

CLIENT ALERT

# Colorado Releases Revised Draft of Groundbreaking AI Insurance Regulation

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## AUTHORS

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In July 2021 Colorado enacted [Colo. Rev. Stat. § 10-3-1104.9](#), which prohibits insurers from using external consumer data and information sources (“[ECDIS](#)”), as well as any algorithms or predictive models that use ECDIS, in a way that unfairly discriminates based on race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity or gender expression. Colo. Rev. Stat. § 10-3-1104.9(2)(b) directs the Insurance Commissioner to engage with stakeholders to develop implementing regulations. Following months of stakeholder engagement, on May 23, 2023 the Colorado Division of Insurance (“[CO DOI](#)”) released a revised Draft Proposed Algorithm and Predictive Model Governance Regulation (the “[Draft Regulation](#)”), amending its [initial draft regulation](#), which was released on February 1, 2023. The Draft Regulation establishes a governance and risk management framework for life insurers that use ECDIS. The CO DOI held a stakeholder meeting on Thursday, June 8 to discuss the Draft Regulation and elicit feedback from stakeholders.

At the stakeholder meeting, Jason Lapham, Big Data and AI Policy Director at CO DOI, explained that the Draft Regulation is intended to be a generally applicable governance and risk management framework for life insurers that use ECDIS for “insurance practices.” “Insurance practices” are defined in Colo. Rev. Stat. § 10-3-1104.9(8)(c) as marketing, underwriting, pricing, utilization management, reimbursement methodologies and claims management in the transaction of insurance.

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For purposes of the Draft Regulation, ECDIS is defined as:

[A] data or an information source that is used by a life insurer to supplement or supplant traditional underwriting factors or other insurance practices or to establish lifestyle indicators that are used in insurance practices. This term includes credit scores, social media habits, locations, purchasing habits, home ownership, educational attainment, licensures, civil judgments, court records, occupation that does not have a direct relationship to mortality, morbidity or longevity risk, consumer-generated Internet of Things data, and any insurance risk scores derived by the insurer or third-party from the above listed or similar data and/or information source.

Draft Regulation, Section 4(C).

Life insurance industry representatives voiced concern that the Draft Regulation is not entirely clear as to what types of outcomes are considered discriminatory and it is therefore difficult to create a governance and risk management framework to control against discrimination. CO DOI expects to expose a draft testing regulation by the end of June, which is expected to test consumer outcomes to see if biases exist in insurance practices. Both industry representatives and Colorado regulators expressed hope that the testing regulation would help provide clarity on the outcomes that the regulation considers to be discriminatory.

### **Overview of Draft Regulation Requirements**

The Draft Regulation requires life insurers that use ECDIS in insurance practices to establish a governance and risk management framework to determine whether their use of ECDIS results in unfair discrimination (currently only with respect to race). As an overview, the Draft Regulation provides that the governance and risk management framework must include the following.

**Board Oversight and Senior Management Accountability.** The board of directors or an appropriate board committee must oversee the risk management framework. Senior management is responsible for setting, monitoring and directing governance on the use of ECDIS. This includes establishing lines of communication and regular reporting from employees to senior management on performance and risks of ECDIS. There must also be a cross-functional governance group composed of representatives from key functional areas including legal, compliance, risk management, product development, underwriting, actuarial, data science, marketing and customer service.

**Written Policies.** Insurers must establish written policies for employees, including assigned roles and responsibilities, for the design, development, testing, deployment, use, selection of vendors and ongoing monitoring of ECDIS. These policies must include ongoing supervision and training for employees on compliant use of ECDIS.

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**Consumer Complaints and Inquiries.** Insurers must have processes and protocols for addressing consumer complaints and inquiries about the use of ECDIS, providing sufficiently clear information to allow customers to take action in the event of an adverse decision.

**Oversight of Vendors.** Insurers using third-party vendors with respect to ECDIS are responsible for ensuring that all regulatory requirements are met, including the production of documents or information.

### **Notable Changes to the Draft Regulation**

Notable changes from the last version of the Draft Regulation include the following.

**Limits to Documentation Requirements.** Documentation requirements in the Draft Regulation include:

- Governing principles outlining the values and objectives of the insurer that provide guidance for ensuring that ECDIS are designed, developed, used and monitored in a manner suited for oversight and management and that use of ECDIS does not lead to unfair discrimination;
- Policies and processes for the design, testing, deployment, use, selection and oversight of vendors, and ongoing monitoring of ECDIS;
- An up-to-date inventory of all utilized ECDIS, including a description of each ECDIS, their clearly stated purpose and outputs generated;
- Explanation of material changes to the inventory of the ECDIS and rationale for the change;
- Description of testing conducted to detect and steps taken to address unfair discrimination resulting from ECDIS use;
- Description of ongoing monitoring of ECDIS performance; and
- Description of process for selecting vendors that supply ECDIS.

The prior version of the Draft Regulation had included several additional documentation requirements regarding the underlying data and maintenance of the data model, which were objected to by the industry as unworkable, as insurers may not have access to the underlying data model.

**Addition of Risk Assessment and Prioritization.** The Draft Regulation now requires insurers to create a rubric for assessing and prioritizing risks associated with use of ECDIS, with appropriate consideration given to consumer impacts.

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**Reduced Reporting Requirements.** The reporting requirements for insurers using ECDIS were reduced to (1) a report to the CO DOI six months following the effective date of the Draft Regulation and (2) a report to the CO DOI one year after the effective date of the Draft Regulation and annually thereafter.

- The initial six-month report must include a narrative report summarizing the progress made towards complying with the requirements of the Draft Regulation, including identifying the areas still under development, any difficulties encountered and the expected completion date.
- The annual report must include a narrative report summarizing compliance with the requirements of the Draft Regulation and providing the title of each individual responsible for ensuring compliance with each specific requirement.

The prior version of the Draft Regulation had required six-month, one-year and biennial reports, and it prescribed certain elements to be included in each report.

**Limitation of Unfair Discrimination to Race.** The Draft Regulation limits the governance and management framework that insurers are required to develop to apply only to race. When questioned on why the framework only applies to race and not to the other protected classes listed in Colo. Rev. Stat. § 10-3-1104.9(8)(e) (color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression), Mr. Lapham indicated that CO DOI would revisit this limitation, which was based on its interpretation of the operative statute.

**Confidentiality.** The Draft Regulation was revised to treat any documents or materials disclosed in connection with the Draft Regulation as confidential, although Colo. Rev. Stat. § 10-3-1104.9(3)(d) allows data to be made public in an aggregated or de-identified manner.

CO DOI is providing a two-week period (ending June 23) for informal written comments on the current version of the Draft Regulation and expects to begin the formal rulemaking process shortly thereafter.

The Willkie insurance team continues to monitor Colorado's efforts to implement this first-of-its-kind legislation on the use of artificial intelligence and big data in the business of insurance. Please contact any of the attorneys listed here if you would like to discuss further.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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