



AMERICAN ACADEMY *of* ACTUARIES

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April 30, 2021

Honorable Janet Buckner
Colorado State Capitol
200 E. Colfax Ave., Room 346
Denver, CO 80203

Dear Senator Buckner:

On behalf of the Health Practice Council of the American Academy of Actuaries,¹ I would like to offer input on the revised April 21, 2021, draft version that has been made available to us (see Appendix) of Colorado Senate Bill 21-169, a bill protecting consumers from unfair discrimination in insurance practices. This letter follows up on [our comments](#) on the prior version of the bill, submitted on March 29, 2021, and again focuses on the potential impact to health insurance.

As with the prior version, the bill would prohibit the consideration of certain personal characteristics, such as race, ethnicity, and sex in any insurer practices. It would also prohibit the use of external data, algorithms, or predictive models that unfairly discriminate against individuals with these characteristics. The new version, however, directs to the insurance commissioner's rulemaking authority important considerations as to how these provisions would be implemented.

The Academy's Health Practice Council supports the goal of eliminating unfair discrimination in insurance and appreciates the revised bill's provisions for the commissioner to undertake a robust process for stakeholder engagement. However, we remain concerned that the legislation is overly broad and may result in unintended consequences. An absolute prohibition on using personal characteristics such as race, ethnicity, and sex in insurer practices such as pricing, utilization management, and reimbursement methodologies could run counter to appropriate actuarial practices and could interfere with efforts to reduce health disparities. We reiterate examples from our original letter, with respect to major medical coverage:

¹ The American Academy of Actuaries is a 19,500-member professional association whose mission is to serve the public and the U.S. actuarial profession. For more than 50 years, the Academy has assisted public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

- Although health insurers are not allowed to vary premiums for individuals by race, ethnicity, sex, or the other factors specified in the bill, in some instances, actuaries may incorporate some of these factors when projecting utilization and costs for the market as a whole. Prohibiting the incorporation of these factors in projections could lead to overall premiums that are either excessive or inadequate.
- Prohibiting the consideration of race, ethnicity, or sex could make it more difficult for insurers to target efforts to improve care and health outcomes for underserved populations and to measure progress towards equity goals. Additionally, it might prohibit care management programs related to services and conditions among certain segments of the population (e.g., pregnancy, prostate cancer screening).
- Prohibiting the consideration of personal characteristics in provider reimbursement methods, such as value-based purchasing, could reduce the ability for insurers to tie provider compensation to patient outcomes. For instance, it may be appropriate to adjust patient outcomes for patient characteristics.

We would welcome the opportunity to speak further about these comments. If you wish to follow up with us to discuss matters pertaining specifically to health policy, please contact the Academy's senior health policy analyst, Matthew Williams, at williams@actuary.org. If you would like to discuss the Academy's input more generally across practice areas,² please feel free to contact Craig Hanna (hanna@actuary.org), director of public policy.

Sincerely,

Al Schmitz, MAAA, FSA
Vice President, Health
American Academy of Actuaries

cc: Senate Business, Labor & Technology Committee,
Michael Conway, Colorado Insurance Commissioner

² See letters from the Academy on the introduced bill from a [property and casualty perspective](#) and a [life perspective](#).

Appendix
Revised Bill provided by Senate Staff

SB169_L.001

SENATE COMMITTEE OF REFERENCE AMENDMENT

Committee on Business, Labor, & Technology.

SB21-169 be amended as follows:

1 Amend printed bill, strike everything below the enacting clause and
2 substitute:

3 **"SECTION 1. Legislative declaration.** (1) The general assembly
4 finds that:

5 (a) Increasingly, insurers use external consumer data and
6 information sources, algorithms, and predictive models in their insurance
7 rating, underwriting, claims, and other business practices;

8 (b) Although such tools have the potential to benefit insurers and
9 consumers by simplifying and expediting insurance rating, underwriting,
10 and claims processes, the accuracy and reliability of external consumer
11 data and information sources can vary greatly, and some algorithms and
12 predictive models may lack a sufficient rationale for use in insurance
13 practices; and

14 (c) The use of particular external consumer data and information
15 sources, algorithms, and predictive models by insurers may have a
16 significant negative impact not only on the availability and affordability
17 of insurance for protected classes of consumers but also on the utilization
18 of such insurance.

19 (2) The general assembly therefore declares that in order to ensure
20 that all Colorado residents have fair and equitable access to insurance
21 products, it is necessary to:

22 (a) Prohibit:

23 (I) The use of an individual's race, color, national or ethnic origin,
24 religion, sex, sexual orientation, or gender identity in any insurance
25 practice; and

26 (II) The use of external consumer data and information sources,
27 algorithms, and predictive models insurance, which use has the result of
28 unfairly discriminating against an individual based on an individual's
29 race, color, national or ethnic origin, religion, sex, sexual orientation, or
30 gender identity; and

31 (b) After notice and rulemaking by the commissioner, require
32 insurers that use external consumer data and information sources,
33 algorithms, and predictive models to control for, or otherwise
34 demonstrate that such use does not result in, unfair discrimination.

35 **SECTION 2.** In Colorado Revised Statutes, **add** 10-3-1104.9 as
36 follows:

37 **10-3-1104.9. Insurers' use of external consumer data and**
38 **information sources, algorithms, and predictive models -**
39 **consideration of protected class status prohibited - unfair**
40 **discrimination prohibited - rules - stakeholder process required -**
41 **investigations - definitions.** (1) NOTWITHSTANDING SECTION 10-3-1104

1 (1)(f), AN INSURER SHALL NOT, WITH REGARD TO ANY INSURANCE
2 PRACTICE:

3 (a) USE AN INDIVIDUAL'S RACE, COLOR, NATIONAL OR ETHNIC
4 ORIGIN, RELIGION, SEX, SEXUAL ORIENTATION, OR GENDER IDENTITY; OR

5 (b) PURSUANT TO RULES ADOPTED BY THE COMMISSIONER, USE
6 ANY EXTERNAL CONSUMER DATA AND INFORMATION SOURCE, ALGORITHM,
7 OR PREDICTIVE MODEL THAT UNFAIRLY DISCRIMINATES AGAINST AN
8 INDIVIDUAL BASED ON AN INDIVIDUAL'S RACE, COLOR, NATIONAL OR
9 ETHNIC ORIGIN, RELIGION, SEX, SEXUAL ORIENTATION, OR GENDER
10 IDENTITY.

11 (2) (a) THE COMMISSIONER SHALL ADOPT RULES FOR THE
12 IMPLEMENTATION OF THIS SECTION.

13 (b) THE COMMISSIONER SHALL ENGAGE IN A STAKEHOLDER
14 PROCESS PRIOR THE ADOPTION OF RULES FOR ANY TYPE OF INSURANCE
15 THAT INCLUDES CARRIERS, PRODUCERS, CONSUMER REPRESENTATIVES,
16 AND OTHER INTERESTED PARTIES. THE COMMISSIONER SHALL HOLD
17 STAKEHOLDER MEETINGS FOR STAKEHOLDERS OF DIFFERENT TYPES OF
18 INSURANCE TO ENSURE SUFFICIENT OPPORTUNITY TO CONSIDER FACTORS
19 AND PROCESSES RELEVANT TO EACH SUCH TYPE OF INSURANCE. THE
20 COMMISSIONER SHALL PROVIDE NOTICE OF SUCH STAKEHOLDER MEETINGS
21 ON THE DIVISION WEBSITE, AND STAKEHOLDER MEETINGS SHALL BE OPEN
22 TO THE PUBLIC.

23 (3) (a) AFTER THE STAKEHOLDER PROCESS DESCRIBED IN
24 SUBSECTION (2) OF THIS SECTION, THE COMMISSIONER MAY ADOPT RULES
25 FOR SPECIFIC TYPES OF INSURANCE, WHICH RULES ESTABLISH MEANS BY
26 WHICH AN INSURER MAY DEMONSTRATE THAT IT HAS TESTED WHETHER ITS
27 USE OF EXTERNAL CONSUMER DATA AND INFORMATION SOURCES,
28 ALGORITHMS, OR PREDICTIVE MODELS UNFAIRLY DISCRIMINATE BASED ON
29 AN INDIVIDUAL'S RACE, COLOR, NATIONAL OR ETHNIC ORIGIN, RELIGION,
30 SEX, SEXUAL ORIENTATION, OR GENDER IDENTITY. ANY SUCH RULES SHALL
31 NOT BECOME EFFECTIVE UNTIL JANUARY 1, 2023 AT THE EARLIEST FOR
32 ANY TYPE OF INSURANCE.

33 (b) RULES ADOPTED PURSUANT TO THIS SECTION MUST REQUIRE
34 EACH INSURER TO:

35 (I) PROVIDE INFORMATION TO THE COMMISSIONER CONCERNING
36 THE EXTERNAL CONSUMER DATA AND INFORMATION SOURCES USED BY
37 THE INSURER IN THE DEVELOPMENT AND IMPLEMENTATION OF
38 ALGORITHMS AND PREDICTIVE MODELS FOR A PARTICULAR INSURANCE
39 PRACTICE;

40 (II) PROVIDE AN EXPLANATION OF THE MANNER IN WHICH THE
41 INSURER USES EXTERNAL CONSUMER DATA AND INFORMATION SOURCES,
42 ALGORITHMS, AND PREDICTIVE MODELS FOR THE PARTICULAR TYPE OF
43 INSURANCE;

1 (III) ESTABLISH AND MAINTAIN A RISK MANAGEMENT FRAMEWORK
2 THAT IS REASONABLY DESIGNED TO DETERMINE, TO THE EXTENT
3 PRACTICABLE, WHETHER THE INSURER'S USE OF EXTERNAL CONSUMER
4 DATA AND INFORMATION SOURCES, ALGORITHMS, AND PREDICTIVE
5 MODELS UNFAIRLY DISCRIMINATES AGAINST INDIVIDUALS BASED ON THEIR
6 RACE, COLOR, NATIONAL OR ETHNIC ORIGIN, RELIGION, SEX, SEXUAL
7 ORIENTATION, OR GENDER IDENTITY;

8 (IV) PROVIDE AN ASSESSMENT OF THE RESULTS OF THE RISK
9 MANAGEMENT FRAMEWORK AND ACTIONS TAKEN TO MINIMIZE THE RISK
10 OF UNFAIR DISCRIMINATION, INCLUDING ONGOING MONITORING; AND

11 (V) PROVIDE AN ATTESTATION BY THE INSURER'S CHIEF RISK
12 OFFICER THAT THE INSURER HAS IMPLEMENTED THE RISK MANAGEMENT
13 FRAMEWORK APPROPRIATELY ON A CONTINUOUS BASIS.

14 (c) INFORMATION SUBMITTED BY INSURERS TO COMPLY WITH THIS
15 SECTION IS SUBJECT TO THE "COLORADO OPEN RECORDS ACT", PART 2 OF
16 ARTICLE 72 OF TITLE 24.

17 (4) PURSUANT TO SECTION 10-3-1106, THE COMMISSIONER MAY
18 EXAMINE AND INVESTIGATE AN INSURER'S USE OF AN EXTERNAL
19 CONSUMER DATA AND INFORMATION SOURCE, ALGORITHM, OR PREDICTIVE
20 MODEL IN ANY INSURANCE PRACTICE. INSURERS SHALL COOPERATE WITH
21 THE DIVISION IN ANY EXAMINATION OR INVESTIGATION UNDER THIS
22 SECTION.

23 (5) IN THE EVENT THAT IT IS DETERMINED AS A RESULT OF AN
24 INSURER'S PROPER COMPLIANCE WITH THE REQUIREMENTS OF THIS SECTION
25 THAT THE INSURER'S USE OF EXTERNAL CONSUMER DATA AND
26 INFORMATION SOURCES, ALGORITHMS, OR PREDICTIVE MODELS IS FOUND
27 TO UNFAIRLY DISCRIMINATE AGAINST INDIVIDUALS BASED ON THEIR RACE,
28 COLOR, NATIONAL OR ETHNIC ORIGIN, RELIGION, SEX, SEXUAL
29 ORIENTATION OR GENDER IDENTITY, THE COMMISSIONER MAY ISSUE AN
30 ORDER TO THE INSURER, WHICH ORDER SHALL BE LIMITED TO:

- 31 (a) ANY NECESSARY RESTITUTION FOR CONSUMERS; AND
- 32 (b) ANY OTHER ACTION REQUIRED TO BE TAKEN BY THE INSURER
33 TO REMEDY THE UNFAIR DISCRIMINATION ON A PROSPECTIVE BASIS.

34 (6) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE
35 REQUIRES:

36 (a) "ALGORITHM" MEANS A COMPUTATIONAL PROCESS THAT
37 INFORMS HUMAN DECISION-MAKING IN INSURANCE PRACTICES.

38 (b) "EXTERNAL CONSUMER DATA AND INFORMATION SOURCE"
39 MEANS A DATA OR INFORMATION SOURCE THAT IS USED BY AN INSURER TO
40 SUPPLEMENT TRADITIONAL UNDERWRITING OR OTHER INSURANCE
41 PRACTICES OR TO ESTABLISH LIFESTYLE INDICATORS THAT ARE USED IN
42 INSURANCE PRACTICES. "EXTERNAL CONSUMER DATA AND INFORMATION
43 SOURCE" INCLUDES CREDIT SCORES, SOCIAL MEDIA HABITS, LOCATIONS,

1 PURCHASING HABITS, HOME OWNERSHIP, EDUCATIONAL ATTAINMENT,
2 OCCUPATION, LICENSURES, CIVIL JUDGMENTS, AND COURT RECORDS.

3 (c) "INSURANCE PRACTICE" MEANS MARKETING, UNDERWRITING,
4 PRICING, UTILIZATION MANAGEMENT, REIMBURSEMENT METHODOLOGIES,
5 CLAIMS MANAGEMENT, AND FRAUD DETECTION IN THE TRANSACTION OF
6 INSURANCE.

7 (d) "PREDICTIVE MODEL" MEANS A PROCESS OF USING
8 MATHEMATICAL AND COMPUTATIONAL METHODS THAT EXAMINE CURRENT
9 AND HISTORICAL DATA SETS FOR UNDERLYING PATTERNS AND CALCULATE
10 THE PROBABILITY OF AN OUTCOME.

11 (e) "UNFAIR DISCRIMINATION BASED ON AN INDIVIDUAL'S RACE,
12 COLOR, NATIONAL OR ETHNIC ORIGIN, RELIGION, SEX, SEXUAL
13 ORIENTATION, OR GENDER IDENTITY" INCLUDES THE USE OF AN EXTERNAL
14 CONSUMER DATA AND INFORMATION SOURCE, ALGORITHM, OR MODEL
15 WHOSE PREDICTIVE CAPABILITY IS DERIVED IN SUBSTANTIAL PART FROM
16 ITS CORRELATION WITH MEMBERSHIP IN ONE OR MORE OF SUCH PROTECTED
17 CLASSES.

18 **SECTION 3 Act subject to petition - effective date.** This act
19 takes effect at 12:01 a.m. on the day following the expiration of the
20 ninety-day period after final adjournment of the general assembly; except
21 that, if a referendum petition is filed pursuant to section 1 (3) of article V
22 of the state constitution against this act or an item, section, or part of this
23 act within such period, then the act, item, section, or part will not take
24 effect unless approved by the people at the general election to be held in
25 November 2022 and, in such case, will take effect on the date of the
26 official declaration of the vote thereon by the governor."

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