

Data Accountability and Transparency Act of 2020

August 4, 2020

Senator Sherrod Brown of Ohio recently introduced a bill entitled the Data Accountability and Transparency Act of 2020 (the “Act”) which would establish a new federal agency, called the Data Accountability and Transparency Agency (the “Agency”) focused on protecting the privacy rights of individuals. While such legislation is unlikely to pass under the current administration, the chances of passage may increase if there is a change in administration and composition of the Senate.

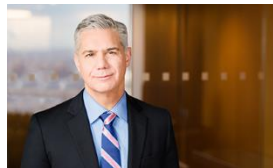
As drafted, the Act has a number of provisions that could impact the insurance industry’s underwriting practices, should the Act become law:

- The Act prohibits the use of personal data in a manner that discriminates based on protected class.
- Notably, the Act specifically addresses the use of algorithms in underwriting. Data aggregators using algorithms must perform continuous and automated testing for bias and for disparate impact based on a protected class in their algorithms.
- In the event that the algorithm does have a disparate impact on a protected class, the insurer will have the burden of demonstrating that such use of personal data (i) is not intentionally discriminatory; (ii) is strictly necessary to achieve one or more substantial, legitimate, nondiscriminatory interests; and (iii) there is no reasonable alternative policy or practice that could serve such interests with a less discriminatory effect.
- Data aggregators using algorithms will also need to periodically (as determined by the director of the Agency, but no less than annually) file with the Agency an automated decision system impact evaluation, which filings will be publicly available.
- The Act also contains a private right of action which would permit individuals to bring suit against any party (including in the insurance space) for allegations that such party has violated the Act. The Act provides that a court may award damages of

\$100 to \$1000 per violation per day, or actual damages, whichever is greater, as well as punitive damages and other forms of relief.

There has been an increasing amount of attention paid to potential bias in artificial intelligence in Congress over the past few years. However, the Act goes further than previous bills meant to address these issues. For example, a bill that received significant media attention last year was the Algorithmic Accountability Act of 2019 (the “AAA”). In contrast to the Act, the AAA did not provide for a private right of action; instead, actions could only be brought by the Federal Trade Commission or state officials. In addition, unlike the Act, the AAA did not require impact assessments to be made public.

As an increasing amount of national attention becomes focused on systemic discrimination and on privacy issues more generally, we would expect the increased restrictions on the use of personal data related to protected classes in underwriting to have increased traction in federal and state legislatures that will impact how the insurance industry does business. We would be happy to advise your team on developments in this area.



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