FTC's Big Data Report Provides Road Map for Insurers Using Big Data

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On January 6, the Federal Trade Commission ("FTC") released a report entitled "Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues" ("Report") that follows the FTC's September 15, 2014 workshop on "the potential of big data to create opportunities for consumers and to exclude them from such opportunities." The Report provides a road map for insurers that use big data by:

- Reviewing federal laws that apply when using big data,

- Setting forth legal compliance questions to be considered when using big data, and

- Detailing policy considerations that should be addressed when using big data.

Review of Federal Laws Applicable to the Use of Big Data The Report discussed the Fair Credit Reporting Act ("FCRA"), which regulates Consumer Reporting Agencies and the users of consumer reports, including insurance companies. The Report did not, however, discuss the various state insurance laws that impact the use of big data, including unfair trade practices laws and information

security and privacy laws. In addition, the Report discusses various federal anti-discrimination laws, including the Equal Credit Opportunity Act, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Housing Act, and the Genetic Information Nondiscrimination Act; as well as Section 5 of the Federal Trade Commission Act, which are not applicable to insurers' use of big data in their insurance business. **Legal Compliance Questions** The Report contained a seven bullet-point list of "Questions for Legal Compliance" regarding big data. The following questions are relevant to insurers using big data:

- **"If you receive big data products from another entity that you will use for eligibility decisions, are you complying with the [FCRA requirements] applicable to users of consumer reports?"** For insurers, this means that, except where the transaction is initiated by the consumer, the FCRA precludes the use of a consumer report in connection with an insurance transaction unless the consumer authorizes the provision of the consumer report or the transaction consists of a "firm offer" for insurance, which is defined under the FCRA.

- **"Are you honoring promises you make to consumers and providing consumers material information about your data practices?"** Material misrepresentations or omissions regarding the use and maintenance of customer data could constitute a violation of state insurance laws.

- **"Are you maintaining reasonable security over consumer data?"** The Report advises that "[c]ompanies that maintain big data on consumers should take care to reasonably secure that data commensurate with the amount and sensitivity of the data at issue, the size and complexity of the company's operations, and the cost of available security measures." This is in addition to the requirements under state information security and privacy laws.

Policy Considerations The Report details the policy considerations the FTC recommends companies address when using big data:

- *"How representative is your data set*?" Is your data set that you are using for targeted marketing, application verification, or for other business purposes missing information about certain populations? Insurers should consider issues of overrepresentation and underrepresentation.

- *"Does your data model account for biases*?" Biases can influence a data set at both the collection and analytics stages of big data's life cycle. Have you analyzed your data set to determine whether it is accurate and large enough to be statistically meaningful?

- *"How accurate are your predictions based on big data*?" Correlation does not mean causation. Big data does not explain which correlations are meaningful. What data points are you using to determine premiums? Are the data points actuarially justifiable?

- **_"Does your reliance on big data raise ethical or fairness considerations_?"** Insurers should assess the factors that go into an analytics model and balance the predictive value of the model with fairness considerations. Some insurance consumer advocates are concerned about the potential disparate treatment or disparate impact that insurers' use of big data may have with respect to low-income communities and underserved populations.

The Report acknowledges that big data use will continue to grow and can have a positive impact on consumers, including those in low-income and underserved populations. It states that the FTC will continue to monitor where big data's use might violate existing laws, including the FTC Act and the FCRA, and will bring enforcement actions where appropriate.

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