



April 3, 2023

Ms. Lois Alexander
Market Regulation Manager
National Association of Insurance Commissioners
1100 Walnut Street, Suite 1500
Kansas City, MO 64106-2197

Dear Ms. Alexander:

The Global Data Alliance (GDA)¹ respectfully submits comments to the National Association of Insurance Commissioners (NAIC) on the initial exposure draft of the Insurance Consumer Privacy Protection Model Law #674 (“Model Law 674”). The GDA appreciates this comment opportunity.

The GDA has serious concerns regarding the breadth of the Model Law’s restrictions on cross-border data transfers – restrictions that are at odds with prevailing domestic and international cross-border data legal norms, including US international legal obligations under international treaties, agreements, and other commitments.

We strongly urge the NAIC to remove these limitations from the Model Law pending a more thorough review of their economic and legal implications. We also urge NAIC to assess the necessity of exclusive reliance on the consent-based restrictions on data transfers, and to consider alternative approaches that would be less restrictive of data transfers and that would not raise the same risks. Finally, the GDA would welcome a virtual meeting with NAIC staff.

I. About the Global Data Alliance

The GDA is a cross-industry coalition of companies that support millions of jobs across the United States. The GDA represents companies that are committed to high standards of data responsibility, privacy, and security, and that rely on the ability to transfer data around the world to innovate and create jobs.

The GDA works to advance policies that promote the responsible handling of data without imposing unnecessary data localization mandates or restrictions on data transfers. The GDA focuses on cross-border data policy proposals across 60+ jurisdictions, across sectoral regulations, and across legal disciplines, including artificial intelligence, consumer protection, cybersecurity, international trade, law enforcement access to data, privacy and personal data protection, and other matters. The GDA has a strong interest in promoting coherent and interoperable legal frameworks that help instill trust in the digital economy while safeguarding the ability to transfer data across borders.

Alliance members are active across many sectors including the agriculture,² automotive,³ clean energy,⁴ finance and insurance,⁵ healthcare and medical technology,⁶ logistics,⁷ media,⁸ pharmaceutical,⁹ and telecommunications sectors.¹⁰ The Global Data Alliance develops studies and reports, as well as model legal texts, on the cross-border aspects of data privacy, cybersecurity, and other legislative or regulatory proposals. This includes the [GDA Cross-Border Data Policy Principles](#).¹¹

The ability to transfer data in a trusted and secure manner across transnational digital networks is of central importance to the national policy objectives of many countries, including the United States. Data transfers support cybersecurity,¹² fraud prevention,¹³ and other activities relating to the protection of health, privacy, security, safety, consumers, and the environment. They also support shared economic prosperity:¹⁴ Cross-border access to marketplaces, purchasers, suppliers, and other commercial partners allows U.S. enterprises of all sizes and in all sectors¹⁵ to engage in mutually beneficial international transactions with foreign enterprises. 75 percent of the value of data transfers accrues to companies in sectors such as manufacturing, agriculture, and logistics¹⁶ and at every stage of the value chain.¹⁷ Finally, scientific and technological progress require the exchange of information and ideas across borders¹⁸: As the WTO has stated, “for data to flourish as an input to innovation, it benefits from flowing as freely as possible.”¹⁹

II. Legal Background

The GDA has reviewed Model Law 674 with interest and care. The GDA supports the efforts of the NAIC to improve consumer privacy in insurance markets through the Model Law. As an organization focused on cross-border data policy issues, the GDA limits its comments to aspects of the Model Law that relate to international data transfers. Please refer to the comments of other organizations regarding aspects of the Model Law that do not relate to international data transfers.

The GDA focuses its comments on the following sections of the Model Law (emphasis added).

Section 4 – A 5(b)

No licensee shall collect, process, retain, or share a consumer’s personal information unless:

The licensee or third-party service provider has obtained prior consent from any consumer whose personal information will be:

Shared with a person outside the jurisdiction of the United States, or its territories, as provided in this Act.

(C) No licensee shall, unless legally required, collect, process, retain, or share a consumer’s personal information with an entity outside of the United States and its territories, unless the licensee has provided the required notice and obtained the consumer’s prior express consent to do so, as required by Article III of this Act.

Section 7 – 7(a)

The requirement that the licensee or third-party service provider obtain the consumer’s express written consent prior to sharing the consumer’s personal information with any person in connection with the collection, processing, retention, or sharing of the consumer’s personal information with a person in a jurisdiction outside of the United States and its territories, and the consumer’s right to prohibit sharing of the consumer’s personal information with such a person;

(C)

(1) A statement that the consumer may, but is not required to, consent to the collection, processing, retention, or sharing, of the consumer’s personal information a jurisdiction outside of the United States and its territories;

(3) That once consent has been given for the collection, processing, retention, or sharing of consumers' personal information in a jurisdiction outside the United States and its territories, a consumer may revoke consent at any time; and

(4) That once consent for the collection, processing, retention, or sharing of consumers' personal information by a person in a jurisdiction outside the United States and its territories has been revoked, any of the consumer's personal information in the possession of such person shall be deleted as set forth in Section 5 of this Act

Section 19 – A (1)(b)

The licensee obtains all necessary consent of consumers' whose personal information is shared with a person outside the jurisdiction of the United States or its territories, as provided in this Act; and

III. Discussion

As drafted, the initial exposure draft would limit data transfers outside of the United States exclusively on the basis of data subject consent. This limitation is at odds with prevailing domestic and international cross-border data legal norms, including US international legal obligations.

We strongly urge the NAIC to remove these limitations from Model Law 674, pending further review of their legal and economic implications and consultation with the Federal Government. We also urge NAIC to fully assess the necessity of the consent-based restrictions on data transfers, and to consider alternative approaches that would be less restrictive of data transfers and that would not raise the same economic and legal risks.

Broadly speaking, permitting cross-border data transfers solely on the basis of consent is far outside of prevailing international norms and best practices in relation to cross-border data policy. Advancing a rule that premises data transfers exclusively upon consent – without any other bases for processing or transfer – would render the Model Law as one of the most restrictive cross-border data transfer measures in the world.

First, we urge the NAIC to consider state-level privacy legislation being advanced across the United States. The data transfer restrictions of the Model Law are at odds with all US state privacy laws in effect today. None of the existing state laws (California, Colorado, Connecticut, Iowa, Utah or Virginia) contain the type of cross-border data restriction that Model Law 674 proposes to implement. These and other states have not adopted such restrictions for good reason: Far from advancing privacy objectives,²⁰ such restrictions frequently hurt small businesses;²¹ undermine data security and cybersecurity;²² threaten human rights;²³ slow scientific progress and innovation;²⁴ and impair various safety, health,²⁵ environmental protection,²⁶ and other state and national policy priorities.²⁷

Second, we also urge the NAIC to account for, and accord due legal respect to, the Foreign Affairs power of the US federal government under Article 1 of the US Constitution, as affirmed in Supreme Court jurisprudence such as *Crosby v. National Foreign Trade Council* and *American Insurance Association v. Garamendi*.²⁸ The data transfer provisions of Model Law 674 raise questions of consistency with numerous existing treaties, international agreements, Presidential and other official acts of the United States – some of which the NAIC provided explicit consent to the Office of the United States Trade Representative (USTR) to negotiate, and was afforded the

opportunity to review during the negotiations. These existing instruments and acts include the cross-border data transfer and data localization commitments adopted by the United States in: (1) its Free Trade Agreements and Digital Economy Agreements (such as the US-Mexico-Canada Agreement),²⁹ (2) at the World Trade Organization,³⁰ (3) at the Group of 7,³¹ (4) at the Group of 20,³² and (5) in US Department of Treasury financial regulatory dialogues with foreign counterparts.³³ The position put forward in the exposure draft is also at odds with positions taken by global regulatory bodies such as the Financial Stability Board and the International Organization of Securities Commissions (“IOSCO”).

Third, the cross-border data transfer restrictions in the exposure draft of Model Law 674 are also in tension with broader international privacy and cross-border data policy trends. Such restrictions are contrary to the positions adopted by US peer countries such as the EU, UK, Singapore, Japan, and Australia. These governments support the free flow of data, including for personal information, and the need to prohibit data localization requirements, while at the same time maintaining privacy frameworks. For example, the EU’s General Data Protection Law (GDPR) permits data transfers on numerous grounds beyond the consent of data subjects.³⁴

In lieu of the approach outlined in Model Law 674, the EU and other countries have adopted an approach modeled on the so-called “accountability principle,” which reflects the prevailing international legal norm relating to the cross-border transfer of data.³⁵ Under this principle, organizations that transfer data globally should implement procedures to ensure that data will continue to be protected, even if it is transferred to countries other than where it was first collected. The accountability principle was first developed by the OECD,³⁶ and was subsequently endorsed and has been integrated in many legal systems including the EU,³⁷ Japan,³⁸ New Zealand,³⁹ Singapore,⁴⁰ and Canada.⁴¹ This principle is also a significant feature of the APEC Privacy Framework,⁴² the APEC Privacy Recognition for Processors (PRP) system,⁴³ the APEC Cross Border Privacy Rules (CBPR) system,⁴⁴ and the ASEAN Model Contractual Clauses.⁴⁵

Finally, notwithstanding the GDA’s concerns regarding the foregoing aspects of Model Law 674, we wish to underscore that the GDA strongly supports NAIC’s goals to protecting consumer information and privacy and personal data protection. GDA members adhere to high standards of data responsibility, data privacy, and data security. However, privacy, data protection, and data security are not dependent on the location of data storage or processing, or the location of the infrastructure supporting it. Rather, protection is a function of the manner in which personal data is protected. What matters most is not where such data is, but rather how it is protected, as embodied in the technologies, systems and internal controls put in to place to protect it.

We urge the NAIC to remove the above-referenced cross-border data restrictions that are at odds with domestic and international legal standards and best practices.

Respectfully yours,

Joseph Whitlock

Joseph P. Whitlock
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Global Data Alliance

- ¹ The Global Data Alliance produces draft treaty and legal texts, regulatory analysis, and sector- and issue-focused studies on cross-border data and digital trust. For more information, please visit the GDA website, at: www.globaldataalliance.org
- ² Global Data Alliance, *GDA Website – Agriculture* (2022), at: <https://globaldataalliance.org/sectors/agriculture/>
- ³ Global Data Alliance, *GDA Website – Automotive* (2022), at: <https://globaldataalliance.org/sectors/automotive/>
- ⁴ Global Data Alliance, *GDA Website – Energy* (2022), at: <https://globaldataalliance.org/sectors/energy/>
- ⁵ Global Data Alliance, *GDA Website – Finance* (2022), <https://globaldataalliance.org/sectors/finance/>
- ⁶ Global Data Alliance, *GDA Website – Healthcare* (2022), <https://globaldataalliance.org/sectors/healthcare/>
- ⁷ Global Data Alliance, *GDA Website – Supply Chain Logistics* (2022), <https://globaldataalliance.org/sectors/supply-chain-logistics/>
- ⁸ Global Data Alliance, *GDA Website – Media and Publishing* (2022), <https://globaldataalliance.org/sectors/media-publishing/>
- ⁹ Global Data Alliance, *GDA Website – Biopharmaceutical R&D* (2022), <https://globaldataalliance.org/sectors/biopharmaceutical-rd/>
- ¹⁰ Global Data Alliance, *GDA Website – Telecommunications* (2022), <https://globaldataalliance.org/sectors/telecommunications/>
- ¹¹ Global Data Alliance, *Cross-Border Data Policy Principles* (2021), <https://globaldataalliance.org/wp-content/uploads/2021/07/03022021gdacrossborderdatapolicyprinciples.pdf>
- ¹² Global Data Alliance, *Cross-Border Data Transfers & Data Localization Measures* (2020), <https://globaldataalliance.org/wp-content/uploads/2021/07/02112020GDACrossborderdata.pdf>
- ¹³ Global Data Alliance, *GDA Website – Finance* (2022), <https://globaldataalliance.org/sectors/finance/>
- ¹⁴ Global Data Alliance, *Cross-Border Data Transfers & Economic Development: Access to Global Markets, Innovation, Finance, Food, and Healthcare* (2021), <https://globaldataalliance.org/wp-content/uploads/2021/07/05062021econdevelopments1.pdf>
- ¹⁵ Global Data Alliance, *The Cross-Border Movement of Data: Creating Jobs and Trust Across Borders in Every Sector* (2020), <https://globaldataalliance.org/wp-content/uploads/2021/07/GDAeverysector.pdf>
- ¹⁶ Global Data Alliance, *Cross-Border Data Transfer Facts and Figures* (2020), <https://globaldataalliance.org/wp-content/uploads/2021/07/gdafactsandfigures.pdf>
- ¹⁷ Global Data Alliance, *Global Data Alliance Infographic: Jobs in All Sectors Depend Upon Data Flows* (2021), <https://globaldataalliance.org/wp-content/uploads/2021/07/infographicgda.pdf>
- ¹⁸ Global Data Alliance, *Cross-Border Data Transfers & Innovation* (2020), <https://globaldataalliance.org/wp-content/uploads/2021/07/04012021cbdtinnovation.pdf>
- ¹⁹ WTO, *Government Policies to Promote Innovation in the Digital Age*, 2020 World Trade Report (2020), at: https://www.wto.org/english/res_e/booksp_e/wtr20_e/wtr20-0_e.pdf
- ²⁰ Global Data Alliance, *Cross-Border Data Transfers & Privacy* (2023), at: <https://globaldataalliance.org/issues/privacy/>
- ²¹ Global Data Alliance, *Cross-Border Data Transfers & Small Businesses* (2023), at: <https://globaldataalliance.org/issues/small-businesses/>
- ²² Global Data Alliance, *Cross-Border Data Transfers & Cybersecurity* (2023), at: <https://globaldataalliance.org/issues/cybersecurity/>
- ²³ Freedom House, *Countering an Authoritarian Overhaul of the Internet* (2022), at: <https://freedomhouse.org/report/freedom-net/2022/countering-authoritarian-overhaul-internet> Freedom House explains the nexus between data transfer restrictions and human rights abuse as follows (emphasis added):

“In at least 23 countries covered by Freedom the Net, laws that limit where and how personal data can flow were proposed or passed during the coverage period. ... The transfer of data across jurisdictions is central to the functioning of the global internet and benefits ordinary users, including by improving internet speeds, enabling companies to provide critical services worldwide, and allowing the storage of records in the most secure data centers available.

As policymakers impose necessary privacy laws that safeguard sensitive information from commercial abuse, they may unintentionally drive fragmentation by creating a barrier between their own countries and those without similar standards. The ensuing patchwork of regulations could incentivize companies, particularly newer or smaller services, to concentrate their growth in certain countries, resulting in less diverse online ecosystems for users elsewhere. ...

[S]ome [countries] have buried problematic obligations that either mandate domestic data storage, feature blanket exceptions for national security or state actors without safeguards, or delegate increased decision-making power to politicized regulators—all of which renders users vulnerable to government abuse despite

improvements pertaining to the use of personal data for commercial purposes. Such contradictory “data washing” measures ultimately fail to strengthen privacy and further fragment the internet....”

²⁴ Global Data Alliance, *Cross-Border Data Transfers & Innovation* (2023), at:

<https://globaldataalliance.org/issues/innovation/>

²⁵ Global Data Alliance, *Cross-Border Data Transfers & Biopharmaceutical R&D* (2022), at

<https://globaldataalliance.org/sectors/biopharmaceutical-rd/>; Global Data Alliance, *Cross-Border Data Transfers & Medical Technology* (2023), at: <https://globaldataalliance.org/sectors/medical-technology/>; Global Data Alliance, *Cross-Border Data Transfers & Healthcare* (2022), at:

<https://globaldataalliance.org/sectors/healthcare/>

²⁶ Global Data Alliance, *Cross-Border Data Transfers & Environmental Sustainability* (2023), at:

<https://globaldataalliance.org/issues/environmental-sustainability/>

²⁷ Global Data Alliance, *Cross-Border Data Transfers & Regulatory Compliance* (2023), at:

<https://globaldataalliance.org/issues/regulatory-compliance/>

²⁸ See generally, Congressional Research Service, *Constitutional Limits on States’ Power over Foreign Affairs* (Aug. 15, 2022), at: <https://crsreports.congress.gov/product/pdf/LSB/LSB10808>; See also, Supreme Court of the United States, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), at:

<https://tile.loc.gov/storage-services/service/ll/usrep/usrep530/usrep530363/usrep530363.pdf>; Supreme Court of the United States, *American Insurance Association v. Garamendi*, 539 US 396 (2003), at:

<https://tile.loc.gov/storage-services/service/ll/usrep/usrep539/usrep539396/usrep539396.pdf>

²⁹ See generally, US-Mexico-Canada Agreement, Art. 19.11-19.12; 17.17-18, at: <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>; US-Japan Digital Trade Agreement, Arts. 11-13, at:

https://ustr.gov/sites/default/files/files/agreements/japan/Agreement_between_the_United_States_and_Japan_concerning_Digital_Trade.pdf

³⁰ See WTO General Agreement on Trade in Services (1995), at:

https://www.wto.org/english/tratop_e/serv_e/gsintr_e.pdf#:~:text=The%20General%20Agreement%20on%20Trade%20in%20Services%20%28GATS%29,of%201947%2C%20the%20GATS%27%20counterpart%20in%20merchandise%20trade

³¹ See e.g., G7 Trade Ministers’ Statement (Sept. 15, 2022), at: <https://ustr.gov/sites/default/files/2022-09/G7%20Trade%20Ministers%20Statement%202022.pdf>; G7 Data Protection and Privacy Authorities’

Communique (Sept. 8, 2022), at: https://www.bfdi.bund.de/SharedDocs/Downloads/EN/Kurzmeldungen/G7-Communique.pdf?__blob=publicationFile&v=3

³² [G20 Osaka Leaders’ Declaration | Documents and Materials | G20 Osaka Summit 2019 \(mofa.go.jp\)](https://www.g20.org/declaration)

³³ See e.g., United States-Singapore Joint Statement on Financial Services Data Connectivity (Feb. 6, 2020),

at: <https://www.mas.gov.sg/news/media-releases/2020/united-states-singapore-joint-statement-on-financial-services-data-connectivity>

³⁴ See generally, GDPR Chapter V, including Articles 45-46.

³⁵ The GDA strongly supports the accountability model for international data transfers. This model was, first established by the OECD and subsequently endorsed and integrated in many legal systems and privacy principles. The accountability model provides an approach to cross-border data governance that effectively protects the privacy and consumer rights of individuals and fosters streamlined, robust data flows by requiring entities that collect personal information (often defined as personal data controllers) to be responsible for its protection no matter where or by whom it is processed.

While governments are rightfully concerned with risks to privacy and data security, these risks are not dependent on the physical location of where data is stored or processed, or the location of the infrastructure supporting it. In fact, the effectiveness of data security and personal information protection is a function of the technologies, systems, and procedures put in place by the companies handling the personal information to protect the data.

To benefit from cross-border data transfers while simultaneously ensuring the responsible processing and protection of data, the focus of privacy policy and regulation needs to be on the quality and effectiveness of the mechanisms and the controls maintained to protect the data in question. The accountability model, therefore, continues to be an important tool in increasing privacy and security by requiring entities to ensure that data will continue to be properly protected, regardless of where the data is located.

Personal data protection and privacy frameworks that are based on a common set of international consensus-based principles facilitate cross border data transfers and drive innovation and business investment in local markets by promoting international interoperable legal frameworks upon which businesses of all sizes can rely.

These coordination mechanisms also help to bridge current gaps in international privacy norms while facilitating the safe and secure international transfer of personal information. Such mechanisms may include private codes of conduct, contractual arrangements such as standard contractual clauses, certifications such as the APEC Cross Border Privacy Rules (CBPR), seals or marks, and mutual recognition arrangements such as the adequacy with the European Union General Data Protection Regulation (GDPR).

³⁶ OECD Privacy Framework 2013 (p15), http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf

³⁷ Directive 95/46/EC (General Data Protection Regulation), <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

³⁸ Act on the Protection of Personal Information, <https://www.ppc.go.jp/en/legal/>

³⁹ Privacy Act 2020, <https://www.legislation.govt.nz/act/public/2020/0031/latest/LMS23223.html>

⁴⁰ Personal Data Protection Act 2012, <https://www.pdpc.gov.sg/Overview-of-PDPA/The-Legislation/Personal-Data-Protection-Act>

⁴¹ *Personal Information Protection and Electronic Documents Act*, Fair Information Principles, https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/p_principle/

⁴² *APEC Privacy Framework*, [https://www.apec.org/Publications/2017/08/APEC-Privacy-Framework-\(2015\)](https://www.apec.org/Publications/2017/08/APEC-Privacy-Framework-(2015))

⁴³ *APEC Privacy Recognition for Processors*, at: <https://www.pdpc.gov.sg/help-and-resources/2021/10/apec-cross-border-privacy-rules-and-privacy-recognition-for-processors-systems>

⁴⁴ *APEC Cross Border Privacy Rules system*, at: <https://www.apec.org/About-Us/About-APEC/Fact-Sheets/What-is-the-Cross-Border-Privacy-Rules-System>

⁴⁵ *ASEAN Model Contractual Clauses* (2021), at: https://asean.org/wp-content/uploads/3-ASEAN-Model-Contractual-Clauses-for-Cross-Border-Data-Flows_Final.pdf; See also, Singapore Personal Data Protection Commission, *Guidance for Use of ASEAN Model Contractual Clauses for Cross-Border Data Flows in Singapore* (2022), at: <https://www.pdpc.gov.sg/-/media/Files/PDPC/PDF-Files/Other-Guides/Singapore-Guidance-for-Use-of-ASEAN-MCCs.pdf?la=en#:~:text=The%20ASEAN%20Model%20Contractual%20Clauses%20%28ASEAN%20MCCs%29%20are,parties%20that%20protects%20the%20data%20of%20data%20subjects.>