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Editorial Office

711 D St. NW, Suite 200, Washington, D.C. 20004
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Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300.

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Morgan Morrissette Wright, Publisher, Full Court Press at mwright@fastcase.com or at 202.999.4878

For questions or Sales and Customer Service:

Customer Service
Available 8am–8pm Eastern Time
866.773.2782 (phone)
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Sales
202.999.4777 (phone)
sales@fastcase.com (email)
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FTC Provides Guidance on Use of AI and Algorithms

Terrell McSweeny, Lee J. Tiedrich, and Jadzia Pierce*

The authors discuss a recent statement by the Federal Trade Commission outlining five general principles for using artificial intelligence and algorithms while adequately managing consumer protection risks.

The Federal Trade Commission ("FTC") has released a blog post[1] about the use of artificial intelligence ("AI") and algorithms in automated decision-making. The blog highlighted the potentially great benefits and risks presented by increasingly sophisticated technologies, particularly in the "Health AI" space. However, it also emphasized that automated decision-making is not a new phenomenon—and the FTC already has a long history of assessing and addressing its challenges.

Based on prior FTC enforcement actions, studies, reports, and other sources of guidance, the post outlined five general principles for using AI and algorithms while adequately managing consumer protection risks, discussed below.

Be Transparent

Entities should be up front with consumers about how they use their AI solutions. For example, if automated tools, such as chatbots, are used to interact with consumers, the nature of this interaction should not be deceiving (i.e., it should be clear to consumers that they are interacting with an AI tool). In particular, entities should be transparent when collecting sensitive data—as secretly using sensitive data to "feed" an algorithm could give rise to an FTC action.

Finally, entities should consider whether certain notices are required when they make automated decisions based on information obtained from a third-party vendor that may be considered a "consumer reporting agency" under the Fair Credit Reporting Act ("FCRA"). For example, when using data obtained from a credit reporting agency to deny someone an apartment, an "adverse

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action" notice must inform the consumer of his or her right to see and contest the information reported about them.

Explain Your Decision to the Consumer

When denying consumers something of value based on an algorithmic decision, entities should be able to explain what data was used in the model and how that data was used to arrive at the decision. Similarly, entities that use algorithms to generate "scores" about consumers should disclose the factors that went into the score and their relative importance with respect to influencing the score. Importantly, if automated tools may alter the terms of an *existing* deal (such as tools that might reduce consumers' credit limits based on their purchasing habits), this must be disclosed to consumers, as well.

Ensure That Your Decisions Are Fair

Entities should ensure that their use of AI does not result in discrimination against protected groups—which is prohibited by several existing antidiscrimination laws. The post emphasized that when evaluating whether one of these laws has been violated, the FTC will look at both the inputs into the AI algorithm (e.g., whether the model contains ethnically based factors or proxies for such factors, such as census tracts), and the outcomes of the inputs (i.e., whether a facially neutral tool results in a discriminatory outcome).

Finally, the FTC notes that consumers are entitled under FCRA to obtain a copy of the information on file about them and to have the ability to correct it.

Ensure That Your Data and Models Are Robust and Empirically Sound

In certain use cases, entities will be legally obligated to ensure that their data and models are robust and empirically sound. For example, entities acting as consumer reporting agencies are required under the FCRA to implement "reasonable measures" to ensure that the information provided is as accurate as possible. Even if an entity is not considered a consumer reporting agency,

it may still be considered a "furnisher" if the company provides data to consumer reporting agencies, and furnishers are required to have in place written policies and procedures to ensure that the data provided is "accurate and has integrity." In all cases, the FTC recommends that a company's AI models are statistically "validated and revalidated to ensure that they work as intended, and do not illegally discriminate."

Hold Yourself Accountable for Compliance, Ethics, Fairness, and Nondiscrimination

Before using an algorithm, the FTC's blog post recommends asking four key questions:

- How representative is the data set?
- Does the data model account for biases?
- How accurate are the predictions based on big data?
- Does a company's reliance on big data raise ethical or fairness concerns?

In addition, when developing AI for others to use, entities should ensure that appropriate access and use controls are put in place to prevent misuse (e.g., contractual obligations, such as a terms of use for the AI tool, and technical measures, such as running the technology on the developer's own servers). Further, entities should ensure they have appropriate accountability mechanisms in place, and should consider using tools and services to test algorithms for potential problems.

As the FTC's blog post noted at the outset, these five principles undoubtedly will come into play as AI increasingly is deployed in critical industries, such as the healthcare sector. AI and other digital health technology has the potential to play an integral role in managing the current COVID-19 pandemic. In particular, researchers are considering whether AI can be applied to patient monitoring, preventing the spread of infection, and vaccine development efforts.

As these and other technologies are developed to address the global health crisis, it will be critical to ensure that regulatory guidance (including the FTC's blog post) is considered and applied throughout the product life cycle.

Notes

* Terrell McSweeny, a former commissioner of the Federal Trade Commission, is a partner in Covington & Burling LLP. Lee Tiedrich is an IP/technology transactions partner at the firm and co-chair of the firm's global and multi-disciplinary Artificial Intelligence Initiative. Jadzia Pierce is a former associate in the firm's Data Privacy and Cybersecurity and Communications and Media Practice Groups.

1. Federal Trade Commission, "Using Artificial Intelligence and Algorithms," *available at* https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms.

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