The Washington Lawyers' Committee for Civil Rights and Urban Affairs Testimony Before the District of Columbia Committee on Government Operations and Facilities B24-0558, the "Stop Discrimination by Algorithms Act of 2021" Submitted October 6, 2022

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("Committee")[1] provides this testimony in support of B24-0558, the "Stop Discrimination by Algorithms Act of 2021" ("SDAA"). We welcome the bill's passage and implementation as a strong consumer protection tool and means to root out race discrimination, and we offer a few areas for clarification and improvement of the bill. Specifically, we recommend the SDAA (1) require "covered entities" to register as "covered entities," (2) provide the public access to the database of registered "covered entities," and (3) call for the D.C. Office of the Attorney General ("OAG") to issue regulations that direct how "covered entities" should conduct their required discrimination in algorithms audits and ensuing reports to the OAG.

I. Algorithmic Discrimination is Widespread and Pernicious.

Algorithms are part of our everyday lives and often result in discriminatory impacts on members of protected classes, particularly people of color. Algorithmic models, such as ones used for employment screening, credit scoring, insurance pricing, underwriting mortgages, advertising, and much more are, simply put, formulas that use certain inputs to analyze data and predict patterns. Employers, credit lenders, advertisers, and healthcare providers use algorithms to make determinations that affect an individual's access to housing, jobs, insurance, healthcare, and more.

By way of recent example, in June 2022 the Department of Justice reached a settlement with Meta Platforms, formerly known as Facebook, to resolve allegations of discriminatory advertising in violation of the Fair Housing Act ("FHA"). The lawsuit alleged, in part, "that Meta [had] use[d] algorithms in determining which Facebook users receive[d] housing ads, and that those algorithms rel[ied], in part, on characteristics protected under the FHA."[2] Under the settlement agreement, Meta agreed to stop using a tool for housing advertisements that allegedly relied on a discriminatory algorithm and develop a new system to address disparities caused by its algorithms in its ad delivery system for housing advertisements.

In addition to discrimination in delivery of advertisements, algorithms are often responsible for mining data – the practice of analyzing large databases in order to generate new information –

[1] The Washington Lawyers' Committee for Civil Rights and Urban Affairs is a civil rights organization that addresses some of the most fundamental needs and rights of vulnerable residents, including the right to be free of discrimination in accessing housing, employment, and public accommodations. Since its founding in 1968, the mission of the Committee is to fight civil rights violations, racial injustice, and poverty in our community through litigation and advocacy.

[2] *Justice Department Secures Groundbreaking Settlement Agreement with Meta Platforms, Formerly Known as Facebook, to Resolve Allegations of Discriminatory Advertising*, Department of Justice Justice News (June 21, 2022), https://www.justice.gov/opa/pr/justice-department-secures-groundbreaking-settlement-agreement-meta-platforms-formerly-known.

in other ways that adversely impact members of protected classes. Indeed, "[a]pproached without care, data mining can reproduce existing patterns of discrimination, inherit the prejudice of prior decision makers, or simply reflect the widespread biases that persist in society," and "can even have the perverse result of exacerbating existing inequalities by suggesting that historically disadvantaged groups actually deserve less favorable treatment."[3] By way of example, an employer who aims to discriminate using an algorithm could do so using "some combination of musical tastes, stored 'likes' on Facebook, and [a] network of friends [that] will reliably predict membership in protected classes. An employer can use these traits to discriminate by setting up future models to sort by these items and then disclaim any knowledge of such proxy manipulation."[4] Redlining can be achieved through similar methods. Due to historic housing segregation that is still prevalent today, the seemingly neutral use of someone's neighborhood to determine whether to make a loan to that individual can be used to discriminate on the basis of race without actually using a protected category in the algorithm itself.[5]

Intentionally or not, algorithms can discriminate even if they have not been programmed to do so.[6] This is because "[t]he whole point of sophisticated machine-learning algorithms is that they can learn how combinations of different inputs might predict something that any individual variable might not predict on its own. And these combinations of different variables could be close proxies for protected classes, even if the original input variables are not."[7] As further research pointed out by the Federal Trade Commission illustrates,

> apparently "neutral" technology can produce troubling outcomes – including discrimination by race or other legally protected classes. For example, COVID-19 prediction models can help health systems combat the virus through efficient allocation of ICU beds, ventilators, and other resources. But as a recent study in the Journal of the American Medical Informatics Association suggests, if those models use data that reflect existing racial bias in healthcare delivery, [artificial intelligence] that was meant to benefit all patients may worsen healthcare disparities for people of color.[8]

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[3] Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 Calif. L. Rev. 671, 674 (2016).

[4] *Id*. at 712 (internal citations omitted). "Data mining allows employers who wish to discriminate on the basis of a protected class to disclaim any knowledge of the protected class in the first instance while simultaneously inferring such details from the data."

[5] *See id*.

[6] *See id*. at 674. The article goes on to state, "Such a possibility has gone unrecognized by most scholars and policy makers, who tend to fear concealed, nefarious intentions or the overlooked effects of human bias or error in hand coding algorithms. Because the discrimination at issue is unintentional, even honest attempts to certify the absence of prejudice on the part of those involved in the data mining process may wrongly confer the imprimatur of impartiality on the resulting decisions."

[7] Jamie Williams, Saira Hussain, and Jeremy Gillula, *EFF to HUD: Algorithms Are No Excuse for Discrimination*, Electronic Frontier Foundation (Sep. 26, 2019), https://www.eff.org/deeplinks/2019/09/dangerous-hud-proposal-would-effectively-insulate-parties-who-use-algorithms.

[8] Elisa Jillson, *Aiming for Truth, Fairness, and Equity in Your Company's Use of AI*, Federal Trade Commission Business Blog (Apr. 19, 2021), https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai.

Preventing algorithmic discrimination is a matter of racial justice, and it is for these reasons that the Committee supports and welcomes the passage and implementation of the SDAA. The District has long been at the forefront of protecting its citizens' civil rights, and the SDAA would be a continuation of that legacy.

II. D.C. OAG should implement a registration process for covered entities.

Though the Committee supports the SDAA as a consumer protection bill, we nonetheless recommend a few clarifications to the SDAA to further strengthen the bill.

The current definition of "covered entities"[9] under the SDAA is broad enough to likely encompass a significant number of employers, large landlords, healthcare providers, and technology companies, to name a few, which will make tracking whether each "covered entity" has filed the requisite report with the D.C. OAG reflecting the results of its algorithmic eligibility determination and algorithmic information availability determination audit nearly impossible. For that reason, we recommend the Council amend the bill to add a mandatory registration mechanism for these entities. Creating such a registration system will avoid having to rely solely on a covered entity's voluntary compliance to assure receipt of the required reports. To the extent registered "covered entities" have not submitted their reports, the D.C. OAG will have a mechanism for tracking down those entities that are not complying with the law.

With respect to the administrability of such a registration system, it could be managed through the District's Department of Licensing and Consumer Protection ("DLCP") that currently handles registration of incorporated companies and associations (previously handled by the Department of Consumer and Regulatory Affairs). As part of the registration process or biannual certification process for incorporated business and entities, DLCP could add a question that asks each incorporated entity to confirm whether the entity meets the definition of a "covered entity" under the SDAA. If answered in the affirmative, DLCP could automatically log that entity as a "covered entity" and ensure access to the "covered entity" database is made available to the OAG and the greater public through search terms and instructions on its website.

III. D.C. OAG should further empower individuals and social justice organizations to bring disparate impact cases under the SDAA.

The SDAA provides individuals a private right of action to vindicate their rights under the bill. Sec. 8(d). Under that private right of action, individuals or organizations like the Committee, on behalf of aggrieved individuals, can theoretically bring a lawsuit based on either disparate treatment (intentional discrimination) or disparate impact (a policy or practice that, although facially neutral, has an adverse or disparate impact on a protected group of people). Unlike

[9] "Covered entit[ies]" under the SDAA include organizations that "possess[] or control[] personal information on more than 25,000 District residents;" have "greater than $15 million in average annualized gross receipts for the 3 years preceding the most recent fiscal year;" data brokers or other entities "that derive[] 50 percent or more of [their] annual revenue by collecting, assembling, selling, distributing, providing access to, or maintaining personal information, and some proportion of the personal information concerns a District resident who is not a customer or an employee of that entity;" or "service provider[s]." Sec. 3(4).

disparate treatment cases, disparate impact cases rely on statistical evidence to demonstrate that the challenged policy or practice has a disproportionate and discriminatory impact on members of a particular protected class. At present, however, the bill will make it difficult for residents of the District, civil rights organizations, and other interested parties to pursue disparate impact cases against "covered entities" that have submitted reports that reveal evidence of discriminatory impact or other prohibited discrimination stemming from the use of algorithmic eligibility determinations and/or algorithmic information availability determinations. The reason for this is that only the D.C. OAG will know which "covered entities" complied with the reporting requirement and self-reported as "covered entities" as it alone will receive the reports from the "covered entities." Shy of a registration system, interested parties would be left to, for example, guess which employer, housing provider, or insurance company is a "covered entity" and proceed to request from the D.C. OAG access to the mandatory report submitted by that entity via a Freedom of Information Act ("FOIA") request to the D.C. OAG.

We accordingly recommend that the D.C. OAG provide a publicly-available list on its website of covered entities that have filed a report so that individuals and civil rights organizations can then file the appropriate FOIA requests and obtain additional information through that avenue. This would empower those individuals and organizations to eventually challenge these practices by bringing disparate impact cases. In coordination with DLCP, making the existing DLCP - generated list of covered entities available should be a generally easy lift for the D.C. OAG.

IV. D.C. OAG should provide additional guidance that direct how "covered entities" should conduct their required audits and report.

The SDAA requires that covered entities audit their algorithmic eligibility determination and algorithmic information availability determination practices to determine whether those practices are discriminatory under the bill, "[a]nalyze [the] disparate-impact risks" of those practices based on a number of protected categories, and conduct annual impact assessments. Sec. 7(a). The SDAA then asks covered entities to "[i]dentify and implement reasonable measures to address risks of an unlawful disparate impact. . ." and provide an annual report to the D.C. OAG. Sec. 7(a)(6), 7(b). However, the bill does not provide guidance about what kind of disparate impact analysis will be sufficient, who should conduct it (should it be handled internally and if so, by whom? by a third-party expert?), and what kind of measures will be sufficient to address any unlawful disparate impact. From the Committee's experience litigating complex civil rights cases, determining whether a policy or procedure has a disparate impact requires an analysis normally performed by a statistical expert with many years of experience in the relevant field.

Therefore, additional guidance from the OAG, potentially in the form of regulations, for covered entities unfamiliar with disparate impact analysis would ensure that these entities perform a meaningful audit of their algorithmic eligibility and algorithmic information availability determinations. Without this guidance, covered entities may not know how to fully satisfy the requirements of the SDAA and therefore inadvertently put themselves at risk of violating the SDAA.

V. Conclusion

The Committee supports the passage and implementation of the SDAA as a strong consumer protection bill for the reasons set out above, and welcomes further opportunities to refine and improve the language of the bill in collaboration with the D.C. OAG as well as the Council.