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New York Department of Financial Services Addresses Use of External Consumer Data and Information Sources in Underwriting for Life Insurance

NYDFS Issues Circular Letter on the Use of External Consumer Data and Information Sources in Underwriting for Life Insurance

SUMMARY

On January 18, 2019, the New York State Department of Financial Services (“NYDFS”) issued a circular letter (“Circular Letter”) to all insurers authorized to write life insurance in New York State, advising insurers of their statutory obligations regarding the use of external consumer data and information sources in underwriting for life insurance.¹

BACKGROUND

Following reports of the emergence of unconventional sources or types of external data available to insurers, including data within or derived from algorithms and predictive models, the NYDFS commenced an investigation of insurers’ underwriting guidelines and practices in New York. On June 29, 2017, the NYDFS issued an information request pursuant to Section 308 of the New York Insurance Law addressed to all life insurers authorized to write life insurance in New York, requesting information about how they use external consumer data and algorithms in their underwriting processes.²

Through this request, the NYDFS required life insurers to disclose whether they use an accelerated or algorithmic underwriting program, or use external consumer data or information sources to supplement a medical underwriting program.³ Insurers that use either of the above were required to respond to a detailed questionnaire that, among other things, requested information about:

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- What specific external data or information about life insurance applicants is being obtained
- How the external data or information is obtained, including the name of, and specific services provided by, third-party vendors
- Exactly how such external data or information is being used
- If external data or information is an input to an algorithm, how those algorithms work, including details on how algorithms weigh and scale the external data or information
- How algorithmic underwriting is disclosed to policy applicants
- What recourse policy applicants have for adverse decisions that rely on such external data or information
- How external data or information is stored and destroyed after completion of the underwriting process

The National Association of Insurance Commissioners (“NAIC”) has also begun to investigate the use of data for accelerated underwriting in life insurance. The NAIC has established the Big Data (EX) Working Group of the Innovation and Technology (EX) Task Force to examine these issues, which is reviewing the current regulatory framework for the oversight of insurers’ use of and need for consumer data.⁴

CIRCULAR LETTER ANALYSIS

The Circular Letter states that the NYDFS fully supports innovation and the use of technology to improve access to financial services, and recognizes that insurers’ use of external data sources has the potential to benefit insurers and consumers alike by simplifying and expediting life insurance sales and underwriting processes. However, the NYDFS has identified two areas of immediate concern regarding the use of external data sources by life insurers. First, according to the Circular Letter, the use of external data sources has significant potential negative impact on the availability of life insurance for protected classes of consumers. The Circular Letter states that an insurer should not use an external data source, algorithm or predictive model for underwriting or rating purposes unless the insurer can establish that the data sources used are not based in any way on race, color, creed, national origin, status as a victim of domestic violence, past lawful travel, or sexual orientation in any manner, or any other protected class, and unless the use of the external data source is not unfairly discriminatory and complies with all requirements of the New York Insurance Law (“NYIL”) and regulations. Second, the NYDFS has determined that the use of external data sources is often accompanied by a lack of transparency for consumers because consumers are not provided with the reasons for any declination, limitation, rate differential or other adverse underwriting decision, or details about the information upon which the insurer based such decision, including the specific source of the information upon which the insurer based its adverse underwriting decision.

The Circular Letter defines “external data” to include any data or information sources not directly related to the medical condition of the applicant that is used—in whole or in part—to supplement traditional medical underwriting, as a proxy for traditional medical underwriting, or to establish “lifestyle indicators”

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that may contribute to an underwriting assessment of an applicant for life insurance coverage. External data sources do not include an MIB Group, Inc. member information exchange service (a membership corporation owned by a number of member U.S. and Canadian insurance companies), motor vehicle reports, or criminal history searches.

Unlawful Discrimination

Based on its investigation, the NYDFS has determined that insurers' use of external data sources in underwriting has the strong potential to mask the forms of discrimination prohibited by New York and federal law for certain classes of individuals. NYIL § 2606 and other relevant provisions of NYIL Article 26 prohibit the use of race, color, creed, national origin, status as a victim of domestic violence, or past lawful travel in any manner, among other things, in underwriting. In addition, NYIL § 4224 prohibits insurers from refusing to insure or continuing to insure, limiting the amount, extent or kind of coverage, or charging a different rate for the same coverage solely because of the physical or mental disability, impairment or disease, or prior history of the disability or disease of an insured or potential insured, except where the refusal, limitation or rate differential is permitted by law or regulation and is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

Because many of the external data sources used by insurers include information such as geographical data, homeownership data, credit information, educational background, court records, and other data that have the potential to reflect disguised and illegal race-based underwriting, the Circular Letter provides the following principles that insurers should use as guidance in utilizing external data sources in their underwriting processes:

First, an insurer should not use an external data source unless the insurer has determined that the external tools or data sources do not collect or utilize prohibited criteria, and may not simply rely on a vendor's claim of non-discrimination as a justification for a failure to independently determine compliance with anti-discrimination laws.

Second, an insurer should not use an external data source unless the insurer can establish that the underwriting or rating guidelines are not unfairly discriminatory in violation of NYIL Articles 26 and 42. In evaluating whether an underwriting or rating guideline derived from external data sources or information is unfairly discriminatory, an insurer should consider the following questions:

- (1) Is the underwriting or rating guideline that is derived, in whole or in part, from external data sources or information supported by generally accepted actuarial principles or actual or reasonably anticipated experience that justifies different results for similarly situated applicants?
- (2) Is there a valid explanation or rationale for the differential treatment of similarly situated applicants reflected by the underwriting or rating guideline that is derived, in whole or in part, from external data sources or information?

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Generally speaking, an insurer may not rely on external data or external predictive algorithms or models unless the insurer has determined that the use of the external data is permitted by law or regulation and is based on both sound actuarial principles or experience and a valid explanation or rationale.

Consumer Disclosure/Transparency

Based on its findings, the NYDFS expressed strong concern regarding the disclosures insurers provide to consumers about their use of external data sources in underwriting, and what recourse consumers have for adverse decisions based on algorithmic underwriting. Pursuant to NYIL § 4224, insurers must notify the insured or potential insured of the right to receive the specific reason or reasons for a declination, limitation, rate differential or other adverse underwriting decision. To ensure that insurers are complying with NYIL § 4224, the NYDFS is requiring that all insurers using external data sources must provide consumers with the reasons for any declination, limitation, rate differential or other adverse underwriting decision, including details about all information upon which the insurer based such adverse underwriting decision, including the specific source of the information used by the insurer. An insurer may not rely on the proprietary nature of a third-party vendor's algorithmic processes to justify the lack of specificity related to an adverse underwriting action. Insurers must also provide notice to and obtain consent from consumers to access external data, where required by law or regulation. Further, the Circular Letter provides that the failure to adequately disclose the material elements of an accelerated or algorithmic underwriting process, and the external data sources upon which it relies, to a consumer may constitute an unfair trade practice under NYIL Article 24.

In addition, to comply with New York insurance law and federal laws, all insurers must establish that the external data sources are based on sound actuarial principles, with a valid explanation or rationale for any claimed correlation or causal connection between the data used and the underwriting decision, and must also disclose to all consumers the content and source of any external data upon which the insurer has based an adverse underwriting decision. Finally, the Circular Letter states that the NYDFS reserves the right to audit and examine an insurer's underwriting criteria, programs, algorithms, and models, including within the scope of regular market conduct examinations, and to take disciplinary action, including fines, revocation and suspension of licenses, and the withdrawal of product forms, in the event of non-compliance.

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ENDNOTES

- ¹ N.Y. Ins. Law §§ 2606, 2612, 2614.
- ² See Information Request Pursuant to New York Insurance Law § 308: Use of External Consumer Data and Information Sources in Underwriting for Life Insurance (the “Information Request”), NYDFS, June 29, 2017, available at <https://us.eversheds-sutherland.com/portalresource/NYDFS-Section308Letter6-29-2017.pdf>.
- ³ The Information Request defined an “accelerated or algorithmic underwriting program” as any non-medical (i.e., no paramedical exam or not physically invasive) underwriting criteria based on external consumer data or information sources, other than an attending physician’s statement, MIB Group, Inc. member information exchange, motor vehicle report, inspection report or prescription drug database. Examples of “external information” given in the Information Request include credit scores, purchasing habits, affiliations, home ownership records and educational attainment.
- ⁴ See NAIC, “Big Data” for more information, available at https://www.naic.org/cipr_topics/topic_big_data.htm.

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