October 6, 2022

Councilmember Robert White
Chair, Committee on Government Operations and Facilities
1350 Pennsylvania Avenue, NW
Suite 117
Washington, DC 20004

Re: District of Columbia B24-0558

Dear Chairperson White:

We, the undersigned trade associations, write on behalf of our respective members to express our concerns with B24-0558, the "Stop Discrimination by Algorithms Act of 2021." The consumer credit industry is committed to equality in lending and shares the Council's concern about discriminatory outcomes. Our members provide District consumers with access to credit to purchase a home or a vehicle, safely make purchases, and securely hold money in their depository accounts like checking, savings or investment accounts, and numerous other financial products.

We appreciate your hard work to prepare for the September 22nd hearing on this legislation. Importantly, we believe the hearing—through testimony from both public and government witnesses, as well as proponents and opponents—exposed many shortcomings of the legislation's current approach. While we understand your urgency to act to prevent discrimination, we urge you not to move forward with the legislation. Instead, we ask that you consider bringing stakeholders together to consider how various industries use these technological tools to interact with consumers and how such industry practices are currently regulated. For industries with a dedicated regulator, like financial services, it is crucial that the regulator have an opportunity to weigh in. Our industry has partnered with lawmakers and regulators on critical consumer issues in the past, and we are confident that another such partnership would be to the benefit of the District's consumers.

Benefits of Algorithms

On behalf of our membership, we believe that discrimination in the allocation of credit and financial services is wrong and is prohibited under existing laws in the District. We support enforcement of fair lending laws at the federal, state, and local levels. As Karima Woods, Commissioner of the Department of Insurance, Securities and Banking, stated in her hearing testimony, "An algorithm is simply a process used to perform a calculation. Like any other technology, it is not inherently good nor bad." We agree. B24-0558 assumes that all automated tools using machine learning and personal data to make predictions and decisions are inherently bad. The bill fails to acknowledge the everyday benefits that automated decision-making systems provide.

The financial services industry believes that technology holds tremendous opportunity to make financial services safer, more convenient, and more inclusive. As such, financial institutions are continuously evaluating ways to safely and responsibly integrate algorithmic solutions to better serve customers and communities across the country. Algorithms make credit decisions more accurate, fair, faster and more affordable by judging applicants on their credit worthiness. Algorithms also eliminate some of the risk of the biases that can be found in human interactions and can help identify products and services designed to benefit communities, including historically underserved populations, helping close the racial wealth gap. Consumers want—and sometimes need—fast access to responsible credit approval. This bill would restrict financial institutions' ability to provide these services due to increased application processing and review time that additional human manual review would provide.

The use of algorithms is also crucial for protecting all consumers and financial institutions alike from fraud. Fraudulent transactions annually amount to billions of dollars,[1] making the need for fraud prevention services greater than ever. Detecting fraudulent patterns is typically based on large multi-country data sets, as fraudsters will use similar methods from one country to another and then attempt to take them globally. Human logic alone is slower and unable to identify such complex patterns. The use of artificial intelligence and algorithms makes this process more efficient and effective. Also, limiting the use of artificial intelligence (AI) to identify fraud will increase risks and costs for merchants, exposing them to potentially higher chargeback costs. As a result, District consumers may also face larger holds on their accounts for hotel stays and rental cars and fewer protections for all their card purchases, while cardholders in Maryland and Virginia would still enjoy the full fraud protections that financial institutions and payment networks offer.

Many financial institutions also use technology-enabled tools to automate routine customer interactions, triage customer calls, provide tailored marketing, and customize trade recommendations. Customers want the convenience of online and mobile platforms, and companies are using algorithms to better connect with customers in their preferred channels. These technologies can also help customers manage budgets and make digital tools more accessible.

[1] See FTC, *New Data Shows FTC Received 2.8 Million Fraud Reports from Consumers in 2021* at https://www.ftc.gov/news-events/news/press-releases/2022/02/new-data-shows-ftc-received-28-million-fraud-reports-consumers-2021-0.

Existing Consumer Protections

As noted above the financial services industry uses technology to benefit consumers and each use of technology is governed by a robust legal framework designed to prohibit discrimination. These laws apply regardless of the use of technology. The District has many existing laws addressing business practices. However, the overwhelming majority of these laws are specific to the industries they govern, since the Council recognized consumers and businesses benefit when there are clear laws that reflect how individual industries operate.

During the hearing, bill proponents highlighted problems with algorithms in certain industries. Absent from the hearing testimony were specific examples of algorithmic discrimination by financial institutions. This is not a coincidence. Instead, it is the result of work by the financial services industry working with state and federal regulatory partners to combat and overcome historical discriminatory practices. Currently law already provides increased transparency and consumer protections in all credit transactions, regardless of whether that transaction in conducted in person, manually, or involves an algorithm or automation.

Further, lack of action at the federal level was discussed at the hearing for the justification of the Council to act on this bill. In fact, federal regulators are acting. The Bureau of Consumer Financial Protection ("CFPB"), Board of Governors of the Federal Reserve System ("FRB"), Office of the Comptroller of the Currency ("OCC"), Federal Deposit Insurance Corporation ("FDIC"), and the National Credit Union Administration ("NCUA") all have been actively engaged on this topic.[2] These agencies are also closely monitoring the work of the National Institute of Standards and Technology ("NIST") within the U.S. Department of Commerce, and other government bodies in the U.S. and around the world, to assess the benefits and risks associated with emerging technologies and issue appropriate guidance. For example, in May of this year, the CFPB issued Circular 2022-03: Adverse action notification requirements in connection with credit decisions based on complex algorithms, which makes it clear that a creditor's obligations regarding discrimination and adverse action notices "apply equally to all credit decisions, regardless of the technology used to make them."[3]

The Equal Credit Opportunity Act (ECOA) has—for nearly 50 years—prohibited discrimination in credit transactions based on certain protected characteristics. ECOA's protections extend beyond just offers or denials of credit based on protected characteristics and also include the fairness of the terms of the credit. ECOA prohibits the use of protected characteristics in any credit decision making system, whether automated or manual. Importantly, ECOA also requires financial institutions to provide adverse action notices explaining the principal reasons for a denial of credit or other unfavorable credit decision. Under ECOA, financial institutions face regulatory scrutiny from multiple federal agencies, including the Consumer Financial Protection Bureau (CFPB). Similarly, the Department of Housing and Urban Development (HUD) also enforces compliance with the Fair Housing Act for mortgage lending.

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[2] See, e.g., https://www.federalregister.gov/documents/2021/03/31/2021-06607/request-for-information-and-comment-on-financial-institutions-use-of-artificial-intelligence

[3] See CFPB, *Consumer Financial Protection Circular 2022-03* at https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/.

The Gramm-Leach-Bliley Act (GLBA) protects the privacy of consumer financial information held by financial institutions. Under GLBA and subsequent regulations, financial institutions are required to make clear and conspicuous privacy disclosures to both customers and consumers who are not customers. These notices must disclose what information is collected or shared and allow a consumer to opt-out of sharing. Similarly, the Fair Credit Reporting Act (FCRA) regulates the collection and use of consumers' credit information to ensure fairness, accuracy, and privacy. The FCRA only permits financial institutions to use credit information for specific purposes limited by the Act and also requires financial institutions to provide adverse action notices in instances where the credit information negatively affected an offer of credit. Special disclosures are also required when a decision is based in any part on a consumer's credit score. Importantly, consumers have a right to see their scores and their consumer reports and to dispute information they believe to be inaccurate.

Federal banking regulators also have oversight over the use of credit modeling that is used to inform decision making. The Office of the Comptroller of the Currency (OCC), Federal Reserve, and the FDIC have published model risk management guidance.[4] These laws and regulations are in addition to numerous other broader laws, like the Federal Trade Commission Act and Consumer Financial Protection Act of 2010, which generally prohibit unfair, deceptive, or abusive acts or practices, and the District's Mortgage Lenders and Brokers Act and Human Rights Act, which empower DISB or the OAG to enforce compliance.

Incompatibility with federal lending programs

The proposed legislation requires covered entities to require service providers to comply with certain provisions of the bill. Based on testimony, we understand this provision is intended to prevent covered entities from circumventing the bill's protections through the use of service providers. However, this requirement is incompatible with the process used to offer federally insured mortgages and those sold on the secondary market to government sponsored enterprises like Fannie Mae or Freddie Mac. Many of these products rely on automated processes that financial institutions have no control of, and thus no ability to audit or meet the bill's other transparency requirements.

During the hearing, testimony from the American Financial Services Association highlighted one example from the Federal Housing Administration (FHA). FHA identifies its TOTAL mortgage scorecard process as: "a statistically derived algorithm developed by HUD to evaluate borrower credit history and application information."[5] As with other federal affordability programs, this

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4 Office of the Comptroller of the Currency, Supervisory Guidance on Model Risk Management, OCC Bulletin 2011-12 (Apr. 4, 2011), https://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-12.html; Board of Governors of the Federal Reserve System, SR Letter 11-7 (Apr. 4, 2011), https://www.federalreserve.gov/supervisionreg/srletters/sr1107.htm; Federal Deposit Insurance Corporation, Guidance on Model Risk Management, FDIC FIL-22-2017 (June 7, 2017), https://www.fdic.gov/news/financial-institution-letters/2017/fil17022.html.

5 See U.S. Department of Housing and Urban Development, *FHA TOTAL Scorecard*, at https://www.hud.gov/program_offices/housing/sfh/total.

algorithm was developed and is maintained by a federal agency, but any financial institution participating in HUD programs could not comply with the legislation due to the inability to force FHA to comply with the legislation, as required of Service Providers. The TOTAL mortgage scorecard is one example, but similar issues exist with the Fannie Mae Desktop Underwriter, Freddie Mac Loan Product Advisor, and other federally administered Automated Underwriting Systems (AUS) such as those approved by the Department of Veterans Affairs. If financial institutions cannot comply with the proposed bill while also meeting their obligations under federal law and lending programs, District consumers could lose access to numerous federal programs aimed at increasing mortgage affordability. The greatest impact of the loss of these programs would be on consumers with lower credit scores or incomes who rely on those programs to purchase a home.

B24-0558 Fails to Achieve Its Intended Goals

B24-0558 is a one-size-fits-all regulatory approach that fails to consider the unique legal and regulatory structure of the financial services industry. Financial institutions are already highly regulated and supervised—usually by more than one regulator—and existing regulation and examination procedures capture the risks of algorithmic decision-making, making this approach redundant. Financial institutions and service providers already provide numerous disclosures in compliance with the laws outlined above and to ensure consumers understand their accounts and products. Adding new sets of consumer disclosures and notices duplicates the information already provided under other laws, but in a slightly different format. These proposed disclosures risk overloading consumers with information so voluminous that it may become meaningless, which may lead to more confusion and undermine the central purpose of such disclosures.

Like Commissioner Woods, we believe the current bill is unequivocally not a fit for the financial services industry. First, the bill duplicates core lending regulatory functions and protections currently administered by DISB, the Office of Attorney General, and federal financial regulators. This would create unnecessary confusion and uncertainty and impose significant and costly regulatory compliance burdens on financial services companies operating in the District that will be passed along to consumers. Second, where the bill does not duplicate existing laws, it includes standards that are inconsistent with existing laws governing financial services companies, which will cut off access for District consumers to numerous federal programs aimed at increasing credit affordability, with the greatest impact on those consumers with lower credit scores or income who rely on those programs most. Finally, the bill could interfere with countless beneficial uses of algorithms that prevent fraud and facilitate consumer account access, which keep costs down for consumers and increase financial accessibility in the District.

Conclusion

In short, daily use of algorithms that help predict credit loss, prevent fraud, and facilitate consumer account access keeps costs down for consumers and increases access to credit in the District. Because legal and regulatory protections already apply to the use of algorithms and automation in credit transactions and District authorities and federal regulators have the power to enforce them, the proposed legislation would not provide any new material benefit for District consumers.

For the reasons outlined above, we urge you to consider the effects the proposed restrictions will have on credit availability in the District and not move forward with the legislation as drafted. We encourage you to study the issue further and bring together industry and government stakeholders. We would appreciate the opportunity to participate in that process. Thank you in advance for your consideration of our comments.

Sincerely,

American Bankers Association
American Financial Services Association
Card Coalition
Consumer Data Industry Association
MD|DC Credit Union Association
Maryland Mortgage Bankers and Brokers Association
Mortgage Bankers Association
Mortgage Bankers Association of Metropolitan Washington
Virginia Mortgage Bankers Association