

Big Tech’s “Digital Trade” Agenda Threatens the District of Columbia’s Tech Policy Goals

Nationwide, state legislators have introduced bills to protect people from biased artificial intelligence (AI) models, online privacy violations, abuses of children and teens’ data, and anti-competitive practices by tech companies—and to guarantee our right to repair our phones, cars, and other equipment.

The surge in statehouse tech legislation shows that the American people—and their elected officials at every level—want action now. But few people realize that the very firms whose conduct led to this bipartisan response have a strategy to undermine tech regulation through a stealthy form of international preemption. They want to add rules to international trade deals that limit how state, local, and federal governments can regulate tech.

The most extreme of what these Big Tech interests misleadingly call “digital trade” rules would:

- limit governments’ powers to require impact assessments, bias audits, or pre-deployment testing of even high-risk AI and other programs if this involves government regulators or independent reviewers having access to detailed descriptions of algorithms or to source code;
- forbid right to repair polices that require manufacturers to share repair tools that depend on access to code or algorithms;
- ban regulation of international data transfers, guaranteeing rights for firms to choose where our personal data moves and is stored; and
- prohibit requirements to keep certain data locally stored, for instance to keep sensitive data within the state for privacy or any other reason.

DC lawmakers’ initiatives to regulate the tech industry must not be thwarted by “digital trade” rules being pushed by Big Tech firms. We must ensure that tech bills in Washington, DC, are not undermined by this plot for international preemption.

The rest of this explainer details how “digital trade” provisions conflict with specific legislation proposed in DC relating to AI regulation.



*For a detailed analysis of these “digital trade” rules, see <https://rethinktrade.org/reports/international-preemption-by-trade-agreement/>

AI REGULATION

To try to avoid civil rights and liberties violations and other harms from AI systems being rushed into use, legislators are introducing bills in statehouses nationwide that require impact assessments, bias audits, or pre-deployment testing to ensure that AI models are fair and accurate. The Big Tech-demanded “digital trade” rule that bans access to source code and algorithms would forbid such reviews from being conducted by or made available to government regulators or independent bodies, as many bills require.

In 2023, the Council of the District of Columbia considered the Stop Discrimination by Algorithms Act. If passed, this policy would have imposed audit requirements on the users of AI systems to develop impact assessments that are meant to protect DC residents from risks to their health, safety, and rights:

“Sec. 7. Auditing for Discriminatory Processing and Reporting Requirement.

(a) Auditing requirement. A covered entity shall annually audit its algorithmic eligibility determination and algorithmic information availability determination practices to: (...)

(2) Analyze disparate-impact risks of algorithmic eligibility determinations and algorithmic information availability determinations based on actual or perceived race, color, religion, national origin, sex, gender identity or expression, sexual orientation, familial status, genetic information, source of income, or disability; (...)

(5) Conduct the audits under paragraphs (1), (2), and (3) of this subsection in consultation with third parties who have substantial information about or participated in the covered entity’s algorithmic eligibility determinations and algorithmic information availability determinations, including service providers (...)

(b)(1) Report. A covered entity shall annually submit a report containing the results of the audit mandated under this section to the Office of the Attorney General for the District of Columbia on a form provided by the Office of the Attorney General. The report shall contain the following information: (...)

(B) The data and methodologies that the covered entity uses to establish the algorithms;

(C) The optimization criteria of the algorithms used to make the determinations;

(D) Any data or sets of data used to train the algorithms, and the source or sources of that data;

(E) The methodologies the covered entity uses to render the determinations (...).”

By requiring firms to conduct audits of their algorithms in consultation with third parties and then submit audit reports to the district’s attorney general, the policy could be at risk of legal challenges from AI deployers or developers based on algorithmic secrecy guarantees in “digital trade” provisions.

The good news is that very few of the hundreds of trade agreements in effect worldwide include Big Tech’s “digital trade” rules. The bad news is that Big Tech lobbyists are using their power and money to try to rig numerous trade deals that are being negotiated right now to derail the wave of tech regulation underway nationwide. To learn more, please visit: www.rethinktrade.org