GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL
KARL A. RACINE

December 09, 2021

The Honorable Phil Mendelson
Chairman, Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W., Suite 504
Washington, D.C. 20004

Dear Chairman Mendelson:

I write to transmit the "Stop Discrimination by Algorithms Act of 2021" ("Bill") for consideration and enactment by the Council of the District of Columbia. The Bill would protect against algorithmic discrimination and promote transparency about the use of algorithms that limit important life opportunities. Algorithms are tools that use machine learning and personal data to make predictions about individuals. Increasingly, algorithms are used to determine eligibility for opportunities in employment, housing, education, and public accommodations like healthcare, insurance, and credit.

But all too often, algorithms reflect and replicate historical bias, exacerbating existing inequalities and harming marginalized communities. For instance:

- Employment algorithms can filter job applicants by how closely they match a business's current workers and screen out applicants with disabilities;[1]

- Housing advertisers on Facebook have used algorithms to target ads to renters or buyers based on race, religion, sex, and familial status;[2]

- A healthcare algorithm has suggested that healthier white patients should receive more services to manage their health than sicker Black patients;[3] and

- Lending algorithms have calculated higher interest rates for borrowers who attended Historically Black Colleges and Universities.[4]

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[1] Drew Harwell, "A face-scanning algorithm increasingly decides whether you deserve the job," WASH. POST, Nov. 9, 2019, https://www.washingtonpost.com/technology/2019/10/22/ai-hiring-face-scanning-algorithm-increasingly-decides-whether-you-deserve-job/

[2] Marrian Zhou, "Facebook takes heat from HUD over allegedly discriminatory housing ads," CNET, Aug. 17, 2018, https://www.cnet.com/news/facebook-takes-heat-from-hud-over-allegedly-discriminatory-housing-ads/

[3] Ziad Obermeyer et al., *Dissecting racial bias in an algorithm used to manage the health of populations*, 366 SCIENCE 6464, 447-453 (2019), https://science.sciencemag.org/content/sci/366/6464/447.full.pdf.

[4] Student Borrower Protection Center, *Educational Redlining* (2020) 4, https://protectborrowers.org/wp-content/uploads/2020/02/Education-Redlining-Report.pdf.

Additionally, it can be impossible to tell how and why algorithms make these decisions because they operate under the radar and unregulated—without any transparency as to how they function.

This Bill would combat these problems and set baseline standards of fairness by requiring entities that make algorithmic decisions about important life opportunities to:

- stop the discriminatory use of traits like race, sex, and disability in automated decisions about employment, housing, education, and public accommodations;

- audit algorithms for discriminatory patterns and report the results and any corrective actions to the Office of the Attorney General; and

- disclose and explain when algorithms negatively affect a consumer's opportunities.

It would also empower the Office of the Attorney General and private individuals to bring suit for violations of these provisions, with remedies to include injunctive relief, damages, restitution, and penalties.

The District has been a leader in passing and enforcing civil rights laws that help prevent discrimination. I look forward to working with the Council and other stakeholders to strengthen our laws so that all individuals in the District can live, learn, and work without facing discrimination or hate. If you have any questions, please contact me or Deputy Attorney General Emily Gunston at (202) 805-7638.

Sincerely,

Karl A. Racine
Attorney General for the District of Columbia

Chairman Mendelson
at the request of the Attorney General

A BILL

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IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

_____

Chairman Mendelson, at the request of the Attorney General, introduced the following bill, which was referred to the Committee on _____.

To prohibit users of algorithmic decision-making from utilizing algorithmic eligibility determinations in a discriminatory manner, to require corresponding notices to individuals whose personal information is used, and to provide for appropriate means of civil enforcement.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as "Stop Discrimination by Algorithms Act of 2021".

Sec. 2. Findings and declaration of policy.

The Council of the District of Columbia makes the following findings:

(a) It is the sense of the Council that technological advancements should support the dignity and well-being of the people of the District.

(b) Computers and data-derived decision-making tools play ever larger roles in modern life. As of 2019, 90 percent of U.S. adults regularly used the internet. Approximately 76 percent of households in the District of Columbia have a broadband internet subscription, and many who lack a home internet connection use smartphones to go online.

(c) When District residents engage in online activities like posting on social media, searching web-based listings for an apartment, or submitting electronic job applications, they

1 generate personalized information that is harvested by data collectors. Data collectors can track

2 hundreds of categories of data about specific individuals including age, gender, employment

3 status and place of employment, income level, sexual orientation, national origin, and religion.

4   (d) Companies often use data from both online and offline sources to create algorithms,

5 which are tools that use machine learning and personal data to make educated guesses about an

6 individual's preferences, abilities, and future behavior. These algorithms are then incorporated

7 into decision-making processes that affect many aspects of life.

8   (e) Increasingly, algorithms determine an individual's opportunities to secure

9 employment, insurance, credit, housing, and public accommodations, as well as access to

10 information about those opportunities.

11   (f) Algorithms often rely on personal traits protected under the D.C. Human Rights Act.

12 And algorithmic decision-making can amplify discrimination based on race, gender, sexual

13 orientation, disability, age, source of income, credit information, and other protected traits when

14 algorithmic models replicate existing societal inequalities. Algorithmic decision-making systems

15 that fail to account for bias disproportionately harm marginalized communities.

16   (g) Despite their prevalence and the potential problems they pose, algorithms are poorly

17 understood by most individuals, in part because of the many entities involved and the lack of

18 accountability among those entities.

19   (h) This act seeks to protect individuals and classes of individuals from the harm that

20 results when algorithmic decision-making processes operate without transparency, rely on

21 protected traits and other personal data that are correlated with those traits, or disproportionately

22 limit access to and information about important life opportunities. The act combats these

23 challenges by:

1   (1) Encouraging transparency and accountability by requiring covered entities to

2 provide notice to individuals about how the covered entity uses personal information in

3 algorithmic decisions, including additional information when the algorithmic decision results in

4 an adverse action, audit its algorithmic determination practices for discriminatory processing or

5 impact, and report this information to the Office of the Attorney General;

6   (2) Prohibiting adverse algorithmic decision-making based on protected traits, or

7 that have the effect of making decisions based on such traits; and

8   (3) Creating public investigatory and enforcement authority, and an individual

9 right of action.

10   Sec. 3. Definitions.

11   The following words and terms when used in this act have the following meanings:

12   (1) "Adverse action" means a denial, cancellation, or other adverse change or assessment

13 regarding an individual's eligibility for, opportunity to access, or terms of access to important

14 life opportunities.

15   (2) "Algorithmic eligibility determination" means a determination based in whole or in

16 significant part on an algorithmic process that utilizes machine learning, artificial intelligence, or

17 similar techniques to determine an individual's eligibility for, or opportunity to access, important

18 life opportunities.

19   (3) "Algorithmic information availability determination" means a determination based in

20 whole or in significant part on an algorithmic process that utilizes machine learning, artificial

21 intelligence, or similar techniques to determine an individual's receipt of advertising, marketing,

22 solicitations, or offers for an important life opportunity.

3

1   (4) "Covered entity" means any individual, firm, corporation, partnership, cooperative,

2 association, or any other organization, legal entity, or group of individuals however organized,

3 including entities related by common ownership or corporate control, that either makes

4 algorithmic eligibility determinations or algorithmic information availability determinations, or

5 relies on algorithmic eligibility determinations or algorithmic information availability

6 determinations supplied by a service provider, and that meets one of the following criteria:

7   (A) Possesses or controls personal information on more than 25,000 District

8 residents;

9   (B) Has greater than $15 million in average annualized gross receipts for the 3

10 years preceding the most recent fiscal year;

11   (C) Is a data broker, or other entity, that derives 50 percent or more of its annual

12 revenue by collecting, assembling, selling, distributing, providing access to, or maintaining

13 personal information, and some proportion of the personal information concerns a District

14 resident who is not a customer or an employee of that entity; or

15   (D) Is a service provider.

16   (5) "Important life opportunities" means access to, approval for, or offer of credit,

17 education, employment, housing, a place of public accommodation as defined in section 102(24)

18 of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official

19 Code § 2-1401.02(24)), or insurance.

20   (6)(A) "Personal information" means any information held by a covered entity –

21 regardless of how the information is collected, inferred, derived, created, or obtained – that is

22 linked or reasonably linkable to an individual, household, or a personal device.

1   (B) Information is reasonably linkable to an individual, household, or personal

2   device if it can be used on its own or in combination with other information reasonably available

3   to the covered entity, regardless of whether such other information is held by the covered entity,

4   to identify an individual, household, or personal device.

5   (C) Examples of personal information include:

6   (i) Individually identifiable information such as a real name, alias,

7   signature, date of birth, union membership number, postal address, unique personal identifier,

8   online identifier, internet protocol address, media access control (MAC) address, unique device

9   identifier, email address, phone number, account name, social security number, military

10   identification number, driver's license number, vehicle identification number, passport number,

11   or other similar identifiers;

12   (ii) A person's race, national origin, religious affiliation, gender identity,

13   sexual orientation, marital status, or disability;

14   (iii) Commercial information, including records of personal property,

15   products or services purchased, obtained, or considered, or other purchasing or consuming

16   histories or tendencies;

17   (iv) Real-time or historical geolocation data more specific than a 50-mile

18   radius;

19   (v) Education records, as defined in 34 C.F.R. § 99.3 or any successor

20   regulation;

21   (vi) Biometric data, including voice signatures, facial geometry,

22   fingerprints, and retina/iris scans;

5

1   (vii) Inferences drawn from any of the information identified in sub-

2 subparagraphs (i)-(vi) to create a profile about an individual reflecting the individual's

3 predispositions, behavior, habits, attitudes, intelligence, abilities, and aptitudes.

4   (7) "Service provider" means any entity that performs algorithmic eligibility

5 determinations or algorithmic information availability determinations on behalf of another entity.

6   Sec. 4. Prohibited practices.

7   (a) In general.

8   (1) A covered entity shall not make an algorithmic eligibility determination or an

9 algorithmic information availability determination on the basis of an individual's or class of

10 individuals' actual or perceived race, color, religion, national origin, sex, gender identity or

11 expression, sexual orientation, familial status, source of income, or disability in a manner that

12 segregates, discriminates against, or otherwise makes important life opportunities unavailable to

13 an individual or class of individuals.

14   (2) Any practice that has the effect or consequence of violating paragraph (1) of

15 this subsection shall be deemed to be an unlawful discriminatory practice.

16   (b) Exemptions.

17   (1) Nothing in subsection (a) shall limit the availability of the exemptions in

18 section 103 of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38;

19 D.C. Official Code § 2-1401.03).

20   (2) Nothing in this act shall prohibit covered entities from using individuals'

21 personal information to make algorithmic eligibility determinations or algorithmic information

22 availability determinations as part of an affirmative action plan adopted pursuant to District or

23 federal law.

1   Sec. 5. Relationships with service providers.

2   Any covered entity that relies in whole or in part on a service provider to conduct an

3   algorithmic eligibility determination or an algorithmic information availability determination

4   shall require by written agreement that the service provider implement and maintain measures

5   reasonably designed to ensure that the service provider complies with this act.

6   Sec. 6. Right to notice and disclosure.

7   (a) Notice requirement. A covered entity shall:

8   (1) Develop a notice about how the covered entity uses personal information in

9   algorithmic eligibility determinations and algorithmic information availability determinations,

10   including:

11   (A) What personal information the covered entity collects, generates,

12   infers, uses, and retains;

13   (B) What sources the covered entity uses to collect, generate, or infer

14   personal information;

15   (C) Whether the personal information is shared, sold, leased, or exchanged

16   with any service providers for any kind of consideration, and if so, the names of those service

17   providers, including subsidiaries of the service providers;

18   (D) A brief description of the relationship between the personal

19   information and the algorithmic information availability or algorithmic eligibility

20   determinations;

21   (E) How long the covered entity will hold the personal information; and

22   (F) The rights provided under this act;

1   (2) Ensure that the notice developed and made available under paragraph (1) of

2   this subsection:

3   (A) Is clear, concise, and complete;

4   (B) Does not contain unrelated, confusing, or contradictory materials; and

5   (C) Is in a format that is:

6   (i) Prominent and easily accessible;

7   (ii) Capable of fitting on one printed page; and

8   (iii) Provided in English, as well as in any non-English language

9   spoken by at least 500 individuals in the District of Columbia population.

10   (3) Within 30 days after changing its collection or use practices or policies in a

11 way that affects the content of the notice required by paragraph (1) of this subsection, update that

12 notice;

13   (4) Make the notice required under paragraph (1) of this subsection continuously

14 and conspicuously available:

15   (A) On the covered entity's website or mobile application, if the covered

16 entity maintains a website or mobile application;

17   (B) At the physical place of business or any offline equivalent the covered

18 entity maintains; and

19   (5) Send the notice required under paragraph (1) of this subsection to an

20 individual before the first algorithmic information availability determination it makes about the

21 individual, by:

22   (A) Mail, if the personal information was gathered through the individual

23 contacting or contracting with the covered entity through mail;

1   (B) Email, if the personal information was gathered through the individual

2   contacting or contracting with the covered entity through email, or if the covered entity has the

3   individual's email address for another reason;

4   (C) Informing individuals through a "pop-up" notification upon navigation

5   to the covered entity's website or within the covered entity's mobile application; or

6   (D) Providing a clear and conspicuous link on the covered entity's

7   website's homepage, or the home screen of its mobile application, leading to the notice.

8   (b) A covered entity need not provide the notice described under subsection (a) of this

9   section if another covered entity has provided notice to the same individual for the same action

10   as part of a contracted arrangement with the covered entity.

11   (c) Prohibited acts.

12   A covered entity that is subject to paragraph (a)(1), with respect to any individual whose

13   personal information the covered entity holds as described in that paragraph, may not use any

14   personal information of the individual in an algorithmic eligibility determination unless the

15   covered entity has provided the individual with notice consistent with that paragraph.

16   (d) Adverse action disclosure requirements.

17   If a covered entity takes any adverse action with respect to any individual that is based in

18   whole or in part on the results of an algorithmic eligibility determination, the covered entity shall

19   provide the individual a written or electronic disclosure that includes:

20   (1) The covered entity's name, address, email address, and telephone number;

21   (2) The factors the determination depended on; and

22   (3) An explanation that the individual may:

9

1   (A) Access any personal information described in section 3(6)(A)-(C),

2   pertaining to that individual, that the covered entity used to make the determination;

3   (B) Submit corrections to that information; and

4   (C) If the individual submits corrections, request that the covered entity

5   conduct a reasoned reevaluation of the relevant algorithmic eligibility determination, conducted

6   by a human, based on the corrected data.

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

8   (a) Auditing requirement. A covered entity shall annually audit its algorithmic eligibility

9   determination and algorithmic information availability determination practices to:

10   (1) Determine whether the processing practices discriminate in a manner

11   prohibited by section 4 of this act;

12   (2) Analyze disparate-impact risks of algorithmic eligibility determinations and

13   algorithmic information availability determinations based on actual or perceived race, color,

14   religion, national origin, sex, gender identity or expression, sexual orientation, familial status,

15   genetic information, source of income, or disability;

16   (3) Create and retain for at least 5 years an audit trail that records, for each

17   algorithmic eligibility determination:

18   (A) The type of algorithmic eligibility determination made;

19   (B) The data used in the determination, including the source of any such

20   data;

21   (C) The methodology used by the entity to establish the algorithm;

22   (D) The algorithm used to make the determination;

1   (E) Any data or sets of data used to train the algorithm;

2   (F) Any testing and results for model performance across different

3 subgroups or for discriminatory effects;

4   (G) The methodology used to render the determination; and

5   (H) The ultimate decision rendered;

6   (4) Conduct annual impact assessments of:

7   (A) Existing systems that render algorithmic eligibility determinations and

8 algorithmic information availability determinations; and

9   (B) Prior to implementation, new systems that render algorithmic

10 eligibility determinations and algorithmic information availability determinations;

11   (5) Conduct the audits under paragraphs (1), (2), and (3) of this subsection in

12 consultation with third parties who have substantial information about or participated in the

13 covered entity's algorithmic eligibility determinations and algorithmic information availability

14 determinations, including service providers; and

15   (6) Identify and implement reasonable measures to address risks of an unlawful

16 disparate impact identified in the audits and impact assessments conducted under paragraphs (1),

17 (2), and (3) of this subsection, including the risks posed by determinations made by the covered

18 entity's service providers.

19   (b)(1) Report.

20   A covered entity shall annually submit a report containing the results of the audit

21 mandated under this section to the Office of the Attorney General for the District of Columbia on

22 a form provided by the Office of the Attorney General. The report shall contain the following

23 information:

1   (A) The types of algorithmic eligibility determination and algorithmic

2 information availability determination that the covered entity makes;

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

4 the algorithms;

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

6 determinations;

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

8 sources of that data;

9   (E) The methodologies the covered entity uses to render the

10 determinations;

11   (F) Any performance metrics the entity uses to gauge the accuracy of the

12 assessments, including accuracy, confidence intervals, and how those assessments are obtained;

13   (G) The frequency, methodology, and results of the impact assessments or

14 risk assessments that the entity has conducted;

15   (H) Within the description of each of the above decisions, the rationale for

16 each of these decisions;

17   (I) Whether the covered entity has received complaints from individuals

18 regarding the algorithmic eligibility determinations and algorithmic information availability

19 determinations it has made; and

20   (J) If the covered entity has determined that one or more of the exemptions

21 referred to in section 4(b) apply to practices that would otherwise violate section 4(a), a

22 declaration and explanation of the covered entity's reliance on those exemptions.

1   (2) To the extent consistent with federal law or other District law, a covered entity

2 may, in place of the report required by paragraph (1) of this subsection, submit to the Office of

3 the Attorney General a report previously submitted to a federal, District, or other government

4 entity, if that report contains the required information or is supplemented with the missing

5 information.

6   (3) Nothing in this section shall affect Freedom of Information Act exemptions

7 that protect trade secrets and other information from public disclosure, as provided by section

8 204 of the District of Columbia Administrative Procedure Act, approved March 29, 1977 (D.C.

9 Law 1-96; D.C. Official Code § 2-534).

10   (d) The Attorney General for the District of Columbia, pursuant to the District of

11 Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C.

12 Official Code § 2-501 *et seq.*), may issue rules to implement the reporting provisions of this

13 section.

14   Sec. 8. Enforcement.

15   (a) Enforcement by Attorney General.

16   In any case in which the Attorney General for the District of Columbia has reason to

17 believe that any person has used, is using, or intends to use any method, act, or practice in

18 violation of this act or a regulation promulgated under this act, or has failed to provide a notice, a

19 disclosure, or a report required by this act, the Attorney General for the District of Columbia may

20 commence appropriate civil action in the Superior Court of the District of Columbia for:

21   (1) A temporary or permanent injunction;

22   (2) Penalties as described in subsection (c)(1) of this section;

23   (3) Damages or restitution; or

1   (4) Any other relief that the court considers appropriate.

2   (b) Investigatory powers of Attorney General.

3   In the course of an investigation to determine whether to seek relief, the Attorney General

4   for the District of Columbia may subpoena witnesses, administer oaths, examine an individual

5   under oath, require sworn written responses to written questions, and compel production of

6   records, books, papers, contracts, and other documents. A subpoena issued pursuant to this

7   subsection shall be issued in compliance with the procedures specified in section 110a(b)-(e) of

8   the Attorney General for the District of Columbia Clarification and Elected Term Amendment

9   Act of 2010, effective October 22, 2015 (D.C. Law 21-36; D.C. Official Code § 1-301.88d(b)-

10   (e)).

11   (c) Attorney General actions for violations.

12   (1) Any covered entity or service provider that violates any provision of this act

13   shall be liable for a civil penalty of not more than $10,000 for each violation, which may be

14   recovered in a civil action brought in the name of the District of Columbia by the Attorney

15   General.

16   (2) Any civil penalty assessed for a violation under any provision of this act, and

17   the proceeds of any settlement of an action brought pursuant to this subsection, shall be

18   deposited in the Litigation Support Fund established in section 106b of the Attorney General for

19   the District of Columbia Clarification and Elected Term Amendment Act of 2010, effective

20   October 22, 2015 (D.C. Law 21-36; D.C. Official Code § 1-301.86b).

21   (d) Civil actions for violations.

1 Any person aggrieved by a violation of this act may bring a civil action in any court of

2 competent jurisdiction, and the court may award an amount not less than $100 and not greater

3 than $10,000 per violation or actual damages, whichever is greater.

4 (e) Relief.

5 In a civil action brought under either subsection (c) or (d) of this section in which the

6 plaintiff prevails, the court may also award:

7 (1) Punitive damages;

8 (2) Reasonable attorney's fees and litigation costs; and

9 (3) Any other relief, including equitable or declaratory relief, that the court

10 determines appropriate.

11 (f) Injury in fact.

12 In a civil action brought under subsection (d) of this section, a violation of this act or a

13 regulation promulgated under this act with respect to an individual constitutes a concrete and

14 particularized injury to that individual.

15 Sec. 9. Fiscal impact statement.

16 The Council adopts the fiscal impact statement in the committee report as the

17 fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975,

18 approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

19 Sec. 10. Effective date.

20 This act shall take effect following approval by the Mayor (or in the event of

21 veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional

22 review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved

23 December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the

1 \ District of Columbia Register.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

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ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

MEMORANDUM

TO: **Emily Gunston**
                Deputy Attorney General for Legislative Affairs and Policy
                Office of the Attorney General

FROM: **Brian K. Flowers**
                Deputy Attorney General
                Legal Counsel Division

DATE: **November 22, 2021**

SUBJECT: **Legal Sufficiency Review – Draft "Stop Discrimination by Algorithms Act of 2021"**
                2021"
                (AE-21-571)

This is to Certify that this Office has reviewed the above-referenced draft legislation and found it to be legally sufficient. If you have any questions in this regard, please do not hesitate to call me at 724-5524.

Brian K. Flowers
_____
Brian K. Flowers