may be utilized, the reconfigurations and process changes described herein would have to be reversed, thereby resulting in similar expenses and operational disruption to the Company to reinstate the IT systems and operational processes, once again involving thousands of hours of employee time, resulting in substantial harm to the Company.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of April, 2021, at Alexandria, Virginia.

Russell Kenneth Ward

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EXHIBIT 5

OFFICE of the INSURANCE COMMISSIONER
WASHINGTON STATE

FAQ for implementation of WAC 284-24A-088, 284-24A-089

What is CBIS?

This document uses CBIS as an abbreviation for credit-based insurance score.

Which types of insurance are impacted?

(Revised April 13, 2021) The emergency rule applies to personal auto, homeowners and renters coverage. Personal auto includes personal coverage for motorcycles, collector vehicles, antique autos, and RVs. Homeowners coverage includes personal dwelling property (whether submitted under TOI 040, 010, or 301), mobile homeowners, manufactured homeowners, and condominium owner's coverage. The rule does not apply to commercial lines, personal liability and theft coverage, earthquake coverage, personal inland marine coverage, farmowners coverage, or mechanical breakdown coverage.

Why does the emergency rule allow, but not require, neutral factors that vary by peril or coverage?

This wording is meant to accommodate insurers that currently have filed rating plans in which there are different sets of CBIS factors for each peril (in homeowners and renters filings) or for each coverage (in auto filings). To be flexible, the emergency rule allows these insurers to choose to apply either a single neutral factor or to apply a different neutral factor for each peril or coverage. Insurers with filed CBIS factors that do not vary by peril or coverage should only need a single neutral factor.

What are the rate filing requirements?

The emergency rule requires insurers to stop using credit history in premium calculations. Therefore, your filing needs to include changes to your rating plan to accomplish that. However, in order for OIC to process neutral factor filings promptly, we would prefer that filers minimize the complexity of these filings. Rating plans should be amended to include the neutral factor as an exception rule that temporarily supersedes your existing CBIS rules and factors. Filers should not include other changes to rates and rules that are not necessary for removing CBIS factors. The filing should include:

- The phrase "Remove the use of credit" in the Product Name field, the Project Name field, or the beginning of the Filing Description field in SERFF
- An exhibit showing the calculation of the neutral factor

Contact: Eric Slavich | 360-725-7137 | EricS@oic.wa.gov

- A rate/rule page with the neutral factor and stating that this factor will supersede the CBIS factors in your rating plan

Do not include unrelated changes to your rating plan. We will waive the usual requirement for a complete manual of rates and rules for these filings.

How should we calculate the neutral factor?

Total premiums for your book of business should not change due to the removal of CBIS factors. If your rating plan uses a policy fee or other fixed fee, you might need to adjust this calculation accordingly.

The neutral factor exhibit could show your actual distribution of in-force written premiums by credit-based tier compared to the hypothetical premium for each tier if CBIS factors were not applied. The neutral factor would then be the ratio of total actual premiums to total hypothetical premiums.

For technical reasons, we cannot calculate the neutral factor that way. What should we do?

In your filing, explain the technical issue and how you calculated the neutral factor or determined other changes to your rates needed to comply with the emergency rule. In reviewing your filing, OIC will seek to ensure that your filing removes the use of credit from premium calculations and results in no overall rate level change.

Can we include a complete rating plan overhaul in the neutral rating factor filing?

No. With credit scoring no longer allowed, we understand that insures will wish to refresh their rating models to reflect the absence of credit information. However, the emergency rule requires that filings be limited to only changes required by the rule. This provision is necessary in order for OIC to process the neutral factor filings in a timely manner.

An insurer wishing to make other changes will need to first wait for its initial filings to remove credit to be approved, and then may submit a separate filing to make other changes. Given the limited time until premium calculations will be impacted by the emergency rule, OIC will prioritize filings submitted to only remove the use of credit. Filings involving other changes will not be prioritized. Subsequent filings involving additional changes will be reviewed in keeping with our standard review process.

When does the rule take effect?

The emergency rules itself takes effect immediately when it is filed. The prohibition on the use of credit history applies to new policies effective and existing policies processed for renewal on or after June 20, 2021. Filings to make the necessary changes must be submitted no later than May 6, 2021. For new business policies with coverage terms beginning on and after June 20, 2021, you must not use credit history to calculate premiums or use credit history for underwriting (including placement with an affiliate in a group of insurers). For renewal policies, the emergency rule applies to renewals processed

on or after June 20, 2021. Under WAC 284-24-115(1), you may use an effective date for renewal policies up to sixty days after the effective date for new business policies. This reflects the fact that insurers process a renewal policy well in advance of the date that renewal policy takes effect.

We used credit history in the past to determine in which of our affiliates each applicant will be offered coverage. Do we have to reevaluate these company placement decisions without using credit?

(Revised April 13, 2021) The emergency rule applies to company placement decisions made on or after June 20, 2021; it does not require insurers to reevaluate prior company placement decisions. If your normal process involves reevaluating company placement at each renewal, you will need to adjust this process such that it does not use credit history. But if you do not normally reevaluate company placement at renewal, the emergency rule would not require you to do so.

We use the term "company placement" to refer to the process of deciding which company – in a group of affiliated companies – a given applicant will be assigned to. "Company placement" is not the same as tier placement within a company or premium calculations within a company.

What happens to our other filings that are already under review?

OIC will continue to review existing filings, though filings submitted to comply with the emergency rule will be prioritized. Note that you must submit a new, separate, filing to remove credit from your rating plan; we will not accept amendments to existing filings for this purpose. If a pending filing involves changes to CBIS factors, the insurer might wish to consider withdrawing the filing or amending the filing to remove the changes to CBIS factors. Insurers should avoid amending existing filings in a way that significantly increases the complexity of the filing.

Our IT staff do not have time to program this change. Can we get an extension?

No. We cannot grant extensions to the dates specified in the emergency rule.

How do we calculate a neutral factor for a new program with little to no premium?

In such cases, using your in-force premiums to estimate the neutral factor would not make sense. Some other estimate of the neutral factor would be necessary, calculated such that the insurer's overall rate level remains the same. Depending on the exact situation, it might be appropriate to consider the distribution of credit scores for the population of the state as a whole or to consider the assumptions made in the insurer's original analysis submitted in support of its CBIS factors.

Since an emergency rule can last only 120 days, why does the rule say it lasts until three years after the state of emergency ends?

The OIC intends to pursue normal (non-emergency) rulemaking to make this rule "permanent", as that term is understood under the Administrative Procedure Act, Chapter 34.05 RCW. The OIC expects the three-year timeframe to be included in the permanent rule. The emergency rule will automatically expire after 120 days unless either a permanent rule is adopted or the emergency rule is refiled under RCW 34.05.350.

What if a simple constant neutral factor won't work with our rating plan? For example, what if we apply one set of CBIS factors to an expense constant and another set of CBIS factors to the variable portion of the premium?

OIC understands that a single, constant neutral factor will not work in certain situations. In such a case, the insurer should seek to make minimally complex revisions to its rating plan to remove the use of credit history from all parts of the premium calculation, while not increasing or decreasing the total premiums for the insurer's book of business.

Can we apply premium capping to mitigate the premium changes due to removing credit? What if we have a currently active premium capping rule?

No. You may not submit a new premium capping rule to mitigate the premium changes resulting from removing credit from your rating plan. Existing capping rules can continue to apply, but in accordance with WAC 284-24-130(8), a previously filed capping rule cannot be used to cap premium changes resulting from a subsequent filing. Therefore, premium changes resulting from the removal of credit from your premium calculations cannot be capped. If you are unable to administer your capping rule in a manner that excludes premium changes resulting from the emergency rule, OIC would allow you to delete the premium capping rule in your neutral factor filing.

Added March 29, 2021:

Do we need to remove all credit-related rates and rules from our rating plan?

No. Instead of removing credit-related rates and rules, you should leave them in place in your rating plan, but file an additional rule that supersedes your CBIS factors. This will make it easier for OIC to review your filing and for you to revert back to using CBIS factors after the temporary prohibition on using credit ends. The filing you submit to comply with the emergency rule should include a single manual page showing the neutral factor and stating something like, "CBIS Override Rule: Apply the factor shown below to every policy instead of applying the CBIS factor. Rules 3.a through 3.e do not

apply as long as this CBIS Override Rule is in effect." Ideally, no other manual pages should be included in your filing.

Added April 13, 2021:

Will our neutral factor rule automatically expire when the emergency rule terminates?

This depends on how your neutral factor rule is written. In order to set up your rule so that it only applies while the emergency rule is in effect, we suggest:

- Filing a neutral factor rule on a new rule page, with the rule functioning such that it overrides or supersedes your exiting CBIS rating rules.
- Not making changes to any current manual pages, such as your base rate pages or CBIS rating factor pages.
- Including wording in your neutral factor rules stating that the rules only apply while the emergency rule is in effect.

Given the uncertainty about how long the emergency rule will be in effect, we advise writing your rules this way to avoid having to later submit another filing specifically to withdraw the neutral factor rules.

If a company submits its filing by May 6, when will OIC approve it? What action is the filing company expected to take if approval is delayed?

OIC cannot guarantee a specific approval date, since some parts of the filing review process are under the filer's control, not OIC's. OIC will prioritize filings submitted to comply with the emergency rule. Assuming filers provide minimally complex filings as discussed above, OIC intends to complete initial review of each such filing within four business days. Provided that filers respond promptly to any objections raised following OIC review, OIC believes there is sufficient time to process all the required filings. In the event that approval of an insurer's filing is delayed, the insurer should contact OIC to discuss what actions to take. OIC will consider the circumstances leading to the delay and will focus on ensuring that CBIS rating is removed from premium calculations on time, even if filing details are still being worked out.

Is the use of credit information in new business tiering considered an underwriting decision, and if so, does the order only apply to new underwriting decisions after 6/20?

No. Tier placement is part of the premium calculation process; it is not just an "underwriting decision." Under the emergency rule, insurers must rate each policy, including tier placement, without using credit information.

This question appears to be related to the question above about company placement. The wording of the answer to that question appears to have confused some readers, and we have clarified that answer by removing the phrase "underwriting decision."

If a policy is quoted and issued for new business prior to 6/20 with an effective date after 6/20 would we have to go in later and cancel/re-rate it?

For new business policies, the emergency rule applies based on the date policies take effect, regardless of when those polices were quoted. New business policies with effective dates on or after June 20, 2021 must be rated without the use of credit information. An insurer that used credit information to calculate the premiums for a new business policy that took effect on or after June 20, 2021 would be in violation of the emergency rule.

Can filings intended to be effective prior to May 6, 2021 be submitted for approval if they are not modifying the current use of credit whether in rating or underwriting?

Yes. Filings with proposed effective dates prior to May 6, 2021 (or even prior to June 20, 2021) can be submitted and do not need to comply with the emergency rule. Note, however, that OIC will need to prioritize filings submitted to comply with the emergency rule. Other filings will be reviewed in keeping with our standard review process.

Does the OIC plan to respond to credit neutralization filings sooner than the current 30-day requirement?

Yes. Assuming filers provide minimally complex filings as discussed above, OIC intends to complete initial review of each such filing within four business days.

Is there any limitation on how soon carriers can file subsequent filings not related to credit after May 6, 2021?

An insurer wishing to submit a subsequent filing should wait for its initial filing to remove credit to be approved, and then may submit a separate filing to make other changes.

Will insurers be required to file applications going forward if they make a change as a result of this rule? Is the OIC requiring the application to be filed by all insurers going forward even if it is not part of the policy?

The emergency rule does not change the requirements related to filing applications. As always, if the application is made part of the policy, it needs to be filed. If the application is not made part of the policy, it does not need to be filed. If the company is currently using an application which was **not** filed with our office and which contains language allowing the company to access and utilize the applicant's credit report, we expect the company to remove such language from the application. If the company is currently using an application which **was** filed with our office and which contains such language, we expect the company to file a revised version of that application removing such language.

Insurers have disclosures related to credit that are part of online quote flows or direct-agent scripts. These disclosures alert consumers that credit may be used to calculate their premium or determine eligibility. The IT work associated with removing such online disclosures AND with amending the scripts will take longer than it might to deal with the rating issues themselves. Are carriers expected to have removed any such references by the 6/20 date? Or will the OIC provide some leniency so that carriers can prioritize the actual filings and rating IT work?

Due to the short time-frame insurers have to make the changes to their rating plans required by the emergency rule, OIC does not expect insurers to prioritize removing these disclosures from their systems. In particular, the June 20, 2021 date does not apply to removing these disclosures. If the rule is made "permanent" (as that term is understood under the Administrative Procedure Act, Chapter 34.05 RCW), or the emergency order is extended, OIC would expect insurers to have had enough time to remove these disclosures.

What are the OIC's expectations if/when a company's IT staff is unable to program this change? We understand an extension is not available. Are we expected to non-renew any existing business and stop accepting new business?

In the event that an insurer is unable to implement the necessary process changes in time, the insurer should contact OIC to discuss what actions to take, which likely would include stopping new business

writings. OIC does not anticipate that changing rating procedures to replace a table of CBIS factors with a single neutral factor before June 20, 2021 will be an insurmountable challenge.

Does the Emergency Rule apply to non-commercial Farm/Ranch policies?

No.

Last updated April 13, 2021

☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: September 3, 2021
Time: 9:00 a.m.
Judge/Calendar:
The Honorable Mary Sue Wilson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PROFESSIONAL INSURANCE AGENTS OF WASHINGTON, and INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON, and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

vs.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

NO. 21-2-00542-34

DECLARATION OF NANCY WATKINS IN SUPPORT OF PETITIONER INTERVENOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT

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I, Nancy Watkins, hereby declare as follows:

A. Qualifications

1. My name is Nancy Watkins, and my business address is 650 California Street, San Francisco, California. I am a Principal and Consulting Actuary with Milliman, Inc. (Milliman). I am a Fellow of the Casualty Actuarial Society (CAS) and a Member of the American Academy of Actuaries (AAA). A leading international organization for credentialing and professional education, the CAS is the world's only actuarial organization focused exclusively on property and casualty risks and serves over 9,000 members worldwide. CAS members may be "Associates" or "Fellows," with "Fellow" designating the highest recognized level.

2. Milliman is among the world's largest providers of actuarial, risk management, and related technology and data solutions. Milliman's consulting and advanced analytics capabilities encompass healthcare, property and casualty insurance, life insurance and financial services, and employee benefits. With more than 4,500 employees in 2020, the firm serves the full spectrum of business, financial, government, union, education, and nonprofit organizations. Founded in 1947, Milliman today has offices in principal cities worldwide, covering markets in North America, Latin America, Europe, Asia and the Pacific, the Middle East, and Africa.

3. A complete statement of my educational, employment and academic credentials is included in the curriculum vitae filed as Attachment A with this testimony. To summarize, I have a Bachelor of Science degree in Mathematical Sciences from the University of North Carolina at Chapel Hill. From 1983 to 1986, I was an actuarial student at Aetna Life & Casualty. From 1986 to 1989, I was an actuarial analyst at John Hancock Reinsurance. From 1989 to 1991, I was an actuarial consultant at Price Waterhouse; my title was Senior Manager when I left the company. I was the owner and President of an independent actuarial consulting firm, Watkins Consulting Co., from 1991 to 1997. I joined Milliman in 1997 as a Consulting Actuary

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and was made a Principal in 1999; currently I co-manage a practice of 33 actuaries and professionals in San Francisco.

4. I have been actively involved in professional leadership roles throughout my career. Currently I am a volunteer member of the Climate Insurance Linked Resilient Infrastructure Finance Working Group of the United Nations Capital Development Fund, piloting climate adaptation financing for emerging markets and least developed countries. I also lead the Milliman Climate Resilience Initiative and chaired the Milliman Climate Resilience Forum 2021, an event which drew over 1000 participants and included 55 speakers representing climate leadership across the international insurance, government, finance and scientific communities.

5. Previously I served on the AAA Flood Insurance Subgroup, in recognition of which I received the AAA Outstanding Volunteerism Award. I also served as Vice-Chair and Chair of the Committee on Property and Liability Financial Reporting, a committee of the AAA that deals with property/casualty financial reporting issues. In this capacity I worked closely with representatives of the National Association of Insurance Commissioners (NAIC).[1] I served as chair of the Risk Transfer Subgroup, to provide technical assistance to regulators, standard-setters and other governing bodies as necessary in the risk transfer area. I also chaired the Risk Transfer Work Group, a group that contains actuaries from the industry as well as representatives from the Big 4 accounting firms and regulators from the New York Insurance Department. During that time I also served as a member of the AAA Financial Reporting Council and

[1] Insurance in the U.S. is regulated on a state-by-state basis. The National Association of Insurance Commissioners (NAIC) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories

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Casualty Practice Council, and co-chaired the AAA Best Estimates Working Group. In recognition of these efforts I received the CAS Above and Beyond Achievement Award.

6. I have presented on technical ratemaking and financial reporting topics at many NAIC meetings as well as meetings of the National Flood Conference, Reinsurance Association of America, International Association of Insurance Receivers, Internal Revenue Service, Securities and Exchange Commission, American Institute of Certified Public Accountants Insurance Expert Panel, and Public Company Accounting Oversight Board. At the request of the California Department of Insurance, I have recently presented on the use of catastrophe models to address property insurance availability and affordability issues in the state.

7. As a consultant, I manage a San Francisco Property and Casualty (P&C) practice that specializes in climate resilience, insurtech and catastrophic property risk. Our consulting services include product pricing and development, litigation support, use of catastrophe models in ratemaking, competitive analysis, predictive modeling, class plan analysis, assistance working with state regulators, reserve reviews, and state expansion strategies. I have submitted and/or worked on hundreds of rate filings in the past 20 years, mostly for residential property and personal automobile insurance.

8. I meet the Qualification Standards of the American Academy of Actuaries to render the opinions contained herein.

9. My 2021 billable rate is $800 per hour payable to Milliman, Inc. for my actuarial consulting services, including expert witness support. My payment is not dependent on the outcome of this matter.

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B. Questions Presented and Summary of Conclusions

10. I[2] have been retained by the National Association of Mutual Insurance Companies (NAMIC) primarily to address a specific question:

What would need to happen to evaluate whether/how the pandemic caused credit-based insurance scoring (CBIS) models to be unreliable and inaccurate for purposes of ratemaking?

My conclusions are:

- CBIS is generally accepted as one of the most predictive factors for the risk of loss in the lines affected by the regulations.
- From an actuarial perspective, it is consistent with actuarial standards of practice to conduct quantitative studies of the changes in CBIS and correlations to losses to reach a conclusion on the reliability or accuracy of a CBIS model for the purposes of ratemaking.
- The Washington State Office of the Insurance Commissioner (OIC) has not shown a quantitative study demonstrating the impact the pandemic has had, or may have, on the distribution of CBIS or the relationship to insurance losses.
- The process which the OIC has mandated for removing CBIS from rates is likely to cause unfair discrimination.

11. To determine whether the pandemic materially impacted the correlation between CBIS and insurance risk, actuarial analysis is required. Based on my review, the OIC did not conduct that analysis in accordance with applicable actuarial standards, nor did it ask insurers to conduct that analysis. Further, the June 3, 2021 data calls issued by the OIC do not request data that would be a sufficient basis upon which to base such an analysis.

[2] Throughout this report, references to "I", "me" or "my" are intended to include Milliman employees working under my direction to assist in this assignment, including internal peer reviewers. The opinions stated in this report are my opinions.

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12. In my opinion, the temporary changes in credit reporting do not render the continued use of CBIS inconsistent with actuarial standards of practice, absent further evidence and analysis. Based on the relatively small number of consumers impacted by pandemic-related changes in credit reporting laws and the experience of the 2008 Great Recession, there is little reason to conclude that significant changes have occurred in the relationship between current CBIS models and expected losses as a result of the pandemic. Prohibiting CBIS in the manner prescribed by the OIC, however, is likely to create unfair discrimination as a consequence of removing one rating factor from a rating plan that was calibrated to be actuarially fair as a cohesive whole. For example, one potential consequence will be unfairly high rates for older Washingtonians with good credit scores correlated to lower risk, who may see their insurance rates increase.

C. Background and Scope of Work

13. CBIS has historically been accepted for insurance ratemaking in the state of Washington, subject to review by the OIC. The OIC is tasked with ensuring that insurance rates are not excessive, inadequate, or unfairly discriminatory.

14. Recently the OIC issued a temporary emergency order prohibiting insurers from using credit history to determine premiums, rates or eligibility applicable to insurance coverage for private automobiles, renters and homeowners. The order cites asserted disruptions in the credit reporting process attributable to the CARES Act and related orders adopted by the Governor, and states that a large volume of negative credit corrections will flood consumer credit histories once the CARES Act protections and the Governor's orders are eliminated. According to the order, this situation has caused CBIS models to be unreliable and therefore inaccurate when applied to produce a premium amount for an insurance consumer in Washington state. The order states that, without data to demonstrate the continued predictive ability of the currently

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filed CBIS models, it cannot be assumed that continued use of such models results in rates that are not unfairly discriminatory.

15. NAMIC engaged me to provide written testimony to provide context with which to better evaluate the OIC's basis for the emergency regulations. As requested by NAMIC, this testimony provides a high-level overview of the following:

- How personal lines rates are made
- Regulatory review process and standards in Washington
- Why and how CBIS is used in ratemaking
- What would need to happen to evaluate whether/how the pandemic caused the CBIS models to be unreliable and inaccurate for purposes of ratemaking
- How the OIC emergency order impacts unfair discrimination

16. My work has been peer-reviewed by a P&C actuary colleague at Milliman.

D. Basis of Analysis

17. My analysis was based on the following data and information:

- Emergency rules WAC 284-24A-088, WAC 284-24A-089, and FAQs
- WAC Chapter 284-24A
- Agency Administrative Record - Emergency Rule-Making CR 103 - 05-25-21 (Agency Administrative Record)
- The Insurance Commissioner's Response Opposing Petitioner's Motion for a Preliminary Injunction, April 16, 2021
- OIC Private Passenger Auto Data Call and Homeowners Data Call issued June 3, 2021
- *Basic Ratemaking*, 5th edition published in 2016, by Geoff Werner and Claudine Modlin
- *NAIC Public Hearing on Credit-Based Insurance Scores*[3]

[3] https://content.naic.org/sites/default/files/inline-files/committees_c_090430_hearing_materials.

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- Testimony of Jeff Kucera, FCAS, MAAA, representing Casualty Practice Council of AAA, April 30, 2009
- Testimony of Chet Wiermanski, representing TransUnion LLC, April 30, 2009
- Presentation of Jon Burton, representing LexisNexis, April 30, 2009
- Testimony of Lamont D. Boyd, CPCU, AIM, representing Fair Isaac Corporation, April 24, 2009

18. I also referenced relevant Actuarial Standards of Practice (ASOPs)[4] and other guidance promulgated by the Actuarial Standards Board (ASB), the AAA, and the CAS, including:

- ASOP 1: *Introductory Actuarial Standard of Practice*
- ASOP 12: *Risk Classification (for All Practice Areas)*
- ASOP 17: *Expert Testimony by Actuaries*
- ASOP 23: *Data Quality*
- ASOP 25: *Credibility Procedures*
- ASOP 56: *Modeling*
- CAS *Statement of Principles Regarding Property & Casualty Insurance Ratemaking*[5]

19. As stated in ASOP 1, the ASOPs are promulgated for and binding on members of the U.S.-based actuarial organizations when rendering actuarial services in the U.S. While these ASOPs are binding, they are not the only considerations that affect an actuary's work. There are situations where applicable law (statutes, regulations, and other legally binding authority) may

[4] Full text of the ASOPs can be found on the ASB website here: http://www.actuarialstandardsboard.org/standards-of-practice.

[5] Rescinded December 2020; for background please see https://www.casact.org/article/cas-board-responds-memberregulator-feedback-rescinded-ratemaking-principles.

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require the actuary to deviate from the guidance of an ASOP. Where requirements of law conflict with the guidance of an ASOP, the requirements of law shall govern.

E. How personal lines rates are made

20. *Basic Ratemaking* is a text published by the CAS that outlines the fundamentals of setting insurance prices, which is referred to as "ratemaking" in the P&C insurance industry. The price the insurance consumer pays is referred to as "premium." Insurance premiums can vary significantly for groups of insureds with different risk characteristics.

21. Ratemaking is composed of two separate types of analysis – an overall rate level analysis to determine the total premium for the insurer to charge during a prospective period, and a risk classification plan analysis to determine how much to charge individual segments of policyholders, considering their differences in expected risk.[6] Actuarially sound premiums are determined by (1) an overall amount of premium reasonable to charge for all business within a given program or state, and then (2) a rating plan, consisting of an overall formula (or "rating algorithm") and rating factors, that distributes the overall premium across all policyholders on the basis of relative risk. With respect to these rating factors, for each factor — e.g. Driver Safety Record for auto insurance — there are various risk classifications. Within the Driver Safety Record example, there could be multiple classifications based on accidents and traffic violations statistically correlated to the relative risk of an accident occurring. Each policyholder is placed within a risk classification and charged the appropriate premium according to the pool of insureds within that classification. The object is to charge everyone an actuarially fair rate relative to the risk of loss for each policyholder segment.

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[6] In the actuarial context the term "risk" can be used in multiple ways. It can mean that which is insured, for example a property or person. It can mean a possibility of harm or damage against which something is insured, such as the risk of an auto accident or a house fire. It can also refer to uncertainty in estimation.

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22. My assignment in this case, concerning CBIS, involves only the second step. As described in *Basic Ratemaking*, when estimating the differences in risk of loss among policyholders, actuaries consider the following criteria:

- Statistical significance – The rating characteristics should be statistically significant risk differentiators.
- Homogeneity – The levels of a rating variable should represent distinct groups of risks with similar expected costs. If a group of insureds contains materially different risks, then the risks should be subdivided further.
- Credibility – The number of risks in each group should either be large enough or stable enough to accurately estimate the costs. Credibility is a measure of the predictive value the actuary attaches to new data, which is used to blend an actuarial estimate from new experience with prior estimates or estimates from other data sources.

23. In addition, in accordance with ASOP 12 – Risk Classification, as part of the design of risk classification systems actuaries should:

- Select risk characteristics that are related to expected outcomes;
- Select risk characteristics that are capable of being objectively determined;
- Reflect practical considerations underlying the data capture needed to determine risk characteristics;
- Show that the variation in actual experience correlates to the risk characteristic;
- Consider the interdependence of risk characteristics and make appropriate adjustments; and
- Consider the reasonableness of results, including the consistency of patterns of rates, values, and factors among risk classes.

24. Heterogeneity created by differences in how data is reported does not necessarily make a risk characteristic unacceptable for risk classification or create unfair discrimination.

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This can be illustrated by considering Driver Safety Record, a commonly used rating factor for private passenger auto insurance. Typically, risk segments for the Driver Safety Record factor are based on traffic citations and accident data from motor vehicle reports. However, not all risky driving results in a citation and, in cases where drivers are allowed to defer tickets by attending traffic school, citations may not show up on a motor vehicle report. With respect to accidents, they have to be reported in order be counted in classifying risk. When drivers choose to absorb the cost or damage from accidents rather than reporting them to insurers, the accidents are not counted as part of Driver Safety Record.

25. Despite the "false negatives" that are widely known to occur, historical traffic citation and accident data generally correlate with expected loss. In the absence of better alternatives, Driving Safety Record factors based on this data are widely considered acceptable and not unfairly discriminatory for the purpose of risk classification.

F. Regulatory review process and standards

26. Washington has a rate standard (RCW 48.19.020) stating that "Premium rates for insurance shall not be excessive, inadequate, or unfairly discriminatory." This is the typical standard employed across the U.S. for purposes of insurance rate regulation, and contains two separate tests:

- The "not excessive/inadequate" standard is directed to the total amount of premium the insurer proposes to charge for the entire program or state. If total premium is deemed to be too high, then the rates would violate the "not excessive" standard. If total premium is deemed to be too low, then the rates would violate the "inadequate" standard.
- The "unfairly discriminatory" standard is directed to an assessment of how that total premium is distributed across policyholders. That distribution should occur such that higher risk groups of insureds pay more, and lower risk groups of insureds pay less.

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Unfair discrimination is defined as charging different premiums for insureds having substantially like risk and expense factors. (RCW 48.18.480).

27. According to WAC 284-24A-005, a "risk classification plan" means a plan to formulate different premiums for the same coverage based on group characteristics. Rates within a risk classification system would be considered "fair" or "equitable" if differences in rates reflect material differences in expected cost for risk characteristics. "Fair differentiation" is then the result of actuarially sound classification factors, with persons of substantially the same risk and expense charged similar premiums.

28. The process of classifying insureds according to risk, and determining appropriate rating differentials that represent the relative risk for each class, can be considered a "zero sum game," since it does not change the total amount the insurer would earn under the rate proposal.

G. Why and how CBIS is used in ratemaking

29. Following the 2008 financial crisis, the NAIC held hearings on CBIS due to concerns that the economic crisis could cause insurance scores to worsen and lead to unwarranted premium increases. Testimony from the AAA Casualty Practice Council in 2009 provides background information on the use of CBIS in ratemaking that is relevant today:

- Most companies use CBIS in the rating of personal lines such as private-passenger automobile or homeowners' insurance. The use of CBIS helps insurance companies charge those risks that are likely to generate greater costs higher premiums, while those likely to generate lower costs get lower premiums. The removal of such insurance scores will not lower overall insurance premium; rather, it will redistribute the premium charges so that those risks with lower expected costs will pay more than is actuarially fair, while those with greater expected costs will pay less than is actuarially fair.
- Some insurers use insurance scores simply to determine whether a prospective insured qualifies to be written by the company. More typically, insurers also use insurance scores

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to help segment risks into different groups with similar expected costs for the purpose of rating.

- The importance of CBIS is that there is a strong correlation with the expected costs associated with the risk. In other words, in a group of insureds who are identical in every other way, insureds with favorable insurance scores are significantly more likely to have better loss experience than insureds with unfavorable insurance scores. Consequently, credit-based insurance scores are a statistically reliable tool for segmenting risks into different groups with different expected cost levels.
- Studies have shown that credit scores reflect significant differences in expected loss costs. Thus, credit scores are appropriate tools for risk differentiation. Rates based on groups differentiated by insurance score are not excessive, inadequate, or unfairly discriminatory.
- In a 2001 survey, 90 percent of the responding insurers (from the top 100 personal lines companies) indicated that they were using credit data. Today [2009], the number of companies using credit is likely even greater.

30. The use of CBIS in ratemaking is accepted in most states, including Washington. Companies that use CBIS in underwriting or rating personal insurance coverage in the state must adhere to the rules in Chapter 284-24A of the Washington Administrative Code. The chapter stipulates that:

- Insurance scoring models are filed separately from other rate and rule filings and are reviewed to determine whether the model includes any prohibited factors or attributes that may result in unfair discrimination. (WAC 284-24A-035).
- If a model is found to be out of compliance with Washington law, the modeler is notified of the reasons for non-compliance and provided 60 days to revise the model to resolve

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the issues, and a date when the model may no longer be used in Washington if it is not revised to resolve the issues. (WAC 284-24A-040).

- Any time insurers use credit history or an insurance score to revise a risk classification plan, rating factor, rating plan, rating tier, or base rates, they must submit a multivariate statistical analysis and show how the proposed CBIS rating factors are related to the indicated factors from this analysis. (WAC 284-24A-045).
- The multivariate statistical plan must evaluate the relationship between CBIS and specific rating variables for homeowners (territory, protection class, amount of insurance, loss history, number of family units and form) and personal auto (driver class, multicar discount, territory, vehicle use, driving record and loss history). (WAC 284-24A-050).

31. Therefore, when the OIC approves premium rates incorporating CBIS as being not excessive, inadequate, or unfairly discriminatory, this is based on a thorough evaluation of how predictive CBIS is after application of many of the most significant rating factors that are commonly used in homeowners and personal auto rating plans.

H. What would need to happen to evaluate whether/how the pandemic caused the CBIS models to be unreliable and inaccurate for purposes of ratemaking

32. The CARES Act has impacted credit history data by temporarily protecting consumers against being reported as delinquent if they have been impacted by COVID-19 and made agreements to modify their normal payment schedule in some way (called an "accommodation").

33. The OIC order contends credit history data has become "inaccurate" because of the CARES Act reporting protections and the Governor's orders. The OIC asserts that the pandemic and/or the CARES Act and Governor's orders could render CBIS unreliable for ratemaking through two potential scenarios:

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1. The CARES Act and the Governor's orders caused an underreporting of negative events that would have been predictive of insurance losses. In this scenario, insurance rates would be understated for the population with unreported events.
2. After the CARES Act and the Governor's orders expire, there may be a spike in negative events on credit reports that are not predictive of insurance risk, because the circumstances under which they occurred were different from the historical circumstances under which the relationship between scores and risks was established. In this scenario, insurance rates would be overstated for the population with pandemic-related credit events.

34. The OIC issued data calls on June 3 requesting data on use of credit by Private Passenger Auto and Homeowners insurers. Based on my review of the data requested, it would be sufficient to answer two questions:

- Who will get premium increases and who will get premium decreases if CBIS were removed from rates without adjusting any other rating factors?
- Approximately what will the premium increases and decreases be?

35. The data requested would not be sufficient to answer the questions that should be addressed in order to prove the OIC's assertions regarding the reliability (or lack thereof) of CBIS for ratemaking, namely:

- What portion of policyholders were impacted by the pandemic and CARES Act data reporting issues related to credit?
- How did the reporting issues manifest within the data used by credit vendors and insurers?
- When did the impacts occur and for how long?
- How did the impacts impact the CBIS used by insurers?
- Was the predictive nature of CBIS materially altered within a given insurer's rating plan?

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- If the relationship between CBIS and expected loss showed a material change, what are the implications on the fairness of differentiation within insurer rating plans that use CBIS?

36. ASOP 12 – Risk Classification states that if the risk classification system has changed, or if business or industry practices have changed, the actuary should consider testing the effects of such changes. In order to determine whether the pandemic or CARES Act caused CBIS to be unreliable for ratemaking, the Commissioner would need to quantify the impact of these possible distortions. This would require three analyses:

1. Quantification of the proportion of consumers with credit histories impacted by modified reporting.
2. A review of the distribution of scores before and throughout the pandemic, with consideration given to statistics in the aggregate such as the mean or median score, as well as statistics that describe the prevalence of outliers. If the pandemic has not changed scores materially, it is unlikely that it has rendered them unreliable for ratemaking.
3. A review of the correlation between CBIS and insurance losses during and after the pandemic.

37. Related to the first analysis, data is currently available quantifying the extent of the credit reporting modifications. According to the Equifax article "What Does a K-Shaped Recovery Mean for the Economy?" included in the Agency Administrative Record, a total of 2.4% of loans or accounts were under possible accommodations as of December 29, 2020, versus 1.5% on March 3, 2020. The 2.4% figure will decline as loans roll off accommodations. Expressed another way, credit reporting is operating in a manner similar to the historical data for over 97% of accounts. This suggests that a relatively small proportion of consumers are currently impacted by pandemic-related changes in credit reporting laws. If that is the case, there is little reason to presume that a reporting change for a small proportion of the population

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could cause material changes in relationship between current CBIS models and expected losses for the entire population.

38. The second analysis is a review of the distribution of CBIS scores before and throughout the pandemic. The OIC has asserted that a "flood of negative credit history" after the CARES Act protections and Governor's orders expire will occur, causing CBIS models to be unreliable. That assertion is based on an assumption that the CBIS models are highly sensitive to those characteristics. If that assumption were correct, we would expect to see significant changes in the distribution of CBIS scores during and after the CARES Act protections and Governor's orders.

39. According to testimony from FICO, TransUnion, and LexisNexis presented for the NAIC Public Hearing on Credit-Based Insurance Scores in 2009, the average CBIS scores for these vendors exhibited relatively little change during the Great Recession. While CBIS models in use today may not be the same as those in use during the Great Recession, that experience shows that one cannot make conclusions about how CBIS scores may or may not behave in periods of economic change. Credit characteristics are weighted differently in CBIS versus credit default models, and differently from model to model, which impact their sensitivity to distributional shifts in credit report data. Furthermore, the research presented in "What Does a K-Shaped Recovery Mean for the Economy?" indicates that while delinquency rates are expected to increase, the levels "don't come anywhere near the level we had during the last financial crisis."

40. Additionally, the Commissioner, reporting agencies and insurers can consider the appropriate treatment of negative credit events that occurred during the pandemic. The Commissioner's concern seems to be that the suppressed delinquencies will be automatically scored without modification upon expiration of the CARES Act and Governor's orders. However, modelers or insurers may have developed strategies to mitigate any disruption caused

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by pandemic-related credit events. Instead of assuming how these events will be treated, the Commissioner should inquire as to whether scoring agencies or insurers have taken measures to reduce the potential volatility in scores once the CARES Act and Governor's orders expire. Alternatively, the OIC or Washington legislature could prohibit their use for CBIS modeling, like the prohibition on the use of medical collections or disputed trade accounts. (RCW 48.19.035).

41. Lastly, a review of the correlations between CBIS models and insurance losses post-pandemic is the ultimate test to determine whether CBIS models are reliable. The use of CBIS within a ratemaking model would be subject to guidance in ASOP 56 – Modeling, which directs actuaries to:

- Assess whether the structure of the model is appropriate for the intended purpose.
- Use data appropriate for the model's intended purpose.
- Where applicable, use assumptions as input that are appropriate given the model's intended purpose. This may involve using ranges of assumptions, evaluating assumptions within the model for consistency, and considering the reasonability of the model output when determining whether the assumptions are reasonable in the aggregate.
- Evaluate model risk and, if appropriate, taking reasonable steps to mitigate model risk, through steps such as:
    - Testing to ensure that the model reasonably represents that which is intended to be modeled;
    - Validating that the model output reasonably represents that which is being modeled; and
    - Implementing internal procedures regarding model review and checking to reduce the risk that the model output is not reliably calculated or not utilized as intended.

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42. The prior approval process in Washington makes it possible for the OIC to review the data used by CBIS modelers and insurers, including tests of the effects of changes in credit reporting and how pandemic-related credit events relate to insurance losses compared to other credit events, in compliance with ASOP 56.

43. The Insurance Commissioner's Response Opposing Petitioner's Motion for a Preliminary Injunction asserts that during the pandemic CBIS has remained stable while personal auto claims have dropped dramatically, as one example of how the correlation between insurance credit scoring models and claims has been disrupted by the pandemic. This is neither a valid comparison nor a logical conclusion. Taking this argument further, one could assert that many other risk characteristics that have not undergone distributional shifts, such as gender or age, must also no longer have a relationship to expected losses. Significant shifts that have occurred in other risk variables, such as miles driven, are more likely explanations for the decline in claims. Furthermore, the removal of CBIS does not lower overall premium collected, commensurate with the decline in claim frequency; removing CBIS only redistributes the premium collected such that risks with lower expected costs will pay more, and those with greater expected costs will pay less.

44. There is no record that the OIC has conducted any of these analyses in accordance with actuarial standards of practice, nor asked insurers or CBIS model vendors to conduct them. As discussed in Section E of this report, there are other examples of risk factors based on data that may be inconsistent or incomplete, such as traffic accidents or violations, which are still highly correlated with expected loss and not unfairly discriminatory for the purpose of risk classification. Further, the OIC has not demonstrated why normal OIC regulatory procedures, which require insurers to submit data showing a link between CBIS and insurance risk, are insufficient to address any potential changes in the relationship between CBIS and expected losses.

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I. Impact of OIC's emergency order on unfair discrimination

45. The Commissioner asserts that the removal of CBIS is necessary to protect the general welfare of Washingtonians, and the public harm will accrue to citizens if CBIS is not removed. Companies may substitute a "neutral" rating factor for the CBIS factor, such that the total premium for the book of business is unchanged. Filings are limited to only the changes required by rule, and insurers wishing to make other changes to their rating factors must wait until after the filing to remove credit is approved and submit a separate filing to make other changes.

46. In Washington, the use of CBIS in ratemaking is allowed under legislation. In contrast, some states have passed statutes that prohibit the use of CBIS. Removing or avoiding the use of a rating factor due to legal or regulatory requirements is not considered a deviation from actuarial standards of practice, if the resulting rates and classification factors are developed without the consideration of CBIS.

47. OIC regulations require that insurers incorporate CBIS using a multivariate analysis, which considers multiple variables together, given that there may be interaction among the variables. This is consistent with the guidance of ASOP 12 – Risk Classification, which specifies that "The actuary should consider the interdependence of risk characteristics. To the extent the actuary expects the interdependence to have a material impact on the operation of the risk classification system, the actuary should make appropriate adjustments."

48. Given that the currently approved rating plans in Washington were developed and supported using multivariate analysis, the proper way for a company removing CBIS from its rating plan would be to redo the multivariate analysis without the CBIS factors and recalibrate other rating factors accordingly. However, the OIC's emergency rule specifically prohibits insurers from including a complete rating overhaul in the neutral rating factor filing specified under the emergency order.

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49. The removal of CBIS rate differentials without adjustments to other rating factors could cause the remaining rating plan to become unfairly discriminatory because the relativities for other factors would have been calculated in a multivariate framework including CBIS. For example, in a typical situation where there is a positive correlation between age and CBIS, the age curve used in conjunction with CBIS would be flatter than it would be if credit were not present. In that case, if CBIS were removed without a multivariate analysis, rates on average would be unfairly overstated for older people. This group is likely to be larger, and potentially subject to much bigger premium distortions that could result from the removal of credit, than the small group of consumers whose premiums have been reduced due to the temporary suppression of reporting.

50. The order permits offsetting rates, such that the total premium for all policies the program is unchanged. All else equal, this process would result in rate increases for policyholders with good credit scores correlated to lower risk, and rate decreases for policyholders with poor credit scores correlated to higher risk.

51. Thus, in an attempt to address credit reporting issues for a relatively small population of insureds, the OIC emergency regulations could be introducing unfair discrimination on a much larger group of insureds. In my opinion, removal of credit scoring in the manner proscribed by the OIC emergency order is likely to cause much more pricing inaccuracy and unfair discrimination than would be present if it were left intact.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

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June 14, 2021 San Francisco, CA
Date and Place

Nancy Watkins

Betts
Patterson
Mines
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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on June 14, 2021, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **DECLARATION OF NANCY WATKINGS IN SUPPORT OF PETITIONER INTERVENOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT; and**
- **CERTIFICATE OF SERVICE.**

Counsel for Petitioners American Prop. Cas. Ins. Ass'n, et al.:	☐ U.S. Mail
Michael B. King	☐ Hand Delivery
Jason W. Anderson	☐ Facsimile
Carney Badley Spellman PS	☐ Overnight
701 Fifth Avenue, Suite 3600	☑ Email
Seattle, WA 98104-7010	
king@carneylaw.com	
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Counsel for Respondents Washington State Office of Insurance Commissioner, and Mike Kreidler, Insurance Commissioner for the State of Washington State Office of Ins. Commn'r:	☐	U.S. Mail
	☐	Hand Delivery
	☐	Facsimile
	☐	Overnight
Marta U. DeLeon	☑	Email
Suzanne Becker		
Office of the Attorney General		
1125 Washington Street SE		
PO Box 40100		
Olympia, WA 98504-0100		
marta.deleon@atg.wa.gov		
suzanne.becker@atg.wa.gov		

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of June, 2021.

Valerie D Marsh

Valerie D. Marsh

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ATTACHMENT A

NANCY P. WATKINS
Milliman, Inc.
650 California Street, Suite 2100
San Francisco, California 94108
(415) 394-3733

PROFESSIONAL EXPERIENCE

1997 to present	MILLIMAN, INC.: Atlanta, GA and San Francisco, CA Principal and Consulting Actuary — Manages San Francisco property & casualty consulting practice.
1991 to 1997	WATKINS CONSULTING CO.: Atlanta, GA President — Owned and managed independent actuarial consulting firm.
1989 to 1991	PRICE WATERHOUSE, LLP: Atlanta, GA Senior Manager and Consulting Actuary
1986 to 1989	JOHN HANCOCK REINSURANCE: Boston, MA Actuarial Analyst
1983 to 1986	AETNA LIFE & CASUALTY: Hartford, CT Actuarial Student

EDUCATION AND CREDENTIALS

B.S. in Mathematical Sciences, University of North Carolina at Chapel Hill

Fellow, Casualty Actuarial Society

Member, American Academy of Actuaries

AWARDS

American Academy of Actuaries Outstanding Volunteerism Award, November 2018

Casualty Actuarial Society Above and Beyond Achievement Award, October 2006

PROFESSIONAL SERVICE

Leader, Milliman Climate Resilience Initiative

Member, Climate Insurance Linked Resilient Infrastructure Finance Working Group of United Nations Capital Development Fund

Member, American Academy of Actuaries Flood Insurance Subgroup

Lead, Best Practices in Property Ratemaking document

Chair, American Academy of Actuaries Committee on Property and Liability Financial Reporting

Member, American Academy of Actuaries Casualty Practice Council

Member, American Academy of Actuaries Financial Reporting Council

Co-Chair, American Academy of Actuaries Best Estimates Working Group

Member, Casualty Actuarial Society Committee on Special Interest Seminars

Member, Casualty Actuarial Society Committee on Reinsurance Research

INVITED PRESENTATIONS

"The Risk of Rapid Sea-Level Rise and the Financial Risks to U.S. Coastal Communities"
The House Select Committee on the Climate Crisis, May 2021

"A New Strategy for Addressing the Wildfire Epidemic in California"
Stanford Woods Institute for the Environment Webinar, May 2021

"Climate Risk and Market Value: Data Innovations for Real Estate"
ULI Climate Data Webinar, March 2021

"Climate Change: From Emerging Risk to Real Life Danger"
Milliman Climate Resilience Forum, March 2021

"U.S. Insurance Regulatory Climate Leadership"
Milliman Climate Resilience Forum, March 2021

"Unprecedented, Predictable, and Uninsurable: The Risks Posed by Climate Change"
Milliman Climate Resilience Forum, March 2021

"The Case for Change: Regulatory Approval of Catastrophe Models"
California Department of Insurance Virtual Meeting, December 2020

"Climate Data, Disclosure, and Industry Impacts" - ULI Resilience Summit, December 2020

"Regulatory Workshop on Private Flood Insurance"
Southeastern Zone Regulators Association, September 2020

"B2C Insurtech Strategy" - NYCA Insurance Symposium, September 2020

"Insurance Innovations: It's Not Your Grandmother's Flood Insurance"
Floodplain Management Association Annual Meeting, September 2020

"Clearing the Way for Regulatory Approval of Catastrophe Models"
NAIC Catastrophe Insurance Working Group Meeting, July 2020

"Climate Change Consulting and the Milliman Climate Resilience Initiative"
Milliman Casualty Forum, June 2020

"The Climate-Savvy Investor: Assessing Resilience in U.S. Markets"
ULI Spring Meeting, June 2020

"The State of the Private Flood Market" - National Flood Conference, June 2020

"Making Communities Flood Resilient" The Economic and National Security Dimensions of Climate Change Panel, - UNC Clean Tech Summit, February 2020

Climate Change and Real Estate Panel
ULI SF Climate Change in Real Estate, February 2020

"National Flood Insurance Program – The Need for Change"
NAIC Winter National Meeting, December 2019

Cat Model Clearinghouse Panel
Property Insurance Report National Conference, November 2019

"Staging Your State for Private Flood"
NAIC SE Regional Insurance Commissioners Meeting, October 2019

“Staging Your State for Private Flood”
NAIC Summer National Meeting, August 2019

“Is California Catastrophe Regulation Leading to a Homeowners Rate Crisis?”
APCIA Western Region General Counsel Conference, July 2019

“NFIP Reauthorization - How to Bridge the Flood Insurance Gap”
PCI National Flood Conference, June 2019

“Underwriting Private Flood Insurance” - RAA Board Meeting, April 2019

“Insurance: Transferring and Assessing Risk”
Hinshaw Sea Level Rise/Climate Change, April 2019

“Global Corporate Responsibility” - Climate Resilience Summit, November 2018

“The Future of Flood Insurance” - Risk Mitigation Leadership Forum, October 2018

“The Rising Private Flood Insurance Market” - Torrent Flood Seminar, July 2018

“Overview of the Private Flood Market”
CAS Underwriting Collaboration Seminar, June 2018

“NFIP Risk Rating and Policy Forms Redesign” - PCI National Flood Conference, June 2018

“What Federal Flood Insurance Reform Means to You” - RMS Exceedance, May 2018

“The Rising Flood Insurance Market” - Florida Insurance Market Summit, March 2018

“Competitive Analysis: Know the Data, Know the Market”
CAS Ratemaking, Product and Modeling Seminar, March 2017

“Private Flood Insurance” - CAS Severe Weather Workshop, March 2017

“Insuring Flood in the United States”
RAA Cat Risk Management Conference, February 2017

“Competitor Premium Analysis” - Milliman Casualty Consultants Forum, June 2016

“Flood Insurance Pricing” - CAS Severe Weather Workshop, March 2016

“Flood Insurance - Private Market Alternatives”
Florida Insurance Market Summit, March 2016

“Strategies for Homeowners Profitability and Growth”
Casualty Actuaries of the Northwest, September 2015

“Assessing and Integrating Risk into Actuarial Practices”
California Insurance Commissioner / Risky Business / Stanford University Steyer-Taylor Center for Energy Policy and Finance / Sandia National Laboratories / American Academy of Actuaries Climate Risk Forum: Bridging Climate Science and Actuarial Practice, September 2014

“Property Analytics Using Third Party Data”
Guy Carpenter ERM and Capital Modeling Conference, September 2014

“Homeowners Profitability and Growth”
CSC Executive Innovation Series for Florida Residential Property, April 2014

“Best Practices Rating Model”
Property Casualty Insurers Association of America “Caught in the Middle” Roundtable, November 2013

“Caught in the Middle Panel”
Property Casualty Insurers Association of America Annual Meeting, October 2013

“Best Practices in Catastrophe Ratemaking”
Wharton Risk Management and Decision Processes Center National Cat Solutions Meeting, June 2013

“Homeowners Profitability” - Casualty Actuarial Society Spring Meeting, May 2013

“Emerging Issue and Opportunities in Catastrophe Management”
Milliman Casualty Consultants Forum, June 2012

“Beach Plan Deficit: Cost to N. C. Policyholders and Taxpayers”
North Carolina Legislative Research Subcommittee on Property Insurance Ratemaking, March 2012

“Using Predictive Analytics to Profitably Grow your Business”
Duck Creek Insurance Forum, May 2010

“Practical Applications of Predictive Modeling in Homeowners Insurance”
Casualty Actuarial Society Ratemaking and Product Management Seminar, March 2010

“Predictive Modeling — Case Studies” - Milliman Casualty Consultants Forum, June 2009

“California Private Passenger Auto Ratemaking — A Case Study”
Casualty Actuarial Society Ratemaking and Product Management Seminar, March 2009

North Carolina General Assembly Joint Select Study Committee on the Potential Impact of Major Hurricanes on the North Carolina Insurance Industry, October 2008

“Issues and Opportunities” - Fiserv Insurance Executive Summit, September 2008

“Auto Class Plan Filings”
Association of California Insurance Companies General Counsel Seminar, July 2008

“Solve Business Problems Using Predictive Analytics”
Milliman Casualty Consultants Forum, June 2008

“Reinsurance — Risk Transfer Overview”
Crittenden Medical Insurance Conference, April 2008

“Reinsurance: Accounting, Actuarial and Real World Perspectives“
International Association of Insurance Receivers Insolvency Workshop, January 2008

“Hot Topics in P&C Accounting and Reinsurance”
Fiserv Client Conference, September 2007

“Impact of Auto Rating Factor Regulations”
Association of California Insurance Companies General Counsel Seminar, August 2007

“Reinsurance Risk Transfer Practices” - Crittenden Reinsurance Conference, August 2007

“Finite Risk”
Casualty Actuarial Society Risk Transfer Limited Attendance Seminar, November 2006

"Hot Topics in P&C Accounting, Reporting and Reinsurance"
Fiserv Client Conference, September 2006

"Reinsurance Client Panel: Finite Reinsurance" - Fiserv Client Conference, September 2006

"Financial Reporting Issues" - Milliman Casualty Consultants Forum, June 2006

"Finite Reinsurance and Risk Transfer: Activities of the American Academy of Actuaries"
Reinsurance Association of American Current Issues Forum, May 2006

"Accounting Issues Update: Reinsurance Risk Transfer"
National Risk Retention Association Annual Conference, October 2005

"Insurance Risk Transfer — An Issues Update"
Casualty Loss Reserve Seminar, September 2005

"Financial Reporting: Other Issues" - Milliman Casualty Consultants Forum, June 2005

"Issues Regarding Statutory Statements of Actuarial Opinion"
Southern California Casualty Actuarial Club Fall Meeting, September 2004

"Financial Reporting Issues" - Milliman Casualty Consultants Forum, June 2004

"Financial Reporting Issues" - Milliman Casualty Consultants Forum, October 2003

"NAIC/AAA Loss Reserve Symposium for Readers and Writers of Loss Reserve Opinions",
Casualty Loss Reserve Seminar, September 2003

"Why Establish a Virtual Company?" - Virtual Insurance Operations Conference, June 2001

"Actuaries and the Internet" - Casualty Actuarial Society Annual Meeting, November 2000

"Virtual Insurance Companies" - Virtual Insurance Operations Forum, November 2000

PUBLICATIONS

"Trial by Wildfire: Will Efforts to Fix Home Insurance in California Stand the Test of Time?" -
Milliman Insight, September 2020

"U.S. Private Flood Insurance: The Journey to Build a New Market."
Carrier Management, Insurance Journal, September 2019

"Climate change is making Americans anxious. Insurers can help."
Milliman Insight, April 2019

"Four Ways Hurricane Florence Could Ricochet Across the Insurance Industry"
Milliman Insight, September 14, 2018

"What Could Private Flood Insurance Look Like in New Jersey and New York?"
Milliman Insight, July 24, 2018

"Could Private Flood Insurance be Cheaper than the NFIP?"
Milliman Insight, July 10, 2017

"Why Big Data is a Big Deal" - Insurance ERM, July 13, 2013

"Being Virtual Has Its Virtues" - National Underwriter, September 4, 2000

EXPERT WITNESS ASSIGNMENTS

Howard Mills, Superintendent of Insurance of State of New York vs. Everest Reinsurance Company, expert on behalf of defendant, October 2006.

Mercury Casualty Company, expert in support of rate filing #13-716 being considered by the California Department of Insurance for Mercury's California Homeowners business, June 2013.

Monterey Bay Military Housing, LLC, et al. v. Pinnacle Monterey LLC, et al., expert in support of plaintiffs Monterey Bay Military Housing, LLC, et al., June 2014.

State Farm Fire & Casualty Company, et al. v. Bruce L. Brown, et al., expert in support of defendants State Farm Fire & Casualty Company, et al. February 2017.

Farmers Insurance Exchange & Mid Century Insurance Company v. Roger Harris, Duane Brown, & Brian Lindsey, expert in support of defendants Farmers Insurance Exchange & Mid Century Insurance Company, November 2018.

EXPERT TESTIMONY AT RATE HEARINGS

Table 1
Expert Testimony at Rate Hearings by Nancy Watkins

Hearing Date	Company	Filing #	Line of Business	State
11/9/2006	St. Johns	FCP 06-11223	HO	Florida
11/16/2006	United P&C	FCP 06-13037	HO	Florida
10/29/2009	Olympus Ins Co	FCP 09-17588	HO	Florida
2/10/2010	First Home	FCP 09-23287	HO	Florida
3/2/2010	ACA Home	FCP 10-00311	HO	Florida
10/21/2010	First Community	FCP 10-14149	DF	Florida
12/7/2010	First Home	FCP 10-17219	HO	Florida
3/10/2011	Olympus	FCP 11-00692	HO	Florida
3/22/2011	First Community	FCP 11-00972	HO	Florida
5/12/2011	Fidelity National	FCP 11-04301	HO	Florida
9/8/2011	Fidelity Fire & Casualty/First Protective	FCP 11-11215	DF	Florida
5/17/2012	Sunshine State	FCP 12-0376 FCP 12-04939	HO DF	Florida
9/20/2012	Citizens Property Insurance Corporation	FCP 12-13991 FCP 12-13992	HO (Coastal) HO	Florida
5/30/2013	Fidelity National	FCP-13-07023	HO	Florida
1/7/2016	State Farm General	CDI 14-8381	HO	California

ARBITRATIONS

Sunshine State Insurance Company (SSIC) and Florida State Board of Administration (SBA), served on an arbitration panel of three actuaries appointed to conduct the resolution of a dispute between the Florida Hurricane Catastrophe Fund and SSIC, November 2010.

Kramer-Wilson Company, Inc. and National General Holding Corp. arbitration. Party arbitrator for Kramer-Wilson Company, Inc., May 2019

☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: September 3, 2021
Time: 9:00 a.m.
Judge/Calendar:
The Honorable Mary Sue Wilson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PROFESSIONAL INSURANCE AGENTS OF WASHINGTON, and INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON, and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, Petitioners, vs. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON, Respondents.	NO. 21-2-00542-34 PETITIONER INTERVENOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES' MOTION TO SUPPLEMENT THE RECORD

PETITIONER INTERVENOR National Association of Mutual Insurance Companies ("NAMIC") respectfully moves the Court for an order to supplement the record under RCW

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34.05.562(1)(b) to allow for consideration of additional evidence in conjunction with its Motion for Summary Judgment, being filed concurrently with this Motion to Supplement.

This Motion is based upon the pleadings already on file with the Court in this case, as well as the following pleadings filed concurrently with this Motion:

1. Petitioner Intervenor National Association of Mutual Insurance Companies' Opening Brief in Support of Motion to Supplement the Record
2. Declaration of Joseph D. Hampton in Support of Petitioner Intervenor National Association of Mutual Insurance Companies' Motion to Supplement the Record (and exhibits thereto);
3. Declaration of Nancy Watkins in Support of Petitioner Intervenor National Association of Mutual Insurance Companies' Motion for Summary Judgment (Watkins Declaration) (and exhibits thereto);
4. [Proposed] Order Granting Petitioner Intervenor National Association of Mutual Insurance Companies' Motion to Supplement the Record.

The pleadings already of record, and those submitted in support of this Motion and NAMIC's Motion for Summary Judgment, show that the Watkins Declaration addresses disputed issues regarding the unlawfulness of the Office of Insurance Commissioner's procedure and decisionmaking process in adopting emergency regulations WAC 284-24A-088 and WAC 284-24A-089. NAMIC respectfully requests that this Court issue an order supplementing the judicial record to include the Watkins Declaration.

DATED this 14th day of June, 2021.

BETTS, PATTERSON & MINES, P.S.

By _____

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Joseph D. Hampton, WSBA #15297
Attorneys for Intervenor National
Association of Mutual Insurance Companies

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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on June 14, 2021, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Petitioner Intervenor National Association Of Mutual Insurance Companies' Motion To Supplement The Record and**
- **Certificate of Service.**

Counsel for Petitioners American Prop. Cas. Ins. Ass'n, et al.: Michael B. King Jason W. Anderson Carney Badley Spellman PS 701 Fifth Avenue, Suite 3600 Seattle, WA 98104-7010 king@carneylaw.com anderson@carneylaw.com	☐ ☐ ☐ ☐ ☑	U.S. Mail Hand Delivery Facsimile Overnight Email
Counsel for Respondents Washington State Office of Insurance Commissioner, and Mike Kreidler, Insurance Commissioner for the State of Washington State Office of Ins. Commn'r: Marta U. DeLeon Suzanne Becker Office of the Attorney General 1125 Washington Street SE Olympia, WA 98504-0100 marta.deleon@atg.wa.gov suzanne.becker@atg.wa.gov	☐ ☐ ☐ ☐ ☑	U.S. Mail Hand Delivery Facsimile Overnight Email

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of June, 2021.

Valerie D. Marsh

Valerie D. Marsh

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Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: September 3, 2021
Time: 9:00 a.m.
Judge/Calendar:
The Honorable Mary Sue Wilson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PROFESSIONAL INSURANCE AGENTS OF WASHINGTON, and INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON, and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, Petitioners, vs. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON, Respondents.	NO. 21-2-00542-34 PETITIONER INTERVENOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES' OPENING BRIEF IN SUPPORT OF MOTION TO SUPPLEMENT THE RECORD

NAMIC'S MOTION TO SUPPLEMENT THE RECORD

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I. INTRODUCTION

National Association of Mutual Insurance Companies (NAMIC) brings this motion to supplement the record to include the Declaration of Nancy Watkins (Watkins Declaration), to the extent such a motion may be necessary. To be clear, the Watkins Declaration is submitted for the *judicial* record. RCW 34.05.562(1)(b) states that "[t]he court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding" the "[u]nlawfulness of procedure or of decision-making process." NAMIC submits this motion to supplement the record with the Watkins Declaration. The Watkins Declaration is submitted in support of NAMIC's Motion for Summary Judgment on Count III of its Petition, which addresses the unlawfulness of the Office of Insurance Commissioner (OIC)'s procedure and decisionmaking process in adopting emergency regulations WAC 284-24A-088 and WAC 284-24A-089.

II. STATEMENT OF FACTS

OIC adopted WAC 284-24A-088 and WAC 284-24A-089 without notice-and-comment through emergency rulemaking. Those regulations ban Credit-Based Insurance Scoring (CBIS). As explained in NAMIC's Opening Brief in Support of Motion for Summary Judgment (NAMIC Mot.), filed concurrently with this motion, OIC claims that CBIS is unfairly discriminatory because Congress and the Governor have adopted laws prohibiting or preventing the reporting of certain information on consumer reports. OIC also alleges that CBIS is unfairly discriminatory because Congress and the Governor may repeal those laws, and that information will once more be reported. In Count III of its Petition, NAMIC asks this Court to declare the emergency regulations invalid because they were adopted in violation of the Washington Administrative Procedure Act (APA). *See* NAMIC Mot. 8-21. The Petition also alleges, in Counts I and II, that

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the regulations were adopted by an executive agency contrary to constitutional separation of powers, and the agency action in adopting them exceeds OIC's statutory authority. *See id.* at 21-25.

OIC seeks to supplement the record with the Declaration of Nancy Watkins. Nancy Watkins is a Principal and Consulting Actuary with Milliman, Inc. Milliman is among the word's largest providers of actuarial, risk management, and related technology and data solutions. Ms. Watkins was retained by NAMIC to address "[w]hat would need to happen to evaluate whether/how the pandemic caused credit-based insurance scoring [ ] models to be unreliable and inaccurate for purposes of ratemaking." Watkins Dec. ¶ 10. The Watkins declaration describes (1) how home, automobile, and renter's insurance rates are made; (2) the regulatory review process and standards for insurance ratemaking in Washington; (3) why and how CBIS is used in ratemaking; (4) what would need to happen to evaluate whether and how the pandemic caused the CBIS models to be unreliable and inaccurate for purposes of ratemaking; and (5) how the OIC emergency order impacts unfair discrimination. *Id.* ¶¶ 20-51.

The Watkins Declaration concludes, among other things, that "CBIS is generally accepted as one of the most predictive factors for the risk of loss" for automotive, home, and renter's insurance; "it is consistent with actuarial standards of practice to conduct quantitative studies of the changes in CBIS and correlations to losses to reach a conclusion on the reliability or accuracy of a CBIS model for the purposes of ratemaking"; OIC "has not shown a quantitative study demonstrating the impact the pandemic has had, or may have, on the distribution of CBIS or the relationship of insurance losses," and the "process which the OIC has mandated for removing CBIS from rates is likely to cause unfair discrimination." *Id.* ¶ 10.

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III. ISSUE PRESENTED

Whether this Court should supplement the record with the Watkins Declaration, which addresses the unlawfulness of OIC's procedure and decisonmaking process.

IV. AUTHORITY AND ARGUMENT

This Court may receive additional evidence to address the "[u]nlawfulness of procedure or of decision-making process" of an administrative agency. RCW 34.05.562(1)(b); *see Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 14 Wn. App. 2d 945, 965, 474 P.3d 1107 (2020). The Watkins Declaration directly addresses both issues, providing background and analysis supporting NAMIC's challenge to OIC's unlawful administrative procedures and arbitrary and capricious decisonmaking. *See* Watkins Dec. ¶¶ 10-51; *see also Pres. Responsible Shoreline Mgmt. v. City of Bainbridge Island*, 11 Wn. App. 2d 1040, 2019 WL 6699975, at *4 (2019) ("Where an agency engages in some unlawful procedure . . . subsection (b) grants discretionary authority to the superior court to supplement the administrative record to decide those disputed issues.").

NAMIC submits the Watkins Declaration as evidence of the types of facts and analyses that would be necessary for OIC to reach a conclusion that use of CBIS as an insurance rating factor is no longer predictive of insurance losses and therefore "unfairly discriminatory." The process of ratemaking is an actuarial exercise. Actuarial evidence is essential to inform the Court regarding the principles applicable to rating and consideration of rating factors. Ms. Watkins provides a "primer" on the basics of ratemaking to allow the Court to independently understand and consider the important question of the minimum record necessary to support the regulations. She identifies controlling "Actuarial Statement of Principles" (ASOPs) that dictate considerations relating to ratemaking issues, and explains their application here. Ms. Watkins further explains what only an expert actuary can explain: that the regulations as adopted and

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implemented are likely to cause far more unfair discrimination than they could possibly correct, even if OIC's premises had any type of evidentiary support accepted for an actuarial task such as insurance ratemaking (which, as Ms. Watkins explains, they do not). *See* NAMIC Mot. 8-21; Watkins Dec. ¶¶ 10-44. The Declaration further explains that "[t]here is no record that the OIC has conducted" an analysis of the relationship between CBIS and risk of loss "in accordance with actuarial standards of practice," which is required to determine whether CBIS no longer remains an accurate predictor of loss. Watkins Dec. ¶ 44. And the Declaration explains that there is no reason to assume that pandemic-related changes in credit reporting would affect the relationship between CBIS and risk of loss. *See id.* ¶¶ 37-44.

The Watkins Declaration also supports NAMIC's argument that OIC's decisonmaking is arbitrary and capricious because the agency's reasoning is conclusory, unsupported by evidence, and fails to consider important aspects of the problem. *See* NAMIC Mot. 13-21; Watkins Dec. ¶¶ 10-51. The Watkins Declaration explains how OIC could have—but did not—determine whether CBIS remains predictive of loss. *See* Watkins Dec. ¶¶ 37-44. It also explains how OIC could have—but did not—analyze whether the repeal of the CARES Act would affect consumer credit. *See id.* The declaration describes how OIC failed to consider the impact of banning CBIS on consumers who may be helped by CBIS, such as older Washingtonians. *See id.* ¶¶ 12, 49. And it further describes how banning CBIS without allowing insurers to redo their insurance rating plans may *cause* unfair discrimination. *Id.* ¶¶ 45-51.

The Watkins Declaration directly addresses the unlawful procedures and decisionmaking adopted by the OIC in this case. This Court should thus supplement the record to include the Watkins Declaration, which is particularly relevant to NAMIC's summary judgment briefing.

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V. CONCLUSION

For the reasons stated in this memorandum, NAMIC respectfully requests that the Court grant the motion to supplement the record.

DATED this 14th day of June, 2021.

BETTS, PATTERSON & MINES, P.S.

By _____
Joseph D. Hampton, WSBA #15297
Attorneys for Intervenor National
Association of Mutual Insurance Companies

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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on June 14, 2021, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Petitioner Intervenor National Association Of Mutual Insurance Companies' Opening Brief In Support Of Motion To Supplement The RecordTo Supplement The Record; and**
- **Certificate of Service.**

Counsel for Petitioners American Prop. Cas. Ins. Ass'n, et al.: Michael B. King Jason W. Anderson Carney Badley Spellman PS 701 Fifth Avenue, Suite 3600 Seattle, WA 98104-7010 king@carneylaw.com anderson@carneylaw.com	☐ ☐ ☐ ☐ ☑	U.S. Mail Hand Delivery Facsimile Overnight Email
Counsel for Respondents Washington State Office of Insurance Commissioner, and Mike Kreidler, Insurance Commissioner for the State of Washington State Office of Ins. Commn'r: Marta U. DeLeon Suzanne Becker Office of the Attorney General 1125 Washington Street SE PO Box 40100 Olympia, WA 98504-0100 marta.deleon@atg.wa.gov suzanne.becker@atg.wa.gov	☐ ☐ ☐ ☐ ☑	U.S. Mail Hand Delivery Facsimile Overnight Email

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of June, 2021.

Valerie D. Marsh

Valerie D. Marsh

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☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: September 3, 2021
Time: 9:00 a.m.
Judge/Calendar:
The Honorable Mary Sue Wilson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PROFESSIONAL INSURANCE AGENTS OF WASHINGTON, and INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON, and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, Petitioners, vs. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON, Respondents.	NO. 21-2-00542-34 DECLARATION OF JOSEPH D. HAMPTON IN SUPPORT OF PETITIONER INTERVENOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES' BRIEF IN SUPPORT OF MOTION TO SUPPLEMENT

I, Joseph D. Hampton, hereby certify under penalty of perjury, that the following is true and correct and within my personal knowledge:

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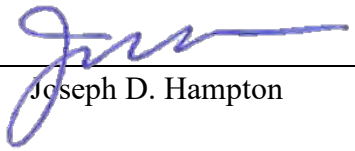
1. I am over the age of 18, have personal knowledge of all facts contained in this declaration, and am competent to testify as a witness to those facts.

2. I am an attorney with Betts, Patterson & Mines, P.S., the attorneys of record for Petitioner Intervenor National Association of Mutual Insurance Companies in this matter.

3. Attached hereto as Exhibit 1 is a true and correct copy of the Declaration of Nancy Watkins in Support of Petitioner Intervenor National Association of Mutual Insurance Companies' Motion for Summary Judgment.

DATED this 14th day of June, 2021, at Seattle, Washington.



Joseph D. Hampton

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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on June 14, 2021, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Declaration Of Joseph D. Hampton In Support Of Petitioner Intervenor National Association Of Mutual Insurance Companies' Brief In Support Of Motion ; and**
- **Certificate of Service.**

Counsel for Petitioners American Prop. Cas. Ins. Ass'n, et al.: Michael B. King Jason W. Anderson Carney Badley Spellman PS 701 Fifth Avenue, Suite 3600 Seattle, WA 98104-7010 king@carneylaw.com anderson@carneylaw.com	☐ ☐ ☐ ☐ ☑	U.S. Mail Hand Delivery Facsimile Overnight Email
Counsel for Respondents Washington State Office of Insurance Commissioner, and Mike Kreidler, Insurance Commissioner for the State of Washington State Office of Ins. Commn'r: Marta U. DeLeon Suzanne Becker Office of the Attorney General 1125 Washington Street SE PO Box 40100 Olympia, WA 98504-0100 marta.deleon@atg.wa.gov suzanne.becker@atg.wa.gov	☐ ☐ ☐ ☐ ☑	U.S. Mail Hand Delivery Facsimile Overnight Email

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of June, 2021.

Valerie D. Marsh

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EXHIBIT 1

☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: September 3, 2021
Time: 9:00 a.m.
Judge/Calendar:
The Honorable Mary Sue Wilson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PROFESSIONAL INSURANCE AGENTS OF WASHINGTON, and INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON, and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

vs.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

NO. 21-2-00542-34

DECLARATION OF NANCY WATKINS IN SUPPORT OF PETITIONER INTERVENOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT

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I, Nancy Watkins, hereby declare as follows:

A. Qualifications

1. My name is Nancy Watkins, and my business address is 650 California Street, San Francisco, California. I am a Principal and Consulting Actuary with Milliman, Inc. (Milliman). I am a Fellow of the Casualty Actuarial Society (CAS) and a Member of the American Academy of Actuaries (AAA). A leading international organization for credentialing and professional education, the CAS is the world's only actuarial organization focused exclusively on property and casualty risks and serves over 9,000 members worldwide. CAS members may be "Associates" or "Fellows," with "Fellow" designating the highest recognized level.

2. Milliman is among the world's largest providers of actuarial, risk management, and related technology and data solutions. Milliman's consulting and advanced analytics capabilities encompass healthcare, property and casualty insurance, life insurance and financial services, and employee benefits. With more than 4,500 employees in 2020, the firm serves the full spectrum of business, financial, government, union, education, and nonprofit organizations. Founded in 1947, Milliman today has offices in principal cities worldwide, covering markets in North America, Latin America, Europe, Asia and the Pacific, the Middle East, and Africa.

3. A complete statement of my educational, employment and academic credentials is included in the curriculum vitae filed as Attachment A with this testimony. To summarize, I have a Bachelor of Science degree in Mathematical Sciences from the University of North Carolina at Chapel Hill. From 1983 to 1986, I was an actuarial student at Aetna Life & Casualty. From 1986 to 1989, I was an actuarial analyst at John Hancock Reinsurance. From 1989 to 1991, I was an actuarial consultant at Price Waterhouse; my title was Senior Manager when I left the company. I was the owner and President of an independent actuarial consulting firm, Watkins Consulting Co., from 1991 to 1997. I joined Milliman in 1997 as a Consulting Actuary

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and was made a Principal in 1999; currently I co-manage a practice of 33 actuaries and professionals in San Francisco.

4. I have been actively involved in professional leadership roles throughout my career. Currently I am a volunteer member of the Climate Insurance Linked Resilient Infrastructure Finance Working Group of the United Nations Capital Development Fund, piloting climate adaptation financing for emerging markets and least developed countries. I also lead the Milliman Climate Resilience Initiative and chaired the Milliman Climate Resilience Forum 2021, an event which drew over 1000 participants and included 55 speakers representing climate leadership across the international insurance, government, finance and scientific communities.

5. Previously I served on the AAA Flood Insurance Subgroup, in recognition of which I received the AAA Outstanding Volunteerism Award. I also served as Vice-Chair and Chair of the Committee on Property and Liability Financial Reporting, a committee of the AAA that deals with property/casualty financial reporting issues. In this capacity I worked closely with representatives of the National Association of Insurance Commissioners (NAIC).[1] I served as chair of the Risk Transfer Subgroup, to provide technical assistance to regulators, standard-setters and other governing bodies as necessary in the risk transfer area. I also chaired the Risk Transfer Work Group, a group that contains actuaries from the industry as well as representatives from the Big 4 accounting firms and regulators from the New York Insurance Department. During that time I also served as a member of the AAA Financial Reporting Council and

[1] Insurance in the U.S. is regulated on a state-by-state basis. The National Association of Insurance Commissioners (NAIC) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories

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Casualty Practice Council, and co-chaired the AAA Best Estimates Working Group. In recognition of these efforts I received the CAS Above and Beyond Achievement Award.

6. I have presented on technical ratemaking and financial reporting topics at many NAIC meetings as well as meetings of the National Flood Conference, Reinsurance Association of America, International Association of Insurance Receivers, Internal Revenue Service, Securities and Exchange Commission, American Institute of Certified Public Accountants Insurance Expert Panel, and Public Company Accounting Oversight Board. At the request of the California Department of Insurance, I have recently presented on the use of catastrophe models to address property insurance availability and affordability issues in the state.

7. As a consultant, I manage a San Francisco Property and Casualty (P&C) practice that specializes in climate resilience, insurtech and catastrophic property risk. Our consulting services include product pricing and development, litigation support, use of catastrophe models in ratemaking, competitive analysis, predictive modeling, class plan analysis, assistance working with state regulators, reserve reviews, and state expansion strategies. I have submitted and/or worked on hundreds of rate filings in the past 20 years, mostly for residential property and personal automobile insurance.

8. I meet the Qualification Standards of the American Academy of Actuaries to render the opinions contained herein.

9. My 2021 billable rate is $800 per hour payable to Milliman, Inc. for my actuarial consulting services, including expert witness support. My payment is not dependent on the outcome of this matter.

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B. Questions Presented and Summary of Conclusions

10. I[2] have been retained by the National Association of Mutual Insurance Companies (NAMIC) primarily to address a specific question:

What would need to happen to evaluate whether/how the pandemic caused credit-based insurance scoring (CBIS) models to be unreliable and inaccurate for purposes of ratemaking?

My conclusions are:

- CBIS is generally accepted as one of the most predictive factors for the risk of loss in the lines affected by the regulations.
- From an actuarial perspective, it is consistent with actuarial standards of practice to conduct quantitative studies of the changes in CBIS and correlations to losses to reach a conclusion on the reliability or accuracy of a CBIS model for the purposes of ratemaking.
- The Washington State Office of the Insurance Commissioner (OIC) has not shown a quantitative study demonstrating the impact the pandemic has had, or may have, on the distribution of CBIS or the relationship to insurance losses.
- The process which the OIC has mandated for removing CBIS from rates is likely to cause unfair discrimination.

11. To determine whether the pandemic materially impacted the correlation between CBIS and insurance risk, actuarial analysis is required. Based on my review, the OIC did not conduct that analysis in accordance with applicable actuarial standards, nor did it ask insurers to conduct that analysis. Further, the June 3, 2021 data calls issued by the OIC do not request data that would be a sufficient basis upon which to base such an analysis.

[2] Throughout this report, references to "I", "me" or "my" are intended to include Milliman employees working under my direction to assist in this assignment, including internal peer reviewers. The opinions stated in this report are my opinions.

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12. In my opinion, the temporary changes in credit reporting do not render the continued use of CBIS inconsistent with actuarial standards of practice, absent further evidence and analysis. Based on the relatively small number of consumers impacted by pandemic-related changes in credit reporting laws and the experience of the 2008 Great Recession, there is little reason to conclude that significant changes have occurred in the relationship between current CBIS models and expected losses as a result of the pandemic. Prohibiting CBIS in the manner prescribed by the OIC, however, is likely to create unfair discrimination as a consequence of removing one rating factor from a rating plan that was calibrated to be actuarially fair as a cohesive whole. For example, one potential consequence will be unfairly high rates for older Washingtonians with good credit scores correlated to lower risk, who may see their insurance rates increase.

C. Background and Scope of Work

13. CBIS has historically been accepted for insurance ratemaking in the state of Washington, subject to review by the OIC. The OIC is tasked with ensuring that insurance rates are not excessive, inadequate, or unfairly discriminatory.

14. Recently the OIC issued a temporary emergency order prohibiting insurers from using credit history to determine premiums, rates or eligibility applicable to insurance coverage for private automobiles, renters and homeowners. The order cites asserted disruptions in the credit reporting process attributable to the CARES Act and related orders adopted by the Governor, and states that a large volume of negative credit corrections will flood consumer credit histories once the CARES Act protections and the Governor's orders are eliminated. According to the order, this situation has caused CBIS models to be unreliable and therefore inaccurate when applied to produce a premium amount for an insurance consumer in Washington state. The order states that, without data to demonstrate the continued predictive ability of the currently

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filed CBIS models, it cannot be assumed that continued use of such models results in rates that are not unfairly discriminatory.

15. NAMIC engaged me to provide written testimony to provide context with which to better evaluate the OIC's basis for the emergency regulations. As requested by NAMIC, this testimony provides a high-level overview of the following:

- How personal lines rates are made
- Regulatory review process and standards in Washington
- Why and how CBIS is used in ratemaking
- What would need to happen to evaluate whether/how the pandemic caused the CBIS models to be unreliable and inaccurate for purposes of ratemaking
- How the OIC emergency order impacts unfair discrimination

16. My work has been peer-reviewed by a P&C actuary colleague at Milliman.

D. Basis of Analysis

17. My analysis was based on the following data and information:

- Emergency rules WAC 284-24A-088, WAC 284-24A-089, and FAQs
- WAC Chapter 284-24A
- Agency Administrative Record - Emergency Rule-Making CR 103 - 05-25-21 (Agency Administrative Record)
- The Insurance Commissioner's Response Opposing Petitioner's Motion for a Preliminary Injunction, April 16, 2021
- OIC Private Passenger Auto Data Call and Homeowners Data Call issued June 3, 2021
- *Basic Ratemaking*, 5th edition published in 2016, by Geoff Werner and Claudine Modlin
- *NAIC Public Hearing on Credit-Based Insurance Scores*[3]

[3] https://content.naic.org/sites/default/files/inline-files/committees_c_090430_hearing_materials.

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- Testimony of Jeff Kucera, FCAS, MAAA, representing Casualty Practice Council of AAA, April 30, 2009
- Testimony of Chet Wiermanski, representing TransUnion LLC, April 30, 2009
- Presentation of Jon Burton, representing LexisNexis, April 30, 2009
- Testimony of Lamont D. Boyd, CPCU, AIM, representing Fair Isaac Corporation, April 24, 2009

18. I also referenced relevant Actuarial Standards of Practice (ASOPs)[4] and other guidance promulgated by the Actuarial Standards Board (ASB), the AAA, and the CAS, including:

- ASOP 1: *Introductory Actuarial Standard of Practice*
- ASOP 12: *Risk Classification (for All Practice Areas)*
- ASOP 17: *Expert Testimony by Actuaries*
- ASOP 23: *Data Quality*
- ASOP 25: *Credibility Procedures*
- ASOP 56: *Modeling*
- CAS *Statement of Principles Regarding Property & Casualty Insurance Ratemaking*[5]

19. As stated in ASOP 1, the ASOPs are promulgated for and binding on members of the U.S.-based actuarial organizations when rendering actuarial services in the U.S. While these ASOPs are binding, they are not the only considerations that affect an actuary's work. There are situations where applicable law (statutes, regulations, and other legally binding authority) may

[4] Full text of the ASOPs can be found on the ASB website here: http://www.actuarialstandardsboard.org/standards-of-practice.

[5] Rescinded December 2020; for background please see https://www.casact.org/article/cas-board-responds-memberregulator-feedback-rescinded-ratemaking-principles.

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require the actuary to deviate from the guidance of an ASOP. Where requirements of law conflict with the guidance of an ASOP, the requirements of law shall govern.

E. How personal lines rates are made

20. *Basic Ratemaking* is a text published by the CAS that outlines the fundamentals of setting insurance prices, which is referred to as "ratemaking" in the P&C insurance industry. The price the insurance consumer pays is referred to as "premium." Insurance premiums can vary significantly for groups of insureds with different risk characteristics.

21. Ratemaking is composed of two separate types of analysis – an overall rate level analysis to determine the total premium for the insurer to charge during a prospective period, and a risk classification plan analysis to determine how much to charge individual segments of policyholders, considering their differences in expected risk.[6] Actuarially sound premiums are determined by (1) an overall amount of premium reasonable to charge for all business within a given program or state, and then (2) a rating plan, consisting of an overall formula (or "rating algorithm") and rating factors, that distributes the overall premium across all policyholders on the basis of relative risk. With respect to these rating factors, for each factor — e.g. Driver Safety Record for auto insurance — there are various risk classifications. Within the Driver Safety Record example, there could be multiple classifications based on accidents and traffic violations statistically correlated to the relative risk of an accident occurring. Each policyholder is placed within a risk classification and charged the appropriate premium according to the pool of insureds within that classification. The object is to charge everyone an actuarially fair rate relative to the risk of loss for each policyholder segment.

---

[6] In the actuarial context the term "risk" can be used in multiple ways. It can mean that which is insured, for example a property or person. It can mean a possibility of harm or damage against which something is insured, such as the risk of an auto accident or a house fire. It can also refer to uncertainty in estimation.

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22. My assignment in this case, concerning CBIS, involves only the second step. As described in *Basic Ratemaking*, when estimating the differences in risk of loss among policyholders, actuaries consider the following criteria:

- Statistical significance – The rating characteristics should be statistically significant risk differentiators.
- Homogeneity – The levels of a rating variable should represent distinct groups of risks with similar expected costs. If a group of insureds contains materially different risks, then the risks should be subdivided further.
- Credibility – The number of risks in each group should either be large enough or stable enough to accurately estimate the costs. Credibility is a measure of the predictive value the actuary attaches to new data, which is used to blend an actuarial estimate from new experience with prior estimates or estimates from other data sources.

23. In addition, in accordance with ASOP 12 – Risk Classification, as part of the design of risk classification systems actuaries should:

- Select risk characteristics that are related to expected outcomes;
- Select risk characteristics that are capable of being objectively determined;
- Reflect practical considerations underlying the data capture needed to determine risk characteristics;
- Show that the variation in actual experience correlates to the risk characteristic;
- Consider the interdependence of risk characteristics and make appropriate adjustments; and
- Consider the reasonableness of results, including the consistency of patterns of rates, values, and factors among risk classes.

24. Heterogeneity created by differences in how data is reported does not necessarily make a risk characteristic unacceptable for risk classification or create unfair discrimination.

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This can be illustrated by considering Driver Safety Record, a commonly used rating factor for private passenger auto insurance. Typically, risk segments for the Driver Safety Record factor are based on traffic citations and accident data from motor vehicle reports. However, not all risky driving results in a citation and, in cases where drivers are allowed to defer tickets by attending traffic school, citations may not show up on a motor vehicle report. With respect to accidents, they have to be reported in order be counted in classifying risk. When drivers choose to absorb the cost or damage from accidents rather than reporting them to insurers, the accidents are not counted as part of Driver Safety Record.

25. Despite the "false negatives" that are widely known to occur, historical traffic citation and accident data generally correlate with expected loss. In the absence of better alternatives, Driving Safety Record factors based on this data are widely considered acceptable and not unfairly discriminatory for the purpose of risk classification.

F. Regulatory review process and standards

26. Washington has a rate standard (RCW 48.19.020) stating that "Premium rates for insurance shall not be excessive, inadequate, or unfairly discriminatory." This is the typical standard employed across the U.S. for purposes of insurance rate regulation, and contains two separate tests:

- The "not excessive/inadequate" standard is directed to the total amount of premium the insurer proposes to charge for the entire program or state. If total premium is deemed to be too high, then the rates would violate the "not excessive" standard. If total premium is deemed to be too low, then the rates would violate the "inadequate" standard.
- The "unfairly discriminatory" standard is directed to an assessment of how that total premium is distributed across policyholders. That distribution should occur such that higher risk groups of insureds pay more, and lower risk groups of insureds pay less.

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Unfair discrimination is defined as charging different premiums for insureds having substantially like risk and expense factors. (RCW 48.18.480).

27. According to WAC 284-24A-005, a "risk classification plan" means a plan to formulate different premiums for the same coverage based on group characteristics. Rates within a risk classification system would be considered "fair" or "equitable" if differences in rates reflect material differences in expected cost for risk characteristics. "Fair differentiation" is then the result of actuarially sound classification factors, with persons of substantially the same risk and expense charged similar premiums.

28. The process of classifying insureds according to risk, and determining appropriate rating differentials that represent the relative risk for each class, can be considered a "zero sum game," since it does not change the total amount the insurer would earn under the rate proposal.

G. Why and how CBIS is used in ratemaking

29. Following the 2008 financial crisis, the NAIC held hearings on CBIS due to concerns that the economic crisis could cause insurance scores to worsen and lead to unwarranted premium increases. Testimony from the AAA Casualty Practice Council in 2009 provides background information on the use of CBIS in ratemaking that is relevant today:

- Most companies use CBIS in the rating of personal lines such as private-passenger automobile or homeowners' insurance. The use of CBIS helps insurance companies charge those risks that are likely to generate greater costs higher premiums, while those likely to generate lower costs get lower premiums. The removal of such insurance scores will not lower overall insurance premium; rather, it will redistribute the premium charges so that those risks with lower expected costs will pay more than is actuarially fair, while those with greater expected costs will pay less than is actuarially fair.
- Some insurers use insurance scores simply to determine whether a prospective insured qualifies to be written by the company. More typically, insurers also use insurance scores

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to help segment risks into different groups with similar expected costs for the purpose of rating.

- The importance of CBIS is that there is a strong correlation with the expected costs associated with the risk. In other words, in a group of insureds who are identical in every other way, insureds with favorable insurance scores are significantly more likely to have better loss experience than insureds with unfavorable insurance scores. Consequently, credit-based insurance scores are a statistically reliable tool for segmenting risks into different groups with different expected cost levels.
- Studies have shown that credit scores reflect significant differences in expected loss costs. Thus, credit scores are appropriate tools for risk differentiation. Rates based on groups differentiated by insurance score are not excessive, inadequate, or unfairly discriminatory.
- In a 2001 survey, 90 percent of the responding insurers (from the top 100 personal lines companies) indicated that they were using credit data. Today [2009], the number of companies using credit is likely even greater.

30. The use of CBIS in ratemaking is accepted in most states, including Washington. Companies that use CBIS in underwriting or rating personal insurance coverage in the state must adhere to the rules in Chapter 284-24A of the Washington Administrative Code. The chapter stipulates that:

- Insurance scoring models are filed separately from other rate and rule filings and are reviewed to determine whether the model includes any prohibited factors or attributes that may result in unfair discrimination. (WAC 284-24A-035).
- If a model is found to be out of compliance with Washington law, the modeler is notified of the reasons for non-compliance and provided 60 days to revise the model to resolve

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the issues, and a date when the model may no longer be used in Washington if it is not revised to resolve the issues. (WAC 284-24A-040).

- Any time insurers use credit history or an insurance score to revise a risk classification plan, rating factor, rating plan, rating tier, or base rates, they must submit a multivariate statistical analysis and show how the proposed CBIS rating factors are related to the indicated factors from this analysis. (WAC 284-24A-045).
- The multivariate statistical plan must evaluate the relationship between CBIS and specific rating variables for homeowners (territory, protection class, amount of insurance, loss history, number of family units and form) and personal auto (driver class, multicar discount, territory, vehicle use, driving record and loss history). (WAC 284-24A-050).

31. Therefore, when the OIC approves premium rates incorporating CBIS as being not excessive, inadequate, or unfairly discriminatory, this is based on a thorough evaluation of how predictive CBIS is after application of many of the most significant rating factors that are commonly used in homeowners and personal auto rating plans.

H. What would need to happen to evaluate whether/how the pandemic caused the CBIS models to be unreliable and inaccurate for purposes of ratemaking

32. The CARES Act has impacted credit history data by temporarily protecting consumers against being reported as delinquent if they have been impacted by COVID-19 and made agreements to modify their normal payment schedule in some way (called an "accommodation").

33. The OIC order contends credit history data has become "inaccurate" because of the CARES Act reporting protections and the Governor's orders. The OIC asserts that the pandemic and/or the CARES Act and Governor's orders could render CBIS unreliable for ratemaking through two potential scenarios:

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1. The CARES Act and the Governor's orders caused an underreporting of negative events that would have been predictive of insurance losses. In this scenario, insurance rates would be understated for the population with unreported events.
2. After the CARES Act and the Governor's orders expire, there may be a spike in negative events on credit reports that are not predictive of insurance risk, because the circumstances under which they occurred were different from the historical circumstances under which the relationship between scores and risks was established. In this scenario, insurance rates would be overstated for the population with pandemic-related credit events.

34. The OIC issued data calls on June 3 requesting data on use of credit by Private Passenger Auto and Homeowners insurers. Based on my review of the data requested, it would be sufficient to answer two questions:

- Who will get premium increases and who will get premium decreases if CBIS were removed from rates without adjusting any other rating factors?
- Approximately what will the premium increases and decreases be?

35. The data requested would not be sufficient to answer the questions that should be addressed in order to prove the OIC's assertions regarding the reliability (or lack thereof) of CBIS for ratemaking, namely:

- What portion of policyholders were impacted by the pandemic and CARES Act data reporting issues related to credit?
- How did the reporting issues manifest within the data used by credit vendors and insurers?
- When did the impacts occur and for how long?
- How did the impacts impact the CBIS used by insurers?
- Was the predictive nature of CBIS materially altered within a given insurer's rating plan?

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- If the relationship between CBIS and expected loss showed a material change, what are the implications on the fairness of differentiation within insurer rating plans that use CBIS?

36. ASOP 12 – Risk Classification states that if the risk classification system has changed, or if business or industry practices have changed, the actuary should consider testing the effects of such changes. In order to determine whether the pandemic or CARES Act caused CBIS to be unreliable for ratemaking, the Commissioner would need to quantify the impact of these possible distortions. This would require three analyses:

1. Quantification of the proportion of consumers with credit histories impacted by modified reporting.
2. A review of the distribution of scores before and throughout the pandemic, with consideration given to statistics in the aggregate such as the mean or median score, as well as statistics that describe the prevalence of outliers. If the pandemic has not changed scores materially, it is unlikely that it has rendered them unreliable for ratemaking.
3. A review of the correlation between CBIS and insurance losses during and after the pandemic.

37. Related to the first analysis, data is currently available quantifying the extent of the credit reporting modifications. According to the Equifax article "What Does a K-Shaped Recovery Mean for the Economy?" included in the Agency Administrative Record, a total of 2.4% of loans or accounts were under possible accommodations as of December 29, 2020, versus 1.5% on March 3, 2020. The 2.4% figure will decline as loans roll off accommodations. Expressed another way, credit reporting is operating in a manner similar to the historical data for over 97% of accounts. This suggests that a relatively small proportion of consumers are currently impacted by pandemic-related changes in credit reporting laws. If that is the case, there is little reason to presume that a reporting change for a small proportion of the population

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could cause material changes in relationship between current CBIS models and expected losses for the entire population.

38. The second analysis is a review of the distribution of CBIS scores before and throughout the pandemic. The OIC has asserted that a "flood of negative credit history" after the CARES Act protections and Governor's orders expire will occur, causing CBIS models to be unreliable. That assertion is based on an assumption that the CBIS models are highly sensitive to those characteristics. If that assumption were correct, we would expect to see significant changes in the distribution of CBIS scores during and after the CARES Act protections and Governor's orders.

39. According to testimony from FICO, TransUnion, and LexisNexis presented for the NAIC Public Hearing on Credit-Based Insurance Scores in 2009, the average CBIS scores for these vendors exhibited relatively little change during the Great Recession. While CBIS models in use today may not be the same as those in use during the Great Recession, that experience shows that one cannot make conclusions about how CBIS scores may or may not behave in periods of economic change. Credit characteristics are weighted differently in CBIS versus credit default models, and differently from model to model, which impact their sensitivity to distributional shifts in credit report data. Furthermore, the research presented in "What Does a K-Shaped Recovery Mean for the Economy?" indicates that while delinquency rates are expected to increase, the levels "don't come anywhere near the level we had during the last financial crisis."

40. Additionally, the Commissioner, reporting agencies and insurers can consider the appropriate treatment of negative credit events that occurred during the pandemic. The Commissioner's concern seems to be that the suppressed delinquencies will be automatically scored without modification upon expiration of the CARES Act and Governor's orders. However, modelers or insurers may have developed strategies to mitigate any disruption caused

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by pandemic-related credit events. Instead of assuming how these events will be treated, the Commissioner should inquire as to whether scoring agencies or insurers have taken measures to reduce the potential volatility in scores once the CARES Act and Governor's orders expire. Alternatively, the OIC or Washington legislature could prohibit their use for CBIS modeling, like the prohibition on the use of medical collections or disputed trade accounts. (RCW 48.19.035).

41. Lastly, a review of the correlations between CBIS models and insurance losses post-pandemic is the ultimate test to determine whether CBIS models are reliable. The use of CBIS within a ratemaking model would be subject to guidance in ASOP 56 – Modeling, which directs actuaries to:

- Assess whether the structure of the model is appropriate for the intended purpose.
- Use data appropriate for the model's intended purpose.
- Where applicable, use assumptions as input that are appropriate given the model's intended purpose. This may involve using ranges of assumptions, evaluating assumptions within the model for consistency, and considering the reasonability of the model output when determining whether the assumptions are reasonable in the aggregate.
- Evaluate model risk and, if appropriate, taking reasonable steps to mitigate model risk, through steps such as:
    - Testing to ensure that the model reasonably represents that which is intended to be modeled;
    - Validating that the model output reasonably represents that which is being modeled; and
    - Implementing internal procedures regarding model review and checking to reduce the risk that the model output is not reliably calculated or not utilized as intended.

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42. The prior approval process in Washington makes it possible for the OIC to review the data used by CBIS modelers and insurers, including tests of the effects of changes in credit reporting and how pandemic-related credit events relate to insurance losses compared to other credit events, in compliance with ASOP 56.

43. The Insurance Commissioner's Response Opposing Petitioner's Motion for a Preliminary Injunction asserts that during the pandemic CBIS has remained stable while personal auto claims have dropped dramatically, as one example of how the correlation between insurance credit scoring models and claims has been disrupted by the pandemic. This is neither a valid comparison nor a logical conclusion. Taking this argument further, one could assert that many other risk characteristics that have not undergone distributional shifts, such as gender or age, must also no longer have a relationship to expected losses. Significant shifts that have occurred in other risk variables, such as miles driven, are more likely explanations for the decline in claims. Furthermore, the removal of CBIS does not lower overall premium collected, commensurate with the decline in claim frequency; removing CBIS only redistributes the premium collected such that risks with lower expected costs will pay more, and those with greater expected costs will pay less.

44. There is no record that the OIC has conducted any of these analyses in accordance with actuarial standards of practice, nor asked insurers or CBIS model vendors to conduct them. As discussed in Section E of this report, there are other examples of risk factors based on data that may be inconsistent or incomplete, such as traffic accidents or violations, which are still highly correlated with expected loss and not unfairly discriminatory for the purpose of risk classification. Further, the OIC has not demonstrated why normal OIC regulatory procedures, which require insurers to submit data showing a link between CBIS and insurance risk, are insufficient to address any potential changes in the relationship between CBIS and expected losses.

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I. Impact of OIC's emergency order on unfair discrimination

45. The Commissioner asserts that the removal of CBIS is necessary to protect the general welfare of Washingtonians, and the public harm will accrue to citizens if CBIS is not removed. Companies may substitute a "neutral" rating factor for the CBIS factor, such that the total premium for the book of business is unchanged. Filings are limited to only the changes required by rule, and insurers wishing to make other changes to their rating factors must wait until after the filing to remove credit is approved and submit a separate filing to make other changes.

46. In Washington, the use of CBIS in ratemaking is allowed under legislation. In contrast, some states have passed statutes that prohibit the use of CBIS. Removing or avoiding the use of a rating factor due to legal or regulatory requirements is not considered a deviation from actuarial standards of practice, if the resulting rates and classification factors are developed without the consideration of CBIS.

47. OIC regulations require that insurers incorporate CBIS using a multivariate analysis, which considers multiple variables together, given that there may be interaction among the variables. This is consistent with the guidance of ASOP 12 – Risk Classification, which specifies that "The actuary should consider the interdependence of risk characteristics. To the extent the actuary expects the interdependence to have a material impact on the operation of the risk classification system, the actuary should make appropriate adjustments."

48. Given that the currently approved rating plans in Washington were developed and supported using multivariate analysis, the proper way for a company removing CBIS from its rating plan would be to redo the multivariate analysis without the CBIS factors and recalibrate other rating factors accordingly. However, the OIC's emergency rule specifically prohibits insurers from including a complete rating overhaul in the neutral rating factor filing specified under the emergency order.

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49. The removal of CBIS rate differentials without adjustments to other rating factors could cause the remaining rating plan to become unfairly discriminatory because the relativities for other factors would have been calculated in a multivariate framework including CBIS. For example, in a typical situation where there is a positive correlation between age and CBIS, the age curve used in conjunction with CBIS would be flatter than it would be if credit were not present. In that case, if CBIS were removed without a multivariate analysis, rates on average would be unfairly overstated for older people. This group is likely to be larger, and potentially subject to much bigger premium distortions that could result from the removal of credit, than the small group of consumers whose premiums have been reduced due to the temporary suppression of reporting.

50. The order permits offsetting rates, such that the total premium for all policies the program is unchanged. All else equal, this process would result in rate increases for policyholders with good credit scores correlated to lower risk, and rate decreases for policyholders with poor credit scores correlated to higher risk.

51. Thus, in an attempt to address credit reporting issues for a relatively small population of insureds, the OIC emergency regulations could be introducing unfair discrimination on a much larger group of insureds. In my opinion, removal of credit scoring in the manner proscribed by the OIC emergency order is likely to cause much more pricing inaccuracy and unfair discrimination than would be present if it were left intact.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

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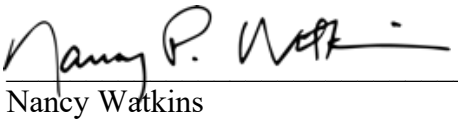
June 14, 2021 San Francisco, CA
Date and Place



Nancy Watkins

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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on June 14, 2021, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **DECLARATION OF NANCY WATKINGS IN SUPPORT OF PETITIONER INTERVENOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT; and**
- **CERTIFICATE OF SERVICE.**

Counsel for Petitioners American Prop. Cas. Ins. Ass'n, et al.:	☐ U.S. Mail
Michael B. King	☐ Hand Delivery
Jason W. Anderson	☐ Facsimile
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Counsel for Respondents Washington State Office of Insurance Commissioner, and Mike Kreidler, Insurance Commissioner for the State of Washington State Office of Ins. Commn'r:	☐	U.S. Mail
	☐	Hand Delivery
	☐	Facsimile
	☐	Overnight
Marta U. DeLeon	☑	Email
Suzanne Becker		
Office of the Attorney General		
1125 Washington Street SE		
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suzanne.becker@atg.wa.gov		

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of June, 2021.

Valerie D Marsh

Valerie D. Marsh

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ATTACHMENT A

NANCY P. WATKINS
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PROFESSIONAL EXPERIENCE

1997 to present	MILLIMAN, INC.: Atlanta, GA and San Francisco, CA Principal and Consulting Actuary — Manages San Francisco property & casualty consulting practice.
1991 to 1997	WATKINS CONSULTING CO.: Atlanta, GA President — Owned and managed independent actuarial consulting firm.
1989 to 1991	PRICE WATERHOUSE, LLP: Atlanta, GA Senior Manager and Consulting Actuary
1986 to 1989	JOHN HANCOCK REINSURANCE: Boston, MA Actuarial Analyst
1983 to 1986	AETNA LIFE & CASUALTY: Hartford, CT Actuarial Student

EDUCATION AND CREDENTIALS

B.S. in Mathematical Sciences, University of North Carolina at Chapel Hill

Fellow, Casualty Actuarial Society

Member, American Academy of Actuaries

AWARDS

American Academy of Actuaries Outstanding Volunteerism Award, November 2018

Casualty Actuarial Society Above and Beyond Achievement Award, October 2006

PROFESSIONAL SERVICE

Leader, Milliman Climate Resilience Initiative

Member, Climate Insurance Linked Resilient Infrastructure Finance Working Group of United Nations Capital Development Fund

Member, American Academy of Actuaries Flood Insurance Subgroup

Lead, Best Practices in Property Ratemaking document

Chair, American Academy of Actuaries Committee on Property and Liability Financial Reporting

Member, American Academy of Actuaries Casualty Practice Council

Member, American Academy of Actuaries Financial Reporting Council

Co-Chair, American Academy of Actuaries Best Estimates Working Group

Member, Casualty Actuarial Society Committee on Special Interest Seminars

Member, Casualty Actuarial Society Committee on Reinsurance Research

INVITED PRESENTATIONS

"The Risk of Rapid Sea-Level Rise and the Financial Risks to U.S. Coastal Communities"
The House Select Committee on the Climate Crisis, May 2021

"A New Strategy for Addressing the Wildfire Epidemic in California"
Stanford Woods Institute for the Environment Webinar, May 2021

"Climate Risk and Market Value: Data Innovations for Real Estate"
ULI Climate Data Webinar, March 2021

"Climate Change: From Emerging Risk to Real Life Danger"
Milliman Climate Resilience Forum, March 2021

"U.S. Insurance Regulatory Climate Leadership"
Milliman Climate Resilience Forum, March 2021

"Unprecedented, Predictable, and Uninsurable: The Risks Posed by Climate Change"
Milliman Climate Resilience Forum, March 2021

"The Case for Change: Regulatory Approval of Catastrophe Models"
California Department of Insurance Virtual Meeting, December 2020

"Climate Data, Disclosure, and Industry Impacts" - ULI Resilience Summit, December 2020

"Regulatory Workshop on Private Flood Insurance"
Southeastern Zone Regulators Association, September 2020

"B2C Insurtech Strategy" - NYCA Insurance Symposium, September 2020

"Insurance Innovations: It's Not Your Grandmother's Flood Insurance"
Floodplain Management Association Annual Meeting, September 2020

"Clearing the Way for Regulatory Approval of Catastrophe Models"
NAIC Catastrophe Insurance Working Group Meeting, July 2020

"Climate Change Consulting and the Milliman Climate Resilience Initiative"
Milliman Casualty Forum, June 2020

"The Climate-Savvy Investor: Assessing Resilience in U.S. Markets"
ULI Spring Meeting, June 2020

"The State of the Private Flood Market" - National Flood Conference, June 2020

"Making Communities Flood Resilient" The Economic and National Security Dimensions of Climate Change Panel, - UNC Clean Tech Summit, February 2020

Climate Change and Real Estate Panel
ULI SF Climate Change in Real Estate, February 2020

"National Flood Insurance Program – The Need for Change"
NAIC Winter National Meeting, December 2019

Cat Model Clearinghouse Panel
Property Insurance Report National Conference, November 2019

"Staging Your State for Private Flood"
NAIC SE Regional Insurance Commissioners Meeting, October 2019

“Staging Your State for Private Flood”
NAIC Summer National Meeting, August 2019

“Is California Catastrophe Regulation Leading to a Homeowners Rate Crisis?”
APCIA Western Region General Counsel Conference, July 2019

“NFIP Reauthorization - How to Bridge the Flood Insurance Gap”
PCI National Flood Conference, June 2019

“Underwriting Private Flood Insurance” - RAA Board Meeting, April 2019

“Insurance: Transferring and Assessing Risk”
Hinshaw Sea Level Rise/Climate Change, April 2019

“Global Corporate Responsibility” - Climate Resilience Summit, November 2018

“The Future of Flood Insurance” - Risk Mitigation Leadership Forum, October 2018

“The Rising Private Flood Insurance Market” - Torrent Flood Seminar, July 2018

“Overview of the Private Flood Market”
CAS Underwriting Collaboration Seminar, June 2018

“NFIP Risk Rating and Policy Forms Redesign” - PCI National Flood Conference, June 2018

“What Federal Flood Insurance Reform Means to You” - RMS Exceedance, May 2018

“The Rising Flood Insurance Market” - Florida Insurance Market Summit, March 2018

“Competitive Analysis: Know the Data, Know the Market”
CAS Ratemaking, Product and Modeling Seminar, March 2017

“Private Flood Insurance” - CAS Severe Weather Workshop, March 2017

“Insuring Flood in the United States”
RAA Cat Risk Management Conference, February 2017

“Competitor Premium Analysis” - Milliman Casualty Consultants Forum, June 2016

“Flood Insurance Pricing” - CAS Severe Weather Workshop, March 2016

“Flood Insurance - Private Market Alternatives”
Florida Insurance Market Summit, March 2016

“Strategies for Homeowners Profitability and Growth”
Casualty Actuaries of the Northwest, September 2015

“Assessing and Integrating Risk into Actuarial Practices”
California Insurance Commissioner / Risky Business / Stanford University Steyer-Taylor Center for Energy Policy and Finance / Sandia National Laboratories / American Academy of Actuaries Climate Risk Forum: Bridging Climate Science and Actuarial Practice, September 2014

“Property Analytics Using Third Party Data”
Guy Carpenter ERM and Capital Modeling Conference, September 2014

“Homeowners Profitability and Growth”
CSC Executive Innovation Series for Florida Residential Property, April 2014

“Best Practices Rating Model”
Property Casualty Insurers Association of America “Caught in the Middle” Roundtable, November 2013

“Caught in the Middle Panel”
Property Casualty Insurers Association of America Annual Meeting, October 2013

“Best Practices in Catastrophe Ratemaking”
Wharton Risk Management and Decision Processes Center National Cat Solutions Meeting, June 2013

“Homeowners Profitability” - Casualty Actuarial Society Spring Meeting, May 2013

“Emerging Issue and Opportunities in Catastrophe Management”
Milliman Casualty Consultants Forum, June 2012

“Beach Plan Deficit: Cost to N. C. Policyholders and Taxpayers”
North Carolina Legislative Research Subcommittee on Property Insurance Ratemaking, March 2012

“Using Predictive Analytics to Profitably Grow your Business”
Duck Creek Insurance Forum, May 2010

“Practical Applications of Predictive Modeling in Homeowners Insurance”
Casualty Actuarial Society Ratemaking and Product Management Seminar, March 2010

“Predictive Modeling — Case Studies” - Milliman Casualty Consultants Forum, June 2009

“California Private Passenger Auto Ratemaking — A Case Study”
Casualty Actuarial Society Ratemaking and Product Management Seminar, March 2009

North Carolina General Assembly Joint Select Study Committee on the Potential Impact of Major Hurricanes on the North Carolina Insurance Industry, October 2008

“Issues and Opportunities” - Fiserv Insurance Executive Summit, September 2008

“Auto Class Plan Filings”
Association of California Insurance Companies General Counsel Seminar, July 2008

“Solve Business Problems Using Predictive Analytics”
Milliman Casualty Consultants Forum, June 2008

“Reinsurance — Risk Transfer Overview”
Crittenden Medical Insurance Conference, April 2008

“Reinsurance: Accounting, Actuarial and Real World Perspectives“
International Association of Insurance Receivers Insolvency Workshop, January 2008

“Hot Topics in P&C Accounting and Reinsurance”
Fiserv Client Conference, September 2007

“Impact of Auto Rating Factor Regulations”
Association of California Insurance Companies General Counsel Seminar, August 2007

“Reinsurance Risk Transfer Practices” - Crittenden Reinsurance Conference, August 2007

“Finite Risk”
Casualty Actuarial Society Risk Transfer Limited Attendance Seminar, November 2006

“Hot Topics in P&C Accounting, Reporting and Reinsurance”
Fiserv Client Conference, September 2006

“Reinsurance Client Panel: Finite Reinsurance” - Fiserv Client Conference, September 2006

“Financial Reporting Issues” - Milliman Casualty Consultants Forum, June 2006

“Finite Reinsurance and Risk Transfer: Activities of the American Academy of Actuaries”
Reinsurance Association of American Current Issues Forum, May 2006

“Accounting Issues Update: Reinsurance Risk Transfer”
National Risk Retention Association Annual Conference, October 2005

“Insurance Risk Transfer — An Issues Update”
Casualty Loss Reserve Seminar, September 2005

“Financial Reporting: Other Issues” - Milliman Casualty Consultants Forum, June 2005

“Issues Regarding Statutory Statements of Actuarial Opinion”
Southern California Casualty Actuarial Club Fall Meeting, September 2004

“Financial Reporting Issues” - Milliman Casualty Consultants Forum, June 2004

“Financial Reporting Issues” - Milliman Casualty Consultants Forum, October 2003

“NAIC/AAA Loss Reserve Symposium for Readers and Writers of Loss Reserve Opinions”,
Casualty Loss Reserve Seminar, September 2003

“Why Establish a Virtual Company?” - Virtual Insurance Operations Conference, June 2001

“Actuaries and the Internet” - Casualty Actuarial Society Annual Meeting, November 2000

“Virtual Insurance Companies” - Virtual Insurance Operations Forum, November 2000

PUBLICATIONS

“Trial by Wildfire: Will Efforts to Fix Home Insurance in California Stand the Test of Time?” -
Milliman Insight, September 2020

“U.S. Private Flood Insurance: The Journey to Build a New Market.”
Carrier Management, Insurance Journal, September 2019

“Climate change is making Americans anxious. Insurers can help.”
Milliman Insight, April 2019

“Four Ways Hurricane Florence Could Ricochet Across the Insurance Industry”
Milliman Insight, September 14, 2018

“What Could Private Flood Insurance Look Like in New Jersey and New York?”
Milliman Insight, July 24, 2018

“Could Private Flood Insurance be Cheaper than the NFIP?”
Milliman Insight, July 10, 2017

“Why Big Data is a Big Deal” - Insurance ERM, July 13, 2013

“Being Virtual Has Its Virtues” - National Underwriter, September 4, 2000

EXPERT WITNESS ASSIGNMENTS

Howard Mills, Superintendent of Insurance of State of New York vs. Everest Reinsurance Company, expert on behalf of defendant, October 2006.

Mercury Casualty Company, expert in support of rate filing #13-716 being considered by the California Department of Insurance for Mercury's California Homeowners business, June 2013.

Monterey Bay Military Housing, LLC, et al. v. Pinnacle Monterey LLC, et al., expert in support of plaintiffs Monterey Bay Military Housing, LLC, et al., June 2014.

State Farm Fire & Casualty Company, et al. v. Bruce L. Brown, et al., expert in support of defendants State Farm Fire & Casualty Company, et al. February 2017.

Farmers Insurance Exchange & Mid Century Insurance Company v. Roger Harris, Duane Brown, & Brian Lindsey, expert in support of defendants Farmers Insurance Exchange & Mid Century Insurance Company, November 2018.

EXPERT TESTIMONY AT RATE HEARINGS

Table 1
Expert Testimony at Rate Hearings by Nancy Watkins

Hearing Date	Company	Filing #	Line of Business	State
11/9/2006	St. Johns	FCP 06-11223	HO	Florida
11/16/2006	United P&C	FCP 06-13037	HO	Florida
10/29/2009	Olympus Ins Co	FCP 09-17588	HO	Florida
2/10/2010	First Home	FCP 09-23287	HO	Florida
3/2/2010	ACA Home	FCP 10-00311	HO	Florida
10/21/2010	First Community	FCP 10-14149	DF	Florida
12/7/2010	First Home	FCP 10-17219	HO	Florida
3/10/2011	Olympus	FCP 11-00692	HO	Florida
3/22/2011	First Community	FCP 11-00972	HO	Florida
5/12/2011	Fidelity National	FCP 11-04301	HO	Florida
9/8/2011	Fidelity Fire & Casualty/First Protective	FCP 11-11215	DF	Florida
5/17/2012	Sunshine State	FCP 12-0376 FCP 12-04939	HO DF	Florida
9/20/2012	Citizens Property Insurance Corporation	FCP 12-13991 FCP 12-13992	HO (Coastal) HO	Florida
5/30/2013	Fidelity National	FCP-13-07023	HO	Florida
1/7/2016	State Farm General	CDI 14-8381	HO	California

ARBITRATIONS

Sunshine State Insurance Company (SSIC) and Florida State Board of Administration (SBA), served on an arbitration panel of three actuaries appointed to conduct the resolution of a dispute between the Florida Hurricane Catastrophe Fund and SSIC, November 2010.

Kramer-Wilson Company, Inc. and National General Holding Corp. arbitration. Party arbitrator for Kramer-Wilson Company, Inc., May 2019

☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: October 8, 2021
Time: 1:30 P.M.
Judge: Mary Sue Wilson

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervener NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

Case No. 21-2-00542-34

THE INSURANCE COMMISSIONER'S OPPOSITION TO SUMMARY JUDGEMENT AND OPPOSITION TO EXPANDING THE AGENCY RECORD

I. INTRODUCTION

The state of emergency caused by the COVID-19 pandemic has presented unparalleled challenges to state agencies in virtually every aspect of their work. From how to actually do the important work they have been tasked with, to how to balance the regulation of industries critical to our economy and the need to protect consumers in new and dramatically shifting circumstances, the pandemic has forced agencies, like the Office of the Insurance Commissioner, to make difficult decisions. This case is no exception. In response to the

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continuing turmoil of the pandemic, federal and state measures were adopted to prevent the reporting of certain information in individual credit histories. As a result of these state and federal laws, the use of credit histories now results in unfair discrimination between similarly situated policyholders and applicants, violating RCW 48.19.020. Moreover, as a result of the challenging circumstance of the pandemic, the assumptions insurers have relied upon about the correlation between credit histories and insurance risk are inherently suspect. Allowing credit histories to continue to be used in setting insurance rates will cause even more financial harm for those worst hit by the pandemic.

Because the current use of credit histories results improper discrimination, the Commissioner has established that he has good cause for adopting the emergency rule at the time it was adopted in order to protect the general welfare of Washington residents who are entitled to be free of improper discrimination in how their insurance rates are set. Further, at the time this rule was implemented, the Commissioner had good cause to believe that this rule needed to be implemented before the state and federal laws shielding the reporting of accurate credit history were repealed, because that repeal, and subsequent use of accurate credit histories, would be financially harmful to those most severely impacted by the pandemic. For these reasons, the Commissioner's Emergency Rule should be affirmed.

Respondent, Insurance Commissioner Mike Kreidler, (Commissioner), and the Office of the Insurance Commissioner (OIC), through their attorneys of record, ROBERT W. FERGUSON, Attorney General, MARTA U. DELEON, Assistant Attorney General, and SUZANNE BECKER, Assistant Attorney General, offer this consolidated response opposing the Motions for Summary Judgement submitted by Petitioners American Property Casualty Insurance Association, Professional Insurance Agents Of Washington, Independent Insurance Agents And Brokers Of Washington, and Intervener National Association Of Mutual Insurance Companies (collectively, "Petitioners"), and opposing the attempts by the Petitioners to expand

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the agency record to include information that is not necessary to decide material issues before this Court in this petition for judicial review.

II. STATEMENT OF FACTS

A. The Insurance Commissioner's Rule Making Authority

The Washington Legislature has long recognized that "[t]he business of insurance is one affected by the public interest . . . ." RCW 48.01.030. In order to protect this public interest, Legislature has delegated the enforcement of the Washington State Insurance Code, Title 48 RCW, to the Washington State Insurance Commissioner. RCW 48.02.060(2). The Insurance Commissioner has been vested with "authority expressly conferred upon him or her by or reasonably implied from the provisions of this code." RCW 48.02.060(1). This includes general rulemaking authority to enforce the provisions of the Insurance Code. RCW 48.02.060(3)(a). More specifically, the Legislature has delegated to the Commissioner the authority to review rates and rating methodologies to ensure that rates are not "excessive, inadequate, or unfairly discriminatory," and to promulgate rules to ensure that is the case. RCW 48.19.020. *See also* RCW 48.18.480, RCW 48.19.080, RCW 48.19.370. Further, the Commissioner has express authority to adopt rules affecting the use of insurance credit scoring. RCW 48.19.035. In the case of a declared state of emergency, such as the one that state has been operating under for over a year, the Commissioner has been delegated authority to issue certain emergency orders. RCW 48.02.060(4). Under the Administrative Procedure Act (APA), Chapter 34.05 RCW, the Legislature has also delegated to the Commissioner the authority to adopt emergency rules that temporarily forgo the notice and rule making process, when an agency for good cause finds immediate adoption is necessary to protect the general welfare. RCW 34.05.350(1)(a).

On March 22, 2021, pursuant to this legislatively delegated authority, the Commissioner issued an emergency rule temporarily banning the use of credit histories in setting insurance rates. The Commissioner's Emergency Rule is the subject of this petition for judicial review.

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B. Use of Credit History in Setting Insurance Premiums

Although the use of credit history in setting insurance premiums is widespread in property and casualty insurance, it is not unfettered. "Credit history" is the communication of "any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, or credit capacity that is used or expected to be used, or collected in whole or in part, for the purpose of serving as a factor in determining personal insurance premiums or eligibility for coverage." RCW 48.19.035(1)(c). An "insurance score," also sometimes called and "insurance credit score" is a "number or rating that is derived from an algorithm, computer application, model, or other process that is based in whole or in part on credit history." RCW 48.19.035(1)(d).

The Legislature has limited insurers' ability to use individual credit history information in setting premiums. First, insurers must comply with the requirements of RCW 48.19.035, other applicable provisions of the Insurance Code, and any rules promulgated by the Commissioner. RCW 48.19.035(5). An insurer's methodology for using various pieces of a consumer's credit history must be documented and submitted as an insurance credit scoring model. RCW 48.19.035(2)(a). Insurance credit scoring models are deemed proprietary trade secrets because each insurer uses credit histories in different ways. *Id*. Prior to the current pandemic, the Commissioner determined that insurers could demonstrate that a credit scoring model complies with RCW 48.19.020 by providing a multivariate analysis with their insurance credit scoring model, and any subsequent modifications. WAC 284-24A-045. However, current insurance credit scoring models presume the relative accuracy of the available consumer credit histories. *See* Declaration of Eric Slavich in Opposition to Motion Summary Judgment (Slavich Dec.) at 5. The current state and federal laws designed to alleviate the impact of the pandemic have prevented accurate credit history reporting, and thus has interfered with the reliability of current insurance credit scoring models.

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C. The Impact of the Pandemic on Credit Histories and Credit Scoring Models

The economic interruptions caused by the pandemic have been felt broadly, but also unevenly. AR 701-05, 970-77. For some, the pandemic has brought an improved financial outlook. AR 980-981. For some, the pandemic has caused tremendous economic strain. AR 701-05. When Congress adopted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), (P.L. 116-136, 116th Congress, Mar. 27, 2020), it included several provisions designed to protect consumers from the most difficult financial impacts of the pandemic. AR 315-649. Section 4021 of the CARES Act requires that financial institutions report consumers as current if consumers obtain an accommodation that constitutes less than the full payment. AR 523. Section 4022 of the CARES Act requires certain lenders to offer forbearance options to borrowers, and imposed a moratorium on foreclosures for certain home loans. AR 524. Section 3513 of the CARES Act results in all non-defaulted federally-held student loans being reported as current, even if payments are late. AR 438. In addition, several provisions of various state emergency orders have placed a moratorium on garnishment actions (Emergency Proclamation of the Governor 20-49[1], April 14, 20202, and subsequent amendments) and evictions (Emergency Proclamation by the Governor 20-19[2], July 24, 2020, and subsequent amendments).

The impact of these various federal and state requirements is that for some consumers, negative credit history information cannot be reported as a matter of law. Therefore, for some consumers their credit history information is likely to be inaccurate. While this inaccurate credit history may benefit consumers in some ways, the use of inaccurate credit history results in consumers who are similarly situated in terms of their negative credit histories no longer being

[1] Available at: https://www.governor.wa.gov/sites/default/files/proclamations/20-49%20-%20COVID-19%20Garnishment.pdf. Subsequent amendments are available at: https://www.governor.wa.gov/office-governor/official-actions/proclamations.

[2] Available at: https://www.governor.wa.gov/sites/default/files/proclamations/20-19%20-%20COVID-19%20Moratorium%20on%20Evictions%20%28tmp%29.pdf. Subsequent amendments are available at: https://www.governor.wa.gov/office-governor/official-actions/proclamations.

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treated the same. For example, consumers whose negative credit history was generated before the pandemic have all of their negative credit history reported, and incorporated into their insurance score. But, by operation of law, consumers with similar negative credit histories that developed after the pandemic, have some components of their credit history shielded, resulting in the disparate treatment of similarly situated policy holders, in violation of RCW 48.19.020.

The insurance credit scoring models and the analysis submitted by insurers to support their models rest on the assumption that the relationship between a consumer's credit information and expected claim costs does not vary unpredictably over time. Slavich Dec. at 3. When sudden, large, unexpected changes to consumers' credit histories occur, as has been the case during the pandemic, it is logical to conclude that the relationship between credit and claim costs observed in an insurer's historical data would no longer be a reliable indicator of present risk. *Id*. The bigger the disruption to the consumer credit environment, the less reliable an analysis based on historical data prior to the disruption would be. Slavich Dec. at 3. The pandemic, and the State and Federal laws passed in response to the Pandemic, have been a significant change that severs the ability of credit histories to predict claims data. AR 652-53;706-715; Slavich Dec. at 12.

D. The Commissioner's Emergency Rule

The primary thrust of the emergency rule is to target unfair discrimination caused by the use of inaccurate credit histories on current credit rating methodologies, which violates RCW 48.19.020. The Commissioner found:

> . . . current protections to consumer credit history at the state and federal level have disrupted the credit reporting process. This disruption has caused credit based insurance scoring models to be unreliable and therefore inaccurate when applied to produce a premium amount for an insurance consumer in Washington state. This makes the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020.

AR 1012.

This rule was immediately necessary because the use of inaccurate data was resulting in unfair discrimination in three critical property and casualty lines of insurance: auto insurance, homeowners insurance, and renters insurance. As a result, this actuarially unfair discrimination

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affects the public interest, and this the general welfare, of insurance consumers immediately.

In addition, to the need to end current discrimination between similarly situated consumers, the Commissioner found that implementing changes to the use of credit histories in setting insurance was critical to accomplish before the end of the current credit history protections. The Commissioner found that when the credit history reporting shields expire:

> . . . a large volume of negative credit correction will flood consumer credit histories. This flood of negative credit history has not been accounted for in the current credit scoring models. Without data to demonstrate that the predictive ability of credit scoring models based on pre-pandemic credit and claims histories is unchanged, the predicative ability of current credit scoring models cannot be assumed. This will make the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020.

AR 1012. In addition, the Commissioner found that:

> the negative economic impacts of the pandemic have disproportionately fallen on people of color. Therefore, when the CARES Act protections are eliminated, and negative credit information can be fully reported again, credit histories for people of color will have been disproportionately eroded by the pandemic.

Id. Further, the Commissioner was aware that carriers would need time to update and adjust their IT systems in order to fully implement changes in their rating systems. This lead-up time is part of the reason the timelines of the rule were established the way they were. Slavich Dec. at 7. The deadlines in this rule sought to balance the need for carriers to take time to make changes with immediate need to end the discriminatory credit rating practices.

Several articles and studies have indicated the diverging, or "K shaped" recovery of the pandemic. AR at 701-705; 970-977. Without the protections of the emergency rule in place, those most devastated by the pandemic will be subsidizing the insurance policies of those whose financial outlook has improved as a result of the pandemic.

E. Other Pandemic Work

Although the Commissioner's Emergency Rule did not follow the typical notice and comment rulemaking process, it did not happen in a vacuum. Almost as soon as the CARES Act was implemented, the Commissioner began receiving information and complaints that insurers, particularly property and casualty insurers, were not doing enough to help consumers, despite

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the windfalls property and casualty insurers were experiencing as a result of the pandemic. AR 988-922. The Commissioner received several suggestions for how to address the perceived iniquities in the property and casualty insurance markets. AR 650-654. In some cases, the Commissioner has been able to address issues fairly quickly. For example, the Commissioner issued an emergency order requiring that insurers extend graces periods for premium payments. Insurance Commissioner Emergency Order No. 20-03.[3] The Commissioner also issued an emergency order extending the time consumers had to claim depreciation payments. Insurance Commissioner Emergency Order No. 20-05.[4]

But concerns about property and casualty insurers have not been the only issues the Commissioner has had to wrestle with over the pandemic. In addition, the Commissioner was forced to address issues raised in other lines of insurance, such as health insurance. Throughout the pandemic, the Commissioner has issued six emergency orders concerning health coverage. *See* Insurance Commissioner Emergency Orders Nos. 20-01, 20-02, 20-04, 20-06.[5] In addition, the Commissioner continued to attempt to address the fair regulation of the insurance industry through emergency rules to allow more flexibility insurance producer licensing activities. WSR 20-09-1126, WSR 20-110-0211. All of these activities addressing the pandemic were in addition to the regular work of the agency.

Part of the continuing work of the OIC was the 2021 legislative session. For the 2021 legislative session, the Commissioner approached Sen. Das to advance agency request legislation that would have permanently eliminated the use of credit scoring. Declaration of Jon Noski in Opposition to Motion for Summary Judgement (Noski Dec.) at 2. Unfortunately, Sen. Mullet, the chair of the committee considering this agency request legislation, was more focused on pro-

[3] Available at: https://www.insurance.wa.gov/sites/default/files/documents/emergency-order-20-03_0.pdf

[4] Available at: https://www.insurance.wa.gov/sites/default/files/2020-04/emergency-order-20-05-final.pdf

[5] Available at: https://www.insurance.wa.gov/technical-assistance-advisories-and-emergency-orders

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industry alternatives that ultimately the Commissioner could not, and did not agree to. Noski Dec. at 2-3.

One alternative suggested by Sen. Mullet, which has been adopted in a minority of states, was the "Extraordinary Life Circumstances" proposal. This proposal would have given insurance companies nearly unfettered discretion to ignore the rates filed with the Insurance Commissioner, and treat individual consumers however the company chose. Rather than protect consumers, this alternative would have created an unchecked opportunity for rampant discrimination between similarly situated individual policy holders. The Commissioner considered the numerous legislative proposals and amendments to address the use of credit histories in setting insurance premiums, and his staff provided what technical assistance they could with various proposals. Noski Dec. at 2-3. Ultimately, however, the Commissioner could not support Sen. Mullet's proposals gutting the consumer protections of the original agency request legislation, and so the legislation died in committee. Noski Dec. at 3.

In addition, the Commissioner also considered alternatives proposed by other jurisdictions. AR 659-660; 716-721. However, the Commissioner, in his discretion, ultimately determined that the rule in its current form, was the most appropriate way to address his concerns about the discrimination occurring as a result of the change in state and federal requirements affecting credit history reporting, and to protect those who had been the most severely financially impacted by the pandemic.

III. STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). The court will "consider facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party." *Afoa v. Port of Seattle*, 160 Wn.. App. 234, 238, 247 P.3d 482, 484–85 (2011), *aff'd,* 176 Wash. 2d 460, 296 P.3d 800 (2013) citing *Marks v.Washington Ins. Guar. Ass'n ,* 123 Wn..App. 274, 277, 94 P.3d

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In a petition for judicial review, the burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1)(a). In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: the rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious. RCW 34.05.570(2)(c). The validity of a rule is determined as of the time the agency took the action adopting the rule. *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 148 Wn. 2d 887, 906, 64 P.3d 606, 616 (2003). The agency rule-making file serves as the record for review, though it is not necessarily the exclusive basis for agency action on the rule. RCW 34.05.370(1), (4). *Id.*

IV. ARGUMENT

Under the APA, the court may declare a rule invalid only if it finds that "[t]he rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious." RCW 34.05.570(2)(c). Taking all reasonable inferences from the record in the light most favorable to the Commissioner, Petitioners cannot satisfy their burden to demonstrate that the Emergency Rule is invalid under RCW 34.05.570(2)(c).

Looking at the Legislature's broad delegation of authority to the Insurance Commissioner, the Commissioner's emergency rule is well within his general rate-making authority and his express rule making authority related to credit scoring. Because the Commissioner has shown good cause why the immediate adoption of the rule was necessary to protect the general welfare of the insurance purchasing public, particularly those most financially devastated by the pandemic, the emergency rule was adopted in compliance with the statutory requirements of the emergency rule process provided in RCW 34.05.350. Further, the Emergency Rule is not arbitrary or capricious simply because he did not use the methodology

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espoused by carriers and preferred by a single legislator. Rather, the Commissioner clearly considered multiple options and alternatives to the adoption of the current Emergency Rule. Further, to the extent Sen. Mullet's and Ms. Watkins' declarations are needed to settle disputed issues of material fact, they defeat summary judgment. To the extent they do not address material disputed facts, they do not satisfy the requirements for expanding the Agency record. Because Petitioners have failed to satisfy their burden to demonstrate that the Commissioner's rule is invalid under RCW 34.05.570(2)(c), their motions for Summary Judgment, and their Petitions for Judicial Review must be denied.

A. The Emergency Rule is Well Within the Scope of the Commissioner's Statutory Authority

The Court presumes that administrative rules adopted pursuant to a legislative grant of authority are valid, and will uphold such rules if they are reasonably consistent with the controlling statute. *Washington Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn. 2d 637, 646, 62 P.3d 462 (2003), *Campbell v. Dep't of Soc. and Health Servs.,* 150 Wn.2d 881, 892, 83 P.3d 999 (2004). The burden is on the party challenging the validity of the rule. *Washington Public Ports Ass'n v. Dep't. of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003); RCW 34.05.570(1)(a). An administrative rule is only invalid if "the rule exceeds the statutory authority of the agency . . . ." RCW 34.05.570(2)(c). *See also Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn. 2d 571, 580, 311 P.3d 6 (2013). Administrative rules must be written within the framework and policy of the applicable statutes. *Id*. So long as the rule is " 'reasonably consistent with the controlling statute[s]' an agency does not exceed its statutory authority". *Id.* at 580 (internal citations omitted). This includes the interpretation of the agency's statutes as a whole. *Washington State Hosp. Ass'n v. Dep't of Health*, 183 Wn. 2d 590, 596, 353 P.3d 1285 (2015); *Swinomish Indian Tribal Cmty.*, 178 Wn. 2d at 580-81. "This court assumes the legislature does not intend to create inconsistent statutes. 'Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme . . . which maintains the

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integrity of the respective statutes.'" *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008) (internal citations omitted).

The Insurance Code, when read as a whole, gives broad authority to the Commissioner to regulate insurance, and to enforce the provisions of the Insurance Code, and to adopt rules enforcing the provision of the Insurance Code. RCW 48.02.060(1), (3)(a). The Commissioner has the authority to review rates and rating methodologies to ensure that rates are not "excessive, inadequate, or unfairly discriminatory," and to promulgate rules to ensure that is the case. RCW 48.19.020, RCW 48.02.060. *See also* RCW 48.18.480, RCW 48.19.370. This authority is consistent with his authority to establish rules to implement the limited authority insurers have to use credit scoring. RCW 48.19.035.

In fact, contrary to Petitioner's argument, neither RCW 48.18.545 nor RCW 48.19.020 grant broad discretion to insurers to use credit histories in setting premiums. Rather, they impose significant limitations on how insurers use credit histories, and obligate insurers to submit their rating plans and credit scoring methodologies to the Insurance Commissioner. RCW 48.19.035(2)(a). The fact that insurance scoring models and rates using those models must be filed with the Commissioner necessarily implies that the Commissioner has authority to reject those filings that violate RCW 48.19.020, and other provisions of Chapter 48.19 RCW. Additionally, filings under RCW 48.19.035 are required to comply with RCW 48.19.040. RCW 48.19.035(2)(b). RCW 48.19.040 requires that "Every such filing shall indicate the type and extent of the coverage contemplated and must be accompanied by sufficient information to permit the commissioner to determine whether it meets the requirements of this chapter [Chapter 48.19 RCW]." RCW 48.19.040(2). This includes the requirements of RCW 48.19.020. It is therefore reasonable to imply that as part of his responsibility to adopt rules to "implement" RCW 48.19.035, the Commissioner can adopt rules that bar certain uses of credit histories in setting insurance premiums, when those uses violate other provisions of the rate filing statutes.

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Therefore, the fact that the Commissioner is required to "implement" RCW 48.19.035 does not mean that he cannot, when necessary, limit how certain insurers use credit histories when that use would frustrate or violate other provisions of Chapter 48.19 RCW.

Petitioners ask this court to rewrite RCW 48.19.035 as an expansive grant that eliminates the application of any other statutory rule making authority of the Commissioner. But RCW 48.19.035 cannot be read in a vacuum to restrict the ability of the Commissioner to adopt rules prohibiting improper discrimination in setting insurance rates as he has done with the emergency rule here. Nowhere does the language of RCW 48.19.035 exempt carriers that adopt credit scoring models from the obligation to ensure their rates are not excessive, inadequate, or unfairly discriminatory. Nor does RCW 48.19.035(5) prevent the Commissioner from effectuating the requirements of RCW 48.19.020 as he implements RCW 48.19.035.

Contrary to Petitioners claims, the Commissioner is not repealing or "suspending" RCW 48.19.035. He has temporarily suspended certain conduct by carriers in light of state and federal requirements that are frustrating the Legislature's understood intent to allow limited uses of credit histories, when those uses otherwise comply with the provisions of Chapter 48.19 RCW.

Petitioners also claim the fact that the Legislature failed to pass a complete ban on credit scoring necessarily means the Commissioner lacks authority to issue this emergency rule. But the legislation proposed by the Commissioner was a complete ban on the use of credit histories in setting rates on all property and casualty insurance. The Commissioner's temporary rule only limits the use of credit histories in setting insurance rates in three lines of property and casualty insurance that most directly affect consumers. The original version of the Commissioner's request legislation was a permanent ban. This limit on insurance carriers, is only for a period of three years from the end of the state of emergency that triggered these unique conditions. Finally, the Emergency Rule allows carriers to replace the use of credit histories in their rating manuals, with a neutral factor, rather than forcing insurers to entirely rewrite their underwriting practices to exclude the use of credit histories. The use of this neutral factor approach will allow companies

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to reinstitute their credit scoring models when the Emergency Rule (or a subsequent notice and comment rule) expires.

More importantly, the failure of agency request legislation that has been rewritten to cater to the industry, says nothing about the Commissioner's existing statutory rulemaking authority. As a general principle, the court is loath to ascribe any meaning to the Legislature's failure to pass a bill into law. *State v. Cronin*, 130 Wn. 2d 392, 399-400, 923 P.2d 694 (1996) citing *Spokane Cnty. Health Dist. v. Brockett,* 120 Wn.2d 140, 839 P.2d 324 (1992); *In re Personal Restraint of Andress*, 147 Wn. 2d 602, 611, 56 P.3d 981 (2002). *E.g., Brockett,* 120 Wn.2d at140 This is especially true where nothing in the language of the proposed bill, or the legislative history presented by the Plaintiffs includes any discussion of the Commissioner's existing rule making authority, and the possibility of an emergency rule was never raised before the legislature while the failed legislation was before them.

Petitioners also attempt to concoct a claim that the Commissioner has violated a constitutional provision under RCW 34.05.570(2)(c) because he purportedly invaded the Legislature's prerogative by adopting the emergency rule, thus violating the separation of powers doctrine. But the Commissioner's actions were based squarely on the statutory authority the Legislature has delegated to the Commissioner, to enforce the provisions of the Insurance Code, to implement the rating provisions in Chapter RCW 48.19, and the express authority to implement RCW 48.19.035, consistent with RCW 48.19.020. Other than Senator Mullet's personal opinion about the Commissioner's authority, Petitioners cite no statement by the Legislature indicating that the Commissioner's authority under RCW 48.19.020, RCW 48.19.370, or RCW 48.02.060 are limited, or inapplicable to rules based on RCW 48.19.035. Nor do they cite to any legal precedent limiting the Insurance Commissioner's authority to ensure that the use of credit histories is consistent with RCW 48.19.020. Because the emergency rule is well within the Commissioner's statutory authority to promulgate rules, and is necessary to give full effect to all of the provisions of the Insurance Code in the unique circumstances

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caused by the pandemic, Petitioners have failed their burden to demonstrate that the Commissioner's Emergency Rule exceeds his authority.

B. OIC Had Good Cause to Enact the Emergency Rule

In addition to being well within the Commissioner's authority within the Insurance Code, the rule was adopted consistent with the emergency rule provisions of the APA. RCW 34.05.350. The APA plainly allows state agencies to adopt rules on an emergency basis if, for good cause, an agency finds that immediate adoption of a rule is necessary to preserve the general welfare. RCW 34.05.350(1). There are safeguards in the APA to involve the public in a timely manner as the agency may not adopt similar emergency rules in sequence unless the agency has filed notice of its intent to adopt the rule as a permanent rule, therefore limiting how long the notice and comment period for standard rulemaking may be deferred. RCW 34.05.350(2).

As used in the APA, good cause must be based on a real need to preserve the general welfare, it cannot be "artificial or fabricated". *State v. MacKenzie*, 114 Wash. App. 687, 698–99, 60 P.3d 607, 613–14 (2002). This is similar to the good cause standard used by the court in other contexts. See *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn.. App. 412, 422, 204 P.3d 944, 949 (2009) (To establish good cause for a protective order in discovery" APA, the party must show that specific prejudice or harm will result… Unsubstantiated allegations of harm will not suffice.); *Korte v. Emp't Sec. Dep't,* 47 Wn..App. 296, 302, 734 P.2d 939 (1987) (In the context of the Employment Security statute, "good cause must be based upon existing facts as contrasted to conjecture."). While Petitioners cite to *Mauzy v Gibbs*, this has limited persuasiveness here. *Mauzy v. Gibbs*, 44 Wash. App. 625, 631, 723 P.2d 458, 461 (1986). *Mauzy* is based on the 1986 APA that did not include the "good cause" requirement that was added in a 1988 amendment. *See* RCW 34.04.030 and H.B. 1515, 1988 Wash Sess. Laws. The "good cause" requirement appears to replace any "emergent and persuasive" standard as outlined in *Mauzy*. Therefore once the emergency is determined to be real and not fabricated, it is then within the discretion of the agency on whether to engage in emergency rulemaking and the trial

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court should not substitute its judgment for the wisdom of the regulation for that of the agency. *MacKenzie*, 114 Wn. App. at 687.

There is an immediate risk to the general welfare as the pandemic and the CARES Act restrictions on the reporting of credit history information have had an uneven impact on similarly situated consumers. This uneven impact is a real, current, and evolving future risk to the general welfare. While Petitioners highlight other instances where federal and state law may change what is reported as part of a credit score, this argument misses the point. These laws are implemented uniformly across all similar consumers. The emergency rule is reacting to the irregular impact that the CARES Act and state orders limiting the reporting of certain credit history information are having on similarly situated individual consumers. Further, Petitioners also confuse the Commissioner's often-stated belief that the use of credit scoring can result in systemic discrimination and the past-proposed legislative amendments with the basis for the emergency rule. These are two different issues. The pandemic and the CARES Act are having an unprecedented impact on consumers in ways that are not born uniformly by similarly situated consumers. This is the needed "critical consumer protection" that is the basis for the emergency rule. Finally, Petitioners have also alleged that RCW 48.02.060(4) limits the Commissioner's authority to issue emergency rules to only the four categories listed there. However RCW 48.02.060(4) only speaks to the Insurance Commissioner's emergency *order* authority. The Commissioner's emergency *rule* that Petitioners are contesting was promulgated under RCW 48.02.060(3)(a) and RCW 34.05.350. Taking the facts in the record in the light most favorable to the Commissioner, there is an ongoing and future harm to the general welfare, and emergency rule procedures in RCW 34.5.350 are both warranted and were complied with in adopting this rule.

Where there is no Washington case law construing provisions of the Washington APA, federal precedent may serve as persuasive authority. *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.. 2d 161, 179, 979 P.2d 374, 383 (1999), *as amended on denial of*

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reconsideration (Sept. 22, 1999) However, federal decisions are generally only "persuasive authority when construing state acts which are similar to the federal act." *Inland Empire Distribution Sys., Inc. v. Utilities & Transp. Comm'n*, 112 Wn..2d 278, 283, 770 P.2d 624, 626 (1989). While Petitioners cite to the Federal Administrative Procedure Act (Federal APA) and cases interpreting it, the Federal APA differs significantly from Washington's APA in several important ways.

Under the Federal APA, notice and comment periods do not apply when "the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C.A. § 553(b)(B). This language is very broad, and the federal courts have determined that the "good cause" exception is to be "narrowly construed and only reluctantly countenanced," with its use limited to "emergency situations". *Util. Solid Waste Activities Grp. v. E.P.A.*, 236 F.3d 749, 754 (D.C. Cir. 2001). It is also possible for a regulation to be permanently adopted without notice and hearing when an agency finds "good cause". 5 U.S.C.A. § 553; *Mauzy v. Gibbs*, 44 Wn.. App. 625, 633, 723 P.2d 458, 463 (1986). However, because RCW 34.05.350 is *already* an emergency rule, it should not be held to an even higher standard than the Federal APA by first starting with its narrow "public health, safety, or general welfare" standard, and then interpreting this language even more narrowly. Further, Washington's APA contains procedural safeguards requiring that an emergency rule be in effect for only one hundred and twenty days without initiating permanent rulemaking with full public participation as required by the APA. RCW 34.05.350. Therefore, the Federal APA differs significantly from the Washington APA, and its case law narrowly interpreting a broad standard with few procedural safeguards is not persuasive in this instance.

As another example of this difference, in *California v. Azar*, the court limited the term "good cause" to apply only to situations where an emergency is adopted to preserve "life, property, or public safety," *California v. Azar,* 911 F. 3d 558, 576 (2018). However, the Washington APA permits emergency orders also to protect the "general welfare."

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RCW 34.05.530(1)(a). Petitioners have not cited any authority defining "general welfare" to be only applicable to prevent harm to life, property, or public safety. Therefore the *Azar* case has little persuasive authority here. Further, the Legislature has determined that insurance affects the public interest. RCW 48.01.030. Therefore, it is not unreasonable, where violations of insurance provisions are apparent, and caused by unique and extraordinary circumstances, that an emergency rule be permitted to protect the public's interest and the general welfare by ensuring insurance products are not unfairly discriminatory.

Petitioners claim there can be no emergency because the Commissioner waited too long to take action. But there is no requirement in the APA that mandates an agency can only engage in emergency rulemaking within a certain period of time of the start of the emergency. While the timing may be part of the analysis of whether an actual risk to the public health safety or general welfare exists, the courts have permitted agencies leeway in the discretion on when to engage in emergency rulemaking. For example, in *State v Mackenzie*, the state toxicologist issued an emergency rule *after* engaging in regular rulemaking, in order to update a rule inadvertently left out of the prior rulemaking process. *State v. MacKenzie*, 114 Wash. App. 687, 698–99, 60 P.3d 607, 613–14 (2002). Similarly, the federal courts have also permitted agencies to engage in emergency rulemaking long after the initial occurrence of the risk to the public health and safety. *Hawaii Helicopter Operators Ass'n v. F.A.A.*, 51 F.3d 212, 214 (9th Cir. 1995) In *Hawaii Helicopter Operators Ass'n*, the air fatalities leading to the basis for the1994 emergency rulemaking occurred between 1991 and 1994, a three year period. The federal courts have also held that the when considering the timing of agency actions, the "complexity of statutory scheme and magnitude of responsibility placed upon agency [are] relevant in determining whether [an] agency properly invoked "good cause" exception". *Universal Health Servs. of McAllen, Inc. Subsidiary of Universal Health Servs., Inc. v. Sullivan*, 770 F. Supp. 704, 720 (D.D.C. 1991), *aff'd sub nom. Universal Health Servs. of McAllen, Inc. v. Sullivan*, 978 F.2d 745 (D.C. Cir. 1992). Here, while the initial impact of the pandemic and CARES Act dates to

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March 2020, these early days of the pandemic were also full of previously unseen uncertainty, urgency on many fronts, and difficulty. A delay during the pandemic, where many other issues were vying for a finite amount of agency attention, should not be fatal to the finding of a real emergency.

Petitioners cite to *United States v. Johnson*, to argue that even a seven-month delay is too long, where there was a circuit split on this emergency rule, where the Fourth, Seventh and Eleventh Circuits held that there was "good cause" to bypass notice and comment, while the Fifth, Sixth and Ninth Circuits rejected this argument. *United States v. Johnson*, 632 F.3d 912, 927–28 (5th Cir. 2011). The Eleventh Circuit specifically rejected that the seven-month delay meant that the agency had failed to demonstrate good cause, because if such delays are counted, then "An agency could never demonstrate good cause since delay is inevitably built in as the agency brings its expertise to bear on the issue." *United States v. Dean*, 604 F.3d 1275, 1282 (11th Cir. 2010). Therefore, "the question is whether further delay will cause harm". *Id*. Here, the Commissioner brought the expertise of OIC to the impact of the pandemic and the CARES Act on the use of credit scores, and the future harm once the CARES Act was no longer in place. These are both novel issues and complex ones, and the analysis has taken place during a global pandemic with many other emergency actions that were taken by the agency during this time.

Petitioners have also alleged that RCW 48.02.060(4) limits the Commissioner's authority to issue emergency rules to only the four categories listed there. However RCW 48.02.060(4) only speaks to the Insurance Commissioner's emergency *order* authority. But the Commissioner's emergency *rule* was not promulgated under RCW 48.02.060(4). The emergency *rule* Petitioners are contesting was promulgated under RCW 48.02.060(3)(a) and RCW 34.05.350. The Commissioner's emergency rules are not limited to the topics listed in RCW 48.02.060(4). The Commissioner has the statutory authority to issue an emergency rule regardless of the existence of a state of emergency in the State of Washington, and has authority

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to issue an emergency rule on any topic for which he can issue a standard rule, if the requirements of RCW 34.05.350 are satisfied.

Petitioners cite no authority that holds that agencies are required to adopt an emergency rule as a first option, or at the first moment an agency learns a potential emergency exists. Imposing a strict time sensitive component to APA emergency rulemaking procedures will force agencies to engage in knee-jerk emergency rulemaking for fear of being accused of not moving quickly enough. This has the potential to eliminate an agency's ability to take the time necessary to assess whether an emergency is real and not artificial or fabricated. Considering the incredible uncertainty over the last year caused by the pandemic, the timing of the emergency rule is not remarkable or unreasonable. This has been a year of firsts as agencies recognize and react to myriad impacts from the pandemic, many agencies have had to triage their efforts. As Petitioners note, the Commissioner initially chose to focus his efforts on permanently eliminating the use of insurance credit scoring. When that was unsuccessful, he used his authority to take a different, temporary, and narrower approach to address the discriminatory rating caused by the protections of the CARES Act.

If this rule is not in place when the CARES Act expires, consumers in the most financially vulnerable position will be forced to pay more for vital, and in some cases mandatory, insurance policies that protect not only insureds, but also fellow drivers, banks, and landlords that rely on auto, homeowners, and rental insurance being in place. If financially vulnerable consumers are priced out of the market by drastically reduced credit scores, this will impact the public, not just the policyholders. Therefore the impact on the general welfare from these events is both ongoing and imminent. The Commissioner has for good cause found this emergency rule was necessary to protect the general welfare.

C. The Rules are Not Arbitrary and Capricious as the Emergency is Not Fabricated

An emergency rule will be upheld if the health, safety, or general welfare justification stated by the agency in its CR 103e filing is not arbitrary or capricious, that is, if the emergency

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is "not artificial or fabricated." *State v. MacKenzie*, 114 Wn. App. 687, 698, 60 P.3d 607 (2002). If the emergency is present, the trial court should not substitute its judgment for the wisdom of the regulation for that of the agency. *Id.* (citing *Brannan v. Dep't of Labor & Indus*., 104 Wn.2d 55, 60, 700 P.2d 1139 (1985)). A rule is arbitrary and capricious if it is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Washington Indep. Tel. Ass'n v. Washington Utils. & Transp. Comm'n*, 148 Wn. 2d 887, 905-06, 64 P.3d 606 (2003) " 'Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.'" *Id.* Further, it is within the discretion of the agency what specific procedures of the APA the agency chooses to use. *Hillis v. Dep't of Ecology*, 131 Wn. 2d 373, 400, 932 P.2d 139 (1997). Emergency rulemaking is permitted at any point an emergency exists, it does not have to be the first approach tried by an agency. *Id*.

NAMIC claims the OIC's findings in the CR 103E are flawed because they fail to cite to specific studies like the one Ms. Watkins, their hired expert, believes are necessary. NAMIC Brief at 14. But the APA does not require citation to specific documents in the agency's finding. Instead, it requires that the agency Record contain sufficient information to support the findings of the Agency. The only place where the APA requires "citations" in a rule file is when the agency is making a list available of locations where data relied upon by the Agency can be found by the public. RCW 34.05.370(2)(f).

The federal cases cited by Petitioners for the claim that a rule is arbitrary and capricious where the agency fails to cite to the record are inapposite. In *Islander East Pipeline Co., LLC v. Connecticut Dept. of Environmental Protection,* (482 F.3d 79, 102 (2006)), the court found that the record contained competing studies that countered the Agency's decision, and were not addressed by the agency. In *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., (463 U.S. 29, 52, 103 S.Ct. 2856, 2871 (1983)), the agency failed to separately consider or discuss a safety component before recinding a previously adopted safety standard. In both cases,

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the process at issue was a standard notice and comment rulemaking, where the agency failed to address the contradicting facts before it.

Here, the OIC found that "the current protections to consumer credit history at the state and federal level have disrupted the credit reporting process." This is true by operation of law. The CARES Act and state emergency orders do result in inaccurate credit histories to be reported, because they plainly prohibits some negative credit history from being reported. AR 523, 524, 438. The Commissioner also found that, "This disruption has caused credit based insurance scoring models to be unreliable and therefore inaccurate when applied to produce a premium amount for an insurance consumer in Washington state." AR 1012. Again, this is logically reasonable. No study is needed to show that when the information that is input into a formula or algorithm is objectively inaccurate for some individuals, the resulting output from that algorithm is also inaccurate. Slavich Dec. at 6. However, there is evidence that consumer credit histories are being buoyed by the shielding requirements of the CARES Act. AR 978-987. Therefore, the Commissioner logically concludes that the shielding of information from some, but not all, consumer credit histories "makes the use of currently filed credit based insurance scoring models unfairly discriminatory within the meaning of RCW 48.19.020." AR 1012.

While NAMIC's expert urges this Court to substitute her own opinion that the Commissioner must conduct a study to determine if credit scoring is generally a reliable method overall, the Commissioner's rule is concerned about the impact on individual consumers. NAMIC's expert does counter the Commissioner's conclusion that as a result of state and federal credit protections, the negative credit histories of some consumers are not being reported, and therefore, the credit histories used by insurers are not fully accurate. NAMIC attempts to claim that these histories cannot be inaccurate where the information that is absent is absent by operation of law. But this actually proves the Commissioner's point. By operation of law, information that insurers presume will be reported as credit history information is not reported.

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And insurer credit scoring models presume that the credit histories they use will contain the information that current law prohibits from being reported. Unfortunately for NAMIC, insurance credit scoring models do not presume that the law will eliminate the credit history information the model relies on to set premiums. They also do not assume that the law will shield credit history information for some consumers, but not all.

APCIA, in contrast, turns to the sole opinion of Senator Mullet to claim that the Commissioner's rule can only be fabricated, and thus arbitrary and capricious, because the OIC never discussed a potential emergency with him. But Senator Mullet's declaration does not demonstrate that he ever asked about a potential emergency. *See* Noski Dec. at 2. Further, while Senator's opinion is that the need for immediate action is fabricated, he points to no statement by the Commissioner or OIC staff as the basis for this assumption. Essentially, Senator Mullet's opinion about the Commissioner's motivation is drawn entirely from his assumption that the Commissioner would have discussed a possible emergency with him, and that the Emergency Rule would not have been necessary if the Commissioner's request legislation had been approved. But the Commissioner had no reason or obligation to discuss potential action he believed to be within his already existing statutory authority with any member of the legislature. Nor is it clear that the emergency rule would not have been necessary had the Commissioner's request legislation been approved. Noski Dec. at 3.

Regardless, the Commissioner clearly considered several possible options for addressing this emergency, both in the proposals put before the legislature, and in the alternatives contained in the record. That he chose an option that the industry and Senator Mullet disagree with does not make the emergency rule arbitrary or capricious.

D. The Agency Record Should Not Be Expanded.

A party seeking to expand the agency record under RCW 34.05.562 bears the burden to show one of the narrow categories allowing supplementation or the record applies. *See Samson v. City of Bainbridge Island,* 149 Wn. App. 33, 64-66, 202 P.3d 334 (2009). RCW 34.05.562(1)

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allows the agency record to be expanded only if:

> . . . it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> (b) Unlawfulness of procedure or of decision-making process; or
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

However, summary judgment is only appropriate where there is no genuine issue as to any material fact. CR 56(c). Therefore if the declarations of Sen. Mullet and Ms. Watkins are needed to determine disputed material facts related to the Commissioner's motivation in adopting the rule, or the types of evidence the Commissioner should rely on, these declarations defeat summary judgment. If, as Petitioners contend, the material facts are not in dispute, these declarations, both of which contain facts that are disputed by the Commissioner, are inappropriate additions to the agency record.

Further, under the APA, the declarations of Senator Mullet and Ms. Watkins are not needed by the Court to determine the lawfulness of the agency decision making process, or facts material to the emergency rule making. Ms. Watkins declaration, while offering her opinion of how the Commissioner should evaluate the reliability of credit histories as a general matter, does not dispute the Commissioner's actual finding that as a result of state and federal laws, individual credit histories are not fully reported, resulting in some similarly situated consumers being disparately treated. Further, while she offers an alternative to the Commissioner's emergency rule (conducting a study of the impact of the state and federal credit shielding provisions), she does not point to any legal requirement that a study be conducted first. As noted by the OIC's actuary, a study is not necessary where intervening law has clearly changed the information available to insurers. Slavich Dec. at 6. Further, neither Ms. Watkins declaration, nor the type of study she suggests were available to the Commissioner at the time the Emergency Rule was adopted. What was available, and is in the agency record, was information that although credit scores remain stable, and are even improving for some, those scores are buoyed by federal requirements shielding negative credit history information. AR 978-987.

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Senator Mullet's declaration creates multiple disputed issues of fact. First, it misrepresents the OIC's conduct during the legislative session. As Mr. Noski notes, the OIC never agreed to support the Senator's pro-industry proposals. Noski Dec. at 3. Further, contrary to Sen. Mullet's declaration, many of his proposals would have caused greater likelihood of consumer harm than consumer good. *Id*. at 2. Senator Mullet opines (incorrectly) on the Commissioner's previously existing statutory rulemaking authority, and leaps, without support, to the conclusion that the Commissioner's stated basis for the emergency rule is fabricated simply because Senator Mullet was not aware of its existence and because of the timing of the agency emergency rule. But as Mr. Noski notes, it is possible that this emergency rule may have been necessary, even if the Commissioner's request legislation had been adopted. Noski Dec. at 3. In short, the declarations of Ms. Watkins and Senator Mullet, while colorful, albeit disputed, contextual additions to a motion for summary judgment, do not meet the high threshold to warrant inclusion in the record the agency record should have been considered at the time the Emergency Rule was adopted.

V. CONCLUSION

For the forgoing reasons, the motions for summary judgment, and to expand the agency record, and the petition for judicial review, should be denied.

DATED this 24th day of September, 2021.

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DECLARATION OF SERVICE

I declare that I sent for service a true and correct copy of the ***Insurance Commissioner's Opposition to Summary Judgment and Expansion of the Agency Record***; ***Declaration of Eric Slavich in Opposition to Motion for Summary Judgment***; ***Declaration of Jon Noski in Opposition to Motion for Summary Judgment*** on all parties or their counsel of record on the date below as follows:

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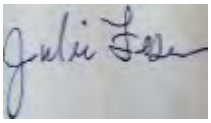
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of September, 2021 at Olympia, Washington.



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☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: October 8, 2021
Time: 1:30 P.M.
Judge: Mary Sue Wilson

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervener NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

Case No. 21-2-00542-34

DECLARATION OF ERIC SLAVICH IN OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT

I, Eric Slavich, declare as follows:

1. I am the lead property and casualty actuary in the Rates, Forms, and Provider Networks division of the Washington State Office of the Insurance Commissioner [OIC]. I have been in that position for four years.

2. I began my actuarial career at the OIC in 1998, starting at the actuarial analyst I level. I was promoted four times, holding positions as an actuarial analyst II, actuarial analyst

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III, and actuary 2 before reaching my current position.

3. I have been an Associate of the Casualty Actuarial Society and Member of the American Academy of Actuaries since 2012. I have a bachelor's degree in mathematics and a bachelor's degree in physics, both from the University of Washington.

4. As part of my current duties with the OIC, I am responsible for supervising the unit that reviews property and casualty insurance rate filings, including the rate filings required by the emergency rule. I am the primary point of contact for insurers with questions about those rate filings. Along with the staff who report to me, I developed filing instructions for insurers to follow when submitting filings in compliance with the emergency rule. I contributed to the writing of the emergency rule itself.

5. Insurers do not have a uniform approach toward using a consumer's credit information to determine insurance premiums, which makes it difficult to make generalizations about the impact of the emergency rule. Insurers are required to submit an insurance scoring model filing that shows how elements of a credit report are combined, sometimes with non-credit information, to generate an "insurance score" for a consumer (RCW 48.19.035(2)(a)). Some insurers create their own insurance scoring models, while other insurers use models created by third-party vendors. Insurance scoring models vary in at least three important respects: First, some models include only credit elements, while some include non-credit information (such as the driver's history of filing insurance claims). Second, the models use different types of information from the consumer's credit report. Third, the formulas used to combine the various elements into a single score are different, so that even if two models did use some of the same credit elements, those elements would typically be weighted differently. In separate rate filings, insurers show how these insurance scores are used to calculate premiums. The way insurers account for credit information in rate filings varies as well. Some insurers file a single table of credit-based insurance scoring factors. Others might file distinct tables of factors that vary by coverage (for example, bodily injury coverage versus collision coverage in auto insurance) or

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peril (such as wind versus fire in homeowners insurance). Some insurers use more complex treatments of credit, with credit-based insurance scoring factors that depend on multiple other rating characteristics. For example, the credit-based insurance scoring factors might vary by coverage and driver age.

6. Insurers are required to provide statistical support for their proposed credit-based insurance scoring factors using multivariate analyses (WAC 284-24A-050). These analyses use the insurer's historical data about policyholders to demonstrate the correlation between credit-based insurance scores and expected claim costs (i.e., how likely is a given consumer to file a claim, and how large would any such claims likely be?). One assumption underlying these analyses is that the relationship between a consumer's credit information and expected claim costs does not vary unpredictably over time. If an insurer's analysis uses data from the period 2013 to 2018, for example, it does not automatically follow that the relationship between credit and claims costs observed in that data would necessarily be the same as the relationship between credit and actual claim costs for the insurer in 2021. Insurers often attempt to account for these variations over time by including a time-based control variable in their multivariate analyses. However, this approach would not account for sudden, large, unexpected changes to consumers' credit information. Thus, if there were such a change to consumers' credit histories, the relationship between credit and claim costs observed in an insurer's historical data would no longer be exactly the same as the relationship that would be observed in the present. It is reasonable to assume that the bigger the disruption to the consumer credit environment, the less accurate an analysis based on historical data prior to the disruption would be.

7. Besides credit, insurers currently use several other factors when calculating premiums. Among the types of information used by some insurers are: Home value; roof material type and age; driver age; gender; marital status; accident history (both at-fault and not-at-fault); moving violations; claims history; whether a youthful driver is a "good" student; whether a youthful driver is a distant student; whether a driver over 55 has taken an approved accident

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prevention course; the number of vehicles compared to the number of drivers; characteristics of the consumer's prior insurance policy (such as bodily injury limits, the length of any lapse in coverage, and whether the prior insurer was a preferred, standard, or non-standard insurer); whether the consumer is purchasing multiple types of policies from the insurer; whether premium is paid up-front or in installments; whether the policyholder is a homeowner; how long in advance of the policy effective date the policy was purchased; length of tenure with the insurer; length of residency at the same location; the policyholder's education level; make, model, and year of an insured vehicle; garaging location or home location; whether the vehicle or home is used for business; annual mileage; and usage-based/telematics rating (in which an electronic device monitors a driver's driving behavior in real time and transmits the data to the insurer automatically).

8. When an insurer adds a new rating factor to its rating plan, there is a possibility this will cause unfair discrimination in violation of RCW 48.18.480 and RCW 48.19.020. But removing a rating factor cannot result in unfair discrimination the way that adding a rating factor can. With respect to premium rates, unfair discrimination occurs when an insurer charges different premiums to substantially similar risks. The question of whether an insurer's action is unfairly discriminatory only needs to be asked if the insurer is somehow treating two insureds differently. Thus, when an insurer wishes to add a new rating factor to its rating plan, the insurer must show that premium differences related to this new factor are fairly discriminatory. In the insurance context, fairly discriminatory means that premium differences between classifications are consistent with differences in the costs by classification the insurer will bear. A classification that is expected to file twice as many claims might be charged twice as much premium. In rate filings, insurers provide statistical support and actuarial analysis to show that rating factors are fairly discriminatory. Removing a rating factor, such as credit-based insurance scoring factors, does not result in unfair discrimination, since removing a rating factor results in treating groups of policyholders the same, not differently.

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9. The use of credit-based insurance scoring factors could result in unfairly discriminatory premiums if the credit information used by the insurer is inaccurate or incomplete. For example, consider two consumers who each have failed to make a payment on a certain type of loan. Suppose one of the two consumers was granted an accommodation by the consumer's lender, such as that permitted under the CARES Act. The account for the consumer with the accommodation under the CARES Act is reported as current, while the other consumer was not granted such an accommodation and therefore has a credit report with a delinquency. Assuming the two consumers are otherwise substantially similar, it would be unfairly discriminatory to charge the two consumers different premiums.

10. On January 14, 2021, I testified in a hearing of the Senate Business, Financial Services and Trade Committee about Senate Bill 5010. In that testimony, I acknowledged that there is a statistical correlation between credit scores and insurance claim costs. However, it is possible to imagine changes to the credit reporting system that could reduce or eliminate that statistical correlation. For example, if every lender stopped reporting late payments, delinquencies, and collections referrals, the correlation between credit information and insurance claim costs would be weakened. The strength of the correlation must obviously depend on the accuracy of the data included in consumer credit reports. Any change to credit reporting procedures that reduces the accuracy of credit data weakens the correlation between credit and claims costs. Some provisions of the CARES Act will make credit reports less accurate, by forcing lenders to report some accounts as current, when those same accounts would have been reported as delinquent in the past.

11. Following a dramatic change to the consumer credit environment, it would take multiple years before insurers were able to adjust their credit-based rating factors to be accurate in the presence of the new environment. Insurers typically examine multiple years of historical data when determining their credit-based rating factors. The process of collecting the data, auditing it, performing the necessary statistical analyses, and filing this information with the OIC

further delays the process. Data insurers use to support credit-based factors in their filings typically spans several years with the most recent year's data being at least one year old, and often older. After a dramatic change to the consumer credit environment, it is thus reasonable to expect that it would take multiple years before insurers could take the necessary steps to determine actuarially sound credit-based rating factors.

12. Given that consumer credit reports became less accurate due to the CARES act, insurers' existing credit-based rating factors became less accurate. For insurance rating purposes, there are three important aspects to consider when considering this change to credit-based rating factors: (i) whether the correlation between credit history and insurance losses changed; (ii) if so, how much did the correlation between credit history and insurance losses change; and (iii) whether the changes to the credit data might result in unfair discrimination for individual consumers. Regarding the first point, the answer is clearly "yes." Any change to data sources used to calculate credit-based insurance scores, and thus premiums, would impact the correlation between credit history and insurance losses to some degree. Regarding the second point, as discussed above, insurers would require several years to accumulate enough data to determine the extent of the change and to make appropriate revisions to their rating factors. But even if the changes were not material enough to render existing rating factors inaccurate, it does not take any actuarial analysis to determine that individual consumers would be unfairly discriminated against due to the changes in credit data reporting (as discussed under paragraph 9 above).

13. The 2008 Great Recession is not a good comparison to the current situation in at least one important way; during the Great Recession, there were no laws mandating the inaccurate reporting of consumer credit information.

14. The emergency rule requires insurers to remove the impact of credit information from their premium calculations, while making the minimal other revisions necessary so that the insurer does not experience any overall premium change for its book of business. The rule is intended to be flexible enough to account for the various ways insurers handle credit in premium

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calculations. The rule describes how to calculate a "neutral factor" but does not require this approach, stating that insurers "may" substitute a neutral factor in lieu of its credit-based rating factors. The rule also states that insurers may apply neutral factors that vary by coverage or by peril. This wording is meant to accommodate insurers that currently have rating plans with credit-base rating factors that vary by coverage or by peril.

15. The OIC published guidance (the "FAQ,") to aid insurers in complying with the emergency rule. I was the primary author of the FAQ. The FAQ includes instructions designed to simplify the filings required by the emergency rule. For example, OIC is not expecting or requiring insurers to remove existing rating rules related to credit; instead, insurers are instructed to provide a new page that supersedes the existing credit-based rating rules. This simplification is meant to make it easier for insurers to file the necessary changes and easier for OIC to review those filings.

16. The FAQ was developed with the Emergency Rule, as a way to ensure that carriers had the practical guidance they needed to implement the rule in a timely manner.

17. Insurers rely on computer software to calculate premiums for policies as they renew and to quote premiums for new business applicants. When concluding the review of a rate filing, a final step in the process is determining the effective date for a filing. From discussing final effective dates with filers, I understand that insurers often need to have a filing approved from two months up to several months in advance of the filing's effective date. This lead time is necessary for the insurer to be able to program the changes to its software. OIC considered this information when determining when to file and implement the emergency rule.

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED in Olympia, Washington this 23rd day of September, 2021.

Eric Slavich

ERIC SLAVICH
Lead Property and Casualty Actuary for the
Office of the Insurance Commissioner

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☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: October 8, 2021
Time: 1:30 P.M.
Judge: Mary Sue Wilson

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervener NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

Case No. 21-2-00542-34

DECLARATION OF JON NOSKI IN OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT

I, Jon Noski, declare as follows:

1. I am over the age of 18 and make this Declaration based on my personal knowledge and I am competent to testify to the facts set forth herein.

2. I am employed by the Washington State Office of the Insurance Commissioner ("Insurance Commissioner" or "OIC") as a Legislative Liaison in the Policy and Legislative Affairs Division. I have held this position since June 8, 2020.

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3. I have over 11 years of legislative experience for the State of Washington. Prior to my employment with the OIC, I worked in multiple other state agencies.

4. It is one of my primary responsibilities to have conversations with legislators and legislative staff about OIC's ongoing legislative priorities.

5. OIC did work closely with Senator Das to propose request legislation during the 2021 legislation session that would ban the use of credit scoring in all person lines of insurance. The bill was introduced at SB 5010. That bill ultimately did not pass.

6. I spoke with numerous legislators and legislative staff during the 2021 legislative session. None of the legislative discussions about SB 5010 concerned the Commissioner's authority to temporarily suspend the use of credit scores if there is no way for credit scoring models to obtain accurate information.

7. Statements made in paragraph nine of Senator Mullet's declaration are incorrect. Washington is not the only state that has not adopted the 'Extraordinary Life Circumstances' legislation. Only 21 states have adopted this measure that is promoted by the industry through the industry-backed National Council of Insurance Legislators (NCOIL). Senator Mullet's fixation on the NCOIL legislation is not germane to the emergency rule. Our concerns and reasons for opposing this legislation (HB 1351 and SB 5409) were repeatedly related to Sen. Mullet and to other members of the Legislature.

8. The primary concern with Sen. Mullet's 'Extraordinary Life Circumstances' legislation as written, is that is grants insurers the ability to make subjective exceptions to their rating procedures on a case-by-case basis. These bills effectively eliminate the Commissioner's oversight and ability to ensure fairness and consistency in how insurers are treating consumers, and actually invites unchecked discrimination, by codifying the industry's ability to treat consumers in any manner they choose, with no check on their discretion. In short, the known risks of the NCOIL legislation outweighs the questionable benefits.

9. Paragraph ten of Sen. Mullet's declaration also contains inaccurate statements.

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The amendment to SB 5010 that came out of the Business, Financial Services & Trade committee was not the work of OIC. This was industry drafted language. Commissioner Kreidler did not refuse to honor a compromise, as claimed, because one had not been reached. OIC staff worked diligently with Senator Mullet to address various other suggested amendments but at no point had an agreement on any version as a final negotiation been reached. This was made clear in emails to both Senator Mullet and Senator Billig.

10. Commissioner Kreidler did however permit staff to work with Senator Mullet to provide technical assistance in the hopes that it would keep SB 5010 alive and moving in the legislative process. This was a proposal that, in its original form, had the support of every member of the Senate Democrats. It was the chair of the committee who effectively killed the bill when OIC would not agree to an industry drafted amendment as its final form. Senator Mullet mischaracterizes the OIC's good faith attempts to work with him. Each amended draft of SB 5010 supported by Sen. Mullet moved further from something Commissioner Kreidler could support. The Commissioner's legislative staff, including myself, conveyed multiple times that the substitute amendment failed to address the racial equity and economic fairness priorities that were the primary reason for running the original bill.

11. The OIC, like other state agencies, has worked to respond to the needs of the public relating to the pandemic swiftly when it has become aware of those actual or imminent impacts. Therefore, even if SB 5010 passed in its original form, it is likely the OIC still would have determined this emergency rule was necessary, given the length of time it would take for SB 5010 to become effective.

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 21 day of September, 2021, at Tumwater, Washington.

Jon Noski
Legislative Liaison
Policy & Legislative Affairs Division

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☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: October 8, 2021
Time: 1:30 p.m.
Judge/Calendar:
The Honorable Mary Sue Wilson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PROFESSIONAL INSURANCE AGENTS OF WASHINGTON, and INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON, and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, Petitioners, vs. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON, Respondents.	NO. 21-2-00542-34 PETITIONER INTERVENOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES' REPLY BRIEF IN SUPPORT OF MOTIONS TO SUPPLEMENT AND FOR JUDICIAL NOTICE

REPLY BRIEF IN SUPPORT OF MOTIONS TO SUPPLEMENT AND FOR JUDICIAL NOTICE

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I. INTRODUCTION

NAMIC files this reply brief in support of its first motion to supplement the record with the declaration of Nancy Watkins, filed June 14, 2021, and its second motion to supplement and for judicial notice, filed on August 17, 2021.[1] Under RCW 34.05.562(1)(b), the "court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding" the "[u]nlawfulness of procedure or of decision-making process." NAMIC submitted its first motion to supplement the record with the Declaration of Nancy Watkins, which addresses the *kind* of evidence OIC should have collected, and the *kind* of analysis OIC should have performed, to support its conclusion that the CARES Act and the Governor's orders render credit-based insurance scoring (CBIS) actuarially unfair. *See* NAMIC's Opening Brief in Support of Motion to Supplement the Record (First Mot. to Supplement) 3-4. That is precisely the kind of evidence that RCW 34.05.562(1)(b) permits: Ms. Watkins' declaration demonstrates that OIC's decision making process was unlawful because the agency failed to cite the kind of evidence and conduct the kind of actuarial analysis necessary to reach its conclusion that CBIS is actuarially unfair, rendering that conclusion arbitrary and capricious. *See id.* This Court should thus supplement the judicial record with Ms. Watkins' declaration.

After NAMIC submitted its first motion to supplement, OIC initiated notice-and-comment rulemaking to adopt a permanent rule banning CBIS for three years. *See* NAMIC's Opening Brief in Support of Motion to Supplement and for Judicial Notice (Second Mot. to

[1] NAMIC submits this reply in support of its motions to supplement and for judicial notice, which were briefed separately from NAMIC's summary judgment briefing. *See* LCR 5(d)(1)(C). NAMIC disagrees with many of OIC's factual recitations and assertions throughout its briefs and declarations and reserves the right to challenge them in later proceedings, if necessary.

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Supplement) 4. In response to OIC's preproposal statement of inquiry, NAMIC submitted comments through Ms. Watkins citing evidence from both TransUnion and LexisNexis Risk Solutions showing that CBIS is *not* actuarially unfair as a result of pandemic-related changes in credit information and credit scores. *See id.* at 4-6. NAMIC submitted its second motion to supplement and for judicial notice of (a) the fact that OIC sought comments on its proposed permanent regulations to be filed within 40 days of posting the Preproposal Statement of Inquiry; (b) the fact that NAMIC submitted comments, through Ms. Watkins, on the proposed permanent regulations within that time period; and (c) the fact that Ms. Watkins' comments, on their face, detailed her investigation into OIC's stated rationales for the CBIS ban, citing data and evidence, and explained why those rationales were mistaken in light of the data and evidence. *See id.* at 2.

Judicial notice of those facts is appropriate; they are not subject to reasonable dispute and they are directly relevant to the question whether OIC *could have* conducted notice-and-comment rulemaking in a timely fashion and obtained evidence and comments relevant to its decision making process. *See id.* at 6-9. This Court should similarly supplement the record with those facts, which are the kind of evidence that RCW 34.05.562(1)(b) permits: They address whether OIC's decision making process was unlawful because the agency failed to conduct notice-and-comment rulemaking—despite having time to do so—and because OIC failed to cite data and analysis to support its conclusions, despite the availability of such evidence. *See id.* at 8-9.

II. ARGUMENT

A. This Court Should Grant NAMIC's First Motion To Supplement.

The Court should grant NAMIC's first motion to supplement under RCW 34.05.562(1)(b). Contrary to OIC's assertion (at 23), NAMIC does not seek to expand the agency record. The agency record is compiled by the agency prior to issuing a rule and is intended to serve as the record supporting the agency's decision making process. (Here, of course, OIC does not dispute that it improperly compiled the agency record *after* it issued the emergency regulations.) NAMIC

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instead seeks to supplement the *judicial* record under RCW 34.05.562, which states that the "court may receive evidence *in addition to that contained in the agency record* for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding" the "[u]nlawfulness of procedure or of decision-making process." RCW 34.05.562(1)(b) (emphasis added).

It is appropriate to supplement the judicial record in this case with the declaration of Ms. Watkins, which directly supports NAMIC's argument that the agency's decision making process in adopting the emergency regulations was unlawful. To be clear, NAMIC does not take the position that OIC was required to conduct any specific study or perform any specific analysis to support the emergency regulations. Instead, it is NAMIC's position that OIC was required to *cite data and analysis* that support its conclusion that CBIS is actuarially unfair. That is a fundamental requirement for administrative rulemaking that OIC did not meet. *See* NAMIC's Opening Brief in Support of Motion for Summary Judgment (NAMIC SJ Mot.) 15-16. The Watkins declaration describes the kind of evidence OIC could have (but did not) collect and the kind of analysis that OIC could have (but did not) perform. It also explains that OIC failed to consider important aspects of the problem, including the impact of the emergency regulations on Washingtonians with good credit and the fact that banning CBIS without allowing insurers to redo their insurance rating plans may *cause* unfair discrimination, particularly for older Washingtonians. *See* First Mot. to Supplement 3-4. The Watkins declaration demonstrates that OIC's decision making process is arbitrary and capricious, and this Court should thus supplement the record to include it under RCW 34.05.562(1)(b).

OIC has three responses. *First*, OIC argues that if Ms. Watkins' declaration creates disputed issues of fact concerning "the types of evidence the Commissioner should rely on," it defeats summary judgment, and if it does not create a disputed issue of fact, it is an "inappropriate addition[] to the agency record." OIC Opposition to Summary Judgment and

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Opposition to Expanding the Agency Record (Opp.) 24. That is wrong. There is no dispute between the parties over "the types of evidence the Commissioner should rely on." NAMIC's position is that OIC is required to cite *some kind of data and analysis* that supports its conclusions, while OIC's position is that it is *not required to cite any data or analysis at all*. *See id.* at 22 (arguing that the CARES Act and the Governor's orders have created actuarially unfair discrimination "by operation of law"). OIC does not dispute that Ms. Watkins' declaration is accurate or that it describes the kinds of data and analysis that would demonstrate whether CBIS is actuarially unfair in light of pandemic-related changes in credit information. The purpose of Ms. Watkins' declaration is to support NAMIC's *legal argument* that OIC has failed to follow proper rulemaking procedures under Washington law by failing to cite data and analysis to support its position. That is a legal dispute, not a factual dispute.

Second, OIC claims that Ms. Watkins' declaration is "not needed by the Court to determine the lawfulness of the agency decision making process" because Ms. Watkins "does not dispute the Commissioner's actual finding that as a result of state and federal laws, individual credit histories are not fully reported, resulting in some similarly situated consumers being disparately treated." Opp. 24. OIC has misconstrued Ms. Watkins' declaration and its purpose. Ms. Watkins' Declaration is evidentiary, and it is not submitted to argue the case. That is the function of the brief supported by the declaration. Further, Ms. Watkins does *not* agree that "individual credit histories are not fully reported" as a result of the CARES Act and the Governor's orders. Instead, she explains that the "requirements of law . . . govern" actuarial analysis. Watkins Dec. ¶ 19. In other words, it is up to lawmakers to decide what it means for an individual's credit information to be "fully" reported.[2] Ms. Watkins also disagrees that as a

[2] As NAMIC explained in its motion for summary judgment, *no consumer's* credit history is "fully" reported. Existing laws prohibit the reporting of many kinds of credit information. *See* NAMIC SJ Mot. 2-3.

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result of the CARES Act and the Governor's orders, "similarly situated consumers" are being "disparately treated." Ms. Watkins states that "[b]ased on the relatively small number of consumers impacted by pandemic-related changes in credit reporting laws and the experience of the 2008 Great Recession, there is little reason to conclude that significant changes have occurred in the relationship between current CBIS models and expected losses as a result of the pandemic." *Id.* ¶ 12. In other words, Ms. Watkins *does not* believe that the CARES Act and the Governor's orders are likely to lead to actuarially unfair discrimination among similarly situated consumers. Instead, Ms. Watkins opines that "[p]rohibiting CBIS in the manner prescribed by the OIC" is "likely to *create unfair discrimination* as a consequence of removing one rating factor from a rating plan that was calibrated to be actuarially fair as a cohesive whole," and that this unfair discrimination is particularly likely to lead to "unfairly high rates for older Washingtonians with good credit scores correlated to lower risk." *Id.* (emphasis added).

Third, OIC claims that Ms. Watkins' declaration "does not point to any legal requirement that a study be conducted." Opp. 24. Again, the purpose of Ms. Watkins' declaration is not to address the legal requirements for emergency rulemaking; those requirements are addressed in NAMIC's briefing. As NAMIC has explained, agencies *are legally required* under the APA to cite data and analysis to support their conclusions. *See* NAMIC SJ Mot. 15-16. OIC also asserts that "neither Ms. Watkins[']] declaration, nor the type of study she suggests were available to the Commissioner at the time the Emergency Rule was adopted." Opp. 24. But OIC could have and should have obtained the relevant data and conducted the relevant analysis; OIC provides no reason why it did not, or could not have, taken these steps. Insurers are required to submit CBIS models and rating plans, a substantial amount of information supporting the model and rating plan, and to update consumer histories at least every 3 years. *See generally* Chapter 284-24A WAC; *see especially* 284-24A-020, 284-24A-025, 284-24A-45, 284-24A-050, 284-24A-055. OIC has access to more data than Actuary Watkins. And in any event, it is clear that OIC could

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have obtained relevant information within 40 days if it had conducted notice-and-comment rulemaking; NAMIC submitted such data to OIC within that period. *See supra* p. 2. OIC cannot credibly contend that it would have been unable to obtain such data and analysis, as NAMIC's second motion to supplement and for judicial notice demonstrates.

As NAMIC explains in its reply brief in support of summary judgment, OIC's citation to a single newspaper article stating that credit scores had risen slightly in the pandemic, *see* AR 978-987, does not say anything about whether CBIS is actuarially unfair. *See* NAMIC's Reply Brief in Support of Motion for Summary Judgment 7. To support such a conclusion, OIC would need to cite data and analysis showing that as a result of the CARES Act and the Governor's orders, CBIS is *unable to predict insurance risk*. As Ms. Watkins has explained, "[t]o determine whether the pandemic materially impacted the correlation between CBIS and insurance risk, actuarial analysis is required," and based on Ms. Watkins' review of the administrative record, "OIC did not conduct that analysis in accordance with applicable actuarial standards, nor did it ask insurers to conduct that analysis." Watkins Dec. ¶ 11. As this discussion demonstrates, Ms. Watkins' declaration is directly relevant to the question whether OIC proceeded through an unlawful administrative process, and the Court should grant NAMIC's first motion to supplement.

B. This Court Should Grant NAMIC's Second Motion To Supplement And For Judicial Notice.

The Court should also grant NAMIC's second motion to supplement and for judicial notice. OIC did not separately contest NAMIC's second motion to supplement or submit any arguments specific to that motion, and it is unclear if OIC intends to oppose that motion. OIC did not oppose NAMIC's request for judicial notice. NAMIC submitted its second motion to supplement and for judicial notice of three facts that are directly relevant to this litigation. *See supra* p. 2. Those facts demonstrate that OIC could have sought and received comments on the

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emergency regulations within 40 days, and that such comments would have provided OIC with data and analysis directly relevant to the question whether CBIS is actuarially unfair as a result of the CARES Act and the Governor's orders. *See id.* Those facts are not reasonably subject to dispute and are thus a proper subject of judicial notice. In addition, they meet the requirements of RCW 34.05.562(1)(b) because they demonstrate that OIC's procedure and decision making in adopting the emergency regulations was unlawful. In particular, those facts support NAMIC's argument that OIC lacked good cause to dispense with notice-and-comment rulemaking, because it could have sought comments before the CARES Act and the Governor's orders were repealed—a point OIC does not contest. Those facts also support NAMIC's argument that the emergency regulations are arbitrary and capricious because OIC failed to obtain data and conduct analysis to support its conclusion that CBIS is actuarially unfair. This Court should thus grant NAMIC's second motion to supplement and for judicial notice.

III. CONCLUSION

For these reasons and those stated in NAMIC's opening briefs, NAMIC respectfully requests that the Court grant NAMIC's motions to supplement and for judicial notice.

DATED this 6th day of October, 2021.

BETTS, PATTERSON & MINES, P.S.

By _____
Joseph D. Hampton, WSBA #15297

HOGAN LOVELLS US LLP

By _____
Vanessa Wells, *pro hac vice*
Katherine Wellington, *pro hac vice*

Attorneys for Intervenor National Association of Mutual Insurance Companies

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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By 12 p.m. PT on October 6, 2021, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Petitioner Intervenor National Association Of Mutual Insurance Companies' Reply Brief In Support Of Motions To Supplement And For Judicial Notice; and**
- **Certificate of Service.**

Counsel for Petitioners American Prop. Cas. Ins. Ass'n, et al.: Michael B. King Jason W. Anderson Carney Badley Spellman PS 701 Fifth Avenue, Suite 3600 Seattle, WA 98104-7010 king@carneylaw.com anderson@carneylaw.com	☐ ☐ ☐ ☐ ☑	U.S. Mail Hand Delivery Facsimile Overnight Email
Harry J.F. Korrell Davis Wright Tremaine LLP 920 Fifth Avenue, Suite 3300 Seattle, WA 98104-1610 harrykorrell@dwt.com	☐ ☐ ☐ ☐ ☑	U.S. Mail Hand Delivery Facsimile Overnight Email

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Counsel for Respondents Washington State Office of Insurance Commissioner, and Mike Kreidler, Insurance Commissioner for the State of Washington State Office of Ins. Commn'r:	☐	U.S. Mail
	☐	Hand Delivery
	☐	Facsimile
	☐	Overnight
Marta U. DeLeon Suzanne Becker Office of the Attorney General 1125 Washington Street SE PO Box 40100 Olympia, WA 98504-0100 marta.deleon@atg.wa.gov suzanne.becker@atg.wa.gov	☑	Email

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of October, 2021.

Valerie D. Marsh

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☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: August 27, 2021
Time: 9:00 A.M.
Judge: Mary Sue Wilson

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervener NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

Case No. 21-2-00542-34

OFFICE OF THE INSURANCE COMMISSIONER'S MOTION TO STRIKE DECLARATIONS NOT IN THE AGENCY RECORD

I. INTRODUCTION

The Administrative Procedure Act, Chapter 34.05 RCW (APA) limits the Court's review of agency action to the agency record. RCW 34.05.558. Reliance on supplemental materials is only permitted after the Court determines that the additional records satisfy the requirements of RCW 34.05.562. Here, Petitioners American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents

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and Brokers of Washington (collectively "APCIA") and Intervener National Association of Mutual Insurance Companies (NAMIC) have both submitted motions for summary judgment supported by declarations that are not part of the agency record on review. Neither NAMIC nor APCIA sought permission to expand the agency record prior to filing these declarations. Instead, APCIA and NAMIC have both asked the court to consider expanding the record on the same day they ask the court to consider the merits of their claims. However, this timing forces the OIC to substantively respond to these additional records, even if this Court ultimately rejects the request to expand the record. This will also force the Court to substantively consider the additional records as it prepares to hear the merits of the petition for judicial review, even if the Court ultimately determines that those additional records are not properly a part of the record on review. Further, the submissions by APCIA and NAMIC do not satisfy the requirements of RCW 34.05.562.

For these reasons, Respondents, Insurance Commissioner Mike Kreidler, (Commissioner), and the Office of the Insurance Commissioner (OIC), through their attorneys of record, ROBERT W. FERGUSON, Attorney General, MARTA U. DELEON, Assistant Attorney General, and SUZANNE BECKER, Assistant Attorney General, move to strike the improperly submitted declarations and the improperly timed motion to supplement the record filed by NAMIC. The Commissioner also asks the Court to strike the declarations submitted by APCIA and the portions of APCIA's motion for summary judgment dedicated to expanding the agency record. In addition, the OIC asks the court to strike the motions to expand the record filed by NAMIC and APCIA as those motions will be moot following the Court's decision on this motion to strike.

II. STATEMENT OF FACTS

On June 14, 2021, NAMIC filed *Petitioner Intervenor National Association Of Mutual Insurance Companies' Motion For Summary Judgme*nt (NAMIC Summary Judgment) and *Petitioner Intervenor National Association Of Mutual Insurance Companies' Motion To*

Supplement The Record (NAMIC Motion). Also on June 14, APCIA filed *Petitioners' Motion For Summary Judgment On Their Claim For Declaratory Relief, For A Permanent Injunction, And To Supplement The Record* (APCIA Motion). These motions have been scheduled to be heard on September 17, 2021. In their motions, both NAMIC and APCIA rely on declarations and records that are not part of the agency record that was submitted to this Court by the OIC as required under the APA.

NAMIC's Summary Judgment includes the *Declaration Of Nancy Watkins In Support Of Petitioner Intervenor National Association Of Mutual Insurance Companies' Motion For Summary Judgment* (Watkins Decl.), as the sole attachment to the *Declaration Of Joseph D. Hampton In Support Of Petitioner Intervenor National Association Of Mutual Insurance Companies' Brief In Support Of Motion To Supplement.* Ms. Watkins purportedly "was retained by NAMIC to address "[w]hat would need to happen to evaluate whether/how the pandemic caused credit-based insurance scoring [ ] models to be unreliable and inaccurate for purposes of ratemaking." NAMIC Motion at 2. Her declaration largely disputes or questions the conclusions the OIC has made concerning whether or not the use of credit history has become unfairly discriminatory. She does not state or demonstrate that the use of credit based insurance scoring was not impacted by the pandemic. She does not contest the Commissioner's main conclusion if carriers are allowed to use credit histories to determine insurance premiums, they would be charging different rates to individuals with similar credit history information, because some consumers have credit history information that was insulated from negative credit history reporting due to the CARES Act, and others did not. Instead, she concludes that "The Washington State Office of the Insurance Commissioner (OIC) has not shown a quantitative study demonstrating the impact the pandemic has had, or may have, on the distribution of CBIS or the relationship to insurance losses." Watkins Decl. at 4. In her opinion, the OIC must have or conduct this quantitative study to justify its conclusion that rates based on credit histories are unfairly discriminatory. Watkins Decl. at 5. In addition, Ms. Watkins questions the wisdom of

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the OIC's emergency rule by addressing possible impacts of the rule. Watkins Decl. at 19-20. Ms. Watkins does not address whether individual consumers have been treated in an unfairly discriminatory manner as a result of the credit history reporting restrictions in the CARES Act. Ms. Watkins does not address the impact that removing the history reporting restrictions in the CARES Act and various Emergency Orders issued by the state will have on the accuracy of assessing the risk level of individual consumers who were the worst impacted by the pandemic. Ms. Watkins does not address the lawfulness of the emergency rule adoption process in RCW 34.05.350.

In support of its own motion, APCIA's attached the *Declaration Of Jason W. Anderson In Support Of Petitioners' Motion For Summary Judgment On Their Claim For Declaratory Relief, For A Permanent Injunction, And To Supplement The Record* (Anderson Decl.) and the *Declaration Of Senator Mark Mullet* (Mullet Decl.). The Anderson Declaration consists primarily of copies of statutes and emergency orders, and even documents already filed with the Court, that the OIC largely does not object to on the grounds that they would properly be the subject of judicial notice. However, the OIC does object to the inclusion of Exhibits 1-3 of the Anderson Declaration:

Exhibit 1 - the original Senate Bill 5010, introduced on January 11, 2021.

Exhibit 2 - the Bill History of Senate Bill 5010 issued by the Washington State Legislature.

Exhibit 3 - Excerpts of a transcript of the public hearing held on Senate Bill 5010 before the Senate Committee on Business, Financial Services, and Trade on January 14, 2021.

While these records address failed agency request legislation, they do not address the emergency rule process, or any fact material to the Commissioner's emergency rule justification. Rather, they merely reiterate the already admitted fact that the rule was adopted after agency request legislation failed. They further reiterate that the OIC understands why carriers have

historically used credit scores. But these records do not address the emergency rule, or how the pandemic, and laws addressing the pandemic, have impacted the use of credit history.

The Mullet Declaration consists of Senator Mullet's description[1] of the events that led to the failure of the Washington State Legislature to pass legislation that would permanently ban the use of credit history in setting insurance rates, and his own justifications for industry favored alternatives that he endorsed. Mullet Decl. at 1-5. In addition, Sen. Mullet offers his personal opinion of the basis for Commissioner's enactment of the rule, and his personal opinion of the proper interpretation of the Commissioner's statutory authority. Mullet Decl. at 5. He also identifies information that was not shared with him. Mullet Decl. at 6. But Sen. Mullet does not dispute that the emergency rule process is a valid rulemaking process under the APA, or address any *material* disputed fact.

None of the disputed documents and declarations offered by NAMIC and APCIA assert that the emergency rule process itself is unlawful. Instead, they support NAMIC and APCIA's request that this Court substitute its own judgement for the Commissioner's in determining whether current state and federal credit history reporting restrictions have created a situation that causes the use of credit history in setting insurance rates to result in improper discrimination. Because these declarations are documents the Commissioner did not, and was not required, to consider, and do not point to any material fact that is not required to be determined on the agency record, they should be stricken.

III. ARGUMENT

The Washington Administrative Procedure Act (APA), Chapter 34.05 RCW, governs judicial review procedures of final agency actions. RCW 34.05.510. In a rule challenge, the agency's rule-making file serves as the record for judicial review. *Musselman v. Department of Social and Health Services*, 132 Wn. App. 841, 853, 134 P.3d 248, 254 (2006). The rule-making

[1] The OIC does not concede that Senator Mullet's description of these facts is accurate or supported by the email exchanges between OIC staff and members of the Legislature and their staff.

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file is required to contain copies of all public notices relating to the rule-making process, transcripts of any public meetings, copies of any comments received, a concise statement explaining the need for the rule, and any other material the agency considered. *Musselman*, 132 Wn. App. at 853.

A party seeking to expand the agency record under RCW 34.05.562 bears the burden to show one of the narrow categories allowing supplementation or the record applies. *See Samson v. City of Bainbridge Island,* 149 Wn. App. 33, 64-66, 202 P.3d 334 (2009). RCW 34.05.562(1) sets forth clear standards for admitting new evidence for judicial review:

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
> (b) Unlawfulness of procedure or of decision-making process; or
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

The courts have repeatedly found that the APA allows supplementation of the agency record with new evidence only under "highly limited circumstances," and the proposed new evidence must fit "squarely" within one of the statutory exceptions set forth in RCW 34.05.562(1). *Samson*, 149 Wn. App. at 64-66; *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005); *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 110 Wn. App. 498, 518, 41 P.3d 1212 (2002).

NAMIC and APCIA do not argue that the OIC was an improper decision making body under RCW 34.05.562(1)(a). Instead, they claim the declarations are needed to demonstrate the unlawfulness of the OIC procedure or decision-making process, or to decide material facts that are not required to be determined on the agency record. But NAMIC and APCIA have failed to demonstrate that this Court should allow the Watkins Declaration, the Mullet Declaration, or Exhibits 1-3 of the Anderson Declaration to be included in the record on either of these grounds.

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A. The Declarations Do Not Address The Lawfulness Of The Emergency Rule Process

NAMIC and APCIA have alleged their proffered declarations are necessary to demonstrate the "unlawfulness of procedure or of decision-making process," but have failed to allege that the emergency rule process is unlawful. In *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, 11 Wn. App. 2d 1040, 2019 WL 6699975, at *4 (2019), the court determined the Superior Court had properly rejected an attempt to supplement the record under RCW 34.05.562(1)(b) where the petitioner failed to claim "that the evidence is necessary to decide whether the procedure used or the decision-making process of the Board violated due process, the APA, or another statute or regulation governing the Board's procedure." *Id.* Both NAMIC and APCIA assert that the Commissioner wrongly concluded that there is an emergency that warrants the use of the emergency rule process, but neither attempt to challenge the emergency rule process under RCW 34.05.350 as invalid. Nor do any of the disputed declarations speak to the validity of the emergency rule process. The disputed documents in the Anderson Declaration do not speak to the emergency rule at all. They deal exclusively with the legislative process surrounding a piece of failed legislation. While the Sen. Mullet's Declaration attempts to contradict the Commissioner's determination of an emergency based on his own opinion of the Commissioner's true intention, he does not challenge the emergency rule process as one that is unlawful. The Watkins Declaration does not address the emergency nature of the rule, or the process of the rule adoption at all.

At most, the declarations challenge the Commissioner's conclusions that he is justified in invoking the valid emergency rule process. APCIA attempts to claim that whether the Commissioner's conclusions that the emergency rule process was justified, is sufficient to bring their additional evidence under the ambit of RCW 34.05.562(1)(b). However, what they are actually challenging is whether the Commissioner's conclusions that the rule qualified for the lawful emergency rule process in RCW 34.05.350 is supported by sufficient evidence. While the Watkins Declaration offers an alternative process for determining whether the use of credit

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history is reliable, it does not demonstrate or even allege, that the Commissioner's conclusion, that individuals with similar credit histories are not being treated the same as a result of state and federal laws. Because the Watkins Declaration does not even address the impact on individual consumers that is the Commissioner's emergency justification, it cannot speak to whether that justification is supported in the record.

Similarly, APCIA has wholly failed to demonstrate why Sen. Mullet's opinion of the Commissioner's authority, or his opinion of the Commissioner's motivation, are even relevant in this proceeding. It is the courts, not individual legislators, that are tasked with the interpretation of state laws. Further, the courts give deference in interpreting statutes to the agencies that enforce those statutes, not individual legislators. *Puget Soundkeeper Alliance v. State, Dept. of Ecology*, 102 Wn. App. 783, 786–87, 9 P.3d 892, 894 (2000) ("We review their legal decisions de novo, giving substantial weight to the agency's interpretation of the statutes it administers. An agency's interpretation of a statute is not binding on the court, but we will uphold it if it is a plausible construction."). APCIA has not offered any justification for why the opinion of a single legislator interpreting the law, or opining on underlying motivations is relevant to the whether the legal requirements of the law have been met.

B. The Declarations Do Not Address Material Facts *Not* Required To Be Determined On The Agency Record

RCW 34.05.350 actually requires that "The agency's finding and a concise statement of the reasons for its finding shall be incorporated in the order for adoption of the emergency rule or amendment filed with the office of the code reviser under RCW 34.05.380 and with the rules review committee." RCW 34.05.350(1). Therefore, the agency's justification is required to be included in the agency record. Further, RCW 34.05.370 provides that the agency rule file must include citations to, or the actual sources of, "data, factual information, studies, or reports on which the agency relies in the adoption of the rule." RCW 34.05.370(f). Therefore, emergency rulemaking context, where notice and comment is not required, the courts are tasked with

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determining that agency's actual basis for making its decision is supported in the record, not whether it employed alternative methods proposed by the entities it regulates.

NAMIC claims the declaration of Ms. Watkins is necessary to determine whether the OIC's emergency rule was arbitrary and capricious because it did not decide or consider issues NAMIC and Ms. Watkins believes the OIC should have considered. But there is no authority NAMIC cites to for the proposition that the Commissioner's decision is not required to be determined on the Agency record. Further, although Ms. Watkins identifies an alternative way of justifying the Commissioner's findings, NAMIC does not point to any legal requirement to consider or incorporate the type of study Ms. Watkins recommends in her declaration.

It would be different if NAMIC or APCIA had pointed to any particular type of evidence the OIC is required to consider in adopting this rule. But they have not cited to any statute or rule that requires the OIC to conduct any study, let alone the study Ms. Watkins describes when the OIC adopted the emergency rule. Because the OIC's reasons for adoption of the emergency rule must be included in the record, the material facts surrounding the OIC's decision must also be contained in the records.

As for the Mullet Declaration, it does not contain any factual information that is relevant, let alone material, to this inquiry. At best, the Mullet Declaration imputes an impure underlying motivation to the Commissioner's decision to adopt the emergency rule at issue based on Sen. Mullet's opinion. But it wholly fails to introduce material facts that counter the stated legal justification provided in the agency record, or dispute that actual factual basis asserted by the Commissioner for the emergency rule. Namely, it wholly ignores the Commissioner's justification that if the use of credit histories is currently allowed, improper discrimination between individual consumers will continue to occur while state and federal laws prevent full reporting of credit histories. More importantly, the Mullet Declaration does not identify any factual dispute that the Commissioner is not required to include in the agency record, and that this Court is not required to determine on the agency record.

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IV. CONCLUSION

The emergency rule process is a valid process for agencies to employ under the APA. None of the proffered declarations allege that the process is improper. Nor do any of the proffered declarations contain material facts related to issues that are *not* required to be included in the agency record. All that the declarations offer are alternative opinions about the Commissioner's real justification, and alternative methods for evaluating the problem the emergency rule was designed to address. While the emergency rule process necessarily limits the input of various groups, it does not alter the requirement that the agency's decision must be justified in the agency record. For these reasons we respectfully request that the Court strike the declarations of Ms. Watkins, Sen. Mullet, and the identified exhibits of Mr. Anderson's declaration be stricken, and the references to these declarations in the pending motions for summary judgment be stricken.

DATED this 17th day of August, 2021.

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DECLARATION OF SERVICE

I declare that I sent for service a true and correct copy of this document on all parties or their counsel of record on the date below as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17th day of August, 2021 at Olympia, Washington.

DEANA G. SULLIVAN
Legal Assistant

☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: August 27, 2021
Time: 10:30 a.m.
Judge/Calendar:
The Honorable Mary Sue Wilson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PROFESSIONAL INSURANCE AGENTS OF WASHINGTON, and INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON, and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, Petitioners, vs. OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON, Respondents.	NO. 21-2-00542-34 PETITIONER INTERVENOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES' OPPOSITION TO THE OFFICE OF THE INSURANCE COMMISSIONER'S MOTION TO STRIKE DECLARATIONS NOT IN THE AGENCY RECORD

I. INTRODUCTION

National Association of Mutual Insurance Companies (NAMIC) opposes the Office of Insurance Commissioner (OIC)'s motion to strike the Declaration of Nancy Watkins (Watkins

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Dec.). This Court should deny OIC's motion to strike and instead allow OIC to file an opposition to NAMIC's motion to supplement the record, which is noticed for the same date as the summary judgment hearing. It is appropriate to decide NAMIC's motion to supplement the record at the same time as NAMIC's motion for summary judgment because those motions are interrelated: The motion for summary judgment argues that OIC followed an unlawful procedure and decisionmaking process in adopting the emergency regulations, and the Watkins Declaration provides evidence to support that argument. This Court would thus benefit from full briefing on NAMIC's summary judgment motion before ruling on NAMIC's motion to supplement. In the alternative, the Court should deny OIC's motion to strike under RCW 34.05.562(1)(b). That provision states that "[t]he court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding" the "[u]nlawfulness of procedure or of decision-making process." RCW 34.05.562(1)(b). NAMIC submitted the Watkins Declaration in support of its Motion for Summary Judgment on Count III of its Petition, which addresses the unlawfulness of the OIC's procedure and decisionmaking process in adopting emergency regulations WAC 284-24A-088 and WAC 284-24A-089. RCW 34.05.562(1)(b) permits such evidence, and the motion to strike should be denied.

American Property Casualty Insurance Association (APCIA) separately requested to supplement the judicial record with additional evidence, which OIC has also asked this Court to strike. APCIA is filing a separate brief to address OIC's challenge to its request to supplement, which involves different evidence and issues than those addressed in this brief. Pursuant to LCR 7(b)(9), NAMIC respectfully requests the Court to extend oral argument, and grant a separate 10-minute argument on OIC's motion to strike to address the issues raised by NAMIC's motion to supplement.

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II. STATEMENT OF FACTS

OIC adopted WAC 284-24A-088 and WAC 284-24A-089 without notice-and-comment through emergency rulemaking. Those regulations ban Credit-Based Insurance Scoring (CBIS). As explained in NAMIC's Opening Brief in Support of Motion for Summary Judgment (NAMIC SJ Mot.), filed on June 14, 2021, OIC claims that CBIS is unfairly discriminatory because Congress and the Governor have adopted laws prohibiting or preventing the reporting of certain information on consumer reports. OIC also alleges that CBIS is unfairly discriminatory because Congress and the Governor may repeal those laws, and that information will once more be reported. In Count III of its Petition, NAMIC asks this Court to declare the emergency regulations invalid because they were adopted in violation of the Washington Administrative Procedure Act (APA). *See* NAMIC SJ Mot. 8-21. The Petition also alleges, in Counts I and II, that the regulations were adopted by an executive agency contrary to constitutional separation of powers, and the agency action in adopting them exceeds OIC's statutory authority. *See id.* at 21-25.

NAMIC seeks to supplement the record with the Declaration of Nancy Watkins. Nancy Watkins is a Principal and Consulting Actuary with Milliman, Inc. Milliman is among the world's largest providers of actuarial, risk management, and related technology and data solutions. Ms. Watkins was retained by NAMIC to address "[w]hat would need to happen to evaluate whether/how the pandemic caused credit-based insurance scoring [ ] models to be unreliable and inaccurate for purposes of ratemaking." Watkins Dec. ¶ 10. The Watkins declaration describes (1) how home, automobile, and renter's insurance rates are made; (2) the regulatory review process and standards for insurance ratemaking in Washington; (3) why and how CBIS is used in ratemaking; (4) what would need to happen to evaluate whether and how the pandemic caused the CBIS models to be unreliable and inaccurate for purposes of ratemaking; and (5) how the OIC emergency order impacts unfair discrimination. *Id.* ¶¶ 20-51.

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The Watkins Declaration concludes, among other things, that "CBIS is generally accepted as one of the most predictive factors for the risk of loss" for automotive, home, and renter's insurance; "it is consistent with actuarial standards of practice to conduct quantitative studies of the changes in CBIS and correlations to losses to reach a conclusion on the reliability or accuracy of a CBIS model for the purposes of ratemaking"; OIC "has not shown a quantitative study demonstrating the impact the pandemic has had, or may have, on the distribution of CBIS or the relationship to insurance losses," and the "process which the OIC has mandated for removing CBIS from rates is likely to cause unfair discrimination." *Id.* ¶ 10.[1]

In its motion to strike, OIC argues that the Watkins Declaration does not "assert that the emergency rule process itself is unlawful" but instead supports NAMIC's "request that this Court substitute its own judgment for the Commissioner's." OIC Mot. 5. According to OIC, because the Watkins Declaration is a document "the Commissioner did not, and was not required, to consider," and does not "point to any material fact that is not required to be determined on the agency record," it should be stricken. *Id.* OIC further argues that this Court should entertain the

[1] NAMIC disputes OIC's description of Ms. Watkins' declaration. *See* OIC Mot. 3-4. Her declaration directly addresses the kind of analysis OIC should have done—but did not do—to determine whether CBIS is unfairly discriminatory as a result of the CARES Act. Contrary to OIC's assertions, her declaration directly addresses the accuracy of CBIS in the pandemic and the issue of unfair discrimination. *See* Hampton Mot. to Supplement Declaration Ex. 1 ¶ 12 ("In my opinion, the temporary changes in credit reporting do not render the continued use of CBIS inconsistent with actuarial standards of practice, absent further evidence and analysis."); *id.* ("[T]here is little reason to conclude that significant changes have occurred in the relationship between current CBIS models and expected losses as a result of the pandemic."); *id.* ("Prohibiting CBIS in the manner prescribed by the OIC . . . is likely to create unfair discrimination as a consequence of removing one rating factor from a rating plan that was calibrated to be actuarially fair as a cohesive whole" and "one potential consequence will be unfairly high rates for older Washingtonians with good credit scores.").

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motion to strike, rather than requiring OIC to respond to NAMIC's motion to supplement. *See id.* at 2.[2]

III. ISSUE PRESENTED

Whether this Court should deny OIC's motion to strike and require OIC to respond to NAMIC's motion to supplement, or in the alternative, whether the Court should deny OIC's motion to strike under RCW 34.05.562(1)(b) because the Watkins Declaration addresses the unlawfulness of OIC's procedure and decisionmaking process.

IV. AUTHORITY AND ARGUMENT

A. The Court Should Deny The Motion To Strike

The Court should deny the motion to strike and require OIC to file a response to NAMIC's motion to supplement. NAMIC filed its motion to supplement at the same time it filed its motion for summary judgment—and noticed both motions for the same hearing—because they are interrelated: NAMIC's summary judgment brief argues that the OIC's procedure and decisionmaking process in adopting the emergency regulations was unlawful, and NAMIC seeks to supplement the judicial record with the Watkins Declaration to provide evidence demonstrating that OIC's procedure and decisionmaking process was in fact unlawful. This Court should thus decide both motions at the same time.

When a litigant objects to the admissibility of evidence at summary judgment, the proper course is to file a responsive brief rather than a motion to strike. *See Cameron v. Murray*, 151 Wn. App. 646, 658-659, 214 P.3d 150 (2009) (holding that a litigant should have objected to

[2] After NAMIC filed its motion to supplement the judicial record with the Watkins Declaration, OIC announced that it was seeking comments on a proposed permanent regulation banning CBIS for three years. NAMIC has filed a separate motion to supplement, and for judicial notice, regarding OIC's request and comments NAMIC filed in response to that request. That motion is set for hearing on September 17, 2021. Given the timing, NAMIC was unable to file both motions to supplement at the same time.

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the admissibility of evidence submitted in connection with a motion for summary judgment through a responsive brief rather than a motion to strike). OIC seeks to sidestep normal procedures here in an attempt to avoid addressing evidence of its unlawful action in its summary judgment briefing and at the summary judgment hearing. This Court should thus deny the motion to strike and rule on NAMIC's motion to supplement at the summary judgment hearing, where it will have the benefit of full briefing on the unlawfulness of OIC's actions—including OIC's response to the evidence of unlawfulness set forth in the Watkins Declaration—permitting a full and fair consideration of the issues raised in NAMIC's summary judgment brief and motion to supplement.[3]

In the alternative, the Court should deny OIC's motion to strike under RCW 34.05.562(1)(b). That provision states that the Court may receive additional evidence to address the "[u]nlawfulness of procedure or of decision-making process" of an administrative agency. RCW 34.05.562(1)(b); *see Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 14 Wn. App. 2d 945, 965, 474 P.3d 1107 (2020). The Watkins Declaration directly addresses both issues, providing background and analysis supporting NAMIC's challenge to OIC's unlawful administrative procedures and arbitrary and capricious decisionmaking. *See* Watkins Dec. ¶¶ 10-51; *see also Pres. Responsible Shoreline Mgmt. v. City of Bainbridge Island*, 11 Wn. App. 2d 1040, 2019 WL 6699975, at *4 (2019) ("Where an agency engages in some unlawful procedure . . . subsection (b) grants discretionary authority to the superior court to supplement the administrative record to decide those disputed issues.").

NAMIC submits the Watkins Declaration as evidence of the types of facts and analyses

[3] Even if this Court declines to supplement the record, it should not strike the Watkins Declaration. As *Cameron* explains, "materials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration" and they "remain in the record to be considered on appeal." 151 Wn. App. at 658.

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that would be necessary for OIC to reach a conclusion that use of CBIS as an insurance rating factor is no longer predictive of insurance losses and is therefore "unfairly discriminatory." The process of ratemaking is an actuarial exercise. Actuarial evidence is essential to inform the Court regarding the principles applicable to rating and consideration of rating factors. Ms. Watkins provides a "primer" on the basics of ratemaking to allow the Court to independently understand and consider the important question of the minimum record necessary to support OIC's emergency regulations. She identifies controlling "Actuarial Statement of Principles" (ASOPs) that dictate considerations relating to ratemaking issues, and explains their application here. Ms. Watkins further explains what only an expert actuary can explain: that the regulations as adopted and implemented are likely to cause far more unfair discrimination than they could possibly correct, even if OIC's premises had any type of evidentiary support accepted for an actuarial task such as insurance ratemaking (which, as Ms. Watkins explains, they do not). *See* NAMIC SJ Mot. 8-21; Watkins Dec. ¶¶ 10-44. The Declaration further explains that "[t]here is no record that the OIC has conducted" an analysis of the relationship between CBIS and risk of loss "in accordance with actuarial standards of practice," which is required to determine whether CBIS no longer remains an accurate predictor of loss. Watkins Dec. ¶ 44. And the Declaration explains that there is no reason to assume that pandemic-related changes in credit reporting would affect the relationship between CBIS and risk of loss. *See id.* ¶¶ 37-44.

The Watkins Declaration also supports NAMIC's argument that OIC's decisionmaking is arbitrary and capricious because the agency's reasoning is conclusory, unsupported by evidence, and fails to consider important aspects of the problem. *See* NAMIC SJ Mot. 13-21; Watkins Dec. ¶¶ 10-51. The Watkins Declaration explains how OIC could have—but did not—determine whether CBIS remains predictive of loss. *See* Watkins Dec. ¶¶ 37-44. It also explains how OIC could have—but did not—analyze whether the repeal of the CARES Act would affect consumer credit. *See id.* The Declaration describes how OIC failed to consider the impact of banning

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CBIS on consumers who may be helped by CBIS, such as older Washingtonians. *See id.* ¶¶ 12, 49. And it further describes how banning CBIS without allowing insurers to redo their insurance rating plans may *cause* unfair discrimination. *Id.* ¶¶ 45-51. The Watkins Declaration directly addresses the unlawful procedures and decisionmaking adopted by the OIC in this case. This Court should thus deny the motion to strike.

B. OIC's Arguments to the Contrary Are Meritless

OIC's motion to strike is meritless. OIC first claims that NAMIC has "failed to allege that the emergency rule process is unlawful" because it did not "attempt to challenge the emergency rule process under RCW 34.05.350 as invalid." OIC Mot. 7. Respectfully, NAMIC devoted a significant portion of its brief to arguing that OIC failed to comply with the requirements for emergency rulemaking. *See* NAMIC SJ Mot. 8-12. NAMIC argued that OIC was not permitted to adopt regulations banning CBIS through emergency rulemaking because it cannot show "good cause" for forgoing notice-and-comment, has not established truly emergent and persuasive reasons for forgoing notice-and-comment, and failed to make findings of fact or cite evidence to support its claimed emergency. *See id.* NAMIC is not challenging RCW 34.05.350 as invalid; it is challenging OIC's adoption of emergency regulations under RCW 34.05.350 when the agency was required to go through notice-and-comment rulemaking.

OIC next claims that the Watkins Declaration does not "speak to the validity of the emergency rule process." OIC Mot. 7. That is incorrect. The Watkins Declaration addresses the kind of evidence and analysis that OIC should have done—but failed to do—before adopting the emergency regulations. *See supra* pp. 2-3, 6.

OIC further asserts that the Watkins Declaration "does not demonstrate or even allege, that the Commissioner's conclusion, that individuals with similar credit histories are not being treated the same as a result of state and federal laws." OIC Mot. 7-8. As explained above, however, the Watkins Declaration directly addresses the actuarial analysis that OIC should have

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conducted to determine whether changes in state and federal law affected CBIS, as well as whether banning CBIS would *lead* to unfair discrimination among individuals. *See supra* pp. 2-3, 6. NAMIC has filed an APA challenge to the emergency regulations; the Watkins Declaration describes the procedure that OIC should have followed under the APA, and the evidence it should have collected as part of that procedure, to support its decision to ban CBIS. *See id.* NAMIC argued in its summary judgment motion—and the Watkins Declaration demonstrates—that there is *no evidence* supporting OIC's assertion that under the CARES Act and state law, similarly situated persons are being treated differently. *See* NAMIC SJ Mot. 14-17, 23. Congress's adoption of the CARES Act establishes that persons with credit events due to the pandemic are *not* similarly situated to persons with credit events in normal times, not impacted by disaster. *See id.*

Finally, OIC contends that "there is no authority NAMIC cites to for the proposition that the Commissioner's decision is not required to be determined on the Agency record." OIC Mot. 8. Putting aside the double negatives, OIC appears to take the position that it can engage in unreviewable emergency rulemaking as long as there is nothing in the record that *the agency itself compiled*—without any input from the public—that contradicts the agency's position. *See id.* That is not what the law says, and it is not how Washington administrative procedure works.

RCW 34.05.562(1)(b) expressly states that the Court may receive additional evidence to address the "[u]nlawfulness of procedure or of decision-making process" of an administrative agency. That provision exists for circumstances like this one, where the agency asserts that its decision is supported by the record it compiled, but the agency *did not comply with proper rulemaking procedures* when it compiled that record and reached its conclusions. Indeed, the precedent that OIC cites to support its position declined to supplement the record when a party had a full opportunity for a hearing before the agency. *See Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 77 110 P.3d 812 (2005). That did not happen in this case. If OIC had conducted

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notice-and-comment rulemaking, it would have obtained comments citing the kind of data, and conducting the kind of analysis, that Ms. Watkins describes in her Declaration. OIC would then have been required by the APA to address that data and analysis prior to reaching a conclusion and promulgating a regulation. By failing to conduct notice-and-comment rulemaking—when it had ample time to do so—OIC short-circuited the administrative process, as Ms. Watkins' Declaration demonstrates.

This Court should thus look *more* critically at OIC's self-serving "record" and conclusions, not less critically, given OIC's attempt to bypass normal rulemaking procedures. Even OIC agreed at the injunction hearing that "particularly in emergency rulemaking, additional information can be supplemented in the record." Hearing Tr. 22:7-8 (Apr. 23, 2021).[4] OIC claims that there is no "statute" or "rule" that requires it to evaluate specific evidence to support is conclusions, *see* OIC Mot. 9, but that is plainly incorrect: Washington's APA forbids arbitrary and capricious agency action. *See Wash. State Hosp. Ass'n v. Wash. State Dep't of Health*, 183 Wn. 2d 590, 595, 353 P.3d 1285 (2015) (quoting RCW 34.05.570(2)(c)). Under Washington law, an agency "must not act cursorily in considering the facts and circumstances surrounding its actions." *Puget Sound Harvesters Ass'n v. Wash. State Dep't of Fish & Wildlife*, 157 Wn. App. 935, 951, 239 P.3d 1140 (2010). To the extent OIC needs to collect particular evidence—and conduct a particular kind of analysis—to support its conclusions, it must collect that evidence and conduct that analysis or its actions are arbitrary and capricious. The "record" that OIC compiled in this case, and the analysis OIC conducted, is plainly insufficient, as they do

[4] As NAMIC explained in its motion for summary judgment, "[t]he affidavits submitted by OIC as part of the injunction proceedings are not part of the administrative record; they are *post hoc* rationalizations that cannot be used to uphold the agency's actions." NAMIC SJ Mot. 16 n.6. It is appropriate to supplement the judicial record, however, to demonstrate that the *procedure* used by the agency is unlawful.

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not address the many issues raised by Ms. Watkins' Declaration; that record, and OIC's analysis, thus does not support the emergency regulations, rendering those regulations unlawful.

V. CONCLUSION

For the reasons stated in this memorandum, NAMIC respectfully requests that the Court deny the motion to strike.

DATED this 24th day of August, 2021.

BETTS, PATTERSON & MINES, P.S.

By _____
Joseph D. Hampton, WSBA #15297

HOGAN LOVELLS US LLP

By _____
Vanessa Wells, *pro hac vice*

Attorneys for Intervenor National Association of Mutual Insurance Companies

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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on August 24, 2021, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Petitioner Intervenor National Association Of Mutual Insurance Companies' Opposition To The Office Of The Insurance Commissioner's Motion To Strike Declarations Not In The Agency Record; and**
- **Certificate of Service.**

Counsel for Petitioners American Prop. Cas. et al.:	☐	U.S. Mail
Michael B. King	☐	Hand Delivery
Jason W. Anderson	☐	Facsimile
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Counsel for Respondents Washington State Office of Insurance Commissioner, and Mike Kreidler, Insurance Commissioner for the State of Washington State Office of Ins. Commn'r:	☐	U.S. Mail
	☐	Hand Delivery
	☐	Facsimile
	☐	Overnight
Marta U. DeLeon	☑	Email
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of August, 2021.

Valerie D Marsh

Valerie D. Marsh

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☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: August 27, 2021
Time: 10:30 A.M.
Judge: Mary Sue Wilson

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervener NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

Case No. 21-2-00542-34

OFFICE OF THE INSURANCE COMMISSIONER'S REPLY TO MOTION TO STRIKE DECLARATIONS NOT IN THE AGENCY RECORD

I. INTRODUCTION

Under the Administrative Procedure Act (APA), the temporary emergency rule process limits the record the agency, and the courts, are required to consider. The oppositions filed by Petitioners American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents and Brokers of Washington (collectively "APCIA") and Intervener National Association of Mutual Insurance Companies (NAMIC)

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essentially argue that the record this Court reviews must be supplemented by the disputed declarations of Ms. Watkins and Sen. Mullet because the OIC failed to consider their opinions or address their claims in the emergency rule process. But by definition, the emergency rule process does not require that an agency consider all opinions, or address all detractors. Rather, the emergency rule process requires agencies to assert and justify the basis for their temporary decisions in the agency record. Consideration of materials outside the agency record is only permitted after the Court determines that the additional records satisfy the requirements of RCW 34.05.562. Neither APCIA nor NAMIC sought permission to supplement the records prior to filing the disputed declarations. Further, the disputed declarations do not satisfy the requirements of RCW 34.05.562. Neither response demonstrates that the justification of an emergency rule is not required to be determined on the agency record, including whether the Commissioner's stated basis for adoption of the emergency rule is valid and supported.

For these reasons, the Office of the Insurance Commissioner's Motion To Strike Declarations Not In The Agency Record should be granted and the portions of APCIA's motion for summary judgment dedicated to expanding the agency record and the motions to expand the record filed by NAMIC should be stricken.

II. ARGUMENT

NAMIC and APCIA do not contest that generally in a rule challenge under the APA, the Court's review of agency action is limited to the agency record. RCW 34.05.558. Only under the limited exceptions found in RCW 34.05.562 is the court permitted to expand the agency record. New evidence is only permitted on judicial review when:

> (1) it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> . . .
>
> (b) Unlawfulness of procedure or of decision-making process; or
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1).

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None of these requirements of RCW 34.05.562 apply in this case.

A. The Watkins Declaration Fails To Address The Lawfulness Of The Agency Procedure Or Decision-Making Process

The Watkins Declaration speaks to the wisdom of the OIC's course of action, not to the validity of the stated basis for the emergency rule. The basis for the emergency rule cited by the OIC is that as a result of state and federal measures that limit the reporting of certain negative credit history events, substantially similarly situated individuals, individuals with similar negative credit history events (such as account payment delinquencies), are being treated dissimilarly in violation of RCW 48.19.020. It is the *current* treatment of similarly situated individuals that justified the OIC's decision to act on an emergency rule basis, rather than to wait for notice and comment rule making.

The exclusive subject of the Watkins Declaration-the wisdom of the OIC's method of addressing the emergency, not the existence of the emergency. NAMIC itself states that the Watkins declaration is necessary to address whether "evidence of the types of facts and analyses that would be necessary for OIC to reach a conclusion that use of CBIS as an insurance rating factor is no longer predictive of insurance losses and is therefore "unfairly discriminatory." Petitioner Intervenor National Association of Mutual Insurance Companies' Opposition to the Office of the Insurance Commissioner's Motion To Strike Declarations Not In the Agency Record ("NAMIC Response") at 5-6. The stated purpose of the Watkins Declaration is to determine "What would need to happen to evaluate whether/how the pandemic caused credit-based insurance scoring (CBIS) models to be unreliable and inaccurate for purposes of ratemaking?" Watkins Dec. at 4. Despite NAMIC's claims, nothing in the Watkins Declaration "demonstrates—that there is no evidence supporting OIC's assertion that under the CARES Act and state law, similarly situated persons are being treated differently." *See* NAMIC Response at 8. The Watkins Declaration does not address this issue at all. At most, the Watkins acknowledges that at least 2.4% of accounts reviewed in a study that is part of the agency record,

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are receiving some form of accommodation. Watkins Dec. at 15. But the Watkins Declaration contains no mention of the number of individuals with similar negative credit histories that are not receiving accommodation because their negative credit experience occurred before the CARES Act, or allege that there are no people whose negative credit history is identical those whose negative credit events are not currently being reported. The Watkins Declaration does not address or challenge the commissioner's actual stated basis for the need to adopt the rule on an emergency basis. Therefore, it does not speak to the lawfulness of the agency's use of the emergency rule procedure.

Nor does the Watkins Declaration demonstrate that the OIC's decision-making process was arbitrary or capricious. It merely asserts the studies NAMIC believes the OIC should have conducted prior to the adoption of the rule. But neither NAMIC, nor the Watkins Declaration point to any statutory requirement to conduct such studies in an emergency rule context. Nor do they point to a requirement to consider NAMIC's expert's opinion in an emergency rule context. NAMIC will have its opportunity to present its experts opinion of the types of studies the OIC should rely on in the standard rule making process that is required for this emergency rule to remain in place. RCW 34.05.350(2) But the existence of an expert opinion that was not provided to the agency at the time an emergency rule was adopted, cannot demonstrate that an emergency rule was "arbitrary and capricious", where consideration of such expert opinions is not required in the emergency rule context.

B. APCIA's Declarations Concerning The Legislative Process Are Speculative or Irrelevant, And Therefore Not Material To The Adoption Of The Emergency Rule

The courts afford little weight to legislative testimony when determining the legislative intent of a statute. *Wilmot v. Kaiser Aluminum & Chem. Co*., 118 Wn.2d 46, 64, 821 P.2d 18 (1991); *North Coast Air Services, Ltd. v. Grumman Corp*., 111 Wn.2d 315, 326–27, 759 P.2d 405 (1988) (giving "little weight" to remarks before a legislative committee as being too speculative to impart the motivation behind legislation.). If comments before the Legislature

about a proposed statute are unhelpful in determining the motivation behind proposed legislation, they are even less helpful in determining the motivation behind a rule adopted through a completely different branch of government, in a completely separate proceeding. Even so, APCIA asks the Court to accept one legislator's opinion about comments that were *not* made before the Legislature as having some bearing on the validity of the OIC's stated justification for the need for an emergency rule. But Sen. Mullet's declaration does not cite to a single statement by the Commissioner or any member of the OIC stating that no emergency exists. Instead, Sen. Mullet's declaration focuses on the *lack* of any statement throughout an entirely separate and legislative process as evidence of the Commissioner's true intent behind the adoption of an agency emergency rule. Sen. Mullet's opinion of the OIC's true intent is wholly speculative. As such, it is irrelevant in determining whether the OIC's stated basis for the emergency rule is "fabricated."

Further, none of the information submitted by APCIA about the legislative process concerning failed legislation is "material" to OIC's emergency rule. Neither the disputed exhibits to the Anderson Declaration, nor any part of the Mullet Declaration, address the impact of the CARES Act on credit histories, or the records and rationale provided by the OIC in support of the rule. Rather, the Mullet Declaration attempts to smear the OIC as merely retaliating for the failure of the legislation. But Sen. Mullet's opinion of the OIC's true intent is speculative, and not helpful or necessary to determine any disputed issues in this case.

C. The Validity Of The Emergency Rule, And The Agency's Basis For The Rule, Are Required To Be Determined On The The Agency Record

Under the APA, the admission of additional evidence outside of the agency record is extremely limited. Additional evidence is admissible "only if it relates to the validity of the agency action and is needed to decide disputed issues regarding improper agency action, unlawfulness of procedure, or material facts not required to be determined on the agency record." *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 110 Wn. App. 498,

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518, 41 P.3d 1212(2002), *aff'd,* 149 Wn. 2d 17, 65 P.3d 319 (2003); RCW 34.05.562. Under RCW 34.05.562(1) and RCW 34.05.570(1)(b), the validity of a rule is determined as of the time the agency took the action adopting the rule. *Washington Indep. Tel. Ass'n*, 148 Wn. 2d at 906. For these reasons, factual disputes under the APA are intended to be determined on the agency record absent extraordinary circumstances. Neither NAMIC nor APCIA dispute that RCW 34.05.350 actually requires that "The agency's finding and a concise statement of the reasons for its finding shall be incorporated in the order for adoption of the emergency rule or amendment filed with the office of the code reviser under RCW 34.05.380 and with the rules review committee." RCW 34.05.350(1). Nor do they dispute that RCW 34.05.370 provides that the agency rule file must include citations to, or the actual sources of, "data, factual information, studies, or reports on which the agency relies in the adoption of the rule." RCW 34.05.370(f).

Even so, APCIA claims that the term "or" in RCW 34.05.562(1)(c), must be interpreted to disconnect the phrase "other proceedings not required to be determined on the agency record" from the rest of the language of RCW 34.05.562(1)(c). First, this is contrary to how the courts have interpreted this statute. The Washington State Supreme Court has summarized RCW 34.05.562(1)(c) as applying both the phrase "material facts" at the beginning of the section, and the phrase "not required to be determined on the agency record" at the end of the section as applying to all three scenarios of "rule making, brief adjudications, or other proceedings." *Washington Indep. Tel. Ass'n*., 148 Wn. 2d at 518. Second, this is contrary to the legislative intent clearly expressed throughout the rest of the APA, particularly in RCW 34.05.530 and RCW 34.05.570, which require that the justification and supporting documentation for an agency rule to be contained in the agency record. APCIA's interpretation of RCW 34.05.562(1)(c) would allow additional evidence whenever there is a disputed issue related to a rule, and would effectively deem rulemaking challenges exempt from the requirements of RCW 34.05.530 and RCW 34.05.570. This would allow for almost unlimited expansion of the record at the Superior Court, in clear conflict with the clear legislative intent in

RCW 34.05.558, and well settled law finding that the expansion of the record should only be permitted in highly limited circumstances. *Samson v. City of Bainbridge Island,* 149 Wn. App. 33, 64-66, 202 P.3d 334 (2009); *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005); *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 110 Wn. App. 498, 518, 41 P.3d 1212 (2002).

APCIA cites to multiple Employment Security Department cases to argue that because "good cause" under the APA is a mixed question of law and fact, the disputed declarations should be admitted. Similarly, APCIA cites to cases on the federal Administrative Procedure Act to support the assertion that questions of "good cause" involve questions of fact. All of these cases miss the point. Any factual question to be resolved is still one to be resolved on the basis of the agency record. As noted by the court in *Mobil Oil Corp*, "[t]he question thus becomes whether, as a matter of fact, FEA's finding of good cause is supported by the *administrative record*." *(*Emphasis added*) Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983). Otherwise, simply alleging that a factual dispute exists would permit a supplementation of the agency record. That is not what is contemplated by RCW 34.05.562.

D. *Cameron v. Murray* Is Inapposite In An Agency Rule Challenge Under The APA

Although APCIA and NAMIC have styled their filings as Motions for Summary Judgement, this matter is a petition for judicial review under RCW 34.05.570. It is governed by different rules that the negligence action at issue in *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009). Both NAMIC and APCIA site *Cameron* to claim that this motion to strike is improper in response to a motion for summary judgment. But unlike summary judgment motions in other contexts, the Court of Appeals has affirmed granting motions to strike in the context of motions for summary judgment to determine the merits of APA actions. *Willman v. Washington Utilities and Transp. Com'n*, 122 Wn. App. 194, 204, 93 P.3d 909 (2004). This is because the APA does not allow the parties to expand the record on review unless the court has approved that expansion. *See* RCW 34.05.562. In fact, unlike the superior court record in a

typical summary judgment decision, the Courts of Appeal will not consider the superior court record unless the Court has allowed the agency record to be expanded under RCW 34.05.562. *Willman*, 122 Wn. App. at 203, ("An appellate court reviewing agency action 'sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency."

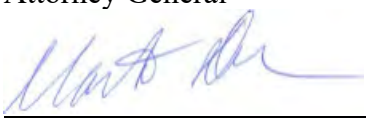
Even in a rule challenge, where no adjudicative process has happened below, the APA still limits the record to be considered to the agency record, unless the Court finds that the requirements of RCW 34.05.562 have been met, and the additional evidence addresses issues related to the lawfulness of the agency process or decision, or material disputed facts. Even then, the expansion of the agency record is a matter of discretion for the Court. Only if the Court determines that additional evidence is *needed* to determine disputed issues is additional evidence appropriate. Where the court has not been asked to make that determination prior to submission of evidence not in the agency record, a motion to strike is an appropriate in an APA matter, and is appropriate here.

III. CONCLUSION

For the forgoing reasons, the OIC respectfully request that the Court strike the declarations of Ms. Watkins, Sen. Mullet, and the identified exhibits of Mr. Anderson's declaration, and the references to these declarations in the pending motions for summary judgment be stricken.

DATED this 25th day of August, 2021.

ROBERT W. FERGUSON
Attorney General



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DECLARATION OF SERVICE

I declare that I sent for service a true and correct copy of this document on all parties or their counsel of record on the date below as follows:

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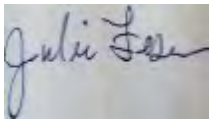
☐ ABC/Legal Messenger

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of August, 2021 at Olympia, Washington.



JULIE FESER
Legal Assistant

Exhibit F

☐ Expedite

☐ No hearing set

☐ Hearing is set
Date:
Time:
Judge/Calendar:

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PROFESSIONAL INSURANCE AGENTS OF WASHINGTON, and INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner in Intervention NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

ex parte

NO. 21-2-00542-34

ORDER GRANTING PETITIONERS' MOTION FOR SUMMARY JUDGMENT ON THEIR CLAIM FOR DECLARATORY RELIEF, FOR ENTRY OF PERMANENT INJUNCTION, AND TO SUPPLEMENT THE RECORD; PETITIONER-INTERVENOR'S MOTION FOR SUMMARY JUDGMENT; AND PETITIONER-INTERVENOR'S MOTION TO SUPPLEMENT THE RECORD

THIS MATTER came before the Court for hearing on Oct. 8, 2021 on Petitioners, American Property Casualty Insurance Association, Professional Insurance Agents of Washington and Independent Insurance Agents and Brokers of Washington's, Motion for Summary Judgment on Their Claim for Declaratory Relief, for a Permanent Injunction and to Supplement the Record; Petitioner-Intervenor National Association of Mutual Insurance Companies' Motion for

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Summary Judgment; and Petitioner-Intervenor National Association of Mutual Insurance Companies' Motion to Supplement the Record. The Court is fully advised, having considered the arguments of counsel and the pleadings and records on file, including:

1. Petitioners' Motion for Summary Judgment on Their Claim for Declaratory Relief, for a Permanent Injunction, and to Supplement the Record;

2. Declaration of Jason W. Anderson in Support of Petitioners' Motion for Summary Judgment on Their Claim for Declaratory Relief, for a Permanent Injunction, and to Supplement the Record, and the exhibits thereto;

3. Declaration of Senator Mark Mullet;

4. Petitioner-Intervenor National Association of Mutual Insurance Companies' Motion for Summary Judgment;

5. Petitioner-Intervenor National Association of Mutual Insurance Companies' Opening Brief in Support of Motion for Summary Judgment;

6. Declaration of Joseph D. Hampton in Support of Petitioner-Intervenor National Association of Mutual Insurance Companies' Opening Brief in Support of Motion for Summary Judgment, and the exhibits thereto;

7. Declaration of Nancy Watkins in Support of Petitioner-Intervenor National Association of Mutual Insurance Companies' Motion for Summary Judgment, and the attachment thereto;

8. Petitioner-Intervenor National Association of Mutual Insurance Companies' Motion to Supplement the Record;

9. Petitioner-Intervenor National Association of Mutual Insurance Companies' Opening Brief in Support of Motion to Supplement the Record;

10. Declaration of Joseph D. Hampton in Support of Petitioner-Intervenor National Association of Mutual Insurance Companies' Brief in Support of Motion to Supplement, and

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the exhibit thereto;

11. The Insurance Commissioner's Opposition to Summary Judgment and Expanding the Agency Record;

12. The Declaration of Eric Slavich in Opposition to Motion for Summary Judgment;

13. The Declaration of John Noski in Opposition to Motion for Summary Judgment;

14. Reply of Petitioners, APCIA, *et al.* in Support of Their Motion for Summary Judgment on Their Claim for Declaratory Relief, for a Permanent Injunction and to Supplement the Record;

15. Petitioner-Intervenor National Association of Mutual Insurance Companies' Reply Brief in Support of Motion for Summary Judgment; and

16. Petitioner-Intervenor National Association of Mutual Insurance Companies' Reply Brief in Support of Motion to Supplement.

Based upon consideration of the above, and the argument of counsel, for the reasons stated in open court at the conclusion of oral argument held on October 8, 2021, the Court determines as follows pursuant to RCW 34.05.570:

1. The regulations challenged in these actions are emergency regulations adopted pursuant to RCW 34.05.350. RCW 34.05.350(1)(a) requires that, in order to adopt an emergency regulation, the agency must make a "good cause" finding that "immediate adoption, amendment or repeal is necessary for preservation of the of the public health, safety or general welfare, and observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest." The good cause finding that the agency makes must be supported by what is in the record.

2. It is appropriate to supplement the agency record with the declarations of Ms.

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Watkins, Senator Mullet, and Mr. Anderson (Exhibits 1-3 and 6-12) because each of those documents goes to whether the agency's action was arbitrary and capricious and whether the agency had good cause to dispense with regular rulemaking and enact an emergency rule. This evidence is therefore admissible ~~including~~ appropriate to consider as part of this rule challenge under RCW 34.05.562(1). MSW

3. Summary judgment is appropriate in this case. There is no genuine issue of material fact.

4. The agency record does not support a good cause finding by the Insurance Commissioner for the State of Washington, Mike Kreidler, to adopt the Emergency Rule R 2021-19 (temporarily prohibiting the use of consumers' credit histories to determine rates, premiums, or eligibility for coverage with respect to all private passenger automobile, renters and homeowners insurance), without notice and comment rulemaking.

5. Petitioners and Petitioner-Intervenor are entitled to judgment as a matter of law on their claims for a judicial declaration that Emergency Rule R 2021-19, adopted by the Insurance Commissioner for the State of Washington Mike Kreidler on March 22, 2021, and extended on July 15, 2021, is invalid.

6. The Court chooses not reach the other grounds raised by the Petitioners and Petitioner-Intervenors in their motions for summary judgment because this ground is sufficient for the Court to determine the validity of Emergency Rule R 2021-19.

7. Because the Court has determined that Emergency Rule R 2021-19 is invalid, entry of a permanent injunction enjoining further implementation and enforcement of Emergency Rule R 2021-19 is appropriate.

Accordingly:

IT IS ORDERED THAT the Motion to Supplement the Record of Petitioners, American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents and Brokers of Washington, is GRANTED,

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and pursuant to RCW 34.05.562(1), the agency record is hereby SUPPLEMENTED to include the Declaration of Senator Mark Mullet and Exhibits 1-3 and 6-12 to the Declaration of Jason W. Anderson in Support of Petitioners' Motion for Summary Judgment on Their Claim for Declaratory Relief, for a Permanent Injunction, and to Supplement the Record; and

IT IS ORDERED THAT Petitioner-Intervenor National Association of Mutual Insurance Companies' Motion to Supplement the Record is GRANTED, and pursuant to RCW 34.05.562(1), the agency record is hereby SUPPLEMENTED to include the Declaration of Nancy Watkins in Support of Petitioner-Intervenor National Association of Mutual Insurance Companies' Motion for Summary Judgment, and the attachment thereto; and

IT IS ORDERED THAT the Motion for Summary Judgment of Petitioners, American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents and Brokers of Washington, and Petitioner-Intervenor National Association of Mutual Insurance Companies' Motion for Summary Judgment are GRANTED, and pursuant to RCW 34.05.574(1)(b) and RCW Chapter 7.24, Emergency Rule R 2021-19 is hereby DECLARED invalid; and

IT IS ORDERED THAT pursuant to RCW 34.05.574(1)(b), the Respondents, the Office of the Insurance Commissioner of the State of Washington and the Insurance Commissioner for the State of Washington, Mike Kreidler, are permanently ENJOINED from further implementing or enforcing Emergency Rule R 2021-19. This injunction is binding only upon the parties to this action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

This Order finally disposes of all claims by all parties in the action. This Court retains jurisdiction as may be necessary to ensure compliance with the Court's Order.

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DATED this 28 day of October, 2021.

Judge Mary Sue Wilson

PRESENTED BY:

DUANE MORRIS; LLP

By */s/ Damon N. Vocke*
Damon N. Vocke, admitted pro hac vice

CARNEY BADLEY SPELLMAN, P.S.

By */s/ Jason W. Anderson*
Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA 30512

DAVIS WRIGHT TREMAINE LLP

By */s/ Harry Korrell*
Harry J. F. Korrell, WSBA No. 23173

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OFFICE OF THE ATTORNEY GENERALOF THE STATE OF WASHINGTON

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Exhibit G

Consumer Data Industry Association
1090 Vermont Ave., NW, Suite 200
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P 202 371 0910

CDIAONLINE.ORG

Helping Consumers Avoid Credit Problems if They Have Been Impacted by Coronavirus (COVID-19)

v. 5.0

Overview

Questions come up about the impact of the spread of Coronavirus has on consumers' credit histories. The Consumer Data Industry Association ("CDIA") and its credit bureau members have answers. For years, the credit bureaus have had systems in place to minimize or eliminate the negative credit impact of the extreme events, like a natural disaster, or a pandemic.

Consumers who have been impacted (directly or indirectly) by Coronavirus are strongly encouraged to contact their lenders and creditors. Lenders and creditors have programs and plans to assist their customers in a time of a financial crisis, like a pandemic. Lenders and creditors typically offer forbearance or deferred payments programs for their customers who need help. In many cases, a consumer will be reported as "paid as agreed".

Consumers should contact their lenders and creditors first

If a consumer is impacted (directly or indirectly) by Coronavirus, the very first thing that consumer should do is contact his or her lender or creditor. Lenders and creditors have a variety of tools in place to help consumers, but these institutions can help only they know that there is a problem. Lenders and creditors may defer payments or place consumers into forbearance programs.

> Consumers cannot get credit relief without first asking for help from their banks. "As a first step, consumers...having financial issues should contact their lenders..." *VantageScore*

The Consumer Financial Protection Bureau ("CFPB") has informed consumers that "if [they are] not able to pay [their] bills on time, [consumers should] contact [their] lenders and servicers to let them know about [their] situation."[1]

Five federal and state regulators have encouraged financial institutions to work with consumers during this public health emergency,[2]

[1] CFPB, *Protect yourself financially from the impact of the coronavirus*.

[2] On March 10, 2020 five federal financial institution regulators and state regulators issued a joint statement "encourage[ing] financial institutions to meet the financial needs of customers and members affected by the coronavirus." These five agencies (the Board of Governors of the Federal Reserve System, the Consumer

For the many consumers that have mortgages, Fannie Mae and Freddie Mac have reminded mortgage services that "hardship forbearance is an option for borrowers who are unable to make their monthly mortgage payment."[3] The largest bank in the U.S., Citi, told its customers that Citi told its customers that a "range of assistance measures include fee waivers, hardship programs and small business."[4]

> "For borrowers that may be experiencing a hardship, I encourage you to reach out to your [mortgage] servicer." *Mark Calabria, Director, Federal Housing Finance Agency (FHFA).*

When a consumer is placed into a forbearance plan, a deferred payment plan, or some other special abatement program, credit reporting codes have been created by the credit bureaus to make sure that the consumer's credit is not treated negatively.

Reporting to the credit bureaus

CDIA has guidance for the approximately 15,000 lenders and creditors who report data to the nationwide credit bureaus to handle a wide variety of data reporting scenarios. CDIA and our credit bureau members are doing our part to help consumers who have been impacted (directly or indirectly) by Coronavirus. To help lenders and creditors offer help consumers affected by Coronavirus, CDIA has guidance for lenders and creditors who put an account either (a) into forbearance as a result of a consumer's inability to make payments due to natural or declared disasters, or for other national crises, or (b) into a deferred payment status.

> The nationwide credit bureaus long ago put systems in place to accept reporting from lenders and creditor for handle mass events like Coronavirus

Financial Protection Bureau, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Conference of State Bank Supervisors) "recognize the potential impact of the coronavirus on [consumers]." These agencies encourage "financial institutions [to] work constructively with borrowers and other customers in affected communities. Prudent efforts that are consistent with safe and sound lending practices should not be subject to examiner criticism. These five agencies are the Federal Reserve ("FRB"), the Conference of State Bank Supervisors ("CSBS"), the Consumer Financial Protection Bureau ("CFPB"), the Federal Deposit Insurance Corporation ("FDIC"), the National Credit Union Administration ("NCUA"), and the Office of the Comptroller of the Currency ("OCC").

[3] Press Release, *FHFA, Statement from FHFA Director Mark Calabria on Corovirus*, March 10, 2020.

[4] Website, Citi, *Citi Assists U.S. Customers and Small Businesses Impacted by COVID-19*, March 6, 2020.

The country's leading score developers, VantageScore and FICO note that forbearance and deferred payment scenarios have a neutral impact on a consumer's credit score so consumers in one of these programs, as reported to the nationwide credit bureaus, should have no negative impact as a result of Coronavirus.

When a consumer is in a deferred payment or forbearance program reported to a credit bureau, or with a natural disaster code, there is no negative scoring impact.

Low or no credit score impact

FICO noted that "the placement and reporting of an account in forbearance or a deferred payment plan in and of itself does not negatively impact a FICO® Score."[5] VantageScore makes clear that "[a] loan placed in a deferred payment or forbearance plan will not result in a negative impact."[6] The same is true for a natural disaster coding: "[t]he net impact is that a consumer's VantageScore credit score will not go down, either because negative information is neutralized because of the natural disaster code or because the account is completely removed."[7]

Conclusion

Questions come up about the impact of the spread of Coronavirus has on consumers' credit histories. CDIA and its credit bureau members have answers. For years, the credit bureaus have had systems in place to minimize or eliminate the negative credit impact of the extreme events, like a natural disaster, or a pandemic.

Consumers who have been impacted (directly or indirectly) by Coronavirus are strongly encouraged to contact their lenders and creditors. This is the advice banks and bank regulators have given. Lenders and creditors have programs and plans to assist their customers in a time of a financial crisis, like a pandemic. Lenders and creditors typically offer forbearance or deferred payments programs for their customers who need help. In many cases, a consumer will be reported as "paid as agreed". Yet, the only way a consumer can get they help she deserves is by asking for help from their lenders and creditors. Asking for help should the first call or the first click.

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[5] FICO Website, *Protecting Your Credit during the Coronavirus Outbreak*.

[6] VantageScore Website, *VantageScore statement advising on scoring options for those impacted by COVID-19 (Coronavirus)*. VantageScore notes that when a loan is in a deferred payment for forbearance, that loan "will continue to positively impact one's credit history and credit score, while the related balance and payment obligations under the plan will not be considered for purposes of a credit score calculation during the forbearance period. The net impact to a consumer's VantageScore credit score is 'set to neutral,' so the consumer's credit score is not harmed.

[7] *Id.*

Additional information on medical debt and credit

Medical debt is treated differently by credit bureaus and scoring models than other kinds of debt.

- *Unpaid medical debt* does not go on a credit report unless it's 180 days past due or longer. This grace period allows consumers six months to resolve any insurance or billing disputes, or to work out a repayment agreement with the medical provider.
- For *paid medical debt*, the nationwide credit bureaus will remove from credit reports, previously reported medical collections that have been or are being paid by insurance. The treatment of unpaid and paid medical debt are part of the National Consumer Assistance Plan ("NCAP") created by the nationwide credit bureaus following a settlement between 31 state attorneys general, led by Ohio, and a separate settlement with the New York Attorney General.[8]

Consumers not only benefit from the changes made by credit bureaus for unpaid and paid medical debt, there is also a credit scoring lift for consumers. VantageScore and FICO do not count paid medical collections in their scoring models.[9]

It is important to also note that federal rules generally require nonprofit hospitals to give consumers at least 120 days before taking "extraordinary collection actions," which include reporting debts to credit bureaus and using debt collection agencies.[10] According to the American Hospital Association in 2018, 48% of all hospitals in the U.S. are community, non-profit hospitals; 21% are for-profit hospitals, and the remainder are federal, state, and local government hospitals, and other hospitals.[11]

(continued...)

[8] *See*, *Attorney General DeWine Announces Major National Settlement with Credit Reporting Agencies*, Ohio Atty. Gen. Mike DeWine press release, May 20, 2015; A.G. Schneiderman Announces Groundbreaking Consumer Protection Settlement With The Three National Credit Reporting Agencies, N.Y. Atty. Gen. press release, March 9, 2015.

[9] *Your score vs. medical debt*, VantageScore blog, Oct. 27, 2018, *Are Medical Collections being removed? Yes – see which one*, FICO blog, Sept. 28, 2017.

[10] 26 U.S. Code § 501(r)(6), 26 CFR § 1.150.

[11] Am. Hospital Assn., *2019 AHA Hospital Statistics*.

Key terms

- A **deferred payment** is a loan arrangement in which the borrower is allowed to start making payments at some specified time in the future.
- **Forbearance** is a period during repayment in which a borrower is permitted to temporarily postpone making regular monthly payments. The debt is not forgiven, but regular payments are suspended until a later time. As an example, forbearance may be granted if a borrower is experiencing temporary financial difficulty. The consumer may be making reduced payments, interest-only payments or no payments.

Additional resources

Nationwide credit bureaus

- Equifax: COVID-19 (Coronavirus) and Your Credit Score
- Experian: COVID-19 (Coronavirus) and Your Credit Report
- TransUnion: Managing Your Credit Through a Financial Hardship

Score developers

- FICO: Protecting Your Credit during the Coronavirus Outbreak
- VantageScore: VantageScore statement on scoring options for those impacted by COVID-19 (Coronavirus)

Government agencies

- CFPB: *Protect yourself financially from the impact of the coronavirus*.

About the Consumer Data Industry Association

The Consumer Data Industry Association (CDIA) is the voice of the consumer reporting industry, representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity all over the world, helping ensure fair and safe transactions for consumers, facilitating competition and expanding consumers' access to financial and other products suited to their unique needs. Find us online at www.cdiaonline.org.

March 15, 2020

Exhibit H

Important Metro 2® Announcement

Reporting information on consumers

(1) for accounts affected by natural and declared disasters, or

(2) accounts in forbearance from a natural or declared disaster, or for other reasons

The Consumer Data Industry Association (CDIA) is sending this notice to remind lenders and creditors ("data furnishers" or "furnishers") how they can work with their individual customers to address financial problems that those consumers may be experiencing as a result of natural or declared disasters, or for other reasons. This Metro 2® announcement is a reminder to all data furnishers that there is specific guidance available for furnishers who report information about consumers where (1) consumers' accounts are affected by natural and declared disasters (FAQ 58), or (2) consumers' accounts placed in forbearance as a result of a natural or declared disaster, or for other reasons (FAQ 45). Please review this announcement and guidance closely. For additional questions about data reporting in the Metro 2® Format, please contact CDIA and the Metro 2® Task Force at metro2info@cdiaonline.org; or contact your consumer reporting agency representatives directly.

Reporting Credit Account Information in the Metro 2® Format for Consumers Affected by Natural Disasters

Consumer reporting agencies know that natural disasters occur across the United States from time to time. Institutions that furnish data to consumer reporting agencies in the Metro 2® Format are reminded that there is specific guidance in FAQ 58 of the Credit Reporting Resource Guide® to assist with the reporting of account information for consumers affected by natural disasters.

You can find the FAQ 58 and other relevant furnisher information on the Metro 2® portion of the CDIA website.

Reporting Forbearance Information

Forbearance is a period of time during repayment in which a borrower is permitted to temporarily postpone making regular monthly payments. The debt is not forgiven, but regular payments are suspended until a later time. As an example, forbearance may be granted if a borrower is experiencing temporary financial difficulty. The consumer may be making reduced payments, interest-only payments or no payments.

Institutions that furnish data to consumer reporting agencies in the Metro 2® Format are reminded that there is specific guidance in FAQ 58 of the Credit Reporting Resource Guide® to assist with the reporting of accounts in forbearance as a result of a natural or declared disaster, or for other reasons.

You can find the FAQ 58 and other relevant furnisher information on the Metro 2® portion of the CDIA website.

Thank you,

Consumer Data Industry Association

About the Consumer Data Industry Association

The Consumer Data Industry Association (CDIA) is the voice of the consumer reporting industry, representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity all over the world, helping ensure fair and safe transactions for consumers, facilitating competition and expanding consumers' access to financial and other products suited to their unique needs.

Exhibit I

45. Question: How should accounts in forbearance be reported?

Answer: Forbearance is a period of time during repayment in which a borrower is permitted to temporarily postpone making regular monthly payments. The debt is not forgiven, but regular payments are suspended until a later time. A forbearance agreement is most commonly applied to mortgages and student loans. However, forbearance is applicable to any type of loan. As an example, forbearance may be granted if a borrower is experiencing temporary financial difficulty. The consumer may be making reduced payments, interest-only payments or no payments.

If the account is in forbearance, report:

- Terms Duration = terms of the loan, which can be changed if the terms of the loan are extended
  (If no payments are due during the forbearance period, blank fill.)
- Terms Frequency = frequency for payments due
  (If no payments are due during the forbearance period, report code **D** for deferred.)
- Scheduled Monthly Payment Amount = new payment due
  (If no payments are due during the forbearance period, zero fill.)
- Account Status = appropriate code that specifies the status of the account for each month the account is in forbearance (e.g., Current, 30 days delinquent, 60 days delinquent)
  (If no payments are due during the forbearance period, report Account Status **11**.)
- Payment History Profile = appropriate code that specifies the previous month's Account Status for each month the account is in forbearance, plus prior history.
  (Increment the Payment History Profile with value **D** if no payments are due during the forbearance period.)
- Special Comment Code = **CP** (Account in forbearance)
- Current Balance = outstanding balance amount, reflecting any payments made
- Amount Past Due = total amount that is 30 days or more past the due date, if the account is delinquent during the forbearance period
- K4 Specialized Payment Indicator = **02** and Deferred Payment Start Date when payments are deferred during the forbearance period

Important Note: Additionally, if the consumer was delinquent going into the forbearance period and no payments were required during forbearance, the two fields below must be considered when the consumer comes out of forbearance and begins repayment.

- Account Status Code = appropriate code that specifies the status of the account when the account comes out of forbearance
- Date of First Delinquency = if the Account Status is delinquent, the original date that led to the Account Status being reported, prior to forbearance

Exhibit J

58. Question: What are the available options for reporting an account affected by a natural or declared disaster?

Answer: Use the following reporting guidelines after it is confirmed that an account is impacted by a natural or declared disaster, based on your internal policies and procedures.

There are two options for reporting **open accounts** – defined as Account Status Code 11 (Current account) or 71, 78, 80, 82, 83 or 84 (Delinquent accounts) – and **closed accounts with balances owing** - reported with the same open Account Status Codes.

1. Report the account as deferred, along with Special Comment **AW** (Affected by natural or declared disaster).

   Per FAQ 44 (How should deferred loans be reported?), report the following Base Segment fields as specified:

   - Terms Duration = blank
   - Terms Frequency = D (Deferred)
     Required for deferred accounts
   - Highest Credit or Original Loan Amount = the total amount borrowed
   - Scheduled Monthly Payment Amount = zero
   - Account Status Code = 11 (Current account)
   - Payment History Profile = Use Character **D** for the months where payments are deferred.
   - Current Balance = outstanding balance amount
   - Amount Past Due = zero

   If the Deferred Payment Start Date is known, report the K4 Segment with Specialized Payment Indicator **02** for Deferred Payment. Also, report the **Deferred Payment Start Date** as the date the first payment will be due. If the deferred payment start date is not known, do not report the K4 Segment.

   Additionally, if the consumer was delinquent going into the deferment period, the two fields below must be considered when the consumer comes out of deferment and begins repayment.

   - Account Status Code = appropriate code that specifies the status of the account when the account comes out of deferment
   - Date of First Delinquency = if the Account Status is delinquent, the original date that led to the Account Status being reported prior to the deferment

FAQ 58 continued on next page

FAQ 58 (continued)

2. Report the Account Status **that applies to the account** (credit grantor's decision). Report Special Comment **AW** (Affected by natural or declared disaster).

Derogatory Accounts – defined as Account Status Codes 88 (Government Claim), 89 (Deed in Lieu), 93 (Collection), 94 (Foreclosure Completed), 95 (Voluntary Surrender), 96 (Repossession), and 97 (Charge-off).

Continue reporting these statuses and add Special Comment **AW** (Affected by natural or declared disaster).

Debt Buyers and Collection Agencies

Continue reporting Account Status Code 93 (Collection) and add Special Comment **AW** (Affected by natural or declared disaster).

If accounts are sold to another company or given back to the original creditor, report Account Status Code **DA** to delete the accounts.

Exhibit K

FAQ 44 - How should deferred loans be reported?

Answer: Report the following:

- Terms Duration = blank
- Terms Frequency = D (Deferred)
- Highest Credit or Original Loan Amount = the total amount borrowed, excluding interest
- Scheduled Monthly Payment Amount = zero
- Account Status Code = 11 (Current account)
- Payment History Profile NOTE: The M2R program will automatically adjust the payment history based on the account status code. When using an additional code such as Specialized Payment you will need to manually check and adjust the payment history code for the applicable months.
  - ✓ Use Character **B** to indicate accounts which have never been in repayment
  - ✓ Use Character **D** to indicate accounts that were previously in repayment but are now deferred. **Note:** When an account goes into deferment, do not change the previously-reported account history in the Payment History Profile.
- Current Balance = outstanding balance amount
- Amount Past Due = zero

Special Payment = **02** for Deferred Payment. Also, report the Deferred Payment Start Date as the date the first payment will be due.
Important Notes: When the account goes into repayment, stop reporting the Special Payment code and Start date and begin reporting monthly payment information. Report valid values as per the repayment agreement in the following fields:

- ✓ Terms Duration
- ✓ Terms Frequency (other than **D**)
- ✓ Scheduled Monthly Payment Amount

Additionally, if the consumer was delinquent going into the deferment period, the two fields below must be considered when the consumer comes out of deferment and begins repayment.

- ✓ Account Status Code = appropriate code that specifies the status of the account when the account comes out of deferment
- ✓ Date of First Delinquency = if the Account Status is delinquent, the original date that led to the Account Status being reported prior to deferment

Exhibit L

Metro 2® Format COVID-19 Post-Accommodation Reporting Guidance Now Available!!

While the COVID-19 pandemic continues to impact consumers upon this publication, the Consumer Data Industry Association (CDIA) and the Credit Reporting Agency (CRA) members are providing specific Metro 2® Format reporting guidance for previously granted COVID-19 Accommodations in which the Accommodation period has ended.

Note: These guidelines are intended for the initial reporting of accounts after a CARES Act Accommodation period ends. Regular Metro 2® reporting standards documented in the Credit Reporting Resource Guide (CRRG®) for all fields can resume thereafter.

The guidance document has three sections for reference:

1) **CARES Act Post-Accommodation Reporting Guidelines** – intended to be all-encompassing guidance for all industries

2) **Fannie Mae/Freddie Mac Post-Forbearance options** – intended for Mortgage servicers that report accounts backed by Fannie Mae and Freddie Mac and is based on their publications regarding post forbearance workout options on their respective websites

3) **Consumer Reporting FAQs Related to the CARES Act and COVID-19 Pandemic** – contains a copy of the FAQs the CFPB published on 6/16/20 up to and including how to report an account after an Accommodation ends. This was the basis for how the Post-Accommodation guidance was written based on alignment stemming from the CARES Act guidance previously released in April.

   As noted within this section, these FAQs can also be referenced within the CFPB's website. https://files.consumerfinance.gov/f/documents/cfpb_fcra_consumer-reporting-faqs-covid-19_2020-06.pdf

This information is not intended to be legal advice. Please review your reporting policies with your legal and compliance teams.

As a reminder the CDIA's website has a COVID-19 page (https://www.cdiaonline.org/covid-19/) dedicated to industry related topics including credit reporting that details the CARES Act and Post-Accommodation guidance both released in accordance with the amendment to the FCRA along with reference links to COVID-19 information available to date.

CARES Act Post-Accommodation Reporting Guidelines

We are providing the following information for your convenience and to assist you with reporting accounts that were previously granted a CARES Act Accommodation in which the Accommodation period has **ended** and regularly scheduled payments will resume unless the account was paid. The purpose of this material is to provide guidance in Metro 2® reporting. This information is not intended to be legal advice. Please review your reporting policies with your legal and compliance teams.

Note: These guidelines are intended for the initial reporting of accounts after a CARES Act Accommodation period ends. Regular Metro 2® reporting standards documented in the Credit Reporting Resource Guide (CRRG®) for all fields can resume thereafter.

Metro 2® fields	CARES Act Post-Accommodation Options		
	Full Accommodation repayment (immediately reinstate the account; single payment made to satisfy all Accommodation[3] payments) (see Note 3 below)	**Short Term Accommodation Repayment (gradually catch up on Accommodation[3] payments)** (see Note 3 below)	**Payment Accommodation Deferral (amount of Accommodation[3] payments moved to end of account payment cycle or loan term upon transfer, sale, payoff/paid out or at maturity)** (see Note 3 below)
Credit Limit	Assigned credit limit for the account (if applicable)	Assigned credit limit for the account (if applicable)	Assigned credit limit for the account (if applicable)
Highest Credit/Original Loan Amount	Highest amount of credit utilized/Original amount of the loan	Highest amount of credit utilized/Original amount of the loan	Highest amount of credit utilized/Original amount of the loan
Terms Frequency	M (monthly) or the applicable frequency for payments due	M (monthly) or the applicable frequency for payments due	M (monthly) or the applicable frequency for payments due
Scheduled Monthly Payment Amount	Minimum amount due based on balance or Regular monthly payment; zero if paid	New minimum amount due or New monthly payment amount	Minimum amount due based on balance or Regular monthly payment
Account Status Code [1] (see Note 1 below)	Current account – Account Status 11; (0-29 days past the due date)	Current account – Account Status 11; (0-29 days past the due date)	Current account – Account Status 11; (0-29 days past the due date)
	Delinquent account – Account Status 71, 78, 80, 82, 83, 84; (30 – 180 days or more past the due date)	Delinquent account – Account Status 71, 78, 80, 82, 83, 84; (30 – 180 days or more past the due date)	Delinquent account – Account Status 71, 78, 80, 82, 83, 84; (30 – 180 days or more past the due date)
	Paid account – Account Status 13; (Paid or closed account/zero balance)	Paid account – N/A	Paid account – N/A
Payment History Profile – PHP (report All prior including Accommodation history) Do not update the Accommodation Payment History Profile entries post the Accommodation period [2]	Appropriate value that specifies the previous month's Account Status during the Accommodation PHP Value = 0-6 or D (see Note 2 below)	Appropriate value that specifies the previous month's Account Status during the Accommodation PHP Value = 0-6 or D (see Note 2 below)	Appropriate value that specifies the previous month's Account Status during the Accommodation PHP Value = 0-6 or D (see Note 2 below)

Metro 2® fields	CARES Act Post-Accommodation Options		
	<u>Full Accommodation repayment</u> (immediately reinstate the account; single payment made to satisfy all Accommodation[3] payments) (see Note 3 below)	**<u>Short Term Accommodation Repayment</u> (gradually catch up on Accommodation[3] payments)** (see Note 3 below)	**<u>Payment Accommodation Deferral</u> (amount of Accommodation[3] payments moved to end of account payment cycle or loan term upon transfer, sale, payoff/paid out or at maturity)** (see Note 3 below)
Current Balance	Current Account – Outstanding balance amount	Current Account – Outstanding balance amount	Current Account – Outstanding balance amount
	Delinquent Account – Outstanding balance amount	Delinquent Account – Outstanding balance amount	Delinquent Account – Outstanding balance amount
	Paid Account – zero filled	Paid Account – N/A	Paid Account – N/A
Amount Past Due	Current Account – zero filled	Current Account – zero filled	Current Account – zero filled
	Delinquent Account – Total amount of payments that are 30 days or more past due in whole dollars only	Delinquent Account – Total amount of payments that are 30 days or more past due in whole dollars only	Delinquent Account – Total amount of payments that are 30 days or more past due in whole dollars only
	Paid Account – zero filled	Paid Account – N/A	Paid Account – N/A
Special Comment	Blank or applicable code for this reporting period	Blank or applicable code for this reporting period	Blank or applicable code for this reporting period
For all other Metro 2® fields and/or appendage segments, the standard guidelines described within the Field Definitions module of the CRRG® should be followed.			
[1] For CARES Act Post-Accommodation credit reporting purposes, if the consumer was not responsible for payments or met any required obligations during the Accommodation period, the Account Status cannot advance upon the period ending. Accounts that were current must continue to be reported as current based on the Accommodation period timeframe. Accounts that were delinquent must remain the delinquent status as of the time the Accommodation was granted based on the Accommodation period timeframe unless the account became current or paid during the period. *Once the account has been initially reported Post-Accommodation, subsequent reporting can resume standard Metro 2® delinquency calculations.*			
[2] It is important to remember that you should not update the Accommodation Payment History Profile entries post the Accommodation period.			
[3] <u>Accommodation</u> for this credit reporting purpose is defined as scheduled monthly payments that were postponed and/or delayed due to a granted CARES Act accommodation. This would be reflective of payments included in 'skip-a-pay', 'payment holiday', deferred or forbearance programs.			

Fannie Mae/Freddie Mac Post-Forbearance options

We are providing the following information for your convenience and to assist you with reporting in accordance with the Fannie Mae/Freddie Mac post-forbearance options for accounts that were previously granted a CARES Act accommodation. The purpose of this material is to provide guidance in Metro 2® reporting. This information is not intended to be legal advice. Please review your reporting policies with your legal and compliance teams.

Metro 2® fields	**Fannie Mae/Freddie Mac Post-Forbearance options**			
	Full repayment (immediately reinstate the loan; single payment made to satisfy all forbearance payments)**	**Short Term Repayment Plans (gradually catch up on missed payments)**	**Payment Deferral (amount of forbearance** payments moved to end of loan term upon transfer, payoff, sale, or at maturity)**	**Loan Modification (original terms of the loan are changed) See below for 3 options*****
Terms Duration	Number of years of Mortgage term	Number of years of Mortgage term (new terms duration if term is extended)	Number of years of Mortgage term (new terms duration if term is extended)	Modified Terms
Terms Frequency	M (monthly) or the applicable frequency for payments due	M (monthly) or the applicable frequency for payments due	M (monthly) or the applicable frequency for payments due	M (monthly) or the applicable frequency for payments due
Scheduled Monthly Payment Amount (SMPA) and Balloon Payment (K4 Segment)	Total dollar amount due to satisfy all payments including the Balloon Payment Amount After reinstatement – Regular Monthly Payment	New Monthly Payment Amount	Regular Monthly Payment Upon end of loan term - Total dollar amount due to satisfy all payments (NOTE: Last payment would include the scheduled payment + balloon payment total)	New scheduled monthly payment per the modified agreement
Account Status Code	Account Status Code that represents the current status of the account (Current or Delinquent)	Account Status Code that represents the current status of the account (Current or Delinquent)	Account Status Code that represents the current status of the account (Current or Delinquent)	Appropriate Account Status Code based on the new terms of the loan
Payment History Profile (report All prior including Accommodation history) Do not update the Accommodation Payment History Profile entries post the Accommodation period*	Appropriate value that specifies the previous month's Account Status	Appropriate value that specifies the previous month's Account Status	Appropriate value that specifies the previous month's Account Status	Appropriate value that specifies the previous month's Account Status

Metro 2® fields	Fannie Mae/Freddie Mac Post-Forbearance options			
	Full repayment (immediately reinstate the loan)	**Short Term Repayment Plans (gradually catch up on missed payments)**	**Payment Deferral (amount of forbearance** payments moved to end of loan term upon transfer, payoff, sale, or at maturity)**	**Loan Modification (original terms of the loan are changed) See below for 3 options*** **
Current Balance	Outstanding balance amount	Outstanding balance amount	Outstanding balance amount	Outstanding balance amount
Amount Past Due	Total amount of payments that are 30 days or more past due in whole dollars only. If the Account Status is current (Status Code 11), this field should be zero.	Total amount of payments that are 30 days or more past due in whole dollars only. If the Account Status is current (Status Code 11), this field should be zero.	Total amount of payments that are 30 days or more past due in whole dollars only. If the Account Status is current (Status Code 11), this field should be zero.	Total amount of payments that are 30 days or more past due in whole dollars only. If the Account Status is current (Status Code 11), this field should be zero.
Special Comment	Blank	Blank	Blank	CO (Loan Modified)
K4 Segment Specialized Payment Indicator (Specialized payment information segment for balloon payments)	N/A	N/A	01 (Balloon Payment)	N/A
K4 Segment Balloon Payment Due Date	N/A	N/A	Date balloon payment is due *(note: payoff date may be used)*	N/A
K4 Segment Balloon Payment Amount	N/A	N/A	Amount of balloon payment (total of all missed payments)	N/A
For all other Metro 2® fields, the standard guidelines described within the Field Definitions module of the CRRG® should be followed.				
***NOTE:** It is important to remember that you should not update the Accommodation Payment History Profile entries post the Accommodation period.*				
***Forbearance for this credit reporting purpose is defined as scheduled monthly payments that were postponed and/or delayed due to a granted CARES Act accommodation.*				

*****Loan Modification (original terms of the loan are changed) – When the loan is modified there are three options for reporting:**

1. If the original Account Number and Date Opened are retained, report the amounts and terms as per the modified agreement. Fields that may be changed include Original Loan Amount, Terms Duration, Terms Frequency, Scheduled Monthly Payment Amount and Current Balance.
   - *Note that the Terms Duration should reflect the terms for the life of the account. Therefore, for a loan modification, set the Terms Duration from the original Date Opened to the new maturity date.*
   - **Optional:** Special Comment Code **CO** (Loan modified) may be reported.
     Note that this code is used when reporting accounts that are modified, but not under a federal government plan.
     Special Comment **CO** may be reported as long as deemed appropriate by the data furnisher, or until another Special Comment becomes more critical. For the length of time the Special Comment should be reported, consult with your internal Legal or Compliance department.

2. If the original Account Number changes and the Date Opened remains the same, follow the above reporting guideline, and include an L1 Segment with the new Account Number. Refer to the L1 Segment specifications within the Field Definitions for reporting guidelines.

3. If the original Account Number and Date Opened change, report the original loan as specified:
   • Account Status Code = 13 (Paid)
   • Payment Rating = the appropriate code that identifies the status of the account within the current month's reporting period
   • Special Comment = AS (Account closed due to refinance)
   • Current Balance and Amount Past Due = zero

   Report the newly modified loan with the new Account Number, new Date Opened and all other applicable fields. Payment history that occurred prior to the new Date Opened should not be reported with this account.

Consumer Reporting FAQs Related to the CARES Act and COVID-19 Pandemic

This is a Compliance Aid issued by the Consumer Financial Protection Bureau. The Bureau published a Policy Statement on Compliance Aids, available at https://www.consumerfinance.gov/policycompliance/rulemaking/final-rules/policy-statement-compliance-aids/, that explains the Bureau's approach to Compliance Aids.

QUESTION 1:

Shortly after Congress enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. 116-136, the Bureau issued a statement addressing consumer reporting and the CARES Act. What did that statement say?

ANSWER (UPDATED 6/16/2020)**:**

On April 1, 2020, the Bureau issued a Statement on Supervisory and Enforcement Priorities Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act (Statement). In the Statement, the Bureau informed furnishers of their responsibilities under the CARES Act amendments to the Fair Credit Reporting Act (FCRA) and stated that the Bureau expects furnishers to comply with the CARES Act. Under the CARES Act amendments to the FCRA, a consumer whose account was not previously delinquent is current on their loan if they have received an accommodation and make any payments the accommodation requires. The Statement also addressed the FCRA requirements for consumer reporting agencies and furnishers to investigate disputes within specific timeframes. The Bureau indicated that in evaluating compliance with these dispute investigations timeframes, the Bureau will consider the individual circumstances that consumer reporting agencies and furnishers face as a result of the COVID-19 pandemic. The Statement makes clear, however, that the Bureau expects furnishers and consumer reporting agencies to make good faith efforts to investigate disputes as quickly as possible, and that absent impediments due to COVID-19, disputes should be resolved under FCRA requirements.

QUESTION 2:

The CARES Act requires that furnishers must report as current certain accounts for consumers affected by the pandemic. What did the Bureau's Statement say about enforcement of this requirement?

ANSWER (UPDATED 6/16/2020)**:**

As noted above, the Statement informed furnishers of their responsibilities under the CARES Act amendments to the FCRA and stated that the Bureau expects furnishers to comply with the CARES Act. The Bureau is enforcing the FCRA, as amended by the CARES Act, and its implementing regulation, Regulation V.

The Bureau is committed to protecting consumers, particularly during this pandemic. Since the

Bureau's inception, it has dedicated significant resources toward enforcing the FCRA and Regulation V, through robust supervisory and enforcement actions at both consumer reporting agencies and furnishers. This work has continued as the Bureau evaluates specific risks to consumers as a result of the COVID-19 pandemic. The Bureau has focused on credit reporting accuracy and dispute handling – both obligations of consumer reporting agencies and furnishers. The Bureau remains committed to vigorously enforcing all consumer financial protection laws under its jurisdiction, including the FCRA. As noted in the Bureau's Statement, the Bureau will consider the circumstances that entities face as a result of the COVID-19 pandemic and entities' good faith efforts to comply with statutory and regulatory obligations as soon as possible. The Bureau will, however, not hesitate to take public enforcement action when appropriate against companies or individuals that violate the FCRA or any other law under its jurisdiction.

QUESTION 3:

The FCRA requires furnishers and consumer reporting agencies to conduct investigations of disputes within specified timeframes. What did the Bureau's Statement say about citing or suing furnishers for violating the FCRA for failure to investigate disputes?

ANSWER (UPDATED 6/16/2020)**:**

While the Bureau's Statement indicated that the Bureau would provide some flexibility in its supervisory and enforcement approach during the COVID-19 pandemic to help furnishers and consumer reporting agencies manage the challenges of the current crisis (see FAQ #1), the Statement did not say that the Bureau would give furnishers or consumer reporting agencies an unlimited time beyond the statutory deadlines to investigate disputes before the Bureau would take supervisory or enforcement action. Furnishers and consumer reporting agencies remain responsible for conducting reasonable investigations of consumer disputes in a timely fashion. The Statement makes clear that the Bureau expects furnishers and consumer reporting agencies to make good faith efforts to investigate disputes as quickly as possible when they are impacted by COVID-19. Furnishers include a wide variety of businesses that vary in size and sophistication and can range from small retailers to very large financial services firms. The Bureau has jurisdiction over the hundreds of consumer reporting agencies in operation, which include smaller and specialty consumer reporting agencies. Many of these furnishers and consumer reporting agencies face unique challenges due to the COVID-19 pandemic. Thus, the Bureau believes it is appropriate to evaluate individually the efforts and circumstances of each furnisher and consumer reporting agency in determining if it made good faith efforts to investigate disputes as quickly as possible.

QUESTION 4:

The CARES Act addresses accommodations to consumers impacted by COVID-19. What is an accommodation for purposes of the CARES Act amendments to the FCRA?

ANSWER (UPDATED 6/16/2020)**:**

An "accommodation" includes any payment assistance or relief granted to a consumer who is affected by the COVID-19 pandemic during the period from January 31, 2020, until 120 days after the termination of the COVID-19 national emergency declared by the President on March 13, 2020 under the National Emergencies Act.[1] Such an accommodation includes, for example, agreements to defer one or more payments, make a partial payment, forbear any delinquent amounts, or modify a loan or contract.[2] An accommodation includes assistance or relief that is granted voluntarily or pursuant to a statutory or regulatory requirement.

QUESTION 5:

Under the CARES Act, is there a requirement that furnishers provide accommodations to consumers impacted by the pandemic?

ANSWER (UPDATED 6/16/2020)**:**

The CARES Act requires accommodations for two specific types of loans. First, consumers with a Federally backed mortgage loan (as that term is defined in the CARES Act) may obtain a forbearance from their mortgage servicer upon request and the borrower's attestation of a financial hardship due to the COVID-19 emergency.[3] Second, the CARES Act provides automatic suspension of principal and interest payments on Federally held student loans through September 30, 2020.[4] Even if accommodations are not required by the CARES Act or by other applicable law, the Bureau and other Federal and State agencies have encouraged financial institutions in prior guidance to work constructively with borrowers who are or may be unable to meet their contractual payment obligations because of the effects of COVID-19.

QUESTION 6:

If a furnisher provides a consumer an accommodation, what are its consumer reporting obligations?

ANSWER (UPDATED 6/16/2020)**:**

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[1] CARES Act, Pub. L. 116-136, section 4021, *codified at* FCRA section 623(a)(1)(F)(i)(I), 15 U.S.C. 1681s2(a)(1)(F)(i)(I).

[2] *Id.*

[3] For more information on the CARES Act forbearance requirements for Federally backed mortgage loans, see prior Bureau guidance and FAQs.

[4] For more information on the CARES Act requirement to suspend payments for Federally held student loans, see CARES Act, Pub. L. 116-136, section 3513.

Section 4021 of the CARES Act amends the FCRA to address how furnishers report accounts subject to an accommodation. For more information on what constitutes an accommodation for purposes of the CARES Act, see FAQ #1 above. As noted in FAQ #1, furnishers can grant accommodations voluntarily or pursuant to a statutory or regulatory requirement. The CARES

Act provisions addressing how furnishers report accounts subject to an accommodation apply if: (1) a furnisher makes an accommodation with respect to one or more payments on a credit obligation or account of a consumer, and (2) the consumer makes the payments or is not required to make one or more payments pursuant to the accommodation.

If the credit obligation or account was current before the accommodation, during the accommodation the furnisher must continue to report the credit obligation or account as current.

If the credit obligation or account was delinquent before the accommodation, during the accommodation the furnisher cannot advance the delinquent status. For example, if at the time of the accommodation the furnisher was reporting the consumer as 30 days past due, during the accommodation the furnisher may not report the account as 60 days past due. If during the accommodation the consumer brings the credit obligation or account current, the furnisher must report the credit obligation or account as current. This could occur, for example, if the accommodation itself brings the credit obligation or account current (such as a loan modification that resolves amounts past due so the borrower is no longer considered delinquent) or if the consumer makes past due payments that bring the credit obligation or account current.

These CARES Act provisions addressing how furnishers report accounts with an accommodation do not apply with respect to credit obligations or accounts that creditors have charged off.

For additional requirements regarding payment suspensions and furnishing information about Federally held student loans, see section 3513 of the CARES Act.

QUESTION 7:

What do furnishers need to consider when reporting consumers as current pursuant to the CARES Act?

ANSWER (UPDATED 6/16/2020)**:**

Whenever furnishers provide information to consumer reporting agencies, they have obligations related to the accuracy and integrity of the information they furnish under the FCRA and Regulation V.[5] To ensure compliance with these obligations, if furnishers are reporting information to consumer reporting agencies about a credit obligation or account that is current, they should consider all of the trade line information they furnish that reflects a consumer's status as current or delinquent. For example, information a furnisher provides about an account's payment status, scheduled monthly payment, and the amount past due may all need to be updated to accurately reflect that a consumer's account is current consistent with the CARES Act. Furnishers are encouraged to ensure they understand the data fields that the consumer reporting agencies to whom they report utilize and which standard data reporting formats may apply.

[5] *See* FCRA section 623, 15 U.S.C. 1681s-2; 12 CFR part 1022, subpart E.

QUESTION 8:

Can a furnisher comply with the requirements of the CARES Act relating to reporting of accommodations simply by using a special comment code to report a natural or declared disaster or forbearance?

ANSWER (UPDATED 6/16/2020)**:**

As discussed in FAQ #3 above, the CARES Act requires a furnisher to report a credit obligation or account as current if it was current prior to the accommodation or not to advance the level of delinquency if it was delinquent prior to the accommodation. Furnishing a special comment code indicating that a consumer with an account is impacted by a disaster or that the consumer's account is in forbearance does not provide consumer reporting agencies with this CARES Act-required information and therefore furnishing such a comment code is not a substitute for complying with these requirements.

QUESTION 9:

Is a furnisher permitted to report all of their consumers' accounts or all of their consumers' accounts in a particular product line (*e.g.*, all auto loans) as in forbearance?

ANSWER (UPDATED 6/16/2020)**:**

To ensure compliance with their obligations related to the accuracy and integrity of the information they furnish under the FCRA and Regulation V,[6] furnishers should not report that consumers' accounts are in forbearance if the accounts have not been placed into forbearance. The Bureau generally supports furnishers' voluntary efforts to provide payment relief to consumers but cautions that reporting forbearances on accounts for which consumers have neither requested a forbearance nor are delinquent increases the risks of inaccurate reporting and consumer confusion.

QUESTION 10:

What must furnishers do in reporting the status of an account after a CARES Act accommodation ends?

ANSWER (UPDATED 6/16/2020)**:**

The consumer reporting protections of the CARES Act continue to apply to the time period that was covered by the accommodation after the accommodation ends. Assuming payments were not required or the consumer met any payment requirements of the accommodation, a furnisher cannot report a consumer that was reported as current pursuant to the CARES Act as delinquent based on the time period covered by the accommodation after the accommodation ends. A furnisher also cannot advance the delinquency of a consumer that was maintained pursuant to the CARES Act based on the time period covered by the accommodation after the accommodation ends.

[6] *See* FCRA section 623, 15 U.S.C. 1681s-2; 12 CFR part 1022, subpart E.

Exhibit M

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Credit Reporting in the U.S. During the COVID-19 Pandemic

Information for lenders, data furnishers, and policy makers.

Updated June 16, 2020

We at FICO recognize the significant challenges faced by lenders in these extraordinary times. As the Coronavirus (COVID-19) pandemic continues to impact borrowers and lenders across the country, we want to make sure that data furnishers are aware of the various reporting options open to them, as well as how those reporting options can impact consumers' FICO® Scores.

KEY PRINCIPLES IN THE USE OF CREDIT BUREAU DATA BY FICO® SCORES

There are several guiding principles that FICO uses when evaluating how to incorporate credit bureau data fields and field values into our scores:

• **Ensure that any treatment is empirically supported.** We assess whether the given approach under consideration is supported by the data: does it improve the effectiveness of the model at rank ordering borrower creditworthiness?

• **Accept data furnished at face value.** Data furnishers are in a much better position than we are to understand a given consumer's situation and to report in the manner that most appropriately reflects that situation. At FICO, we do not feel we are in a position to second guess or override the data that has been furnished to the credit reporting agencies (CRAs).

• **Drive stable, intuitive score dynamics over time.** When evaluating multiple approaches, we give preference to those that tend to result in more stable and intuitive score movement for consumers over time.

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EFFECT OF SPECIAL COMMENT CODE "AW" ON FICO® SCORES

In instances where a borrower accommodation has not been granted (and therefore the data furnishing provisions of the CARES Act do not apply), the Consumer Data Industry Association (CDIA) provides guidelines that include reporting options available to furnishers for borrowers impacted by a disaster. A reporting option cited by the CDIA is to report special comment code AW ("affected by natural or declared disaster"). CDIA guidelines indicate that this code can either be reported along with an account in deferred status, or with *"the Account Status that applies to the account (credit grantor's decision)".*

As noted above, the reporting of special comment code AW alone will not affect a consumer's FICO® Score. There are two reasons for this approach to special comment code AW:

1. Because there is no way to determine when a special comment code has been added to the consumer's credit file, any special treatment based on code AW would have to be applied to the entirety of the account's payment history, and not just to the payment history captured during the period that the consumer was impacted by a disaster

2. Once the period of disaster ends and a furnisher ceases reporting code AW, it will no longer be possible to identify whether any reported missed payments on that account occurred while the consumer was impacted by a disaster.

OTHER, LESS COMMON REPORTING SCENARIOS AND THEIR IMPACT ON FICO® SCORES

Though none of the following codes are specifically mentioned in CDIA reporting guidelines pertaining to borrowers affected by COVID-19, we also want to clarify the FICO® Score's treatment of the following scenarios:

• Reporting an account as "loan modified" (i.e. special comment code CN or CO) alone will not affect FICO® Scores

• Reporting an account as "paying under a partial payment agreement" (i.e. special comment code AC) could have a negative impact on the accountholder's FICO® Score. This treatment is empirically supported and based on the historical use of this code by furnishers in the scenario where a consumer is in an agreed-upon repayment plan where the payments are for less than the amount specified in the original contract. Any impact to score will remain for the duration of time that the furnisher continues to report special comment code AC on the account.

SUMMARY

To summarize:

Reporting that will not have a negative impact on FICO® Scores:

• Account reported as "current" (i.e., account status = 11)

• Account reported as "in forbearance" (i.e., special comment code CP)

• Account reported as "deferred" (i.e. terms frequency = 'D' or special comment code BT)

• Account reported as "affected by natural or declared disaster" (i.e., special comment code AW)

• Account reported with Scheduled Monthly Payment Amount = $0 or missing

• Account reported as "loan modified" (i.e. special comment code CN or CO)

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EN

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Exhibit N

MARCH 13, 2020

Protecting Your Cred Coronavirus Ou

Stay informed as you manage your credit he outbreak.

by Tom Quinn

FICO® SCORE

As the number of coronavirus cases spreads, it is also having negative impact on the financial health of the economy at large and the economic well-being of individuals across the United States. The unusual nature of this pandemic has resulted in the temporary closing of schools, cancellation of events and the disruption of the distribution of goods and services that may have the unintended consequence of impacting some people's ability to pay bills on time.

If you are one of these impacted consumers you may be wondering:

- What will happen if I miss payments on my credit cards and loans?
- How might the decisions I make affect my credit rating and access to credit in the future?

These are important questions to consider because your FICO® Scores influence the credit available to you as well as the terms, such as interest rates and amount of credit extended. To be clear, medical conditions or diseases are not considered by FICO Scores and will not directly impact a FICO Score. However, the potential financial "fall out" of missing a payment, charging credit cards up to and over their limit or opening several new credit accounts over a short period of time can have a negative impact on the scores.

So, what should you do to help yourself and monitor changes to your FICO® Scores if your financial situation has been impacted by coronavirus?

Before bill payments are due, you should contact your bank and other creditors as soon as possible to make them aware of your situation. Your lender will likely have procedures in place to work with customers impacted by this unique health emergency. In fact, several federal and state regulators have already issued guidance to lenders encouraging financial institutions to work constructively with affected consumers, small business owners and communities.

Keep in mind, your prior history of payments will continue to be considered in the calculation of your FICO® Scores. So too will other information that your lender regularly updates on the account, such as current balance and payment status. As such, you may want to also check with your lender on how they intend to report these fields while the account is in forbearance or a deferred payment plan. For example, does your lender plan to report the payment status of your account as 'current' (i.e. 'paid as agreed') during the forbearance period?

Each lender is likely to have their own unique policies, so if you have loans from different financial institutions, you may want to contact each of them to cover all of your bases.

Given the broad and unprecedented nature of this pandemic, financial service providers may update or revise their policies and practices depending on how the situation evolves. It's in your best interest to stay informed as you manage your credit health through this coronavirus outbreak.

Additional information

Keeping on top of your FICO® Score amid Coronavirus

FICO Score | credit | credit score

Stone Towers • a year ago

Hello, I called Bank of America to fix my credit score. I was told to check here. I signed up for the care act then found it was not good for my credit. I paid up all payments and would like to get my score improved. The bank said it would affect my score, but I think it did.

Reply • Share ›

Tina • 2 years ago

Hello and thank you for the information. Will reporting a natural disaster special comment on the account negatively impact the FICO score?

TQ ➚ Tina • 2 years ago

The placement and reporting of an account affected by a natural disaster in and of itself does not negatively impact a FICO Score. This holds true with all versions of the FICO Scores.

Keep in mind, a consumer's prior history of payments will continue to be considered in the calculation of the FICO Scores. So too will other information that a lender regularly updates on the account, such as current balance and payment status.

-Tom

Reply • Share ›

Catalina • 2 years ago

They should pause credit score count from now until the next 3 to 6 months that everything stabilize, that way we the people who has a excellent or good credit score should not be affected. if we have good credit is because we care so if we do not pay is because we cannot right now, all theses should be consider by this companies and the government should put it as a norm

once the special comment/notification is lifted?

Or will negative history, during this unprecedented time period, get neutralized or not scored?

^ | v • Reply • Share ›

TQ ➚ Tony508 • 2 years ago

Hi Tony, each lender determines any special treatment actions they will enact in the wake of the coronavirus crisis and the information they will report on an account to the credit bureaus. For example, your credit union may work with you to set up a deferred payment plan or place the loan in forbearance (meaning you may get temporary relief from having to make full payments). The placement and reporting of an account in forbearance or a deferred payment plan in and of itself does not negatively impact a FICO® Score.

Keep in mind, your prior history of payments will continue to be considered in the calculation of your FICO Scores. So too will other information that your lender regularly updates on the account, such as current balance and payment status. As such, you may want to also check with your lender on how they intend to report these fields while the account is in forbearance or a deferred payment plan. For example, does your lender plan to report the payment status of your account as 'current' (i.e. 'paid as agreed') during the forbearance period?

-Tom

^ | v • Reply • Share ›

rrondinella ➚ TQ • 2 years ago

Tom, There is no guidance as to how credit inquiries (Hard or soft pulls) will impact credit scores. Millions of small businesses will be applying and re-applying for PPP , Local Grants and EIDL Sba loans. Each time they apply, credit is being pulled. How is FICO weighing this into their scoring model?

^ | v • Reply • Share ›

TQ ➚ rrondinella • 2 years ago

Soft inquiries (such as when a consumer pulls their own credit report or when one receives a pre-approved credit offer, etc.,) are not considered in a FICO Score calculation. Hard inquiries (when an individual is seeking credit) are considered by the scores. Certain types of inquiries are include in special inquiry treatment logic – see more detailed information at (https://www.myfico.com/cred....

It may be prudent for small business owners to conduct research and narrow down on the type of credit they want to apply for and with what lender(s) before actually applying versus applying for a variety of new credit with multiple lenders.

-Tom

^ | v • Reply • Share ›

Lisa Johnson • a year ago

Being self employed I filed for a forbearance with Quickenloans for my mortgage on March 25th just incase I needed some time during the shut down, however, I found that I was able to pay my monthly mortgage payments and paid each monthly payment on time, I am now being declined for an equity loan from another lender because there is a forbearance on my credit report. I was never disclosed that this would show on my credit report, (I would have never done the forbearance) the only disclosure I received was that late payments(if I had any) would not be reported. I received a questionnaire in May asking if i needed to extended the forbearance and I indicated that I was all set and no need to extend it. What can I do to get this off my credit report ?

^ | v 1 • Reply • Share ›

Andy Giroux • a year ago • edited

So it says deferments should not affect credit score, but I don't believe it. My credit has dropped 40 points since deferred payment remarks started showing up on my credit report.

The only other change was an overall debt balance increase of $70, which doesn't change my credit utilization as it was interest on my home loan I believe.

And even if it was a credit card it would be such a tiny percentage increase it would never drop me by 40 points

Any ideas on what is going on here?

Thanks!

^ | v 1 • Reply • Share ›

TQ ➚ Andy Giroux • a year ago

Hi Andy, thanks for your question. Can you check if this drop in your credit score is happening on a FICO Score? If the score in

Thank you so much for pointing this out. You are absolutely right. The scores I'm seeing are from TransUnion and Equifax.

• Reply • Share ›

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A consumer's #FICOScore is calculated using the most up-to-date information available. Get the #FICOFacts here:... https://t.co/srJnNy1sK8

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After attending FICO's #ScoreABetterFuture credit education event, Nicole shares her achievements in this #credit s... https://t.co/srDw3v3tUC

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Exhibit O

Consumer Reporting FAQs Related to the CARES Act and COVID-19 Pandemic

This is a Compliance Aid issued by the Consumer Financial Protection Bureau. The Bureau published a Policy Statement on Compliance Aids, available at https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/policy-statement-compliance-aids/, that explains the Bureau's approach to Compliance Aids.

QUESTION 1:

Shortly after Congress enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. 116-136, the Bureau issued a statement addressing consumer reporting and the CARES Act. What did that statement say?

ANSWER (UPDATED 6/16/2020)**:**

On April 1, 2020, the Bureau issued a Statement on Supervisory and Enforcement Priorities Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act (Statement). In the Statement, the Bureau informed furnishers of their responsibilities under the CARES Act amendments to the Fair Credit Reporting Act (FCRA) and stated that the Bureau expects furnishers to comply with the CARES Act. Under the CARES Act amendments to the FCRA, a consumer whose account was not previously delinquent is current on their loan if they have received an accommodation and make any payments the accommodation requires.

The Statement also addressed the FCRA requirements for consumer reporting agencies and furnishers to investigate disputes within specific timeframes. The Bureau indicated that in evaluating compliance with these dispute investigations timeframes, the Bureau will consider the individual circumstances that consumer reporting agencies and furnishers face as a result of the COVID-19 pandemic. The Statement makes clear, however, that the Bureau expects furnishers and consumer reporting agencies to make good faith efforts to investigate disputes

as quickly as possible, and that absent impediments due to COVID-19, disputes should be resolved under FCRA requirements.

QUESTION 2:

The CARES Act requires that furnishers must report as current certain accounts for consumers affected by the pandemic. What did the Bureau's Statement say about enforcement of this requirement?

ANSWER (UPDATED 6/16/2020)**:**

As noted above, the Statement informed furnishers of their responsibilities under the CARES Act amendments to the FCRA and stated that the Bureau expects furnishers to comply with the CARES Act. The Bureau is enforcing the FCRA, as amended by the CARES Act, and its implementing regulation, Regulation V.

The Bureau is committed to protecting consumers, particularly during this pandemic. Since the Bureau's inception, it has dedicated significant resources toward enforcing the FCRA and Regulation V, through robust supervisory and enforcement actions at both consumer reporting agencies and furnishers. This work has continued as the Bureau evaluates specific risks to consumers as a result of the COVID-19 pandemic. The Bureau has focused on credit reporting accuracy and dispute handling – both obligations of consumer reporting agencies and furnishers.

The Bureau remains committed to vigorously enforcing all consumer financial protection laws under its jurisdiction, including the FCRA. As noted in the Bureau's Statement, the Bureau will consider the circumstances that entities face as a result of the COVID-19 pandemic and entities' good faith efforts to comply with statutory and regulatory obligations as soon as possible. The Bureau will, however, not hesitate to take public enforcement action when appropriate against companies or individuals that violate the FCRA or any other law under its jurisdiction.

QUESTION 3:

The FCRA requires furnishers and consumer reporting agencies to conduct investigations of disputes within specified timeframes. What did the Bureau's Statement say about citing or suing furnishers for violating the FCRA for failure to investigate disputes?

ANSWER (UPDATED 6/16/2020)**:**

While the Bureau's Statement indicated that the Bureau would provide some flexibility in its supervisory and enforcement approach during the COVID-19 pandemic to help furnishers and consumer reporting agencies manage the challenges of the current crisis (see FAQ #1), the Statement did not say that the Bureau would give furnishers or consumer reporting agencies an unlimited time beyond the statutory deadlines to investigate disputes before the Bureau would take supervisory or enforcement action. Furnishers and consumer reporting agencies remain responsible for conducting reasonable investigations of consumer disputes in a timely fashion. The Statement makes clear that the Bureau expects furnishers and consumer reporting agencies to make good faith efforts to investigate disputes as quickly as possible when they are impacted by COVID-19. Furnishers include a wide variety of businesses that vary in size and sophistication and can range from small retailers to very large financial services firms. The Bureau has jurisdiction over the hundreds of consumer reporting agencies in operation, which include smaller and specialty consumer reporting agencies. Many of these furnishers and consumer reporting agencies face unique challenges due to the COVID-19 pandemic. Thus, the Bureau believes it is appropriate to evaluate individually the efforts and circumstances of each furnisher and consumer reporting agency in determining if it made good faith efforts to investigate disputes as quickly as possible.

QUESTION 4:

The CARES Act addresses accommodations to consumers impacted by COVID-19. What is an accommodation for purposes of the CARES Act amendments to the FCRA?

ANSWER (UPDATED 6/16/2020)**:**

An "accommodation" includes any payment assistance or relief granted to a consumer who is affected by the COVID-19 pandemic during the period from January 31, 2020, until 120 days after the termination of the COVID-19 national emergency declared by the President on March

13, 2020 under the National Emergencies Act.[1] Such an accommodation includes, for example, agreements to defer one or more payments, make a partial payment, forbear any delinquent amounts, or modify a loan or contract.[2] An accommodation includes assistance or relief that is granted voluntarily or pursuant to a statutory or regulatory requirement.

QUESTION 5:

Under the CARES Act, is there a requirement that furnishers provide accommodations to consumers impacted by the pandemic?

ANSWER (UPDATED 6/16/2020)**:**

The CARES Act requires accommodations for two specific types of loans. First, consumers with a Federally backed mortgage loan (as that term is defined in the CARES Act) may obtain a forbearance from their mortgage servicer upon request and the borrower's attestation of a financial hardship due to the COVID-19 emergency.[3] Second, the CARES Act provides automatic suspension of principal and interest payments on Federally held student loans through September 30, 2020.[4] Even if accommodations are not required by the CARES Act or by other applicable law, the Bureau and other Federal and State agencies have encouraged financial institutions in prior guidance to work constructively with borrowers who are or may be unable to meet their contractual payment obligations because of the effects of COVID-19.

QUESTION 6:

If a furnisher provides a consumer an accommodation, what are its consumer reporting obligations?

ANSWER (UPDATED 6/16/2020)**:**

Section 4021 of the CARES Act amends the FCRA to address how furnishers report accounts subject to an accommodation. For more information on what constitutes an accommodation for

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[1] CARES Act, Pub. L. 116-136, section 4021, *codified at* FCRA section 623(a)(1)(F)(i)(I), 15 U.S.C. 1681s-2(a)(1)(F)(i)(I).

[2] *Id.*

[3] For more information on the CARES Act forbearance requirements for Federally backed mortgage loans, see prior Bureau guidance and FAQs.

[4] For more information on the CARES Act requirement to suspend payments for Federally held student loans, see CARES Act, Pub. L. 116-136, section 3513.

purposes of the CARES Act, see FAQ #1 above. As noted in FAQ #1, furnishers can grant accommodations voluntarily or pursuant to a statutory or regulatory requirement. The CARES Act provisions addressing how furnishers report accounts subject to an accommodation apply if: (1) a furnisher makes an accommodation with respect to one or more payments on a credit obligation or account of a consumer, and (2) the consumer makes the payments or is not required to make one or more payments pursuant to the accommodation.

If the credit obligation or account was current before the accommodation, during the accommodation the furnisher must continue to report the credit obligation or account as current.

If the credit obligation or account was delinquent before the accommodation, during the accommodation the furnisher cannot advance the delinquent status. For example, if at the time of the accommodation the furnisher was reporting the consumer as 30 days past due, during the accommodation the furnisher may not report the account as 60 days past due. If during the accommodation the consumer brings the credit obligation or account current, the furnisher must report the credit obligation or account as current. This could occur, for example, if the accommodation itself brings the credit obligation or account current (such as a loan modification that resolves amounts past due so the borrower is no longer considered delinquent) or if the consumer makes past due payments that bring the credit obligation or account current.

These CARES Act provisions addressing how furnishers report accounts with an accommodation do not apply with respect to credit obligations or accounts that creditors have charged off.

For additional requirements regarding payment suspensions and furnishing information about Federally held student loans, see section 3513 of the CARES Act.

QUESTION 7:

What do furnishers need to consider when reporting consumers as current pursuant to the CARES Act?

ANSWER (UPDATED 6/16/2020)**:**

Whenever furnishers provide information to consumer reporting agencies, they have obligations related to the accuracy and integrity of the information they furnish under the FCRA and Regulation V.[5] To ensure compliance with these obligations, if furnishers are reporting

[5] *See* FCRA section 623, 15 U.S.C. 1681s-2; 12 CFR part 1022, subpart E.

information to consumer reporting agencies about a credit obligation or account that is current, they should consider all of the trade line information they furnish that reflects a consumer's status as current or delinquent. For example, information a furnisher provides about an account's payment status, scheduled monthly payment, and the amount past due may all need to be updated to accurately reflect that a consumer's account is current consistent with the CARES Act. Furnishers are encouraged to ensure they understand the data fields that the consumer reporting agencies to whom they report utilize and which standard data reporting formats may apply.

QUESTION 8:

Can a furnisher comply with the requirements of the CARES Act relating to reporting of accommodations simply by using a special comment code to report a natural or declared disaster or forbearance?

ANSWER (UPDATED 6/16/2020)**:**

As discussed in FAQ #3 above, the CARES Act requires a furnisher to report a credit obligation or account as current if it was current prior to the accommodation or not to advance the level of delinquency if it was delinquent prior to the accommodation. Furnishing a special comment code indicating that a consumer with an account is impacted by a disaster or that the consumer's account is in forbearance does not provide consumer reporting agencies with this CARES Act-required information and therefore furnishing such a comment code is not a substitute for complying with these requirements.

QUESTION 9:

Is a furnisher permitted to report all of their consumers' accounts or all of their consumers' accounts in a particular product line (*e.g.*, all auto loans) as in forbearance?

ANSWER (UPDATED 6/16/2020)**:**

To ensure compliance with their obligations related to the accuracy and integrity of the information they furnish under the FCRA and Regulation V,[6] furnishers should not report that consumers' accounts are in forbearance if the accounts have not been placed into forbearance. The Bureau generally supports furnishers' voluntary efforts to provide payment relief to

[6] *See* FCRA section 623, 15 U.S.C. 1681s-2; 12 CFR part 1022, subpart E.

consumers but cautions that reporting forbearances on accounts for which consumers have neither requested a forbearance nor are delinquent increases the risks of inaccurate reporting and consumer confusion.

QUESTION 10:

What must furnishers do in reporting the status of an account after a CARES Act accommodation ends?

ANSWER (UPDATED 6/16/2020)**:**

The consumer reporting protections of the CARES Act continue to apply to the time period that was covered by the accommodation after the accommodation ends. Assuming payments were not required or the consumer met any payment requirements of the accommodation, a furnisher cannot report a consumer that was reported as current pursuant to the CARES Act as delinquent based on the time period covered by the accommodation after the accommodation ends. A furnisher also cannot advance the delinquency of a consumer that was maintained pursuant to the CARES Act based on the time period covered by the accommodation after the accommodation ends.

Exhibit P

CARES Act Reporting Guidelines

KEY NOTES

We are providing the following information for your convenience and to assist you with reporting in accordance with the CARES Act. The purpose of this material is to provide guidance in Metro 2® reporting. This information is not intended to be legal advice. Please review your reporting policies with your legal and compliance teams.

We recommend that you do not suppress or suspend reporting your entire portfolio or delinquent accounts.

It is also important to remember that you should not update the Accommodation Payment History Profile entries post the Accommodation period.

Furnisher – CARES Act Reporting

- **Report the following Base Segment fields as specified if the account was current prior to the Accommodation period:**
  - Highest Credit or Original Loan Amount = the total amount borrowed
  - Credit Limit = assigned Credit Limit for the account
  - Scheduled Monthly Payment Amount = zero
  - Account Status Code = 11 (Current account)
  - Payment History Profile (report **All** prior history)
    - Report value 0 for the months during the Accommodation period
    - As an option, increment the Payment History Profile with value D during the Accommodation period
  - Current Balance = outstanding balance amount
  - Amount Past Due = zero
  - For all other Metro 2® fields, the standard guidelines described within the Field Definitions module of the CRRG® should be followed.

- **Report the following Base Segment fields as specified if the account was delinquent prior to the Accommodation period**:
  - Highest Credit or Original Loan Amount = the total amount borrowed
  - Credit Limit = assigned Credit Limit for the account
  - Scheduled Monthly Payment Amount = zero
  - Account Status Code = Delinquency Status 71 – 84 as reported prior to the Accommodation period (example 30-day delinquency prior to the period remains a 30-day delinquency throughout the Accommodation period)
  - Payment History Profile (report **ALL** prior history)
    - Report appropriate code that specifies the previous month's Account Status for each month the account is in the Accommodation period
    - As an option, increment the Payment History Profile with value D during the Accommodation period
  - Current Balance = outstanding balance amount
  - Amount Past Due = APD as reported prior to the accommodation period
  - For all other Metro 2® fields, the standard guidelines described within the Field Definitions module of the CRRG® should be followed

- **Report the following Base Segment fields as specified if the account is brought current during the Accommodation period**:
    - Highest Credit or Original Loan Amount = the total amount borrowed
    - Credit Limit = assigned Credit Limit for the account
    - Scheduled Monthly Payment Amount = zero
    - Account Status Code = 11 (Current account) or 13 (Paid account)
    - Payment History Profile (report **All** prior history)
        - Report appropriate code that specifies the previous month's Account Status for each month the account is in the Accommodation period
        - As an option, increment the Payment History Profile with value D during the Accommodation period
    - Current Balance = outstanding balance amount **OR** zero if Paid
    - Amount Past Due = zero
    - For all other Metro 2® fields, the standard guidelines described within the Field Definitions module of the CRRG® should be followed

If furnishers elect to utilize the Metro 2® FAQ 44 (Deferred), FAQ 45 (Forbearance) or FAQ 58 (Natural Disaster), they should do so in accordance with the CARES Act amendment to the FCRA as outlined above.

Exhibit Q

WASHINGTON STATE SENATE

BUSINESS, FINANCIAL SERVICES & TRADE COMMITTEE

Hearing on Credit Scoring Ban Impact on Insurance Rates

September 21, 2021

PRESENT AT THE MEETING:

Chairman Senator Mark Mullet

Senator Perry Dozier

Senator Lynda Wilson

Senator Bob Hasegawa

Senator T'wina Nobles

Senator Sharon Brown

STAFF:

Kellee Gunn, Research Analyst

Noah Powelson, Session Committee Assistant

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September 21, 2021

SENATOR MULLET: -- what's going on in this hearing. So we call this meeting of the Senate Business Financial Services & trade Committee today to assess how emergency rulemaking by the Office of the Insurance Commissioner has affected insurance premiums. In March, the insurance commissioner issued an emergency rule banning insurance companies from using credit scores in determining personal insurance premiums.

I understand most insurance companies have complied with that rule. I also understand that many insurance customers have observed changes in their premium rates. We are here today to understand those changes, who has been impacted by the rule, and how they have been impacted to determine whether future legislation may be needed.

We are not here to examine the insurance commissioner's authority to issue the emergency rule, which is currently the subject of a legal case before the Thurston County Superior Court.

Each of our three branches has an appropriate role to play in government. Out of respect for the Court's role, I'll be limiting today's committee hearing to the question of how the emergency rule has impacted premiums. This hearing will

not examine the underlying validity of the rule, the process by which it came into being.

This hearing will also not examine any pending litigation. We are here solely to examine the impacts of this policy. As a result, I ask the committee members and individuals offering testimony please limit any questions, remarks to that narrow question. And, hopefully, that makes sense.

So, obviously, in nonlawyer speak, we're just trying to make sure that, whether there was the legal ability for the commissioner to issue the emergency order is dealt with through the court process that I think there will be a hearing on next month. And this -- the point of the hearing today is to hear how Washington residents have been impacted by the changes in the insurance premiums.

And, with that, why don't we have -- Kellee Gunn, I think, is going to give us an update.

MS. GUNN: Thank you. Good morning. For the record, again, Kellee Gunn, nonpartisan staff to this committee. I will be providing a short briefing on the Office of the Insurance Commissioner's rule prohibiting the use of credit history and insurance scores, and providing some relevant background information. If you have questions, I will be followed by two panels: One from the Office of the Insurance Commissioner, and another consisting of insurance industry folks. So they will be able to provide specific

information as to implementation of the rule.

For background, since 2002, credit-based insurance scores in Washington State have been controlled by state law. Under that law, credit history may only be used to deny personal insurance in combination with other substantive underwriting factors and certain debts and elements of credit history are prohibited. These include medical debt and lack of credit.

On March 22nd of this year, the Office of the Insurance Commissioner filed an emergency rulemaking order to temporarily prohibit the use of credit history in determining premiums and eligibility for coverage in three (inaudible). Those include private automobile, homeowners', and renters' insurance. The statutory authority for this emergency rule, per the rulemaking order, stems from, quote, the negative economic impact of the coronavirus --

SENATOR MULLET: Is anyone else having problems with a screen that's freezing?

SENATOR WILSON: No. Mine is good.

MS. GUNN: I will continue, hopefully, if people can hear me.

SENATOR WILSON: Yes.

MS. GUNN: So this stems from the negative income impact of the coronavirus pandemic, which has resulted in insurance credit stores impacting premiums in a way that is excessive,

inadequate, or unfairly discriminatory, end quote.

The emergency rule took effect that it was -- the day it was filed. That was March 22nd. But on March -- on June 20th of this year, the prohibitions of this rule began for all new policies, and those up for renewal on or after that date. So that is the date in which it started affecting insurance premiums.

A preproposal statement of inquiry is CR 101. The form to begin regular rulemaking was filed on June 22nd by the Office of the Insurance Commissioner. This regular rule supports the effects of the OIC's emergency rule. A first and second stakeholder draft have been released. And the most recent draft is -- was published on September 7th. Both the emergency rule and the regular rule proposal forms are in your EBB.

To the extent this rule is adopted as a permanent rule, it is in effect for three years following either the national emergency concerning the Novel coronavirus outbreak terminates, or the day the governor's state of emergency proclamation regarding the COVID-19 outbreak expires, whichever is later. So we're not quite yet in that three-year period.

You may recall this last session the committee heard Governor and OIC agency requests legislation. That was Senate Bill 5010 that would have prohibited the use of

credit history in the insurance scores. The initial proposed bill would have prohibited the use of credit history in determining rates, premiums, or eligibility for coverage in personal insurance. An amended version passed out of this committee, but did not pass off the Senate floor -- or was not heard off the Senate floor.

As the chair of the committee mentioned in his opening remarks, this emergency rule is currently being challenged by the insurance industry in Thurston County Superior Court. Petitioners include American Property Casually Insurance Association, Independent Insurance Agents and Brokers of Washington, and the National Association of Mutual Insurance Companies.

And, with that, I'm available for any questions. As noted, the OIC and the insurance industry have panels that will be coming up next, and they may be able -- may be able to provide answers to how this rule has been implemented and its affects.

SENATOR MULLET: Okay. Excellent. Are there any questions for Kellee? And I'm going to -- my computer is doing weird things, so I think I might have a slightly unstable Internet connection.

So, Senator Dozier, if I do have to pop out, I will have you take over the hearing, and I'll just resign in and hopefully have a better connection, but -- because on my

side, Kellee froze a few different times during that update, so -- but it sounds like it was just something happening at my house, nowhere else.

So, with that, I think the Office of Insurance Commissioner is here. We have Jon Noski and David -- I know David. I should know your last -- it's Forte, right? Or is it Forte?

MR. FORTE: It's Forte.

SENATOR MULLET: It's Forte.

MR. FORTE: It's Forte.

SENATOR MULLET: The E is silent. I'm crossing off the E on your name so I will remember that going forward. And go ahead. Okay. John and David.

MR. NOSKI: Thank you, Chair Mullet and members of the committee. Thank you for the opportunity for us to be here today. For the record, I am Jon Noski, the legislative liaison for the Office of the Insurance Commissioner, and I am accompanied by my colleague David Forte, OIC's lead policy analyst for property and casualty insurance.

I'll be providing some opening remarks before handing this presentation over to David. And since Kellee did such a fantastic job with her intro, I'll be extra brief.

I'm going to start by stating that RCW 34.05.350, within the Administrative Procedure Act, provides the insurance commissioner authority to implement emergency rules.

Now, the emergency rule we are here for today took effect on June 20th and temporarily prohibits the use of credit history to determine premiums and eligibility for coverage in private automobile, homeowners', and renters' insurance products. Those who were up for a policy renewal will be notified by their insurance company about possible rate changes. Many people already have been, as you're aware, and I wouldn't be surprised if many of you have been. I have been.

And, as mentioned by the Chair, this rule is currently being challenged in the Thurston County Superior Court by members of the insurance industry, but we respect the parameters that have been set for this work session, and we will keep our focus on how this rule impacts premiums.

Before we do dive in, I'll explain some context for this emergency rule. Now, the commissioner is tasked with insuring that insurance rates are not excessive, inadequate, or unfairly discriminatory. Insurance companies claim that the credit-based insurance score is a predictive measure in their rate filings, and, thus, affects one's premiums that they are charged.

Due to the national public health emergency, the federal government took action where it could to assist the public from the economic disruption that the pandemic has caused, which is laudable. However, the protections offered by the

federal government relating to credit reporting is not required to be afforded to all consumers.

And now the commissioner has found that this imbalance of protection for credit history across all consumers has caused credit-based insurance scoring models to be unreliable and inaccurate when applied to produce a premium amount for an insurance consumer in Washington State. Due to not knowing when the public health emergency will end, companies must immediately engage a rating model that does not use a claimed predictive tool that inputs a temporary inaccurate factor. And now with that background context, I will turn this presentation over to David.

SENATOR MULLET: Yeah. Can I ask, when you say -- because my understanding of the way the CARES Act worked is there was always protections put in there so anything with credit was kind of protected through the CARES Act itself. When you say that didn't protect everybody, like, who is falling outside of the CARES Act protections from the federal government to make sure that whatever happened to their credit as a result of the COVID emergency was not going to be used against them, I guess?

MR. NOSKI: Yeah, absolutely. And I can dive into that, but I'm wondering if, David -- if you wanted to respond.

MR. FORTE: Sure. I'm happy to. So I would say that there's three main areas there. So in CARES Act Section

4021, this provides a loan furnisher if they accommodate a borrower, they are allowed to report it as a current. So if they make arrangements to miss payments, pay less, or whatever the accommodation is, that's allowed to go as current on the credit history. And that is an "if." There's an "if" there. If the borrower is accommodated.

The second section is --

SENATOR MULLET: But, David, didn't everyone have to be accommodated by the CARES Act rule? Or not necessarily, I guess? Or is that just people with Fannie Mae and Freddie Mac loans? Or what was --

MR. FORTE: So I think we're going into the next section. That's Section 4022. So if you have a federally-backed mortgage, then you have some protections. But for those that have conventional loans, you would fall outside that protection.

And then there's also the section relating to federally-backed student loans, treated differently than private student loans. So those are -- those are the three areas.

SENATOR MULLET: Okay. Okay. You can go ahead, David, with your presentation.

MR. FORTE: Okay. Well, good morning, Chair Mullet, and members of the Senate Business Financial Services and Trade Committee. My name is David Forte and I serve as the

property and casually policy analyst at the Office of the Insurance Commissioner. I've been assigned within the agency to facilitate the efforts involving the emergency rule and the regular rulemaking relating to the temporary prohibition on the use of credit history. So thank you for the opportunity to provide information on how the emergency rule impacts premium costs for these insurance products.

Noah, can we do the next slide? And let's get to it.

So you may hear some insurance terms today that can be confusing. An insurance rate is different than an insurance premium. Premium is the amount of money an insurer charges to provide the coverage described in the policy.

An insurance rate is a unit of cost that is multiplied by an exposure base to determine an insurance premium, often using multivariant statistical models to do so.

Now, how these models get to determining an insurance premium is complicated. It takes years of studying and experience in actuarial science to fully comprehend the process. However, important for the committee members to understand is there are numerous rate factors that make up one's premium costs for their specific policy.

I have listed 30 here on this slide, and there may be another 30 or more that companies may use. Each company can choose what it wants to use as a rate factor and how much influence each of them have to determine a premium cost.

So this is why when a consumer or yourself shop around, you may find better pricing with some companies and not others. It depends on how you or the person's risk profile aligns with the company's rate profiles.

The next slide, please.

So let me describe how the emergency rule was designed. First, it is temporary, lasting for three years following the end of the public health emergency. The three years coincides with the insurance code requirement that insurance companies must update a consumer's credit score at least every three years.

Next, as it requires insurance companies to remove the impact of the insured's credit history, it does this by allowing a neutral rate factor. So all the insurance companies submitted what they wanted that neutral rate factor to be; and, therefore, in effect, everyone for that company has the same rate factor relating to credit history, thus, removing its impact in the overall pricing structure.

By designing it this way, the OIC actuaries were able to review and approve 177 rate filings from 128 individual insurance companies in just a few weeks. So despite the fears that --

SENATOR MULLET: Can --

MR. FORTE: Yes, sir.

SENATOR MULLET: I was going to say, David, can I ask,

like -- I mean, this is interesting. So, I mean, the OIC's view doesn't have to be a zero-sum game. Because, clearly, what you've laid out here in this slide is a lot of people's rates are going up and that a lot of people's rates are going down. It seemed like in the bill that moved out of the committee during this session was trying to find the way to not have it be a zero-sum game, was to let people who benefitted from credit score discounts keep those benefits and then find ways to help people who are being penalized through credit scores.

I mean, what -- does the Office of the Insurance Commissioner firmly believe that it just has to be like this slide, where it has to be a zero-sum game? There's no way just to help people who aren't benefitting without then panelizing people who did get the discounts?

MR. FORTE: Well, sir, I'm really here to talk about the emergency rule. And for the emergency rule, it was designed this way, one, to accommodate insurance companies to be able to approve 177 rate filings in just a few weeks.

And then, also, by neutralizing it, the -- what that does is it does cause a premium neutral situation, so -- meaning, as it relates to credit history, the amount of premium costs that increased for some, is decreased for others. And so --

SENATOR MULLET: I guess, based on this slide -- I mean, it seems like if there's four and a half million drivers,

let's say, in Washington, it seems like, based on the initial things that came in this summer, like, half the people were seeing increases. Is that the same map you guys are seeing from the OIC that there's over 2 million people, then, who see an increase in their insurance costs as a result of what's in front of us?

MR. FORTE: Well, next coming slides I have examples of how companies chose to do it. Because companies were able to pick their neutral rate factor, companies were choosing how it impacted their books of business.

So I would say you have a fair assessment that some people went up. Some people stayed the same. And, you know, many people actually had a reduction. So I hope that answers it. But maybe the next couple slides will help explain it a little bit better, so...

SENATOR MULLET: Senator Wilson has a question. One second.

MR. FORTE: Okay.

SENATOR WILSON: Thank you. I guess at the very top right it says that this is an emergency until three years after the emergency concludes. And you stated that it was because of how they have to review the policies that it has to stay in effect for three years after. I'm curious why it can't end when the emergency ends. I mean, at this rate, it could be three years, but who knows.

MR. FORTE: Well, you know, so the -- so the reasons for this are in our rule filings, and it's also subject of what's being litigated. So the three years --

SENATOR MULLET: If that's the case, let's stay away from that. If that's the case, let's stay away from those questions --

MR. FORTE: Yeah.

SENATOR MULLET: -- I guess. If anything that you guys feel is part of what's the active litigation, let's just keep moving on.

SENATOR WILSON: Um-hum.

MR. FORTE: Okay. But I can say the reason that I brought up the three years and in the context of it coinciding with the emergency, where the insurance code is just to provide some context of why the three years. It wasn't arbitrary.

So if it's okay, we can go on to the next slide.

Okay. So I have examples --

SENATOR MULLET: Can I ask on the -- can I ask on the three years, that was an OIC requirement. Like, when I first got to the Senate, I feel like -- I was elected in 2012. I just don't remember them, when I was first on the committee, having to pull credit every three years. I felt like if they chose to, like, they could go without even having a, like -- but I feel like in somewhere in the middle of my term -- time in the Senate in the last nine years --

maybe it was, like, 2016 that they started having to pole every three years. So was that an OIC requirement to do?

MR. FORTE: It is a WAC. It's WAC 284 -- I want to say 284-21-40 -- 284-24-140. And I'm not sure when that rulemaking happened. I'm happy to get back to you, though, with it.

SENATOR MULLET: Okay. And that came from the Office of the Insurance Commissioner, the three-year requirement. Okay. Okay. I apologize. Keep going.

MR. NOSKI: Chairman, we'll get back to you with that WAC and that information.

SENATOR MULLET: Okay.

MR. FORTE: Okay. So I have examples from three different companies. And this is how they reported to us how they projected their premiums to be affected. So this is Company A. And this is showing their homeowner premium changes. So the numbering across the bottom is how this company segmented their credit-based insurance score into 18 buckets.

So the one on the left is the lowest score, and 18 on the far right is the highest score. And so this graph shows the expected percent change of premium for each segment. So you'll see Column 10. That was the neutral zone there for them. And as we go to the right, the premium costs will increase. And as we go to the left from Column 10, we show

how they decrease up to 35 --

SENATOR MULLET: Can I --

MR. FORTE: -- percent.

SENATOR MULLET: Can I ask, David, from an actuarial basis -- because you guys have obviously been approving these filings for the last -- going to back to whatever Kellee said. I think 2002 or 2004. Like, are the people in that Group 1 and 2, are those the people who, at least, actuarially, are the ones filing more insurance claims? I mean, the ones in those -- and are the people in Group 17 and 18, are they the group filing the fewest amount of insurance claims?

MR. FORTE: So I believe that when a company submits that type of claim, they have to support it actuarially. So I believe companies do provide supporting information so that they could use these type of segments for pricing.

MR. NOSKI: Okay. So --

MR. FORTE: Okay. I don't know -- I don't actually have that (inaudible) --

MR. NOSKI: David, correct -- David, correct me if I'm wrong.

MR. FORTE: -- (inaudible).

MR. NOSKI: We're talking about credit -- and, David, correct me if I'm wrong. We're talking about credit scores here, so they're talking about credit scores as a

measurement of potential risk, not necessarily of claims filed. There's a rating factor for claims. We're talking about the credit score rating factor.

SENATOR MULLET: Okay.

MR. FORTE: Yes, there is a rating factor for claims history and claims filed. That's a separate and unique rating factor in there. And insurance companies do use credit-based insurance scores, which are based off credit score and credit history.

Some companies only use credit score in their credit-based insurance scoring. Some add other factors in there. But, yes, that -- they claim that it's a predictive measure of future loss or future claims.

So, in effect, what happens is the people that you see here in 1 and 2 and 3, they're getting penalized for having this low credit-based insurance score; in addition, that if they do file a claim, they get double dinged because there is a credit factor or a rating factor for claims history, so...

SENATOR MULLET: Okay. I guess I -- okay. You can keep moving. I think -- I think it would be helpful to the committee, though, to overlay on this are those groups in 1, 2, and 3 -- are they -- based on what you guys are approving the things, are they the ones -- are those the groups filing more claims than are Group 16, 17, 18, the groups filing the

fewest claims normally? I guess that would be really helpful to overlay on this slide. Because I think part of the anxiety from the committee is that the people filing the fewest claims are also the ones who have seen the largest price increases. But you can keep going. Go ahead. Keep moving forward.

MR. FORTE: I would -- Noah, if we could just go to the next slide.

SENATOR MULLET: Oh, Senator Dozier has a question.

MR. FORTE: I think another way to look at it --

SENATOR MULLET: I apologize. Senator Dozier.

MR. FORTE: Yes, sir.

SENATOR DOZIER: Thank you. A real quick question for you, David.

So when I look at this, too -- so what about ability to pay? So we know that maybe the credit scores are high. Is it also factored in their ability to pay? So when we look at 1, 2, and 3, you know, if they're not paying their insurance claim -- or their insurance premiums, even if they're up or behind on them, is that factored into it, also, or not?

MR. FORTE: No. That's a different consideration. Insurers can cancel a policy for nonpayment of premium. This is -- my understanding, it doesn't have anything to do with the insurance company's view of whether they can make

premium payments.

But, you know, an interesting point is, we're -- when we're talking about claims -- and maybe this has happened in your life or you know somebody -- the ability to not use your insurance is a factor. What -- and this is a good question to ask the insurance industry when they -- when they say this is -- correlates with insurance claims. But that doesn't mean it insures with accidents that actually happened.

You've heard that, Hey, I don't want to file a claim because my insurance rates go up. Well, that's true. And some people choose not to file a claim so they don't have that happen. And they absorb the loss with their own wherewithal that they can.

Some people have to use their insurance that can't do that. So claims just means they had to use their insurance. That's the only comment I have there.

This is Company A, so it's the same company. This is how they viewed the change on their renters' premium rates. So the previous slide was homeowners'. And this is renters'. The difference here is they gave us 16 buckets of credit-based insurance score. And you can see how on the far right, with the highest score, they're projecting a 16.8 percent increase. And then as it goes down from 12 down to a 42.2 percent reduction in premium for the lowest rate

there.

The next slide.

Okay. So here is Company B. This is an auto insurance company. And they provided the information a little different to us. They put it into buckets of $100. So here they say 45 percent of their policies are going to see a 0 to $100 premium change.

And at the other side is -- as you can see to the left of there, that's the policies that are getting a reduction in premium. And then to the right, those are the ones that are getting an increase.

And the next slide.

This is my last one on this. So this is Company C. This is also an auto insurer. And they provided a little bit more information. And you can kind of see here on the bottom that we have the expected premium change across their auto insurance line, the percentage of policies affected, the percentage of premium change. And they were able to provide an average premium change for the term of the policy.

So here they say 23.1 percent of the policies may see an average of a $31 increase for the policy term up to, on the far right, 7.1 may see an increase of 184.

If we go to the left there, we start to see on the far left that 6.6 will see an average reduction of $332.

SENATOR MULLET: And, David, when I'm doing the math on this, am I correct in -- based on your chart, that 60 percent -- six, zero -- 60 percent of these people had an increase in their insurance costs as a result of the emergency rule. Is that -- am I adding that up correctly?

MR. FORTE: That's what this -- that's what this company projected. So they projected that 60 percent would see some type of an increase, and 40 percent would see a significantly more decrease because it is a premium neutral situation.

SENATOR MULLET: Okay.

MR. FORTE: Okay. Next slide, please.

Okay. So just to recap. Those are some examples of how three different companies reported their expected change in premiums. And we've talked about how the emergency rule allowed for a neutral rate factor relating to one's credit history. And it requires, then, that the increases in premium for some are equally decreased for others across the company's insurance products.

It's also important to understand going back to all those different rating factors that I talked about earlier. Those are all still in play. And folks getting an increase in their renewals may also be attributed to those certain rating factors being applied, like age, for example. After a certain age, going forward, one's auto insurance premium

will cost more.

Additionally and significant for the committee members to know, as soon as each company's emergency rule rate filing was approved this past spring, they're able to submit an additional filing to optimize their rate plans to readjust the rate factors as they desire.

Now, most of these companies already have experience in rate models that do not consider credit history, as they do business in other states that prohibit the use of it. Now, some have already submitted these to the OIC and are looking to be more competitive in our market. And many have yet to do this and may be falling behind.

Next slide.

SENATOR MULLET: Can I ask -- can I ask for -- I don't know if it's David or Jon. But, obviously, sometimes there will be -- I guess they call it, like, rate stabilization. Like, if you know you're going to increase insurance rates for 60 percent of the people, you let it be phased in over time so those people can budget for that increase better.

Like, what was the thought process from the Insurance Commissioner's Office of why you specifically prohibited that to be allowed in the emergency rule? Like, why not allow the increases to be phased in gradually over time so it wouldn't be such a big hit to be people up front?

MR. FORTE: Yeah. And I want to get an accurate response,

so I'm going to have to provide you the actuaries' comments on that. And I'll have to get back to you on that. But that was discussed and chosen not to do rate stabilization for a reason. And we'll have to provide that for you.

SENATOR MULLET: Okay.

SENATOR DOZIER: Mark --

SENATOR MULLET: Oh, Senator Dozier.

SENATOR DOZIER: Okay. Thank you. Hey, just to kind of follow up on that. That's one of the things I jotted down here. So, basically, if you were living paycheck to paycheck before anyway, this emergency rule, keeping up with all of your payments that you had to make, you had a good credit rating, what it shows me is that all of a sudden now we have this emergency rule coming out and you're going to be impacted by some of these increases, even though you have been keeping up with your payments. And so now that's going to impact your credit rating at that point as you start falling behind.

And this is kind of the concept I think that Senator Mullet brought up. I mean, because we didn't phase it in, all of a sudden you've got this big hit and we haven't seen any changes in the ability for these people to budget it into their living expenses.

MR. FORTE: Well, sir, I would -- I would go back to the comment that I made about shopping around. You are going

to -- if you're in a spot where you need to look around for insurance, there's going to be a company out there that aligns better with your risks. And you're going to be able to find the price point that works for you for the coverage you need. So I understand the point that you're raising that it may be difficult for some. I don't want to have to look for insurance. But this is really the best time to go look for an insurance company that best aligns with your risks.

MR. NOSKI: And I'd just like to say that, yes, there were --

SENATOR DOZIER: So what you're telling me -- so what you're telling me is if I've been loyal to my insurance company for 40 years, always taken care of things, now you're telling me because of this I should go look around and not give that loyalty to a company that has accommodated my needs just to price shop. Is that what you're telling me?

MR. NOSKI: Well, the question could be turned on to the company for not giving their loyalty to you by redoing their rate structure, submitting it to OIC for us to approve, to mitigate the neutral rating factor, thereby alleviating the sting of the increase that they're charging.

SENATOR DOZIER: That sounds discriminatory, then, doesn't it?

MR. NOSKI: Not if -- not if the rating model already --

SENATOR DOZIER: They're selectively --

MR. NOSKI: Not if the rating model has no discriminatory factors included in it.

SENATOR MULLET: Senator Wilson has a question. Let's go to Senator Wilson.

SENATOR WILSON: Oh, mine is right along the line with Senator Dozier. Exactly, there's -- you're with an insurance company for years. Nothing changes. There are no claims. There are no changes in anything. And all of a sudden their rates go up.

So I certainly would go to my insurance company and ask why, and I've done that before. And they come back with, Well, they just changed the rating and we don't know why.

Because that was a question I had is why is it that they can just change your rating without explaining to the customer why it happens. Because they can't get from their underwriters' information.

And that's what's happening here is what it seems like is that they're getting -- their rates are going up and the answer is: Well, just rate changes. And, well, of course, there was a huge change here with the fact that you can't use your credit store to -- that they've been using all along.

So it does seem discriminatory here in that you can't use

that and now all of a sudden -- and our elderly people who are on fixed incomes are really feeling the brunt of this. So I don't know. I think there needs -- I feel like there should be a better explanation.

MR. NOSKI: Right. So we do have more to our presentation, if you -- if you would like us to continue. And we're happy to --

SENATOR MULLET: Yeah. Let's try to finish because we want to -- we want to keep the hearing -- we want to make sure we have time to hear from all of the folks at Washington who have been impacted. So go ahead.

MR. FORTE: Well, I think Senator Wilson makes a good point. The insurance companies should be very transparent on what is occurring with your rate. If you're getting increases to all sorts of certain rate factors, that -- you should note all of those and not just highlight one or another. So I think that's a really good point.

If we could go to the next slide. This is my -- this is my last slide.

So we have regular rulemaking, as Kellee mentioned. And this process really began as soon as the emergency rule was filed. There have been a couple stakeholder drafts issued, multiple comment periods made available. The rule team is currently reviewing the rule comments now and working on the rule language. The next phase will be to issue another

working draft for comment or to file the proposed rule language with the code revisor and open it for comment.

So thank you for your time. I'm hand it back over to Jon.

MR. NOSKI: Thank you, David. And as we conclude, I just want to briefly address some of the concerns we've heard from members like yourselves just a moment ago, and consumers about how this emergency rule is impacting consumers.

As David demonstrated, a lot of folks with less than perfect credit who have been shouldering these heavy costs, despite no claims or tickets, are now receiving significant reductions. We recognize that doesn't make the sting any less for those who are being notified that their prices will go up. We understand their frustration.

In many cases, consumers in this situation -- myself included -- have been able to work out a lower quote with their company, and many others are finding lower quotes by shopping around with other companies.

And to go off script a little bit here, you know, I would say that, you know, we understand that the prohibition of the industry's use of credit scoring temporarily will disrupt the market. And I've just got to say I think that these market adjustments are the result of the unfortunate extent to which the industry relied so heavily on credit histories for setting costs, perhaps instead of more

relevant rating factors.

You know, consumers should demand transparency from their insurance company, so they should know how much their credit scores impacted what they paid for coverage. And if they never filed claims and had clean driving records, they should ask their company why they are paying more now.

OIC's consumer advocacy program has found -- and one example and in many others, but I'll give one example -- a consumer's 28 percent increase was only 7 percent due to the credit score ban. The remainder 21 of the increase was due to other factors. And this was not communicated to the consumer by their company. Many believe that they are now paying more to subsidize lower rates for people with low credit scores. And we've heard that a lot. And that is what consumers are hearing from their companies. And so it makes sense that they would believe that. But as to not --

SENATOR MULLET: Do you dispute that, Jon? I mean, do you dispute that fact?

MR. NOSKI: That it's a subsidy? I do dispute that, Chairman. Temporarily removing credit as a rating factor eliminates the so-called discount they have been receiving for decades, while people with low credit have been paying significantly more to support this discount. This rule is not giving a subsidy. In fact, I would argue that it's doing the opposite. It's taking one away.

And now, as David mentioned, that all companies have -- in Washington --

SENATOR MULLET: Jon, on that -- on that point, if the people receiving the lower rates were filing very few claims, like, how is that not a fair discount, I guess?

MR. NOSKI: Well, again, folks struggle -- you know, I think that there's been -- I think that there's been enough rhetoric about folks who have low credit being less worthy of paying rates that reflect their safety of their driving.

You know, we've heard the insurance council -- the Northwest Insurance Council make comments that credit scores are a reflection of one's life choices or personal responsibility. We know people in recessed -- economically recessed timber economy sometimes struggle with their finances, struggle with their credit. It doesn't mean they aren't working hard. It doesn't mean they aren't making good choices. But they're paying more than potentially somebody with traffic infractions, but good credit. That just doesn't seem fair. But they've been paying more, so that person, potentially with traffic infractions and good credit, can pay less.

SENATOR MULLET: Okay. Well, I do -- I know we want to keep moving. I do want to publicly thank both Jon Noski and David Forte. They are two of my favorite people at the Insurance Commissioner's Office. I really think you guys

are doing -- I mean, I -- you guys are very responsive, and I think you guys are excellent. Obviously, our -- the committee's preference was to have Commissioner Kreidler here directly. I know you guys are taking some difficult questions because he wasn't able to be here. So I really appreciate you guys taking the time to come and answer these questions. I really do.

MR. NOSKI: Well, thank you, Chairman. And I just want to make one more point, if I might, is that in reiteration of what David said, now that all companies in Washington have filed their rates in accordance with the emergency rule, they actually can file new rates with OIC that readjust the many remaining factors that they use to help their customers and also gain a competitive advantage.

And as David mentioned, some have done so already. And we would absolutely expect more would want to do so, as well.

SENATOR MULLET: How long do those -- or I see Senator Dozier has a question.

SENATOR DOZIER: I think, Senator, you were going to ask the question: How long does it take to get the rate filings (inaudible)?

SENATOR MULLET: Well, yeah. I was just -- when you say that, Jon, you say they can file new filings. Is that, like, a three-week turnaround, or is that a longer turnaround, or how long does it take for those?

MR. FORTE: Well, sure. It's going to depend on the complexity of the filings and -- but no matter what, the sooner you put it in, the sooner it's going to get approved.

SENATOR MULLET: Is there a rough timeline of when those --

MR. FORTE: Oh, it can vary. It could be a couple months. It could be longer. It just depends on the complexity of the filing.

SENATOR MULLET: Oh, so two months would be fast? Okay.

MR. FORTE: I'm sorry?

SENATOR MULLET: Two months would be fast for an approval of the filing; is that --

MR. FORTE: It really just depends on how complex it is. These rate filings, they can be a couple hundred pages to thousands and thousands of pages, so -- but if they want to get it approved, they have to get it in as soon as they can.

SENATOR MULLET: But I'm just saying hitting on September -- like, the emergency rule, as we learned during this hearing, started in June. So it would be -- and their original goal was just to get in compliance. And so it's not -- it would be hard for any of these companies to be able to offer their customers an approved new rate filing as of September 21st. Because it sounds like the process takes a fair amount of time for good reason. I'm not saying it shouldn't -- it should be fast. I --

MR. FORTE: So just to update that timeline, the first filings were approved in April, so they could have immediately done another filing shortly after that in three, four, five months to where we are now. It could have been approved. They could be operating under a different rate structure.

And, again, these aren't rate models they're unfamiliar with. They operate in states where credit history is already prohibited.

SENATOR MULLET: Okay. Well, thanks, again. I really appreciate you guys taking the time to be here.

MR. NOSKI: Thank you, sir.

SENATOR MULLET: Okay. So next I think we have Anthony Cotto and then Nancy Watkins and Eric Ellman. And we're going to try to get back on track. We want to make sure we leave time for people -- the constituents of Washington to be able to give their feedback.

But go ahead, Anthony. Do you want to go first?

MR. COTTO: Fantastic. Thank you. Can you guys hear me?

SENATOR MULLET: Um-hum.

MR. COTTO: Okay. Great. Thank you, Mr. Chairman, members of the committee, for the opportunity to join you again. My name is Tony Cotto. I serve as the director of auto and underwriting policy for the National Association of Mutual Insurance Companies. And on behalf of NAMIC,

especially our 138-member companies in Washington, who represent 48 percent of the state's insurance market, that the OIC just admitted to intentionally disrupting, I appreciate the opportunity to join you here today.

In consideration of the limited scope of today's meeting, I will provide just a few high-level conceptual remarks about what happens when credit-based insurance scores are removed from insurance underwriting and ratemaking. You will hear the real-world stories and lived experiences from your constituents and their agents who have seen their rates increase following my remarks.

As a policy matter, the objective of the insurance underwriting and ratemaking is to match rate to risk. It is this foundational principle that protects consumers from being overcharged to subsidized risks posed by other people. This is a critical concept because ignoring it means intentionally accepting that people less likely to experience (inaudible) will overpay for reasons having nothing to do with risk.

Efforts to match rate to risk work best when insurers are permitted to consider objective, scientifically proven, actuarially sound rating factors that most accurately predict the likelihood of a loss.

In insurance, accuracy is what ultimately fuels competition and healthy markets, which increase the ability

and the access to insurance. It improves consumer choices, and it reduces costs to all policyholders.

The converse is also true. Less accurate measurements reduce predictability and increase costs to both the overall system and raise prices for individual consumers.

Insurance scores are a metric based on objectively confirmable data that tell an insurer whether an applicant or policyholder is more or less likely than another to experience a loss. These scores are not used to deny coverage. They're not used to penalize people without a history of credit. These scores have been studied time and time again over the last three decades by independent entities, academics, state governments, even the Federal Trade Commission. They are consistently found to be highly predictive, and their use is found to benefit most consumers.

Once again, the converse is also true and is what should concern the members of this committee the most. The removal of insurance scores as a tool for insurers means not only sacrificing the accuracy of risk assessment all across the state and across multiple lines, but it means that most of your consumers are losing a benefit that previously kept them from overpaying to subsidize risks posed by other people.

NAMIC and our members believe insurance should be

predicated on and sustained by an objective and equal treatment of every applicant and policyholder, not used as a mechanism for social engineering that picks winners and losers by intentionally ignoring known objective and predictive rating factors.

Thank you for your time. I'm happy to answer any questions. But I believe my colleagues making up the rest of the panel will have much more meaningful contributions for purposes of today's hearing, and what they're seeing on the ground in your state.

SENATOR MULLET: Hey, Tony, how many states allow the use of -- like, how many states allow credit to be part of the -- one of the insurance factors?

MR. COTTO: At this point, it's 47.

SENATOR MULLET: So 47 states allow --

MR. COTTO: And they're --

SENATOR MULLET: Okay.

MR. COTTO: That's correct. And there are variations on it. In some cases it's only in one direction. In some cases, there's a limit on the time frame. But the fact that it is predictive has led even some of the most skeptical states that we've dealt with in the past, like Connecticut, where they used to say: This is a terrible idea. And then they saw how predictive it was and said: My goodness. This is really great for consumers because you're bringing rates

down.

SENATOR MULLET: Okay. Any other questions for Tony before we go to Nancy?

Okay. Nancy, explain what group you're with, because I think some of these acronyms we don't even know what they are sometimes.

MS. WATKINS: I'll do that. Thank you, Senator Mullet, and thank you, committee members, for having me today. I'm Nancy Watkins, and I'm a principal and consulting actuary with Milliman. I've been retained by NAMIC to offer an actuarial perspective on this issue. I'm a fellow of the Casualty Actuarial Society, and a member of the American Academy of Actuaries, which are the highest credentials for U.S. actuaries.

Milliman is an independent consulting firm. We've been around for over 70 years. And our home office is in Seattle. I manage a consulting practice in San Francisco. We work not only for insurers and insurance trade groups, but we also work for state regulators. We've worked for Alabama, California, Hawaii insurance departments, and FEMA as ratemaking and risk experts.

I personally also volunteer with the National Association of Insurance Commissioners, and have worked with the Washington OIC on issues involving climate resilience, insurance availability and affordability.

So for this hearing, I reviewed data and information from two credit vendors: LexisNexis Risk Solution and TransUnion; and also looked at rate filings from some major insurers in response to the OIC order.

So there's three issues I'd like to address today. First, whether we expect to see a flood of negative credit information after the CARES Act expires.

Second, whether credit-based insurance scores -- CBIS is the abbreviation -- are still actuarially predictive, given the disruptions in credit reporting from the pandemic.

And then, last, what do we expect is the impact on consumers from the OIC emergency order?

So on the first point, one of the rationales that's been frequently cited for the regulations is that there's going to be a flood of negative credit information for consumers after the CARES Act expires.

This is untrue for two reasons. First, there's only a small portion of consumers that are still on accommodations. And it's my understanding those accommodations were open to virtually everyone. I'm thinking that most of those have already passed through the system. And then, more importantly, for anyone who did have an accommodation, the relevant credit history during the pandemic time period is protected by the CARES Act for eternity and cannot be used to affect their future CBIS. So whatever happened within

the CARES Act, it stays within the CARES Act.

Going forward from the date of termination of the CARES Act protections, consumers will start clean. So their adverse histories would be based on actions occurring after the CARES Act expires.

So the second point is a rationale for the emergency order. And I think it's one of the most important things you all have been talking about today, is whether the pandemic or the CARES Act have caused CBIS to be unreliable for ratemaking. So the recent information that I reviewed from the two vendors suggest that CBIS have continued to be very stable and reliable predictors of losses throughout the pandemic.

First, the CARES Act directed credit vendors to treat the pandemic situation like a disaster, like a hurricane, like an earthquake with respect to accommodations and data reporting. And that helps to avoid model disruption.

Second, for both vendors that I talked to, the accounts with accommodations were already considered in the historical data underlying the CBIS models.

So the currently approved models in Washington have been calibrated to produce stable and reliable CBIS for consumers with accommodations. For both of these vendors, the median or the average CBIS have remained very stable during the pandemic. And they've actually generally improved

throughout 2020. When there's data that exists by score, banned for accounts with or without accommodations or with high scores or low scores, there's no material differences in trend or stability.

For a LexisNexis attract, I was looking at data from January 2019 through April 2021. And we really see credit score improvement, even for the lowest scores in the 650 to 660 range, as well as the highest scores in the 700-plus range.

So there's evidence, too, that the correlation between the CBIS and the loss cost has remained consistent and stable before and during the pandemic. This was only available to me for one score. That was the LexisNexis Attract auto. But it was based on a sample of nearly 20 percent of the drivers in Washington state.

So as a point of comparison, during the 2008 recession, the CBIS scores, on average, exhibited relatively little change for the three major credit vendors.

Another thing to realize is that derogatory information, such as delinquencies, bankruptcy, et cetera, they're not the only factor contributing to the calibration of CBIS. So some of the things that we're worried about really will not necessarily wag the dog as much as what might be feared.

So on my last point, the impact on consumers, just as we -- as we've heard today, CBIS is generally accepted as

one of the most predictive factors for the risk of loss and the lines that we've been talking about today. Like other factors, such as age or a good student discount, a higher CBIS doesn't cause you to have fewer car crashes or fewer homeowners' claims. It's just an actuarially valid way of predicting how risky you are relative to other policyholders.

The CBIS is highly correlated with age. So older drivers tend to have better scores. For example, the average LexisNexis Attract score for seniors between 66 and 75 years of age is 783; whereas, the average score for drivers below age 25 is 628.

The use of CBIS is reviewed in Washington in the context of the rate filings that have been previously approved before the emergency order. What happens when the insurers comply, as we've already seen, based on the OIC testimony today, is that the removal of CBIS is going to affect pretty much everybody. Hardly anybody's rates stay the same. So the rates were calibrated to be actuarially fair as a cohesive whole. And then when we don't adjust for correlated factors, such as age, you have big disruptions all the way up and down the line.

As was already presented, companies can submit a follow-up rate filing. This is a very involved exercise. It's like taking a bridge that's got a support beam underneath it,

yanking the beam out and then figuring out to use the rest of the beams to keep the bridge from falling into the water.

This is not something that companies have sitting on their shelf. It needs to be based on Washington data, not just a countrywide model. And it's going to take a lot of actuarial effort to make sure all the other factors fit together right after you get rid of credit.

So the thousands of pages scenario, that takes a lot of work. It takes months to develop. And I expect it might take a while to get approved, as well.

So, as we've seen, the insurance companies did not get a windfall from this. They're collecting the exact same amount of total premiums they were already, and that amount was what was approved by the Washington OIC. It's a zero-sum game that shifts dollars out of the pockets of lower risk individuals and into the pockets of higher risk individuals.

So what happens to consumers here is that these lower risk policyholders, who, for auto, for example, are more likely to be seniors who file fewer claims relative to younger policyholders, will see higher premiums, and those policies will be less affordable.

The higher risk policyholders, who are in classes who tend to file more claims than the other policyholders, will get rate decreases. And these people will see lower premiums,

which, for them, will be more affordable.

However, there's not any measurement of affordability up and down the line. No one has targeted affordability. And that data is not going into this calculation. I think that was one of the questions.

So the benefit of CBIS to consumers is that it can distinguish the best risks within a class. And then it allows the people, such as young people with a better credit history or people at any age, any income level, any race, to have the benefit of being distinguished as the best risk within their class.

So what will happen to both consumers and insurers is that without a subsequent price correction to bring things back into balance, the rates after the application of the emergency order will likely be unfairly discriminatory. So that means too high for the low risk classes and then inadequate for the other high risk classes.

So I'm hoping this helps clear up some of the issues. It's a complex topic. And I'm happy to answer questions. Thank you.

SENATOR MULLET: So, Nancy, it seems like just, I guess, from our perspective as legislators anecdotally, our inbox has been just -- a lot of the complaints have been from seniors. But your -- based on what you're saying is that would have been expected because they had the highest credit

scores, basically, so they were the group that was most negatively impacted --

MS. WATKINS: Right.

SENATOR MULLET: -- was senior citizens in Washington. And that would have been a very easy -- I mean, that would have been a known outcome from this emergency rule, basically.

MS. WATKINS: Yes.

SENATOR MULLET: Okay.

MS. WATKINS: And the reason being that if they -- if the rates had been built without credit to start with, the seniors would have gotten a big discount by virtue of their age.

SENATOR MULLET: Got it.

MS. WATKINS: But they -- so you're spreading the premium dollars. The discounts build upon each other. They've got one discount for their credit score and another discount for their age, and that got them to the premium that it was supposed to be to the total discount. And so we've just gotten rid of the discount for the credit. And all they're left is this much discount for their age.

Now, can the insurance go back and -- a company go back and redo all the discounts? Yes, they can. But that takes a while. So, in the meantime, we've got this big disruption that everybody goes -- some people go up. Some people go

down. And then they have to figure out how to get them back to where they should have been.

SENATOR MULLET: Okay. Are there any other questions for Nancy before we go to Eric?

Okay. Eric, once again, explain the acronyms.

MR. ELLMAN: Indeed. Thank you. Good morning, Mr. Chairman and members of the committee. I am Eric Ellman with the Consumer Data Industry Association, CDIA, and we are a trade association for the consumer reporting industry, which includes two of the companies that have been mentioned here: TransUnion and LexisNexis. We also represent quite a few other consumer reporting agencies across the country that help their business consumers, government consumers, and others manage risk, including credit risk, and including credit-based insurance score risk.

I want to thank you for allowing me to testify. I will offer a few -- a few comments and then I'll be happy, of course, to take any questions.

Credit-based insurance scores are reliable, lawful, and predictive. The underlying credit data compiled and maintained in accord- -- that is, compiled and maintained is done so in accordance with both the Federal Fair Credit Reporting Act and the Washington Credit Reporting Act, as well.

The accuracy of credit reports is extraordinarily high,

and they -- and the accuracy has been proven and stress tested by a number of academic and authoritative regulatory studies, including by an organization in North Carolina called PERC, and including, of course, the Federal Trade Commission.

When consumers have disputes in the credit system, of course they are processed quickly and efficiently, and, again, data indicates they are processed fairly and oftentimes at the satisfaction -- and most of the time, at the satisfaction of the consumer.

Importantly for -- or perhaps most importantly for this conversation, as you've heard before from the woman who preceded me, the OIC has, in its rulemaking, offered some unfounded criticisms and forecasts -- unfounded forecasting of what happens to credit scores when accommodations and -- and without repeating a number of comments that were made previously, but important to emphasize, the CARES Act, of course, is designed to avoid model disruption. In fact, the CFPB issued guidance in June of 2020 to make clear that a consumer's payment history should not be backfilled to reflect a delinquent status if the consumer already received the benefit from an accommodation.

Third, the CARES Act does not include a provision that allows furnishers -- data furnishers, which are lenders and creditors, to retroactively add a delinquency status for the

accommodation period. That includes both mortgages and student loans. So, again, there's no provision in the CARES Act that allows this retroactive delinquency to be -- to be provided.

And, then, fourth, the CARES Act guidance specifies that a consumer who has a current account status when the accommodation was entered cannot be reported as delinquent based upon the accommodation period once an accommodation period ends.

So those are really, I think, the most important highlights that I wanted to share with you, Mr. Chairman and members of the committee. We in the consumer reporting community are pleased to offer a service that is reliable, lawful, and predictive. And based upon all the data you -- we have all seen, saves most consumers a fair amount of money, especially seniors.

So I'm happy to answer any questions that you, Mr. Chairman, or members of the committee have.

SENATOR MULLET: I guess, Eric, my question -- and this is maybe a little off topic -- but what should we do as the legislature to help raise people's credit scores? Obviously if somebody does have a low credit score, it not only impacts their insurance rates, it impacts their car loans and their home loans, everything else. Like, what have you noticed, I guess? Is there anything that states can do to

try to help people raise their credit scores?

MR. ELLMAN: Well, I guess maybe I'll answer that question, Mr. Chairman, a couple of ways. First of all, all of the data that we've seen from a number of different sources, from a number of the credit bureaus, from FICO and from VantageScore, and from -- and from others, indicates a strong upward trajectory in credit scores across all -- across all age groups.

In fact, AARP during the legislative process was criticizing -- was critical of the fact that senior citizens have amongst the lowest credit scores and have been hit particularly hard by the pandemic. And that's exactly untrue. And all of the data shows, as was indicated before, that seniors have amongst the highest credit scores of any age bracket. And seniors have seen significant score increases during the course of the pandemic.

The advice that we give to consumers pretty regularly who asked a question like: How can I increase my credit score? Sometimes easier said than done. But if you pay your bills on time over time, that is the single most important way that you can show a score increase.

Now, in terms of what else can you do -- what else can the State do, Mr. Chairman, one of the things that a number of other states have considered, which I don't believe is law in Washington, but it is part of the (inaudible) model, is

to create a particular provision for hardship cases like death in the family, divorce, serious illness, things like that. And that's certainly one of the tools in your toolbox that you can employ. I believe you may have been considering that during the course of the last legislative session. So those are just a few thoughts that I have.

SENATOR MULLET: Okay. Any other questions for Eric before we go to public testimony?

Okay. Eric, thank you very much for being here. I appreciate.

MR. ELLMAN: Thank you. Thank you.

SENATOR MULLET: So we -- for the public testimony, just so folks can try to track how we're going to try to do it, is if people signed in and they didn't list an organization, we assumed it was just like a Washington resident who was impacted. And so we're going to call on those folks first. And so I think a lot of these people may not be used to testifying in front of a Senate committee hearing. Hopefully they realize that we don't bite. We can't bite because we're in a virtual session, so -- and we're going to try to do a two-minute timer just to make sure, you know, they have time.

This first group of -- I don't know. I think it's eight or ten. I'm not sure how many are here because I know some people had a hard time navigating the login process. But is

Karen Dosin (phonetic) and Richard Schweizer, Les Scott, and Sabine Bestier. Those would be the first four we are hoping to hear from. I don't know if -- I know this is where it gets tricky. I see Sabine has her hand up. We're going to try to -- oh, here's Karen Dosin. She is going first.

Okay. Karen, the floor is yours.

MS. DOSIN: Good morning, Chair and members of the committee. Thank you for hearing my testimony. My name is Karen Dosin. And for the sake of demographics, I am a single mother of biracial children who lives in rural south King County.

My dad filed for bankruptcy when I was a child. I did not come from wealth, and I don't live in it now. The morning after my high school graduation, my mom moved away. From that moment and until this day, I have lived with the knowledge that there is no safety net, no backstop, and nobody to catch me if I fall. I have acted accordingly.

I am risk averse. I am a good driver, and I have good credit. My driving record and my credit score reflect the cumulative effect of small choices made daily. They do not reflect income or wealth. I am not rich. I am responsible.

Every additional dollar I pay to my insurance company of 21 years as a result of this new rule will be dollars pulled directly from our family's needs. It will not be pulled from some slush fund or vacation fund or elusive

discretionary income. It will come from our utility fund, our healthcare fund, or our grocery fund. And growing teenage boys eat a lot.

Let me paint a picture of why I feel this rule is unfair, not right, and negatively impacts the very people it naively intends to protect.

In our house, we take five-minute showers. We don't do this because we want to but because it saves money and water. We turn off our lights when we leave the room to save money and electricity.

If there were a rule that went into place in the equity whereas I would be required to pay more each month to subsidize those who use more water or more electricity, as I would in effect be subsidizing those who make more insurance claims, that would just not be unfair. It would be ludicrous. And it would hurt people who cannot afford it.

Removing this proven time-tested, fair, and accurate mechanism of the insurance industry's right to accurately assess risk in effect hamstrings conscientious consumers' right to fair and accurate pricing based on their actual risks and liabilities. It makes insurance pricing less fair, less accurate, and less transparent. It removes an individual's ability to positively affect their insurance pricing through positive choices. A good credit score is indeed valuable, and we should work to help people improve

their credit score so that they can get better pricing on car insurance, car loans, and home loans. That would have a more positive impact on their lives as a whole than a subsidized auto policy.

I just have one more thing to say. Is that okay?

SENATOR MULLET: Oh, that's fine. Go ahead. Yeah, yeah.

MS. DOSIN: Just, like, one paragraph. Okay.

SENATOR MULLET: You got it.

MS. DOSIN: My son, who wanted to testify today but cannot due to his work schedule, is a recent high school graduate who works full time and is 100 percent independent. He has worked diligently to establish good credit, listening to financial podcasts, monitoring his score. Were he able to be here, he wanted you to know that his car insurance is nearly $500, his single largest expense behind rent. He cannot control his youth or his maleness, but his credit score is one element of the car insurance pricing model that he has control over.

While I trust that the intentions were in the right place, this rule is not. It will negatively impact the group of people you may not have thought of: Single moms and young men of color who have played by the rules only to have this rug pulled out from underneath them during a pandemic and just before the long-term care deduction comes out of our paychecks next year.

We need to take some of home -- we need to take home some of our income. Please consider and allow me and others in this same boat to do that. There are a lot of issues to resolve around equity, but this tactic, in my opinion, grossly misses the intended target.

SENATOR MULLET: Excellent. Thank you, Karen.

MS. DOSIN: Thank you.

SENATOR MULLET: Are there any questions for -- okay. Thank you. Very much. That was excellent.

Sabine.

MS. BESTIER: Thank you. Good morning. My name is Sabine --

SENATOR MULLET: We can't see you. Do you -- I think your video --

MS. BESTIER: I'm sorry. I --

SENATOR MULLET: Oh, that's okay.

MS. BESTIER: My technology --

SENATOR MULLET: You're fine. Go ahead.

MS. BESTIER: I apologize.

SENATOR MULLET: That's okay. You can go ahead.

MS. BESTIER: I'm one of the groups that -- I am a senior. I am also a self-employed Realtor. And I am driving a six-year-old car, Subaru Outback, nothing fancy. And my car insurance was $850 a year. I was now informed that my car insurance is $1,150 a year. And if I cannot pay it all at

once, it will go up to $1,550. So it practically doubled in less than a year.

I have no ticket. I have no claim. I have no change in coverage. Yes, I have an excellent credit rating of 826, but I'm working very hard to keep it that way. And if I now, due to the fact that maybe it is more difficult for me because, as a Realtor, you do not have monthly incomes, you do not have weekly incomes, it may happen every few months. So if for any reason I was to lag behind, I would be penalized further.

So I really don't understand what the intent was of this because you're simply shifting the burden from one group of people to another group of people. It seems to me, as the young lady I believe before me said, there should have been a much more reasonable set-aside for emergency situations, such as divorce, such as loss of job, and so on and so forth, rather than looking at the overall picture of the credit score. It does not seem to be a well-thought-out approach.

SENATOR MULLET: Excellent. Thank you very much, Sabine.

MS. DOSIN: You're welcome.

SENATOR MULLET: Well, Richard. Do you want to go ahead? Oh, Richard, you're on mute. Sorry.

MR. SCHWEIZER: Can you hear me now?

SENATOR MULLET: Yes. We can hear you.

MR. SCHWEIZER: Thank you and good morning. And I appreciate this opportunity to speak on behalf of my wife and I this morning. I found that all of the discussion leading up to this moment here has been quite interesting, and I'd like to make a comment about it at the end.

As I stated, my name is Richard Schweizer. My wife and I live in Kirkland, in the same house that we built 37 years ago. In 2016, I retired after 33 years of service with the second largest cruise line in the world. And my wife joined me in retirement after 35 years with her company. We have a daughter who is now 35 years old. And, fortunately, she is very successful in her career.

We both come from very stable backgrounds where our parents mentored us to always be kind, responsible, and respectful to others. Our family values include family first, education, church, community, volunteering, and certainly charitable donations.

In early July, we received our 2021 to 2022 home and auto insurance renewal package -- it's a bundle -- from Met Home and Life, reflecting a 13 percent increase in our premium. That's $562. Obviously, a 13 percent increase came as a total shock to my wife and I. We made no changes to our policy coverage. Neither of us had any driving citations nor did we file any claims. Nevertheless, our rates went up again.

So I called our insurance broker, which happens to be AAA Washington. I was informed that this increase was due to the new emergency rule imposed by Commissioner Kreidler prohibiting my good credit insurance discount.

This emergency mandate is the only reason that my premium was increased, and I vehemently object to losing the discount I have worked hard to earn and enjoy for many years.

So this morning I urge the legislature and the insurance Commissioner Kreidler to understand that these unexpected insurance hikes are, in fact, doing the opposite of good. I mean, you either work for it or you do without. My wife and I are on a fixed income. We've worked hard to maintain our exceptional credit ratings by paying our bills on time, no debt, and living day-to-day within our means.

Yes, the pandemic has driven the cost of everything up. The good credits we earned helped us budget appropriately for our monthly goods and services. My wife and I are now 73 and 72 years of age. We both have some new health challenges, and this emergency mandate has only added stress and made a negative impact on our finances.

So, again, I object to losing my valuable credit rating discount. I would like it restored, and this new ruling hopefully deemed illegal.

In the earlier part of the program here, Jon Noski and

David Forte, you talked about contacting your insurance company or your broker and trying to find lesser insurance. That's all been done, gentlemen. There is no better deal out there. We have the best coverage for what we need for our home and auto.

Right now my credit rating is almost 830. I like it. And I appreciate that companies recognize that the hard work that my wife and I put into getting our credit ratings higher up has provided us with a few extra discounts here and there.

Thank you.

SENATOR MULLET: Thank you, Richard.

Les?

MR. L. SCOTT: Good afternoon. Morning? Morning, yes.

Yeah. I'm a 74-year-old senior citizen who lives on social security, which, as you know, changes very little from year to year. I get a pension that hasn't changed from about 1999, when I retired. I have a small check that comes in for disability through the Veterans.

I was floored when I received the bills for my home and auto insurance. This is very unfair. I was taught by my parents to be frugal, to make payments on time, if not early. A few years ago I applied for a loan. Was amazed on how high my credit score was. Now I have found out that a good credit score used to give me a discount on my home and

auto insurance policy.

I've always prided myself in taking care of my possessions. In fact, I've had persons say if you're getting it from Les, you know it's in good condition, well taken care of.

My premiums have increased by $800 for the home and auto policies combined. What a shock. So in order to afford these increases, I've had to drop an automobile from the policy and reduce the coverages on the others.

Of course, unfortunately, they both came due around the same time, which really made it bad. With all these increases, the funds that I saved to pay for these kind of bills will not cover them. I've had to increase the contributions to this fund over the past few years, but the budget just can't be stretched much further.

I am now being penalized for being a responsible adult. Us seniors cannot take this. Thank you.

SENATOR MULLET: Excellent. Thank you very much, Les. Have you filed any insurance claims in recent history, Les, for your --

MR. L. SCOTT: No.

SENATOR MULLET: None.

MR. L. SCOTT: No, sir.

SENATOR MULLET: Okay. Next we are going to a pro panel, and it would be John Mooney (phonetic) and Tamir Wimer.

And my request is, hopefully, as everyone so far has followed the theme, these are all people who are personally impacted, and I'm hoping that the next panel follows the same theme. We're trying to get people who have had personal impacts from the emergency rule in their rates.

I'm looking now for John or Tamir. Hang on a second. Give us a second for technology to do its thing. Hang on a second. I'm trying to -- I see John on the list of -- aha. There they both. Excellent.

Wait. I think you're both on mute.

John, I think you're on mute, if you want to go first.

Hang on a second. Or, Tamir, do you want to go first or --

MR. WIMER: Sure. Let's do it.

SENATOR MULLET: Okay. Tamir is going to go first.

John, you will go after Tamir.

MR. WIMER: Okay. How's it going, guys?

So I'm just going to get straight to the point. I'm an insured driver, and I have bad credit, but I have a good driving history. And I did receive benefits. I was reduced $480 a year.

And from just sitting back and watching you guys debate back and forth, I have concluded that, my opinion, this is kind of strange how the insurance companies are able to cease all the effect -- how the people with good credit now

get the bad effect, and now we get the good effect.

And I just wanted to say, like, I truly believe that in this situation, we really have no say whether the law changes or not. The insurance company is always going to have the good hand, because they can easily seesaw it back. Whereas if we were -- if you were -- I guess if you were being penalized because of your bad credit, it would be easier if you just simply were to reduce the rates to -- let's say if we were to reduce the rates to the people with the good driving record history, if you were to put that and also do the extra work to dig and look for the people with good credit and you combine both of those together, then we would see a good effect.

But the insurance companies are not going to do that. They're just going to allow this to play out. Like, you know, let's do a seesaw effect. Let's make the people that are upset, let's make them stand out, and then let's just get the law kicked back over.

So, in my opinion, I just watched it, and this is like we're really going in circles here. So if you ask me my opinion, like, as far as I can say, I save 480 bucks a year. Multiply that by 250 million insured drivers in the U.S., just say, just say on average, I'm an average driver, if you were to multiply that and see how much money is being sucked away and where this money is going. And you got 500 million

homeless people in the United States of America, what could that money do?

And it's kind of strange. Like, I just watched as -- I watched the entire meeting from the beginning as to how this effect is being seesawed. And I'm looking at the older generation, explaining that, oh, we got a bill for 1500 bucks versus me that got reduced 480 bucks. And I really feel bad for you. I truly do. And it's really a shame, because I see it going in circles, just like we're going to do a seesaw. Let's kick it over to the people with good credit, and then the people with bad credit, let's give them benefits.

But, in reality, we're not really going nowhere with this, if you guys can see where I'm coming from. So, yeah, that's all I got to say, and I appreciate you taking the time and hearing what I have to say.

SENATOR MULLET: Thank you, Tamir. That was good.

MR. WIMER: Thank you.

SENATOR MULLET: John?

MR. MOONEY: Okay. Can you hear me now?

SENATOR MULLET: Yeah. We can.

MR. MOONEY: Okay. Good morning. My name is John Mooney. I live on the southern border of Washington, White Salmon, down on the Columbia River.

I am 70 years old. I have zero debt. I pay all my bills

on time. I have a credit score over 800. And my insurance agent with Farmers called me in August and said, John, fasten your seat belt. And they increased my rate 86 percent. 86 percent. I can see 5 to 10 percent. But I worked with her for six to seven days trying to bring the rates down. We got it down to 84 percent.

I'm on a fixed income. I'm retired. I've talked to many other neighbors in our neighborhood to see if I was the outlier, and it seems like I was. Most of the other neighbors have their house insurance increased 100 to $300. Mine was increased $800. And this is just for my home. My car insurance, which is with a different company, was increased by 10 percent.

I can live with 10 percent. I can't live with 86 percent. And I would sure appreciate anything you can do in the government, up in your area, to change this policy.

Thank you.

SENATOR MULLET: Excellent. Thank you.

And, John, have you filed any insurance claims in recent history?

MR. MOONEY: My house was burglarized in 2005, so over -- over 15 years ago. That was my only claim in 20 years. I have had no car claims.

Let's see, what else? Oh, the one question I have, age sounds like it's a huge factor. I'm 70. Also, do they look

at your income tax returns every year? That was the big question for me.

SENATOR MULLET: They don't. I don't think your income tax.

MR. MOONEY: Okay. Just (inaudible).

SENATOR MULLET: Thank you very much, John.

And I know it's hard for people -- this was a -- I think people -- it was hard to tell who was pro and who was con. So this is not a traditional hearing environment, but that was excellent. Thank you, John, very much for sharing your story.

MR. MOONEY: Our pleasure. Thank you.

SENATOR MULLET: Okay. I am trying to -- I know there's some people who haven't been able to get in to the system. And so I think Jonathan Ayers, I believe, is not here.

Matthew Hinck, I don't think is here.

And then Gary Glenz, I think, could be here.

And then Delia Gauvreau, I think.

Those are the next two. Let's just see here. I'll wait for staff, and we'll see who kind of starts to pop in.

I see Delia showing up.

DELIA GAUVREAU: Do you want me to talk or...

SENATOR MULLET: Moots (phonetic) fails all committee hearings all the time, so.

Okay. Gary, I think you can go first.

Gary, you're on mute still. Gary, you're on mute.

MR. GLENZ: Oh, sorry about that. How's that?

SENATOR MULLET: That's perfect. We can hear you fine. Go ahead.

MR. GLENZ: I appreciate you allowing me in here. I apologize for the surroundings. I'm at work, so I had to come out to the vehicle to do this. But I've been with my insurance company for in excess of 30 years, and all of a sudden I now have a 40 percent increase in my homeowner, and looking at a 40 percent increase in my auto policy. So a $600 increase in the homeowner and 800 in the auto policy.

I'm not in a fixed income yet, but budgeting in that much extra money due to absolutely no fault of my own, just because one individual decided to make an arbitrary decision to take away our credit rating as a factor. If it had went through the legislature and everybody had voted on it and it was something that was agreed upon, it would be a different argument.

But in this case, it hasn't been. And now we're paying, in my case, an extra $1,400 a year to maintain insurance. Totally not fair to those of us who have worked every day, trying to make sure we make tough decision to go without this or go without that, to make sure that we keep our credit rating where we want it at, whether that means getting a new vehicle or whatever and going without doing

that. I want that credit rating up there so that I can have that ability, if I need to.

One thing I noted earlier, that the two gentlemen from the OIC put the -- tried to put the onus onto the insurance companies, that they need to fix this. This was not caused by the insurance companies. This was caused by the OIC, and there is no reason why the insurance companies should have to jump through hoops all of a sudden to fix something that they -- that the OIC decided to do of their own volition.

My biggest thing is the fact that we are trying to make it supposedly equitable by getting rid of this, this metric, this measure that they had before, that's been a proven measure. I'm not in insurance, obviously. Talking to my insurance provider, the numbers don't lie. The better the credit rating, the more responsible you are, the fewer claims and reports you have to your insurance, while just the opposite is true. The lower your credit score, normally the lower your responsibility level and the more your claims.

Now we're being punished. They're subsidizing the lower credit rating individuals with the higher credit rating individuals. I work every day trying to make sure I keep it up, and to have it just -- that rug swept out, not fair in the least little bit.

I don't think that the credit companies having to file a

change is where it needs to be at right now. That's basically admitting that they're good to go with this change that has been thrown upon them. It needs to be fought until every last little bit has been done to be able to take this rule change away.

It has nothing to do with COVID. This is not anywhere intertwined in that, and to use that as an excuse to change it does not fly.

I appreciate you letting me speak, and I am passionate because (inaudible) --

SENATOR MULLET: Oh, Gary, I think --

MR. GLENZ: -- this is something I think very, very (inaudible).

SENATOR MULLET: Can I ask, Gary, have you filed any claims in recent history on your insurance?

MR. GLENZ: No, sir. Never filed a claim on my home. And the last auto claim has been 15 or 20 years ago at least. And never had a ticket.

SENATOR MULLET: Okay. Thank you. Thank you very much.

MR. GLENZ: Thank you.

SENATOR MULLET: Delia, I think.

DELIA GAUVREAU: Delia.

SENATOR MULLET: Delia. Sorry.

DELIA GAUVREAU: That's okay. My name is Delia Gauvreau. I am a retired senior citizen, a widow, and living on a

fixed income. My insurance has gone up. Not as much as what I've heard here, but I feel fortunate that it hasn't gone up. But I have never had a claim or any citations that I have sent to the insurance company.

I have a good credit rating. I've strived to keep that credit rating high in case I want to do a loan or buy a house or whatever. And I feel now that I'm being penalized for maintaining that good rating.

I think we should be able to have pluses for doing something good. And even if the credit rating only gives you a couple of bucks here and there, it's a couple of bucks as a plus. And that's about all I have to say.

I want to thank you for allowing me to speak in front of the committee.

SENATOR MULLET: Excellent. Thank you very much.

DELIA GAUVREAU: Thank you.

SENATOR MULLET: Is there any questions? Okay.

I think -- and staff can interrupt me if I'm wrong, but I think with Jonathan and Matthew gone, I think that's the end of the folks who I think, based on the sign-in process, looked like they weren't representing an organization.

Now, the goal of this was to hear from those folks first. Since we still do have time left, we will now go to the -- some of the other groups who have signed in. Like I said, the goal was to really focus on people who have been

personally impacted.

So if you can address whether you've been personally impacted, and then speak your organizational stuff, that would be great.

And we have Catherine West and Paula Sardinas.

Hello, Catherine.

MS. WEST: Good morning, Chair Mullet and members of the committee. Thank you for continuing to do this work on behalf of the people. I do work at Legal Voice, but I understand you're looking for personal experiences with the new policy set by the office of insurance commissioner, and I will speak to that as well.

I work at Legal Voice, and we are in strong support of banning credit scores in insurance rate setting. Legal Voice is a nonprofit organization that seeks to advance the rights of women, girls, and LGBTQ+ people in the Pacific Northwest. Prior to joining Legal Voice, I worked and represented low-income consumers and individuals in Washington state for over 16 years, and so I bring that experience with me when I'm talking about this policy and the, you know, familiarity with the real challenges that low-income people face and that people have spoken about today during this hearing.

However, the importance of ensuring that our insurance rates are race neutral is so important and needs to be a

priority for this committee, and I appreciate Commissioner Kreidler taking the opportunity to try and correct what has been a set of racial privileges granted to certain primarily white individuals in the state.

And I know that that is a difficult thing to hear for many who are experiencing real challenges with their budget. My colleague, Courtney Chappell, shared with me that she did experience a rate increase on her auto insurance. It was over a hundred dollars a year. And because of our commitment towards equity and fairness, she said she was very happy to pay that increased rate.

I contacted my own insurance agent expecting a similar rate increase. She told me that it wasn't time to run my policies, and so she couldn't give me that information. But, again, I am very happy to pay a rate increase because I believe in equitable policies that are race neutral.

My other colleague, Michelle Johnson, reported that because of her common name, her credit report is often inaccurate. And so she experiences problems with her credit report all the time. And we know that people with non-Anglo names experience that scenario even more commonly.

So I, again, am here to just really encourage you to continue to consider this policy and that credit scores should be banned, that it is an equitable thing to do, and that there are other policies that the state can take up to

support low-income consumers and individuals, particularly seniors and the working poor.

Thank you for your time.

SENATOR MULLET: Okay. Catherine, what do you say to the people of color, and specifically, I guess, Asian-Americans have been the hardest hit, because they ended up having, I guess, the best credit. I mean, what's your -- I mean, to the people of color who have been really negatively impacted on their rates, I mean, what's your response, I guess?

MS. WEST: I mean, I guess my response would be that we know that there's a racial hierarchy in this country, and that certain people are at the top of that racial hierarchy and that others are at the bottom.

And so while Asian-Americans do experience discrimination, and, you know, we've certainly seen that in the last year and a half, as far as thinking about the sort of racial hierarchy that exists in the United States, they are not folks that are at the bottom of that hierarchy, and so it doesn't surprise me that this policy meant to undo racial privilege has impacted them in a somewhat negative way.

However, you know, I would point to Tamir, who testified too about the real benefit that he experienced. And that brings me such joy, to know that we are trying in some ways to undo the racial hierarchy that exists in this country.

SENATOR MULLET: Thank you.

Paula? Paula, you're on mute. I know you don't like being on mute.

MS. SARDINAS: I am totally not testifying as an advocate today. I am testifying as a constituent, and thank you for saying that.

A couple years ago I had excellent credit, when my daughter had an accident at Bellevue College, which caused a hundred thousand dollars in property damage, and my insurance went up from a little over $300 a month to 1,100. And I remember writing a letter to Attorney General Ferguson and calling Lonnie Johns-Brown and saying, well, how could this happen to me? I had not had an accident since before she was born, and I didn't understand why I was being penalized.

I had been with Geico since my former husband was in the Navy and was kind of told that it is what it is. And so I had the same visceral reaction to this, Senator Mullet, and had contacted you when this policy was going into place, because I was concerned that communities of color would somehow be adversely impacted because that's what a lot of the data had showed. And I still have some concerns.

I want to know, for those folks that are getting some increases, when we parse the data, what they look like. But I can tell you what my personal experience has been. This is my little State Farm policy that I received. My

insurance went down so much that when we were looking at how to send my son, who is an African-American male, to college, I'm saving enough money -- and this is blurred -- that we can pay cash for UW, while he's going to major in dentistry. He is black. We don't have enough black male doctors.

My insurance went down by that much a month with State Farm after they passed this bill. That is a lived experience and story. That's real. I don't know why it went down so much. But that's how much Albert and I are saving living in Issaquah.

So there are real people out here saving real money. I have an excellent driving record. I too pay my bills on time. My credit is good. I have not had a claim. I have a child on my insurance that had a $100,000 claim. I went and sat down with my agency. I said "Run it again. Are you sure this is right? I don't want to owe you money in six months." And she said, "This is what your insurance is under this new stuff."

So we do need to understand -- I understand what you're saying about Asian-Americans. We are black. We are Latin X. We know that most black people do not have good credit scores and that we are treated disparately when it comes to rating premiums. We also understand that we bear the greatest burden of racial disproportionality in this country, especially when it comes to this.

And so I think we need to have these honest conversations, and we need to look at it. I'm not saying the rule is perfect. I have data, Senator Mullet, that I'm going to send you. The consumer bureau complaints went up 86 percent.

So when a young lady says that, oh, we can trust the credit bureau information, we actually cannot. My good friend, Chairman Maxine Waters, has been holding hearings on how inaccurate the data has become under the pandemic. We cannot trust it. We cannot trust it. We cannot trust it.

And so people are continuing to fight that battle with their credit bureaus. We need additional protections and not less. And so, you know, let's not throw out the baby with the bath water with this rule. Let's have these conversations.

I know you to be an honest broker, Senator Mullet. How do we make it better, if people's rates have gone up? How do we fix that? But we do have to have honest conversations about disproportionality.

I worked a long time, and when my rate went up darn near a thousand percent, that harmed me. I was very glad to get my money back because my boy's going to UW. Go Huskies.

Thank you.

SENATOR MULLET: You know, Paula --

MS. SARDINAS: And we're not taking out a student loan,

and I'm paying cash. That is a real lived experience.

SENATOR MULLET: So -- but if you have good credit -- like, was your reduction because of another factor, or what did the State Farm agent say? Because I haven't seen anyone who -- usually if credit scores are 700 or higher --

MS. SARDINAS: $532 a month times 12 months. I'm living in Issaquah now. You know I've come home to the fifth legislative district. Very proud of that. I expected it, moving from Federal Way to Issaquah, I know I'm going to go up because of the district and the type of cars that I drive.

I literally said "Run it three times. We know we're going to pay more." I was sweating moving back to Talus here. It went down so much that I'm writing my check cash for tuition because that's how much money that I'm saving.

SENATOR MULLET: I guess -- but do we know if it went down because of the credit score emergency rule, or did it go down because of a different reason, I guess is what I'm asking.

MS. SARDINAS: I can ask Aaron Jones. I'll ask, and I'll get you that information. Because my credit score fluctuates monthly no more than six to seven points. So I haven't had a big major impact in my credit score.

SENATOR MULLET: Okay. Thank you very much.

MS. SARDINAS: But I'm happy to get that information and

give it to the committee.

SENATOR MULLET: Oh, Senator Nobles has a question.

MS. SARDINAS: Yes.

SENATOR MULLET: And just so the committee knows, Senator Nobles asked to join. And any time any senator wants to join any of our hearings, they're always more than welcome.

So, Senator Nobles, welcome.

SENATOR NOBLES: I actually don't have a question for Paula or this panel. I was raising my hand so that hopefully I could -- I didn't sign in to testify, but hopefully I can share my experience with the change in credit score or -- sorry -- change in insurance premium.

SENATOR MULLET: Yeah. This is the perfect time. Go ahead, Senator Nobles.

SENATOR NOBLES: Okay. Thank you. And thanks to that last panel. But I figured my comments might be appropriate here because I am speaking in pro, although my -- my insurance premium, it has been verified by my insurance provider that I can expect an annual increase of about a thousand dollars a year. And it was interesting that phone call, because they don't know that I'm a state senator, and I have a little more information. I simply had not seen an increase and wanted to know when I can expect it.

But my policy renewed in July. The premiums kind of were implemented in June, but we had already started that process

before my policy renewed, so I won't see my increase until next year.

And I do absolutely empathize with folks who, whether it's a fixed income or just are financially strapped, are seeing an increase. I also agree with Tamir who mentioned that the community is losing. Like, however we teeter-totter this issue, community is being impacted and that hurts. That breaks my heart as a Senator and community member. And at the end of the day, the insurance providers, you know, make the necessary money that they need to make.

I also wanted to answer the question in response to what can people do to increase their credit scores, or what can we do as Senators to help with that? And the gentleman spoke and said, you know, well, on-time payments and, you know, this list of different items. But just as folks can easily list ways that sound really simple and easy to improve credit, there are just as many less obvious barriers to improving credit.

And what I know we can do as senators is pay attention to legislation that we are passing. Pay attention to policy. Because sometimes that policy can be hurtful to communities of color too. I'm a black woman, so to black folks especially. And things that we need to pay attention to are barriers that exist in employment, our flawed criminal justice system, lending practices, incorrect data that is

being contained by our credit score bureau.

I mean, there are so many barriers that exist in this country. And if there is a negative credit snowball, it is very impactful to some of our community members.

Several years ago, I would have been an individual who probably would have saw a reduction in payment, based on credit score and just being young and making different, you know, decisions in life and struggling to make payments on time lots of times. And I've, you know, worked to overcome some of those financial barriers. And so I will see an increase, but I'm not mad.

I understand that that's not the case for different community members. Not that they're mad, but it is a true financial burden, and I am very empathetic to that. But I also think we need to keep working on the system, where no party is benefitting, especially not in a discriminatory way, because others are having to be paid -- are having to pay more.

So we need to continue this conversation and continue the work. But my personal experiences, I will be paying more. And I still am in favor of not using any type of discriminatory practices or practices that are going to harm community members in any way, and that we continue to figure out the best way to roll out the lack of use of credit scores and how we can work with insurance providers.

SENATOR MULLET: Excellent. Thank you very much.

Senator Hasegawa has a question.

SENATOR HASEGAWA: Yeah. Thanks, Mr. Chair.

This is actually for Paula Sardinas, since I know that Ms. Sardinas has extensive background in finance and good analysis. And she mentioned her skepticism about the rule change from the beginning, but I think has -- she mentioned she changed -- is that right, Ms. Sardinas? -- because of the disparate impacts that seem to be embedded within the underlying policy.

And so the way I'm trying to think about it is that credit scoring is more -- is less a surrogate of risk than it is a surrogate for wealth. And, as such, it has been used in the past to -- for those ending up with -- for those who have less wealth, subsidizing those who have more wealth in the scoring.

So when the -- if all things are considered equal, as far as risk level goes, then the person who has the better credit score gets a discount, which offsets -- is offset by subsequent increase of those who don't have as good a credit score. Am I thinking about this correctly?

So with all risk factors being equal, that person with a better credit score is being -- is getting a discount, which equates to that person with a lower credit score having to pay for that discount, with the profit level of the

insurance companies being maintained at the same level, all other things considered equal?

Does that make sense? Am I asking a right question?

SENATOR MULLET: Oh, Paula. You're on mute still.

MS. SARDINAS: Yes, Senator Hasegawa. I'll give you an example. Like, if one of my kids right now were to go get into an accident, for me a risk mitigation factor -- I mean, Gabby's accident, obviously we didn't want to pay Bellevue College the $50,000 for the (inaudible).

But if it's an accident that -- I have a $500 deductible, and one of them has a $500 fender-bender, go put it on the Amex. We're not going to file the claim.

If it's a $5,000 accident, looking at my risk mitigation, I'm probably going to say take it down to X body shop in Issaquah. I'm just -- go put it on the Amex. I don't want to file the claim. Right?

Someone who does not have my resources and means, they cannot afford to do that. They're going to pay a 500 or $1000 deductible, thus they're going to have a claim. So in the actuarial science, they're going to be weighted higher for risk, so they're going to show more accidents, plus they have a lower credit score, so I'm rated differently for risk.

You know, I'm 49 this week. I can't remember, honestly, in my memory, the last time I had an accident. I think I've

had someone, you know, ding me in the parking lot or something like that. I just pay out-of-pocket because I don't want a risk on my policy, because I've got four kids that I insure.

And so, yes -- so I do my own actuarial cost for risk, but people that have a little bit more financial means, we have higher credit scores, so we can actually pay a little bit more for our risk.

SENATOR MULLET: And, really, we have eight people still left, so I really want to hear from those other folks. And, if we can, we'll go to Jana Lunday, Tamara Ellingson, John Kotalik, and then we have Scott Potter and Ryan Stueber, I think is the next five. And then we would have three left after that on the pro side.

Let's see who shows up. And I can definitely stay. I know other committee members may have to go, but if -- I want to make sure I at least hear from everyone who's signed in.

But we will try to stay on the two-minute timer (inaudible).

MS. LUNDAY: I don't -- I just have a busy signal.

SENATOR MULLET: Oh, Jana, I don't see you. I hear you, I think. Are you there? Jana Lunday? No?

Tamara -- oh, Scott Potter. I see your chair. I don't see you. We'll try to figure that out.

MR. POTTER: I got to switch cameras.

SENATOR MULLET: Okay. Well, there's Tamara. Let's go to Tamara. Tamara, you go.

MS. ELLINGSON: Thank you, Chairman. I'm Tami Ellingson. I'm an insurance agent with a small insurance agency in Lakewood, Washington. Our community has one of the lowest annual incomes in the state, and our local elementary school has the highest percentage of kids on free or reduced lunches.

Our customer base is about 30 percent Hispanic, 25 percent African-American, 15 percent Asian-Pacific Islander. Many of our customers have immigrated as adults to create a better life and work hard to build credit to buy homes and to buy reliable cars.

So we have the pleasure of working with people from when they first come and they're driving a 1998 Toyota Camry, and then they slowly build up their credit so they can buy reliable cars and work more jobs. And it's pretty cool to watch people move forward.

Many of my customers are working multiple jobs without benefits, such as caregivers, housekeepers, general laborers, at minimum wage. We have many single parents and elderly on fixed incomes for disability and retirement.

Many of these customers are getting a better rate for full coverage due to their good credit histories. In the last

couple of months, we've had -- in our agency, we contact everybody prior to renewal to review their life circumstances, to see if we can give them a better rate or better coverages or, you know, what do we need to do to help them have the proper insurance.

In the last week, I had two separate renewal conversations with two widowers -- one from Korea, one from Vietnam -- who were seeing a significant rate increase on both their home and auto. Both are on fixed income. For one woman's home, the increase was 31 percent, and her auto increased 25 percent, for a total increase of $59 a month. That doesn't sound like a lot, but her husband had passed away last year and her income is significantly lower since his passing. All I could do to abate the increase was to change her deductible so they're higher. So if something does happen, she would unfortunately have to incur a greater cost. She also has never had any claims, knock on wood. And I lowered coverages, which, again, is not to her benefit. But she wants to keep insurance, because it's the right thing to do.

Some people are choosing not to go with insurance when they see these increases. The second widower also has home and auto. Again, on fixed income. No accidents. And her increase was over $62 a month.

One of my client's renewals, that hasn't been generated,

is a 72-year-old African-American. He is still working full time to make ends meet. His wife is unable to work. She's on disability. And his disabled daughter, who was living in their home, passed away in May, which is lowering the family income.

His increase is going to be over $82 a month. And he makes $15 an hour, so he will have to work 5.4 hours to pay for that increase. And I know it's going to come down to we're going to have to change his coverages, because I just know they can't afford it. And they rent. They don't own a home.

These decreases are helping some, but they are normally the clients that carry minimum liability, and they cancel at a rate of over 45 percent during the policy periods. We have a lot of customers that come, they just want to get their six-month insurance card. Yeah, it's cheaper now, so it's even less money out of pocket. And then they make that one payment, and we don't see them again for six months.

The average premium for specialty, nonstandard auto has always been much lower than our middle market clients. And I define middle market as someone who is usually not moving around a lot. They're a little bit more stable. The nonstandard is about 580 for a six-month policy versus the middle market customer which has about $1,250 for a six-month policy.

The increases are much more substantial than the decreases. So reducing coverages to keep insurance for those impacted negatively just doesn't seem right. Unfortunately, it seems to be the only thing we have. And I'm a broker, so I shop all of my companies, and I'm not seeing a huge differentiation from one company to another.

So the suggestion someone had earlier of shopping, it seems like everybody's prices are pretty darn close right now. So a fixed income is a fixed income. I know other expenses are rising. And I'm just really, really concerned about the people who are being impacted through no fault of their own.

SENATOR MULLET: Okay. Thank you very much.

MS. ELLINGSON: Thank you for your time.

SENATOR MULLET: That Progressive gal in the background of your Zoom box is kind of spooky. You're going to have to hide her.

MS. ELLINGSON: Oh, sorry.

SENATOR MULLET: Ryan, go ahead.

MR. STUEBER: Oh, come on. Everybody loves Flo.

SENATOR MULLET: I didn't know she had a name. Okay.

MR. STUEBER: Right. You don't watch enough TV.

Well, thank you, Mr. Mullet, and other senators on the committee, and everybody else who has been on before me. My name's Ryan Stueber. I am an independent insurance agent

out of Puyallup, Washington. And I had a whole long testimony put forth and written out, but most of it's already been said, so I'm going to touch on some key points.

Statistic-wise in our agency, over 15 different insurance companies. Through the first three months of this credit ban, you know, going into force, we've seen 368 policies decrease and 319 increase, typically ranging anywhere from zero to 30 percent either direction. Right?

I guess I would stress I'm kind of neutral on this. I don't love the way that it was put into place, because it is going to hurt a lot of people while also helping people. But, ultimately, I am here to represent my clients, not the insurance company, not the insurance commissioner. I don't know, I'm pro client.

So a couple of things that haven't been mentioned yet. In the senior community, we definitely are seeing, you know, a vast majority of seniors seeing significant rate increases. Something that hasn't been said, though, is that typically when you are over the age of 65, 70, it's not a good idea to re-shop and move companies for a few reasons.

One being that insurance companies, once you hit about the age of 70, they start to treat you like you're 16 again. And so if you happen to have just moved companies, and you're 75, and you get in an accident, even if it's your first accident in the last 20 years, that company can choose

to drop you. And so -- but if you've been with an insurance carrier for many, many years, that's much less likely to happen.

The other thing that can happen, and I've had this happen to me before, and it's been the worst feeling in the world, is I've switched somebody to another carrier, and that carrier then came back and said, well, you know, we need a doctor's note saying that you're okay to drive due to your age. And it turns out, you know, she wasn't. And, you know, I inadvertently caused her to not be able to drive anymore, which is no fun.

So that's just something to consider, you know, when the insurance commissioner's office kind of flippantly states that, oh, yeah, just re-shop. You know, move -- move insurance companies. There's no problem with that. Well, there's a lot of accrued benefits from staying with a carrier, including accident forgiveness, no drop promises, stuff like that, that you really don't want to lose as a senior. So that's one thing.

Really quick, the next thing I would say, you know, Paula inadvertently touched on this, but, you know, if the insurance companies are not going to be able to rate on credit, they are now going to rate probably more harshly on geography. So she moved from Federal Way to Issaquah. Take a look at the demographics between Federal Way and Issaquah.

You're going to see that they probably mirror, you know, credit in a lot of ways.

And so insurance companies are going to be able to easily sidestep this, but in a much more -- they're going to have to do it in a much more, you know, nontargeted way. So I think it could eventually end up hurting a lot more people in that regard.

And then the last thing I'll say is that this really brings up much larger issues, and that is the FICO credit scoring system. It was billed when it came out many, many years ago as a truly, you know, race and color-neutral system. However, it was probably created by a bunch of old white guys. And, you know --

MS. LUNDAY: White guys.

MR. STUEBER: -- and, historically, it is, you know, shown that it does discriminate, you know, somewhat. And so I think that's the larger question. Not, you know, does it affect -- how does it affect insurance credit scoring and stuff like that. I think it's a larger issue that needs to be examined.

SENATOR MULLET: Senator Brown has questions.

SENATOR BROWN: Thank you. And my question for Ryan is, do you think this would have been way better had we done, as Senator Mullet stated earlier in our committee hearing, a phased in approach?

RYAN STUEBER: Yes. Actually, that's something I had suggested to the insurance commissioner. I'm glad you brought that up. What I would have done is, instead of just ripping off the Band-Aid and making insurance companies, you know, remove the credit scoring factor for, you know, all their renewals. Simply say, okay, after June 20th, credit now is no longer a factor on any new policy.

So if you feel that you had lower credit and were being adversely impacted prior, you can then re-shop and see if you can get a better rate without credit being taken into account, whereas the people, you know, like we've heard from many of these people that had a good rate, you know, because of their good credit, they don't need to, you know, bear the impact of that.

So that would have been, I think, a better way to go about it.

SENATOR MULLET: Okay. Excellent. Thank you very much, Ryan. And I think your comment about seniors just not switching just because they were told that they should just shop was a -- I mean, I have not heard that yet, and I've been in the weeds of this policy back to January, so I think that was a really poignant point. I appreciate you making that, and we'll have to do our best to get that out there, that there could be some downside, if you've been with a carrier for 20 years, to just switching, just because of

this emergency rule. You could end up, like you said -- I know my mom would be a similar situation that you described. I think if she switched, she might not be allowed to drive.

Okay. Let's go on to Jana -- or John or Scott Potter. Whoever shows up on the screen first is going to go.

Scott? You win. You're on mute, though.

You're on mute, Scott. You're still on mute. You're on mute. Aha.

MR. POTTER: How am I doing now?

SENATOR MULLET: You're off mute. Yeah.

MR. POTTER: All right. Thank you for the opportunity to be here today and talk about some real-world situations. I think that Ryan did an amazing job of kind of explaining what's happening in his agency with percentages of changes. I thought I would speak just a little bit about the senior market, where we're seeing rate increases of over 50 percent, and many other people have talked about this before, and I can confirm that's happening on a daily basis. We're at about 60 percent rate increases versus decreases. And the seniors are heavily --

SENATOR MULLET: Where -- Scott, can you explain your job, I guess, where --

MR. POTTER: Oh, I'm sorry. I'm an insurance agent in downtown Issaquah.

SENATOR MULLET: Okay. Oh, I got it.

MR. POTTER: So I'm an insurance broker with multiple markets. Okay? And the -- one of the most important things we're seeing that hasn't been talked too much about is to confirm what Ryan said, is that shopping, as a solution to this problem, is really a shortsighted attack on trying to fix a rating system. And why the seniors have such a problem is because you've got accident forgiveness, which goes away. You have diminishing deductibles, which goes away if you change companies. And there's also claims-free discounts.

So besides what everybody else has already said, I would summarize that the sudden impact of this rule, where seniors can't plan for their expenses, plus shopping really not being a good solution for seniors, it's something that should be thought out more, about letting the companies get their actuaries involved, work with the OIC on how to work with credit, but not just have a shock rule that makes everybody kind of go into a panic mode.

SENATOR MULLET: Okay. Well said. Thank you very much.

MR. POTTER: You bet.

SENATOR MULLET: Okay. Do we have John or Jana, I think? I saw Jana like -- I see Jana. Looks like you have audio maybe, Jana, is that right? And I don't see John showing up anywhere.

And so, I don't know, I guess Clinton, Kelly, and Noah, I

think we probably -- why don't we go next to the final three. This is the pro panel. If we can get any technical issues figured out with those last folks, we'll come back.

And that's Gerald Hankerson with the NAACP, Shaun Scott with Statewide Poverty Action Network, and Bob Cooper.

And, I'm sorry, I apologize to the committee. I feel like, yes, we are now over time and that's my fault. I really apologize.

Shaun, go ahead.

MR. S. SCOTT: Excellent. Thank you very much, Chair Mullet, and good afternoon, I guess it is now, to members of the committee. What does it really mean when those who have exemplary driving records are also paying exorbitant rates for auto insurance? An insurance expert with the Consumer Federation of America opined recently that when insurance companies rely on people's credit histories, they're perpetuating systemic biases.

Meanwhile, the state of California, one of the largest and most diverse economies in the world, has ended this practice, and insurance companies there are still very much profitable.

The previous status quo, which is undone by this ban, at least temporarily, had a discriminatory impact. It was classed as an outcome not in design. With respect to Washingtonians whose premiums may have increased, I would

point out that this isn't the fault of drivers who for too long have paid too much, but rather an insurance -- an issue of insurance companies passing the price of fairness on to consumers.

And we have seen this before. And in upholding segregation in housing, powerful real estate agents once threatened not allowing minorities to move into white neighborhoods would increase property values in residents who benefitted from discrimination. If, as Paul Stewer (phonetic) mentioned before me, insurance companies end up rating based on ZIP Code instead of credit scoring, what they would have done then is actually intentionally replaced one form of redlining with another.

So I think we can uphold our commitment to a fair Washington by upholding the current ban on using credit scores as a factor in insurance ratings. And that's about all I have.

SENATOR MULLET: Okay. Thank you, Shaun.

Gerald or Bob, whoever wants to go.

MR. COOPER: Well, since Gerald's muted, I'll go ahead.

I'm Bob Cooper. And I apologize that the form was not filled out correctly, but I'm here on behalf of the (inaudible) and associates social work (inaudible). But I want to talk about my personal situation.

I have an excellent driving record. No accidents, no

moving violations in more than a quarter century. I would think that that would be the best predictor of risk.

I've owned my home and lived here for 30 years or more, as one of the factors the OIC noted included in setting rates. I'm sure that has to do with stability. I also have excellent credit. As of yesterday, my credit score was 845 out of 850.

SENATOR MULLET: Wow. That's impressive. Okay.

MR. COOPER: Yeah. Thank you, Senator.

That said, when I got my car insurance renewal, the premium had shot up 25 percent year over year. Let that sink in for a minute. No accidents. No moving violations. An increase of 25 percent. And the insurance company told me that that is entirely due to the emergency rule. No other factors involved in that.

And it went up in every category. In bodily injury, property damage, underinsured motorists, personal injury protection, collision and comprehensive.

I can't even begin to fathom how the other guy being underinsured has anything to do with my credit score. That's the one I don't get at all.

But what it does tell me is that this is what systemic privilege looks like. It's there every day, in many ways, and we just don't see it. They've been discriminating against poor people or people whose circumstances have put

them in serious debt for a very long time. And they seem to have made no effort in looking at their rating criteria to ascertain how much of a risk I actually am.

They just took one element out of the formula, like throwing a stick out of the general pile, with no thought on a holistic approach.

I don't think my risk has changed. In fact, if anything, my risk is down, because I'm not driving nearly as much, as I sit here with my five screens and don't drive to Olympia or don't drive to (inaudible).

So instead of fighting this proposed rule or this emergency rule or proposed legislation, maybe you should be looking at what other criteria insurance companies use to assess what their risk is.

SENATOR MULLET: Okay. Thank you, Bob.

Gerald?

MR. HANKERSON: Thank you, Senator Mullet, as chair, and the committee for allowing me the opportunity to speak today. My name is Gerald Hankerson. I'm the president of the NAACP, which is National Association for the Advancements of Colored People. I'm its president for the region of Alaska, Oregon, and Washington. And we've been around over 110 years dealing with similar issues like this, from Jim Crow all the way, dating back through all the different gentrification, all these issues, so this is not

an issue that we're not unfamiliar with.

And originally I come here to have a certain thing I wanted to say. But after listening to the entire conversation of the past hour, I want to echo what Senator Nobles identified and explained that, you know, when we got into this fight a year ago, we wanted to identify -- and I want to take it back to the original form. The argument at the time was why is this black woman with a low credit score but have a perfect driving record have a higher premium than a white woman with a good credit score, with even a DUI, paying a lower one?

So we don't want to get into the debate on who benefits most over others. You know, I really am empathetic to the folks whose scores -- whose premiums increased versus those. I don't want to put a fight against each other. When, in fact, ultimately the insurance companies is the ones that's ultimately responsible for making these decisions.

The use of credit scores, as we identified, was a systemic tool that was used to discriminate in certain locations, and it was targeted in Washington state, where the black folks have been paying higher premiums for years that got us to this point.

So I applaud Commissioner Kreidler for using this emergency action to respond to this act, because it didn't seem like we was going to get anywhere with the legislature

finally making a decision on ending this act. We're only asking for the removal of the discriminatory tool. We using credit scores for people of color, people in -- poor people in those neighborhoods that was paying high premiums for years.

The insurance companies are the folks that should be held accountable here, so these questions should be asked of the insurance agencies. What mechanism can you use, in spite of using credit scoring history, to determine premiums, and how do we stop -- how do we sacrifice that?

But we don't want to ever come across -- because I'm really empathetic to the elderly people that's paying higher premiums, and that's clearly not because of the credit rate removal. That's for other reasons that we don't propose. But we stand firmly behind Commissioner Kreidler for using this emergency authority, to act when the legislature would not.

And we're calling you on, Senator Mullet, and other senators in the legislature to come up with some type of plan to make sure -- don't let the profit take advantage of the people, because it's the people who we are here to represent. And I don't want to fight others, because -- whose premium went up or down versus making a fair rule that's equally neutral statewide.

So I want to make sure, I'm willing to work with -- the

NAACP, we're willing to work with anyone to make that fair, but we don't want to demonize anybody because that rate went up.

Thanks for allowing me the opportunity to testify.

SENATOR MULLET: Okay. Excellent.

I guess, Gerald, is there any part of you that's nervous, the removal of credit, like if they assign more weight to geography or more weight to how many traffic tickets you have, that you end up with a racial bias from those factors, that...

MR. HANKERSON: Yeah. I mean, I'm still -- for the life of me, can't figure out what does my credit score got to do with my ability to be a safe driver? You would think, automatically, that you'll look at my credit score for my ability to pay, to afford something. But when you look at this from our perspective, through the lens that we look at, the racial equity lens, we see that obviously it looks like -- by this practices, it looks like the more darker you get or the more people around you in those certain poor neighborhoods, then you really redlining folks because we're being targeted here to pay a higher premium.

So the credit score should not be a mechanism from which to use (inaudible) being fair. I don't oppose other alternatives, but we show you there's a Jim Crow tool being used to making people in the neighborhood pay higher

premiums. And now that we want to put a stop to it -- we're not upset about that. I'm -- we upset about that. So we just trying to make it fair. We don't want to make them start giving the poor people -- I mean the elderly people higher premiums. Insurance companies need to stop that. But don't continue to do this off the backs of the poor and the black and the brown.

I hope that answer your question.

SENATOR MULLET: Not exactly. That's okay. We're getting really late on time. But let's go to Paul Benz and see.

MR. BENZ: Thanks, Chairman Mullet and committee members. And being that we are way over time, I am going to just suffice it but to say -- so I'm testifying on not just -- on behalf of Faith Action Network, but also in terms of myself as an insurance policyholder where my auto insurance went up probably about 20 percent. I'd have to go back and check the bill.

But let me just boil it down to this. That I feel this is an issue that the parent, the national insurance companies -- I'm not talking about the local insurance agents. I'm talking about the national ones. And I just want to use a quote that was -- because it's -- several quotes were issued by, again, the insurance industry soon after the horrible death, murder of George Floyd well over a year ago, right? So we're talking about the summer of 2020.

And I'm just going to use one quote and -- as we call on the insurance industry in our state to help reduce systemic racism in our state, and that -- glad that three other states, I'd like to see us be the fourth state to join the three other ones, where insurance companies are still doing very good business in those three states.

So the quote is from the Allstate Insurance Company. And when you do systemic change, the system changes and you get the negative impacts we get, but also the positive impacts. So the quote is this: Systemic racism is pervasive, and we must not be complicit by inaction or silence. For our society -- including Washington state -- to eliminate the inequities in America, each of us needs to have the will to change, the heart to trust, and the energy, the energy to lead. We are focused on improving equity for all. We're committed to long-term change.

And I would just simply advocate that this emergency rule, though difficult for many in our state, we have heard that, we certainly hear that as well, that we can make that change and the emergency rule and the original Senate Bill 5010, I think, is still the way to go. Thank you.

SENATOR MULLET: Okay. Thank you, Paul.

And are there any final comments from Senator Hasegawa? Or Senator Dozier was there, but now we just have his chair.

We are at the conclusion. I really apologize for going

long. Did you have any closing remarks, Senator Hasegawa, before I wrap it up, or --

SENATOR HASEGAWA: Yeah. Thanks, Mr. Chair.

So there was a lot of sort of references to discriminatory or not opposing that whole opinion about discriminatory impacts. I was just curious if there's any data, you know, that staff might be able to assemble regarding impacts on seniors. If the charts that were shown to us by the industry representatives earlier, if there was any demographic analysis of those different categories, where rates were going down versus where rates were going up.

You know, it seems like, to me, I agree with the last several speakers who said there's no discrimination -- who said that the impacts of credit scoring, what does that have to do with a person's driving record or the basic risk factors that insurance companies should be basing their rates on. So, you know -- and then they said the insurance companies are still doing very well in those states who have passed this policy.

So I'm curious about the profit margins of a lot of these national insurance companies and where they sit with regard to the imposition of this policy.

So I would ask staff, maybe I could talk with them off line, about getting some data that supports or resolves some of these questions that were -- have risen, that were not

supported by data.

SENATOR MULLET: Yeah. Okay. No. That's fair. And I think we can definitely try to find that, and I think the insurance industry is so tough, because I think when you look at, like, California, like I saw a statistic this week where they paid out 20 billion of claims from the wildfires the last couple years, which ended up being twice as much as their net income from the previous decades or something.

So I think it's just a tricky industry, because you don't know when the natural disasters do hit, and that's the hard thing is we want our insurance companies to be able to pay out every single time there is a natural disaster. So it's a balancing act of -- you know, we deal with this, right, Senator Hasegawa, in health care -- like how much money do you want in the reserve account of your health insurance? Like, it's really a -- I don't know. It's a lot of shades of gray, I guess, is what it comes down to.

Senator Dozier, do you have any final closing remarks before we wrap up?

SENATOR DOZIER: Thanks, Senator Mullet. No. This was really informative, I think, to hear. A little bit of the shift, I think, came to the end moving more on auto insurance and -- you know, but basically this is impacting all insurances from my -- what I understand, from homeowners to renters and everything, so...

But it was a great opportunity to hear from the people, I think, as we're seeing these changes that are happening so rapidly here, that I think we didn't really expect right off. So thank you, Senator.

SENATOR MULLET: Yeah. And I appreciate everyone being here. And I think the whole point of the hearing was to hear impacts from people in Washington, and we obviously did hear that, both positive and negative. And I think at the end of the day, I mean, we've had millions of people in the state, like over north of 2 million, whose rates are going up. We've had a similar round of people whose rates are going down. These are -- we're talking about hundreds and hundreds of millions of dollars getting shifted around in the state of Washington based on this emergency rule.

And so, like I said, I really appreciate, you know, both David Forte and Jon Noski coming to testify. I will repeat that I really wish Commissioner Kreidler had actually come, because I think given the hundreds and hundreds of millions of dollars we're shifting around from people who obviously had a history of filing very few insurance claims to people who tend to file more claims can pay less, I just think it's a very important matter that we really want to make sure -- and I think Senator Hasegawa's request for as much data as possible is an excellent one. And I think that we will try to work on that so that we can start the

January session with as much information at our fingertips as humanly possible.

So thank you very much, everyone. With that, this hearing is closed.

(Conclusion of proceedings)

C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a certified court reporter; and that the transcript is true and accurate to the best of my knowledge and ability, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of November, 2021.

s/ Debra Riggs Torres, RPR
Reed Jackson Watkins, LLC
800 Fifth Avenue, Suite 101-183
Seattle, Washington 98104
Telephone: (206) 624-3005
E-mail: office@rjwtranscripts.com

Exhibit R

Temporary prohibition of use of credit history (R 2021-07)

The Office of the Insurance Commissioner is considering rules to temporarily prohibit the use of credit history to determine premiums and eligibility for coverage in private auto, homeowner and renters insurance for three years after the public emergency concludes.

Proposed rulemaking

> CR-102 for R 2021-07 (PDF, 266.84 KB)

Public hearing

The purpose of the public hearing is for the agency to receive oral comment. If you already provided written comment, or provide a comment before the time and date specified in the rulemaking notice, the agency will consider that comment; there is no need to read your written comments at the public hearing.

If you choose to testify, be sure to register at the link provided below. At the beginning of the hearing, you will be asked to click the "raise hand" button to indicate you would like to testify. OIC staff will be monitoring and placing folks into the speaking queue when there is room. You will be able to clearly see on your screen the order of speakers so you can be ready to speak. When called to testify please provide your full name and business affiliation (if you have any) with your comment on the rulemaking. Due to the expected volume of participants, there will be a two-minute time limit for each testimony.

> Nov. 23, 2021 at 9:30 a.m.

Register for public hearing via Zoom

If you have already provided written comment, or simply want to watch the public hearing, you can watch it on TVW.

Second stakeholder draft released September 7, 2021

Second stakeholder draft for R 2021-07 (PDF, 170.04 KB)

Stakeholder draft released July 13, 2021

First stakeholder draft for R 2021-07 (PDF, 193.76 KB)

Notice to start rulemaking

CR-101 for R 2021-07 (PDF, 116.48 KB)

Comments

Comments for the CR-102 are due Nov. 22, 2021

Submit comments to the rules coordinator.

View previously submitted comments

SEE ALSO

Regulations - Washington Administrative Code (leg.wa.gov)

Laws - Revised Code of Washington (leg.wa.gov)

Recently adopted rules

NEED MORE HELP?

Contact the rules coordinator

YouTube

Exhibit S

Company	Tracker ID #	Submission Date	Disposition Date & Type	# of Days	Effective Date	# of Days from Submission	Comments
American Family	336274	1/8/2018	4/24/2018 Approved	106	7/15/2018	188	
State Farm	**338307**	**1/25/2018**	**1/26/2018 Approved**	**1**	**4/16/2018**	**81**	**Refiled, PV-40050**
GEICO Secure	338788	1/30/2018	5/10/2018 Approved	100	7/9/2018	160	
GEICO Advantage	338791	1/30/2018	5/10/2018 Approved	100	7/9/2018	160	
GEICO Choice	338793	1/30/2018	5/10/2018 Approved	100	7/9/2018	160	
New South	340035	2/12/2018	3/20/2018 Approved	36	6/6/2018	114	
Amica Mutual	340942	2/20/2018	7/2/2018 Approved	132	12/1/2018	284	
Grange	341285	2/23/2018	3/29/2018 Approved	34	8/1/2018	159	
Granwest P&C	341289	2/23/2018	3/30/2018 Approved	33	8/2/2018	160	
Electric	341748	3/2/2018	9/14/2018 Approved	196	12/1/2018	274	
Enumclaw P&C	343037	3/27/2018	8/16/2018 Withdrawn				Not subject to public disclosure
Metromile	343079	3/28/2018	7/27/2018 Approved	121	9/23/2018	179	
State Farm	343132	3/29/2018	4/24/2018 Approved	26	7/30/2018	123	
Country	**346024**	**5/22/2018**	**5/13/2019 Approved**	**356**	**6/24/2019**	**398**	**State Status = Re-Open Processed**
PEMCO	347186	6/19/2018	8/16/2018 Approved	58	9/24/2018	97	
Standard Fire	**348404**	**7/18/2018**	**7/25/2019 Approved**	**372**	**9/1/2019**	**410**	**1 year to approve, doesn't look like refile**
Sentry Select	349522	8/10/2018	9/10/2018 Approved	31	11/12/2018	94	
Privilege Underwriters	**349923**	**8/17/2018**	**6/5/2019 Approved**	**292**	**9/18/2019**	**397**	
American Commerce	350108	8/21/2018	11/16/2018 Approved	87	2/19/2019	182	
Metropolitan Group	350482	8/30/2018	9/27/2018 Approved	28	11/19/2018	81	
Metropolitan/Economy Preferred	350495	8/30/2018	9/27/2018 Approved	28	11/19/2018	81	
Integon National	351256	9/14/2018	10/25/2018 Approved	41	5/26/2019	254	
Permanent General	351481	9/20/2018	11/19/2018 Approved	60	12/11/2018	82	
Enumclaw P&C	351902	9/25/2018	3/8/2019 Approved	164	4/22/2019	209	
Markel American	354631	10/31/2018	12/12/2018 Withdrawn				Not subject to public disclosure
Grange	356010	11/16/2018	12/11/2018 Approved	25	5/1/2019	166	State Status = Re-Open Processed
Granwest P&C	356022	11/16/2018	12/11/2018 Approved	25	5/1/2019	166	State Status = Re-Open Processed
Oregon Mutual	356026	11/16/2018	12/12/2018 Approved	26	3/15/2019	95	
Safeco of Oregon	357675	12/10/2018	12/20/2018 Approved	10	6/12/2019	184	

Great Northern/Pacific/Vigilant/Federal	357968	12/12/2018	1/9/2019 Approved	28	7/9/2019	209	
GEICO General	363890	2/15/2019	5/1/2019 Approved	75	7/8/2019	143	
GEICO Advantage	**363891**	**2/15/2019**	**5/16/2019 Approved**	**90**	**5/23/2019**	**97**	**Only 2/15/2019 GEICO not approved on 5/1/2019**
GEICO Indemnity	363892	2/15/2019	5/1/2019 Approved	75	7/8/2019	143	
GEICO Secure	363893	2/15/2019	5/1/2019 Approved	75	7/8/2019	143	
GEICO Choice	363900	2/15/2019	5/1/2019 Approved	75	7/8/2019	143	
American Family Mutual	367870	4/4/2019	9/4/2019 Approved	153	11/15/2019	225	
Foremost of Grand Rapids	368501	4/18/2019	6/4/2019 Approved	47	10/1/2019	166	
Dairyland	369339	5/2/2019	10/18/2019 Approved	169	12/6/2019	218	
Midvale Indemnity	369486	5/6/2019	7/17/2019 Approved	72	12/20/2019	228	
Amica	**372401**	**7/1/2019**	**9/4/2020 Approved**	**431**	**1/1/2021**	**550**	
First National	372481	7/1/2019	7/12/2019 Withdrawn				Not subject to public disclosure
State Farm	373742	7/30/2019	8/30/2019 Approved	31	1/6/2020	160	No documents attached
State Farm	373744	7/30/2019	8/30/2019 Approved	31	1/6/2020	160	
Allstate Indemnity	374826	8/15/2019	11/25/2019 Approved	102	1/15/2020	153	
IDS P&C	**375265**	**8/27/2019**	**6/2/2021 Approved**	**645**	**9/1/2021**	**736**	No documents attached
Foremost of Grand Rapids	**375897**	**9/11/2019**	**5/5/2020 Approved**	**237**	**5/21/2020**	**253**	**Took awhile to get approved, then took effect quickly**
Middlesex	376591	9/24/2019	12/24/2019 Approved	91	2/19/2020	148	
State Farm	**383417**	**1/6/2020**	**2/6/2020 Approved**	**31**	**3/9/2020**	**63**	**Most 2020 submissions until July were decided relatively quickly**
Country	**384519**	**1/20/2020**	**2/19/2020 Approved**	**30**	6/24/2020	156	
Esurance	387008	2/14/2020	3/26/2020 Approved	41	9/3/2020	202	
Cincinnati	389766	4/3/2020	7/31/2020 Approved	119	1/1/2021	273	
Austin Mutual	391768	5/13/2020	6/12/2020 Approved	30	9/1/2020	111	
State Farm	392505	5/28/2020	7/13/2020 Approved	46	8/24/2020	88	State Status = Re-Open Processed
Trumbull/Hartford	393364	6/15/2020	7/15/2020 Approved	30	2/6/2021	236	
Hartford	393366	6/15/2020	7/15/2020 Approved	30	2/6/2021	236	
Charter Indemnity	394948	7/23/2020	2/22/2021 Approved	214	5/5/2021	286	
Stillwater P&C	395116	7/28/2020	12/7/2020 Approved	132	1/17/2021	173	
Permanent General	396024	8/13/2020	3/18/2021 Approved	217	5/4/2021	264	
Truck Ins. Exchange	397669	9/17/2020	10/8/2020 Approved	21	2/16/2021	152	

							Not subject to public disclosure **No documents attached**
Foremost of Grand Rapids	**399745**	**10/29/2020**	**7/30/2021 Approved**	**274**	**3/15/2022**	**502**	**First of 3 filings not subject to public disclosure that take effect 3/15/2022**
Foremost of Grand Rapids	399747	10/29/2020	2/5/2021 Approved	99	6/15/2021	229	
Eagle West	403079	12/29/2020	10/4/2021 Response Received	279			
Allied P&C/Nationwide	404124	1/12/2021	3/16/2021 Approved	63	**3/15/2022**	427	Not subject to public disclosure No documents attached
GEICO Indemnity/Casualty/General	407178	3/2/2021	6/30/2021 Approved	120	11/11/2021	254	Not subject to public disclosure No documents attached
GEICO Advantage/Choice/Secure	407181	3/2/2021	6/30/2021 Approved	120	11/11/2021	254	Not subject to public disclosure No documents attached
Allstate Indemnity	410812	5/24/2021	7/6/2021 Approved	43	10/13/2021	142	
Foremost of Grand Rapids	415035	8/30/2021	10/22/2021 Response Received	53			
Crestbrook	415389	**9/8/2021**	**9/27/2021 Approved**	**19**	**3/15/2022**	**188**	Not subject to public disclosure No documents attached
Integon National	415771	9/17/2021	10/19/2021 Approved	32	12/3/2021	77	Not subject to public disclosure No documents attached

Company	Tracker ID #	Submission Date	Disposition Date & Type	# of Days	Effective Date	# of Days from Submission	Comments
Progressive Casualty	336187	**1/5/2018**	**2/5/2019 Approved**	**396**	**5/1/2019**	**481**	**All dates the same, but why did it take these two so long to get approved, esp relative to most of the entries in this chart**
American Strategic	336195	**1/5/2018**	**2/5/2019 Approved**	**396**	**5/1/2019**	**481**	
American Family	336343	1/9/2018	2/14/2018 Approved	36	6/15/2018	157	
American Commercial	336706	1/11/2018	5/4/2018 Approved	113	7/25/2018	195	
Enumclaw Mutual	342640	3/16/2018	4/23/2018 Approved	38	6/24/2018	100	
Amica Mutual	342643	3/19/2018	10/10/2018 Approved	205	3/1/2019	347	
Enumclaw P&C	342644	3/16/2018	4/23/2018 Approved	38	6/24/2018	100	
Metropolitan Group P&C	346395	5/30/2018	6/27/2018 Approved	28	8/28/2018	90	
Electric	**347239**	**6/20/2018**	**7/20/2018 Approved**	**30**	**8/1/2019**	**407**	**Approved "quickly," but effective over a year from filing**
Liberty Mutual	**348328**	**7/17/2018**	**3/8/2019 Approved**	**234**	**11/24/2018**	**130**	**State Status = Re-Open Processed Retroactive effective date?** Or, effective date = 11/19/2018
Allstate Indemnity	349108	8/1/2018	9/7/2018 Approved	37	1/3/2019	155	
Oregon Mutual	349304	8/7/2018	9/7/2018 Approved	31	11/15/2018	100	
Allstate	349811	8/16/2018	10/4/2018 Approved	49	12/13/2018	119	
Allstate P&C	351060	9/12/2018	10/8/2018 Approved	26	1/3/2019	113	
Homesite	351991	9/26/2018	10/25/2018 Approved	29	1/31/2019	127	
Enumclaw Mutual	352305	9/28/2019	11/8/2018 Approved	41	12/24/2018	87	
Enumclaw P&C	352311	9/28/2018	11/8/2018 Approved	41	12/24/2018	87	
American Family Mutual	352471	10/2/2018	11/29/2018 Approved	58	3/15/2019	164	
Bankers Standard	353284	10/12/2018	11/13/2018 Approved	32	7/21/2019	290	
Homesite of the Midwest	355324	11/9/2018	12/6/2018 Approved	27	2/28/2019	91	
State Farm	359956	1/7/2019	5/8/2019 Approved	121	7/15/2019	189	
State Farm	359957	1/7/2019	2/20/2019 Approved	44	7/15/2019	189	
Hartford P&C	361239	1/22/2019	2/12/2019 Approved	21	5/5/2019	103	
Austin Mutual	364481	2/20/2019	4/16/2019 Approved	55	6/15/2019	115	
Encompass Indemnity	365544	3/1/2019	3/28/2019 Approved	27	6/15/2019	106	
American Modern Select	367417	3/28/2019	5/6/2019 Approved	39	8/14/2019	139	

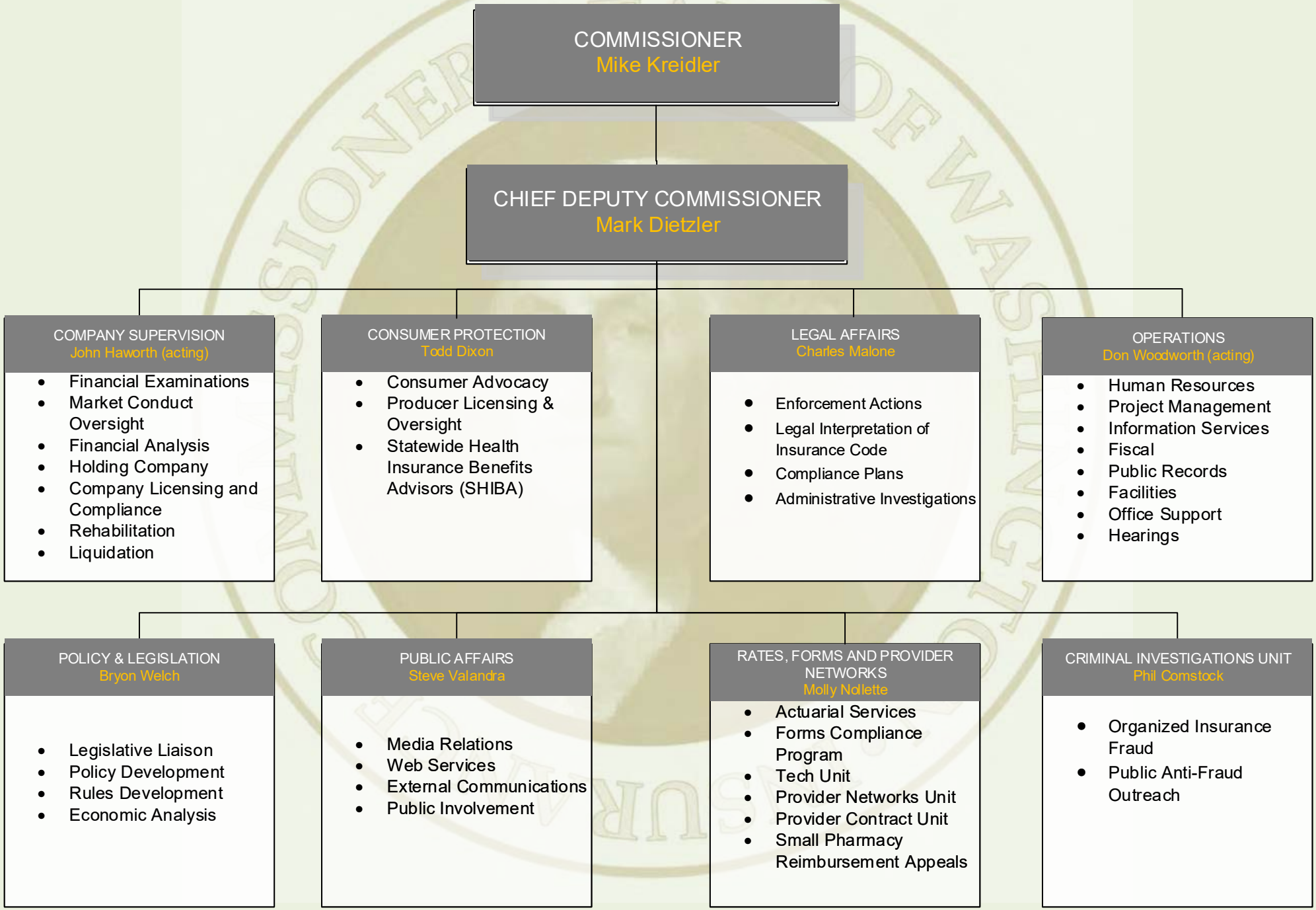
Praetorian	**368309**	**4/15/2019**	**4/21/2020 Approved**	**372**	**10/15/2020**	**549**	**Over a year to approve, take effect**
Country Mutual	369425	5/3/2019	6/14/2019 Approved	42	9/16/2019	134	
American Bankers of Florida	370886	5/30/2019	2/13/2020 Approved	259	6/15/2020	382	
USAA/Garrison P&C	372323	6/28/2019	8/9/2019 Withdrawn				
First American P&C	73899	8/1/2019	8/12/2019 Approved	11	2/1/2020	184	
American Reliable	374985	8/21/2019	9/27/2019 Approved	37	12/1/2019	102	
Grange	376345	9/19/2019	10/31/2019 Approved	42	4/15/2020	209	
Oregon Mutual	376806	9/27/2019	1/10/2020 Approved	105	3/15/2020	170	
Homesite	377165	10/4/2019	10/31/2019 Approved	27	1/31/2020	119	
Allstate Indemnity	380595	11/27/2019	1/10/2020 Approved	44	3/26/2020	120	
Allstate	381012	12/4/2019	1/10/2020 Approved	37	3/26/2020	113	
Allstate P&C	381017	12/4/2019	1/10/2020 Approved	37	3/26/2020	113	
Homesite of the Midwest	381184	12/6/2019	6/18/2020 Approved	195	9/8/2020	227	
Travelers	381438	12/10/2019	6/30/2020 Approved	203	9/12/2020	277	
Allstate	382400	12/23/2019	1/30/2020 Approved	38	5/21/2020	150	
Farmers	**383646**	**1/9/2020**	**11/25/2020 Approved**	**321**	**2/7/2021**	**395**	
Liberty	**386141**	**2/6/2020**	**1/11/2021 Approved**	**340**	**2/25/2021**	**385**	
Travelers Personal	386423	2/10/2020	5/6/2020 Approved	86	7/11/2020	152	
American Strategic	**387476**	**2/19/2020**	**1/4/2021 Approved**	**320**	**1/6/2021**	**322**	**Almost a year to approve, 2 days to take effect**
Encompass Indemnity	388399	3/6/2020	4/10/2020 Approved	35	7/16/2020	132	
Commercial West	388660	3/11/2020	4/2/2020 Approved	22	6/16/2020	97	
Great Northern/Federal/Chubb National/Pacific Indemnity/Vigilant	390326	4/16/2020	1/12/2021 Approved	271	3/22/2021	340	
Liberty Mutual	390786	4/28/2020	6/11/2020 Approved	44	9/22/2020	147	
Austin Mutual	391766	5/13/2020	6/12/2020 Approved	30	9/1/2020	111	
Unitrin	393002	6/8/2020	7/23/2020 Approved	45	12/6/2020	181	
Travelers Personal	397039	9/2/2020	1/1/2021 Approved	121	4/3/2021	213	
American Family Mutual	398723	10/8/2020	11/6/2020 Approved	29	3/15/2021	158	
American Commerce	400171	11/6/2020	12/3/2020 Approved	27	3/23/2021	137	
Allstate	402184	12/14/2020	4/26/2021 Approved	143	8/12/2021	241	
Bankers Standard	403831	1/8/2021	1/27/2021 Approved	19	7/12/2021	185	

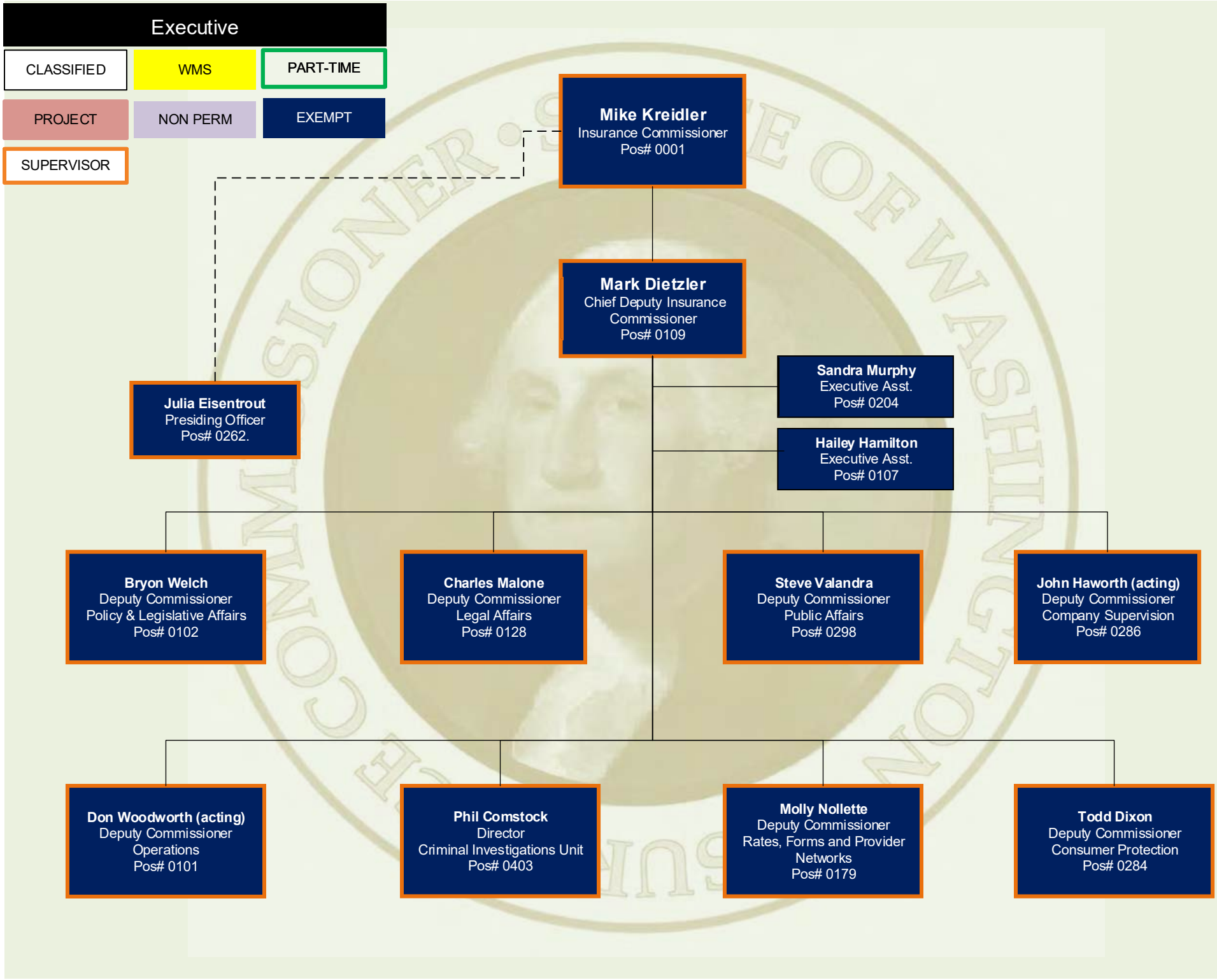
Grange	**405062**	**1/26/2021**	**1/27/2021 Approved**	**1**	**10/1/2021**	**248**	**Approved in 1 day**
Commerce West	407193	3/2/2021	3/31/2021 Approved	29	6/16/2021	106	
Liberty	407788	3/16/2021	5/4/2021 Withdrawn				Not subject to public disclosure
PEMCO Mutual	410988	5/25/2021	7/8/2021 Approved	44	9/8/2021	106	
Electric	411933	6/17/2021	7/29/2021 Approved	42	10/1/2021	106	
Amica Mutual	**412028**	**6/21/2021**	**10/12/2021 Response Received**				
Crestbrook	414782	8/26/2021	9/30/2021 Approved	35	3/15/2022	201	Not subject to public disclosure No documents available
Allied P&C/Depositors/Nation	415491	9/9/2021	10/11/2021 Approved	32	2/15/2022	159	Not subject to public disclosure No documents available
Praetorian	**416043**	**9/24/2021**	**10/21/2021 Active Suspense**				

Exhibit T

Agency Overview

STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER



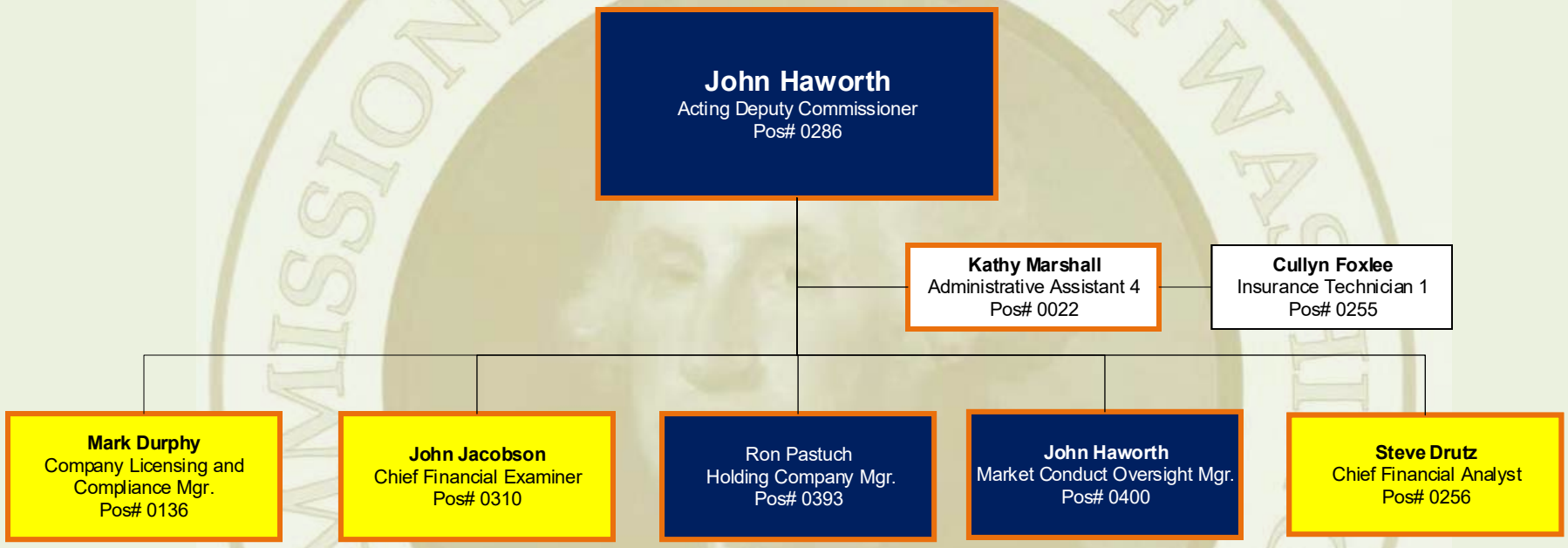

Executive
CLASSIFIED
WMS
PART-TIME
PROJECT
NON PERM
EXEMPT
SUPERVISOR
Mike Kreidler
Insurance Commissioner
Pos# 0001
Mark Dietzler
Chief Deputy Insurance Commissioner
Pos# 0109
Julia Eisentrout
Presiding Officer
Pos# 0262.
Sandra Murphy
Executive Asst.
Pos# 0204
Hailey Hamilton
Executive Asst.
Pos# 0107
Bryon Welch
Deputy Commissioner
Policy & Legislative Affairs
Pos# 0102
Charles Malone
Deputy Commissioner
Legal Affairs
Pos# 0128
Steve Valandra
Deputy Commissioner
Public Affairs
Pos# 0298
John Haworth (acting)
Deputy Commissioner
Company Supervision
Pos# 0286
Don Woodworth (acting)
Deputy Commissioner
Operations
Pos# 0101
Phil Comstock
Director
Criminal Investigations Unit
Pos# 0403
Molly Nollette
Deputy Commissioner
Rates, Forms and Provider Networks
Pos# 0179
Todd Dixon
Deputy Commissioner
Consumer Protection
Pos# 0284

Company Supervision Overview

CLASSIFIED | WMS | PART-TIME

PROJECT | NON PERM | EXEMPT

SUPERVISOR



Company Supervision
Financial Condition

CLASSIFIED | WMS | PART-TIME

PROJECT | NON PERM | EXEMPT

SUPERVISOR

Financial Condition Examination

John Jacobson
Chief Financial Examiner
Pos# 0310

(Vacant)
Administrative Assistant 4
Pos# 0241

Tarik Subbagh
Assistant Chief Examiner
Pos# 0337

Constantine Arustamian
Financial Examiner 4
Pos# 0355

Randy Fong
Financial Examiner 4
Pos# 0146

- **(Vacant)** Financial Examiner 3 Pos# 0036
- **Edsel Dino** Financial Examiner 3 Pos# 0099
- **Zairina Othman** Financial Examiner 2 Pos# 0254
- **(Vacant)** Financial Examiner 2 Pos# 0346

Kathleen Hicks
Financial Examiner 4
Pos# 0199

- **Friday Enoye** Financial Examiner 3 Pos# 0202
- **Albert Karau** Financial Examiner 3 Pos# 0343
- **Tony Quach** Financial Examiner 2 Pos#0333
- **Cherrellie Pasia** Financial Examiner 2 Pos# 0276
- **Jonathan Yee** Financial Examiner 2 Pos# 0347

Susan Campbell
Financial Examiner 4
Pos# 0263

- **Katy Bardsley** Financial Examiner 3 Pos# 0342
- **James Koo** Financial Examiner 3 Pos# 0045
- **Cynthia Clark** Financial Examiner 2 Pos# 0344
- **(Vacant)** Financial Examiner 2 Pos# 0345
- **Amina Mohammud** Financial Examiner 2 Pos# 0437

Steve Drutz
Chief Financial Analyst
Pos# 0256

Financial Condition Analysis

- **Chase Davis** Financial Examiner 4 Pos# 0047
- **Rodica Murphy** Financial Examiner 3 Pos# 0390
- **Joshua Parise** Financial Examiner 2 Pos# 0197
- **Sarah Froyland** Financial Examiner 4 Pos# 0277
- **Joyce Reynolds** Financial Examiner 3 Pos# 0200
- **Tawni Berg** Financial Examiner 2 Pos# 0330
- **Yen Nguyen** Financial Examiner 2 Pos# 0426
- **Timothy Hays** Investment Specialist Pos# 0414

Company Supervision
Market Conduct and Control

CLASSIFIED | WMS | PART-TIME

PROJECT | NON PERM | EXEMPT

SUPERVISOR

John Haworth
Market Conduct Oversight Manager
Pos# 0400

Carolyn Cronin
Administrative Assistant 3
Pos# 0134

Market Conduct Inquiries

Jeanette Plitt
Chief Market Conduct Examiner
Pos# 0145

Paul DuBois
Functional Prog. Analyst 4
Sr. Mkt. Conduct Examiner
Pos# 0229

Anna S. Null
Functional Prog. Analyst 4
Sr. Mkt. Conduct Examiner
Pos# 0208

Becca Hay
Functional Prog. Analyst 3
Market Conduct Examiner
Pos# 0230

Gina Graham
Functional Prog. Analyst 3
Market Conduct Examiner
Pos# 0210

Carla Bailey
Functional Prog. Analyst 3
Market Conduct Examiner
Pos# 0228

Pam Brannan
Functional Prog. Analyst 3
Market Conduct Examiner
Pos# 0352

(Vacant)
Functional Prog. Analyst 3
Market Conduct Examiner
Pos# 0328

Hal Bisnett
Functional Prog. Analyst 3
Market Conduct Examiner
Pos# 0478

Market Conduct Analysis

Jason Carr
Chief Market Analyst
Pos #0401

Lisa Borchert
Functional Prog. Analyst 4
Pos# 0415

Stacey Whiteman
Functional Prog. Analyst 3
Market Analyst
Pos# 0417

Dan Connolly
Functional Prog. Analyst 3
Pos# 0416

Company Licensing and Compliance

Mark Durphy
Company Licensing and Compliance Mgr.
Pos# 0136

Susan Baker
Functional Prog. Analyst 4
Co. Licensing Specialist
Pos# 0425

(Vacant)
Functional Prog. Analyst 4
Co. Licensing Specialist
Pos# 0467

(Vacant)
Functional Prog. Analyst 3
Co. Licensing Specialist
Pos# 0329

(Vacant)
Functional Prog. Analyst 3
Co. Licensing Specialist
Pos# 0517

Sarah Gosney
Insurance Technicican 3
Pos# 0409

Holding Company

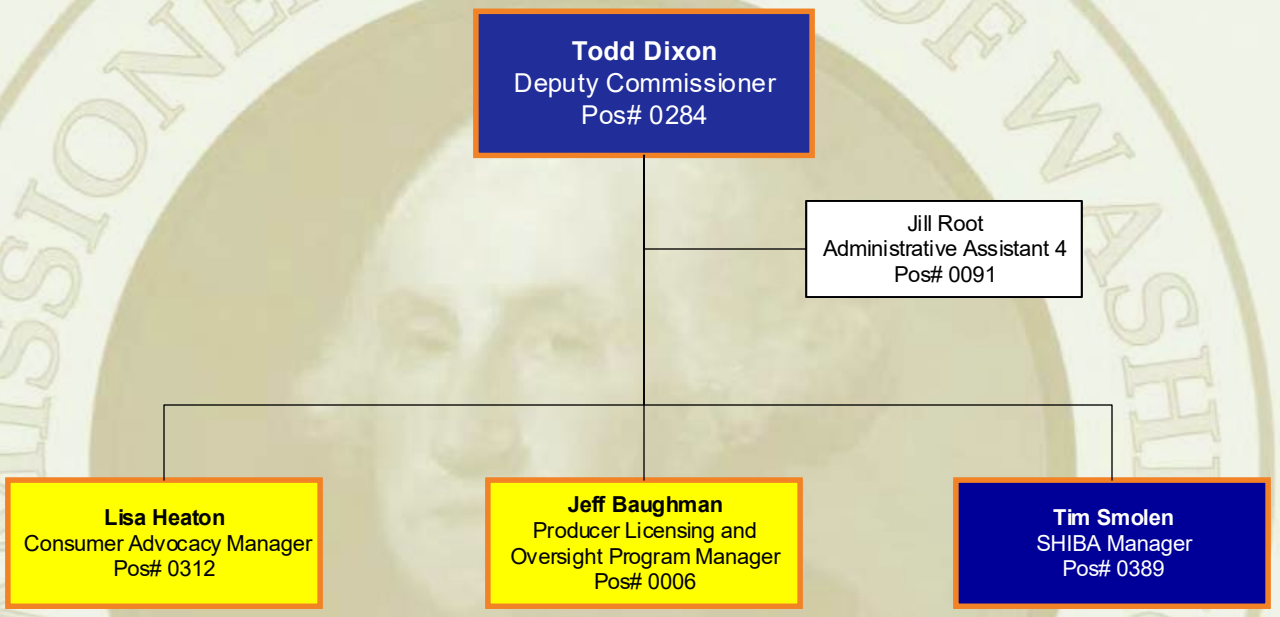
Ron Pastuch
Holding Company Mgr.
Pos# 0393

(Vacant)
Financial Examiner 3
Pos# 0464

Yasen "Ivan" Angelov
Financial Examiner 2
Pos# 0442

Consumer Protection Overview

CLASSIFIED	WMS	PART-TIME
PROJECT	NON PERM	EXEMPT
SUPERVISOR		



Consumer Protection
Consumer Advocacy

CLASSIFIED | WMS | PART-TIME

PROJECT | NON PERM | EXEMPT

SUPERVISOR

Lisa Heaton
Consumer Advocacy Mgr.
Pos# 0312

(Vacant)
Functional Prog. Analyst 4
L&D Compliance Analyst
Pos# 0314

Josh Martinsen
Functional Prog. Analyst 4
P&C Compliance
Pos# 0133

- **Ethel Smith** — Functional Prog. Analyst 3 — Pos# 0070
- **John (Andy) Swokowski** — Functional Prog. Analyst 3 — Pos# 0214
- **Barb Kelley** — Functional Prog. Analyst 3 — Pos# 0086
- **(Vacant)** — Functional Prog. Analyst 3 — Pos# 0324
- **Brenden Weinroth** — Functional Prog. Analyst 3 — Pos#0118
- **Lupita Schnell** — Functional Prog. Analyst 3 — Pos# 0135
- **Amy Teshera** — Functional Prog. Analyst 4 P&C Compliance Analyst — Pos# 0250

(Vacant)
Functional Prog. Analyst 4
L&D Compliance
Pos # 0185

- **Robert Solano** — Functional Prog. Analyst 3 — Pos# 0223
- **Victoria Garcia** — Functional Prog. Analyst 3 — Pos# 0193
- **Ivan Kralovensky** — Functional Prog. Analyst 3 — Pos# 0016
- **Catherine Dill** — Functional Prog. Analyst 3 — Pos# 0247
- **Lindsey Robles** — Functional Prog. Analyst 3 — Pos# 0218
- **Aaron Deggs** — Functional Prog. Analyst 3 — Pos# 0232
- **Sharon Daniel** — Functional Prog. Analyst 4 — Pos# 0215

Daniel Bumbarger
Management Analyst 3
Pos# 0025

Alecia Lee
Insurance Tech. 4
Pos# 0017

- **Lorie Villaflores** — Insurance Technician 3 — Pos# 0264
- **Anthony Cervantes** — Insurance Technician 3 — Pos# 0374
- **Elaine Taylor** — Insurance Technician 3 — Pos# 0007
- **Shane McLemore** — Insurance Technician 3 — Pos# 0367
- **Quenna Lowe** — Insurance Technician 3 — Pos# 0366

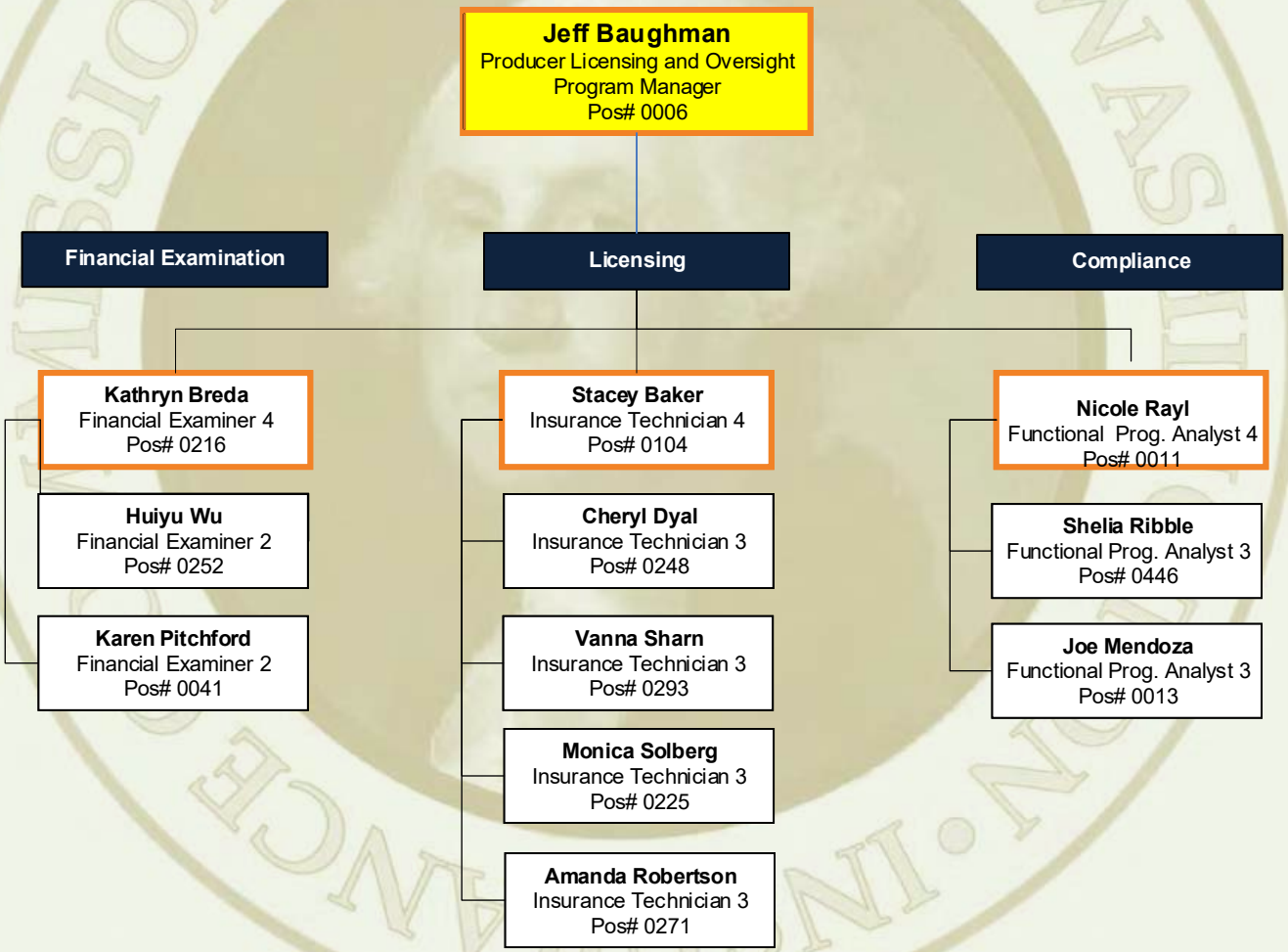
- **Heidi Sommerhalder** — Insurance Technician 1 — Pos# 0519
- **Queennie Wong** — Insurance Technician 1 — Pos# 0520
- **Brian Falconer** — Insurance Technician 1 — Pos# 0521

Consumer Protection
Producer Licensing and Oversight

CLASSIFIED | WMS | PART-TIME

PROJECT | NON PERM | EXEMPT

SUPERVISOR

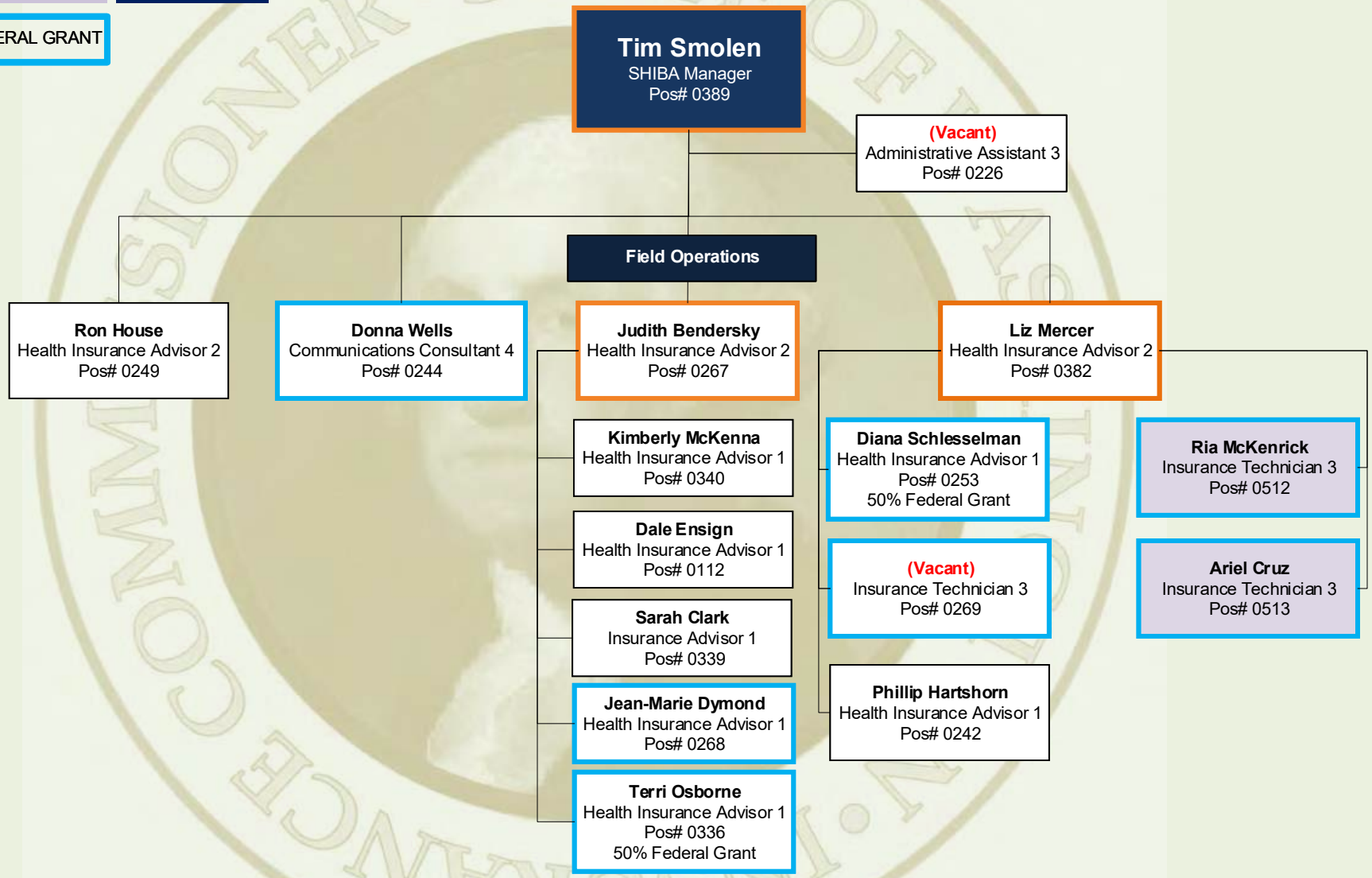


Consumer Protection
SHIBA

CLASSIFIED | WMS | PART-TIME

PROJECT | NON PERM | EXEMPT

SUPERVISOR | FEDERAL GRANT



Legal Affairs

CLASSIFIED | WMS | PART-TIME

PROJECT | NON PERM | EXEMPT

SUPERVISOR

Charles Malone
Deputy Commissioner
Pos# 0128

Barb Bowen
Administrative Assistant 4
Pos# 0026

Darryl Colman
Attorney Manager
Pos# 0368

Sofia Pasarow
Ins. Enforcement Specialist
Pos# 0438

Andres Batista
Ins. Enforcement Specialist
Pos# 0507

Tim Ascher
Ins. Enforcement Specialist
Pos# 0383

Deanna Ogo
Ins. Enforcement Specialist
Pos# 0514

(Vacant)
Ins. Enforcement Specialist
Pos# 0468

Michael Mince
Operations Manager
Pos# 0399

Kimberly Shoblom
Paralegal 2
Pos# 0500

Chris Tribe
Paralegal 2
Pos# 0335

Dawn Krech
Paralegal 2
Pos# 0009

Joshua Pace
Legal Assistant 3
Pos# 0452

Tyler Robbins
Investigations Mgr.
Pos# 0430

Randi Osberg
Investigator 4
Pos# 0245

Jessica Bullington
Investigator 3
Pos# 0434

(Vacant)
Investigator 3
Pos# 0147

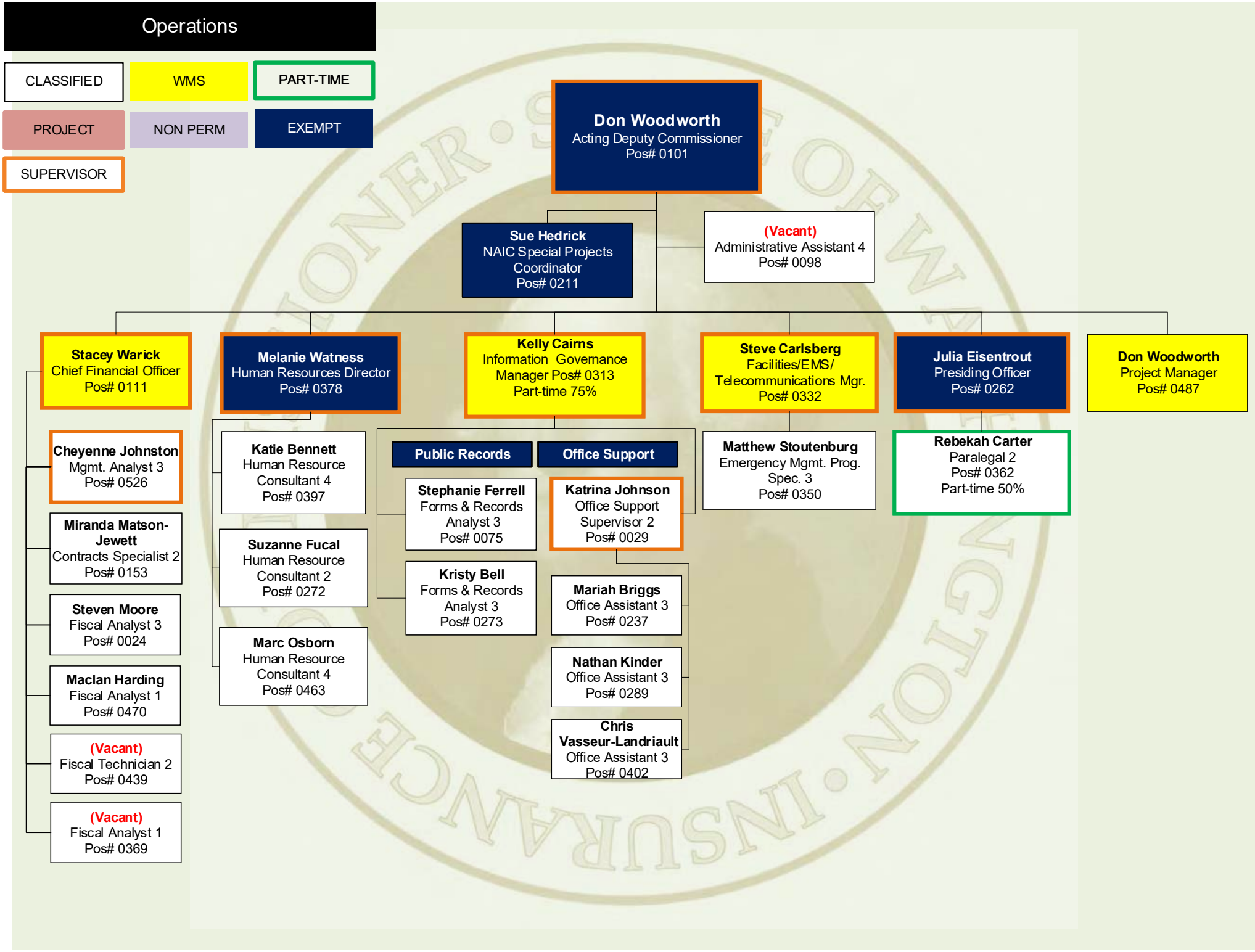
Harvey Churchill
Investigator 3
Pos# 0381

Greg Woehler
Investigator 3
Pos# 0257

Wes Diaz
Investigator 3
Pos# 0251

Leslie Pearsall
Investigator 3
Pos# 0222

(Vacant)
Investigator 1
Pos# 0361

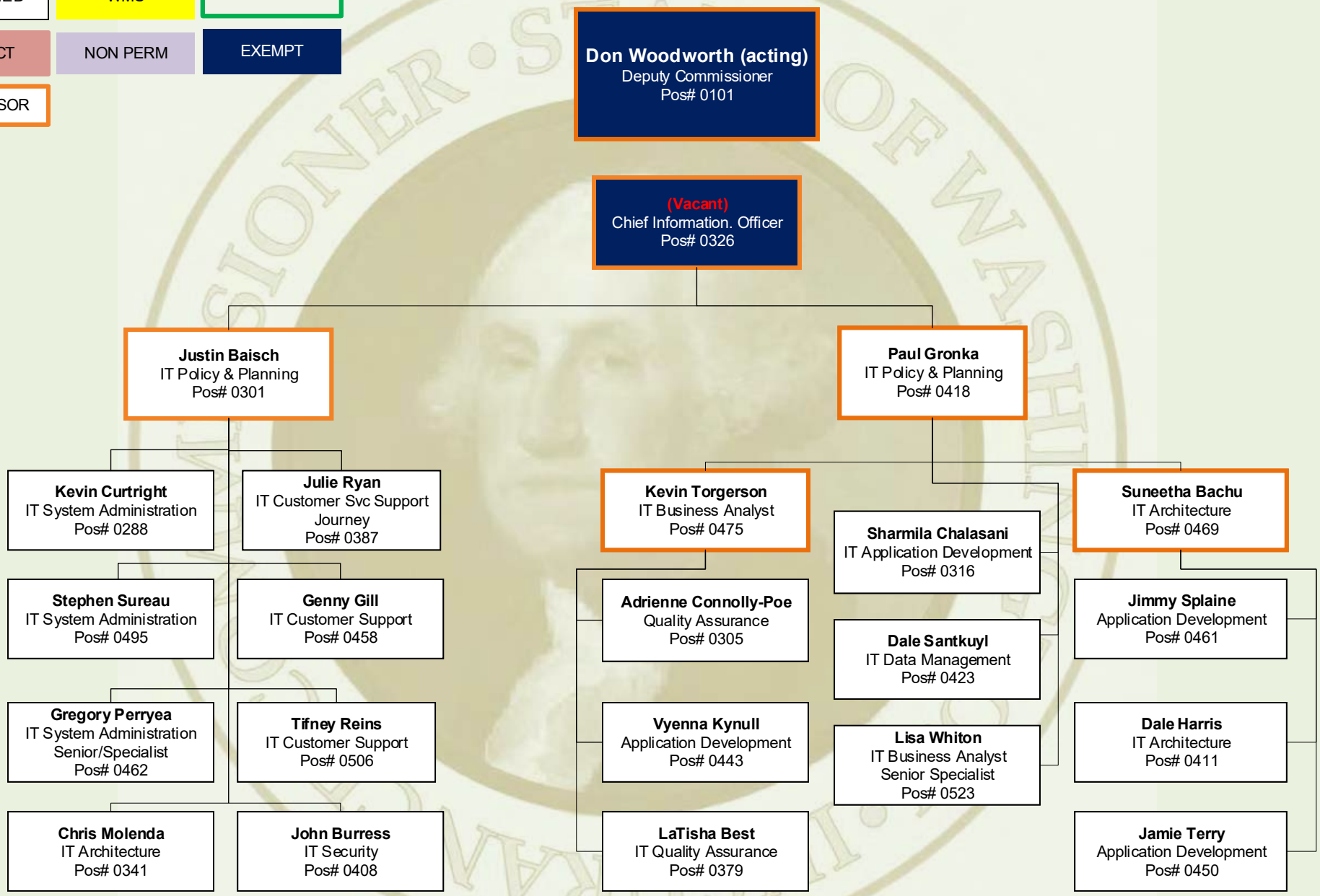

Operations
CLASSIFIED
WMS
PART-TIME
PROJECT
NON PERM
EXEMPT
SUPERVISOR
Don Woodworth
Acting Deputy Commissioner
Pos# 0101
Sue Hedrick
NAIC Special Projects Coordinator
Pos# 0211
(Vacant)
Administrative Assistant 4
Pos# 0098
Stacey Warick
Chief Financial Officer
Pos# 0111
Melanie Watness
Human Resources Director
Pos# 0378
Kelly Cairns
Information Governance Manager Pos# 0313
Part-time 75%
Steve Carlsberg
Facilities/EMS/ Telecommunications Mgr.
Pos# 0332
Julia Eisentrout
Presiding Officer
Pos# 0262
Don Woodworth
Project Manager
Pos# 0487
Cheyenne Johnston
Mgmt. Analyst 3
Pos# 0526
Miranda Matson-Jewett
Contracts Specialist 2
Pos# 0153
Steven Moore
Fiscal Analyst 3
Pos# 0024
Maclan Harding
Fiscal Analyst 1
Pos# 0470
(Vacant)
Fiscal Technician 2
Pos# 0439
(Vacant)
Fiscal Analyst 1
Pos# 0369
Katie Bennett
Human Resource Consultant 4
Pos# 0397
Suzanne Fucal
Human Resource Consultant 2
Pos# 0272
Marc Osborn
Human Resource Consultant 4
Pos# 0463
Public Records
Office Support
Stephanie Ferrell
Forms & Records Analyst 3
Pos# 0075
Kristy Bell
Forms & Records Analyst 3
Pos# 0273
Katrina Johnson
Office Support Supervisor 2
Pos# 0029
Mariah Briggs
Office Assistant 3
Pos# 0237
Nathan Kinder
Office Assistant 3
Pos# 0289
Chris Vasseur-Landriault
Office Assistant 3
Pos# 0402
Matthew Stoutenburg
Emergency Mgmt. Prog. Spec. 3
Pos# 0350
Rebekah Carter
Paralegal 2
Pos# 0362
Part-time 50%

Operations
Information Technology

CLASSIFIED | WMS | PART-TIME

PROJECT | NON PERM | EXEMPT

SUPERVISOR



Policy & Legislation

CLASSIFIED | WMS | PART-TIME

PROJECT | NON PERM | EXEMPT

SUPERVISOR

Bryon Welch
Deputy Commissioner
Pos# 0102

Matthew Kamenz
Administrative Assistant 4
Pos# 0445

Jay Bruns
Senior Climate Advisor
Pos# 0489
Part-time 45%

John Pestinger
Management Analyst 5
Pos# 0493

Jane Beyer
Sr. Health Policy Advisor
Pos# 0144

Jon Noski
Legislative Liaison
Pos# 0373

Rory Paine-Donovan
Assistant Legislative Liaison
Pos# 0334

(Vacant)
Policy and Rules Mgr.
Pos# 0420

Michael Walker
Policy Analyst
General Ins. Focus
Pos# 0384

Jesse Wolff
Administrative Assistant 2
Pos# 0317

David Forte
Policy Analyst
P&C Focus
Pos# 0323

Savanna Cavalletto
Administrative. Assistant 2
Pos# 0491

(Vacant)
Policy Analyst
Health Care Focus
Pos# 0321

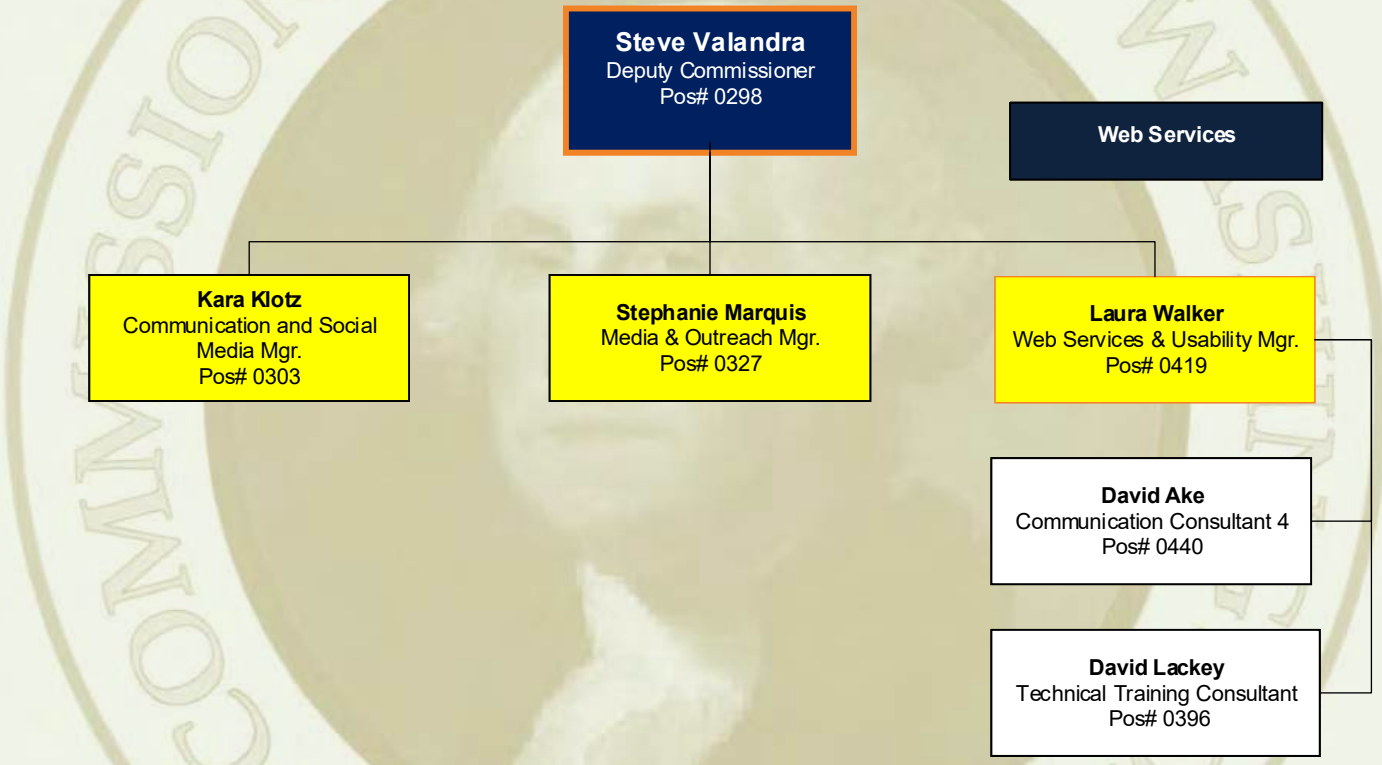
Tabba Alam
Policy Analyst
Economics & Data Focus
Pos# 0348

Simon Casson
Policy Analyst
Economics & Data Focus
Pos# 0410

Shari Maier
Policy Analyst
Health Care Focus
Pos# 0505

Public Affairs

CLASSIFIED	WMS	PART-TIME
PROJECT	NON PERM	EXEMPT
SUPERVISOR		



Rates, Forms and Provider Networks

CLASSIFIED | WMS | PART-TIME

PROJECT | NON PERM | EXEMPT

SUPERVISOR

Molly Nollette
Deputy Commissioner
Pos# 0179

Jennifer McCown
Administrative Assistant 4
Pos# 0213

Forms Compliance Program

Ned Gaines
Forms Compliance Manager
Pos# 0082

Kim Tocco
Health Forms Program Manager
Pos# 0315

Scott Henderson
Functional Prog. Analyst 4
Sr. Insurance Policy & Compliance
Pos# 0234

Dennis Godwin
Functional Prog. Analyst 4
Sr. Insurance Policy & Compliance
Pos# 0372

Mary Kay Schaefers
Functional Prog. Analyst 3
Insurance Policy & Compliance Analyst
Pos# 0238

Todd Merkley
Functional Prog. Analyst 3
Insurance policy & Compliance Analyst
Pos# 0182

Julia Hinrichs
Functional Prog. Analyst 4
Senior Health Forms Compliance Analyst
Pos# 0290

Carla Napper
Functional Prog. Analyst 3
Health Forms Compliance Analyst
Pos# 0131

Alec Sorensen
Functional Prog. Analyst 3
Health Forms Compliance Analyst
Pos# 0181

Chris Bauer
Functional Prog. Analyst 3
Health Forms Compliance Analyst
Pos# 0413

Wendy Conway
Functional Prog. Analyst 4
Health Forms Compliance Analyst
Pos# 0258

Addie Hawkins
Functional Prog. Analyst 3
Health Forms Compliance Analyst
Pos# 0455

Tech Unit

Gail Jones
Management Analyst 4
Pos# 0349

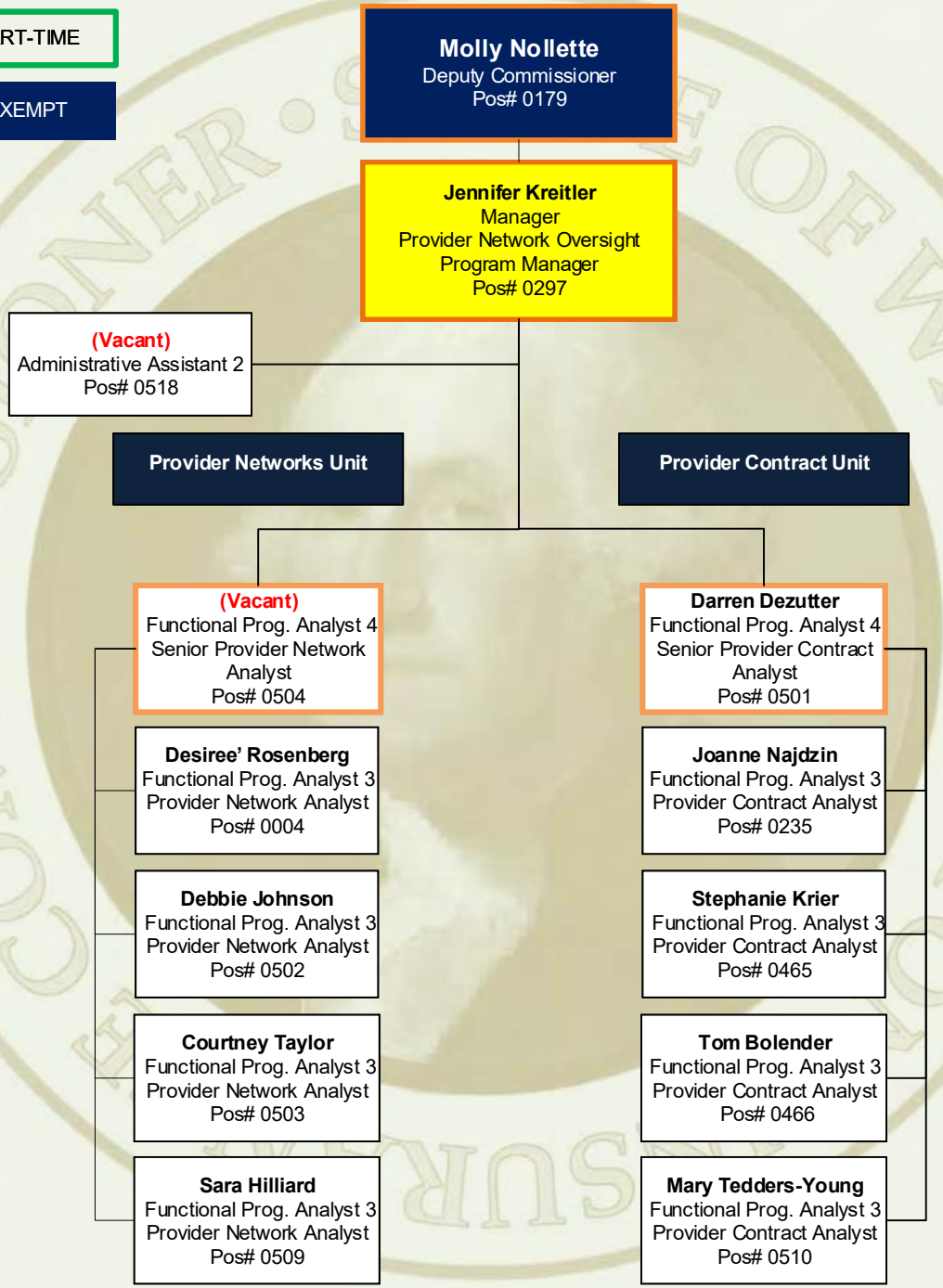
Alyson Bragg
Insurance Technician 3
Pos# 0094

Jean Ann Eksund
Insurance Technician 3
Pos# 0240

Nikki Meador
Insurance Technician 3
Pos# 0083

Rates, Forms and Provider Networks
Provider Networks Oversight Program

CLASSIFIED | WMS | PART-TIME
PROJECT | NON PERM | EXEMPT
SUPERVISOR

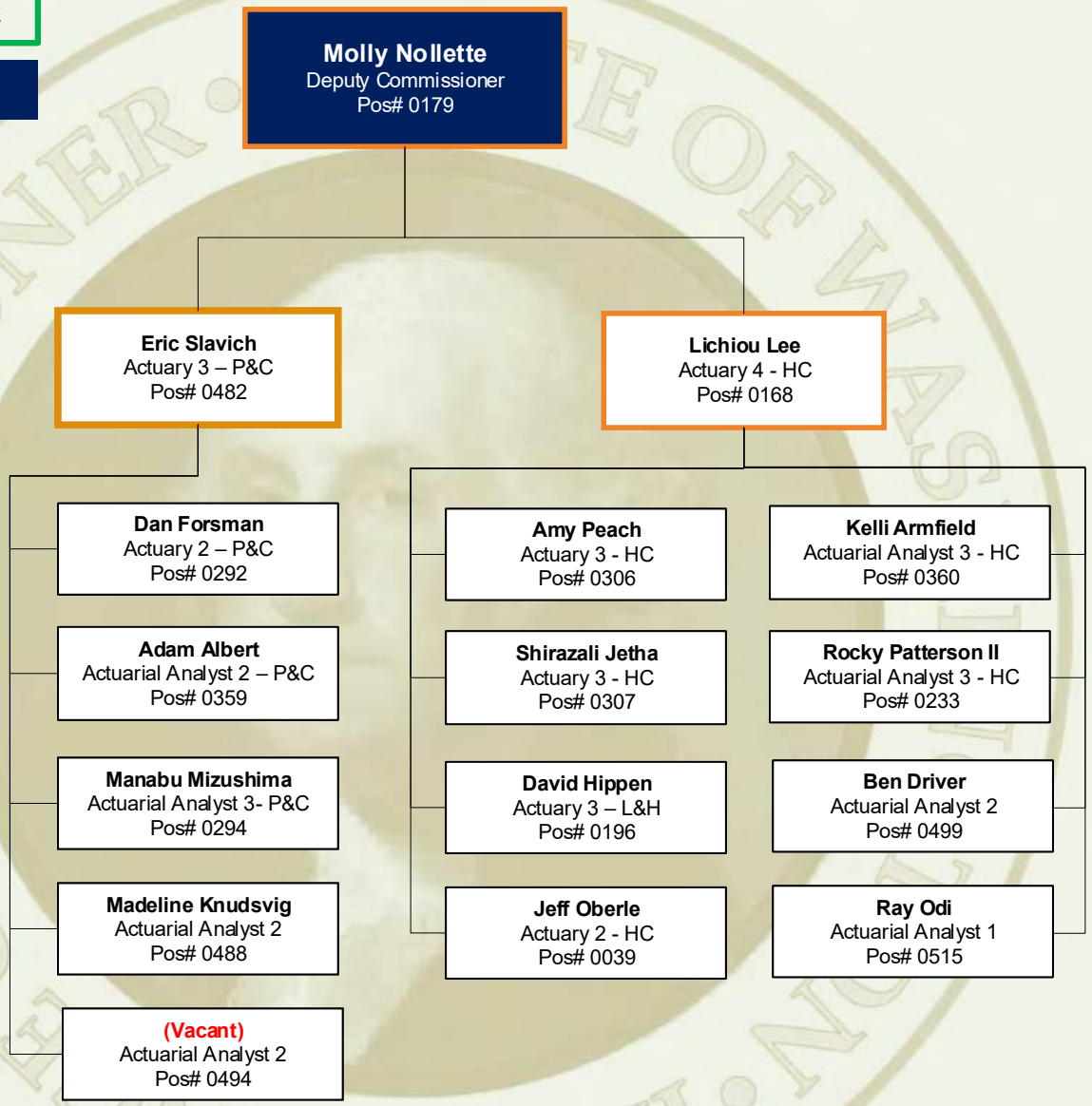


Rates, Forms and Provider Networks
Actuarial Services

CLASSIFIED | WMS | PART-TIME

PROJECT | NON PERM | EXEMPT

SUPERVISOR



Criminal Investigations Unit

CLASSIFIED | WMS | PART-TIME

PROJECT | NON PERM | EXEMPT

SUPERVISOR