



July 13, 2021

Dr. Eric S. Lander  
Director, White House Office of Science & Technology Policy  
Executive Office of the President

Dr. Lynne Parker  
Director, National Artificial Intelligence Initiative Office  
Executive Office of the President

Dr. Alondra Nelson  
Deputy Director, White House Office of Science & Technology Policy  
Executive Office of the President

*Via email*

**RE: Centering Civil Rights in Artificial Intelligence and Technology Policy**

Dear Dr. Lander, Dr. Parker, and Dr. Nelson,

We, the undersigned civil rights, civil liberties, human rights, technology policy, and research organizations, write to urge the White House Office of Science & Technology Policy (OSTP) to fully incorporate the Biden administration’s commitment to “pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality,”<sup>1</sup> into its artificial intelligence (AI) and technology priorities.

We applaud the progress we’ve seen elsewhere in the Administration; however, to date, the administration’s technology priorities, particularly those led by OSTP, have lacked the necessary focus on equity for people of color and others who have been subject to

---

<sup>1</sup> Exec. Order No. 13985, 86 Fed. Reg. 7009, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government>.

historical and ongoing discrimination. As a first step, we urge OSTP to work actively to identify and address the systemic harms of these technologies, and ensure that it consults deeply with civil rights and civil liberties experts.

Over many years, our organizations have been pushing to advance equity and justice in how technology shapes the core interests and opportunities of vulnerable Americans. In 2014, many of us worked to develop the Civil Rights Principles for the Era of Big Data.<sup>2</sup> The Obama White House cited the Principles in its landmark big data report, concluding that “big data analytics have the potential to eclipse longstanding civil rights protections in how personal information is used in housing, credit, employment, health, education, and the marketplace.”<sup>3</sup> Although today’s terminology has shifted from “big data” to “AI,” the issues remain the same and have only increased in urgency.

The Trump administration made a commitment to foster the development and expansion of AI, but did not devote sufficient attention to technology’s harms and protections for civil rights and civil liberties. Indeed, an Executive Order in 2019 called on various parts of the federal government to reduce barriers to AI development.<sup>4</sup> Then, in 2020, the Office of Management and Budget (OMB) issued final guidance on AI policy considerations that emphasized a regulatory approach focused on “encouraging innovation and growth in AI” over the adoption of strong guardrails to protect against bias and discriminatory outcomes.<sup>5</sup> Although the guidance notes that agencies should consider issues of fairness and discrimination in AI when weighing regulatory or non-regulatory action, it does not acknowledge the full extent of the dangers that AI poses to civil rights and civil liberties, nor does it prioritize the need to address them. This approach is unacceptable because it fails to address the significant risks and impacts to vulnerable populations across many potential uses of AI. We are concerned that this guidance, particularly as interpreted by the Office of Information and Regulatory Affairs (OIRA) and its limited staff, will slow much-needed new rules and policies.

---

<sup>2</sup> Civil Rights Principles for the Era of Big Data (Feb. 27, 2014), <https://civilrights.org/2014/02/27/civil-rights-principles-era-big-data>. See also the 2020 update to the Principles, <https://www.civilrightstable.org/principles>.

<sup>3</sup> Exec. Office of the President, *Big Data: Seizing Opportunities, Preserving Values* (May 2014), [https://obamawhitehouse.archives.gov/sites/default/files/docs/big\\_data\\_privacy\\_report\\_may\\_1\\_2014.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf).

<sup>4</sup> Exec. Order No. 13859, 84 Fed. Reg. 3967, Maintaining American Leadership in Artificial Intelligence (Feb. 11, 2019), <https://www.federalregister.gov/documents/2019/02/14/2019-02544/maintaining-american-leadership-in-artificial-intelligence>.

<sup>5</sup> Office of Mgmt. & Budget, Exec. Office of the President, OMB Memorandum No. M-21-06, Guidance for Regulation on Artificial Intelligence Applications (Nov. 17, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/11/M-21-06.pdf>. In addition, Executive Order 13960, regarding the use of AI by federal government agencies, articulates a commitment to privacy, civil rights, and civil liberties, but there has been no public follow-up on these efforts, nor is it clear if the agency inventory or OMB guidance mandated by the Order will appropriately underscore concerns of fairness, equity, and preventing discriminatory outcomes.

Since assuming office, this administration has not pursued a public and proactive agenda on the civil rights implications of AI. In fact, the Trump administration’s executive orders and regulatory guidance on AI remain in force, which constrains agencies across the federal government in setting policy priorities. The recent National Security Commission on Artificial Intelligence (NSCAI) report — drafted by a commission composed mostly of technologists, business leaders, and academic experts with notably few civil rights advocates or representatives of impacted communities — acknowledged civil rights concerns and included certain recommendations to address them. Yet the report failed to insist that the adoption of critical civil rights safeguards must be a threshold condition for the government’s development and use of AI.<sup>6</sup> Now, the OSTP, in coordination with the National Science Foundation, has formed the National AI Research Resource Task Force (the “Task Force”) which once again lacks any civil rights representation notwithstanding the enormous implications of its work on civil rights and civil liberties. Not a single representative was chosen for the Task Force whose work has focused on algorithmic bias, civil rights and liberties, or accountability in the development and deployment of AI.

OSTP must help this Administration bring civil rights and racial justice to the forefront of AI policy across the board in areas beyond national security — in housing, in employment, in criminal legal issues, and more. Otherwise, we risk entrenching existing inequities in AI development and use that will continue to leave our most vulnerable communities behind. We urge OSTP to:

1. Prioritize and support the Domestic Policy Council, OMB, and the federal agencies in assessing how government policies and actions (and inaction) regarding the use of AI and other technologies “perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups,” consistent with Executive Order 13985.<sup>7</sup> OSTP must play a key role in identifying how technology can drive racial inequities, and helping agencies devise new policies, regulations, enforcement activities, and guidance that address these barriers. We have attached concrete recommendations that some of the signatories to this letter are submitting to a range of federal agencies on addressing technology’s role in discrimination in the domains of hiring, housing, and financial services.<sup>8</sup> We would welcome the opportunity to discuss these priorities and others with you in the near future;

---

<sup>6</sup> National Security Commission on Artificial Intelligence, Final Report (Mar. 1, 2021), <https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf>.

<sup>7</sup> Exec. Order No. 13985, *supra* note 1.

<sup>8</sup> Please note that not all signatories to this letter have endorsed all of the specific agency recommendations.

2. Engage with a diverse range of stakeholders including civil rights organizations, consumer advocates, and members of impacted communities, not only through public comment periods but also through inclusion in commissions, task forces, advisory boards, and other formal bodies, like the National AI Advisory Committee; and
3. Ensure that federal investment in research and development of AI technologies includes significant and immediate investment in research on anti-discrimination measures and ways that AI systems can be used to advance equity, as well as investment in strategies to increase equity, diversity and inclusion in the tech industry.

Technological progress must promote equity and justice as it enhances safety, economic opportunity, and convenience for everyone. But far too often, people subject to historical and ongoing discrimination face disproportionate surveillance and bear the brunt of harms amplified by new technologies. To fully realize its commitment to civil rights and racial equity, the administration must act swiftly to address these threats.

Thank you for your attention to these matters. For any questions or further discussion, please contact Olga Akselrod (Senior Staff Attorney, Racial Justice Program, ACLU) at 212-549-2659 or [oakselrod@aclu.org](mailto:oakselrod@aclu.org); or Harlan Yu (Executive Director, Upturn) at 202-677-2359 or [harlan@upturn.org](mailto:harlan@upturn.org).

Cc:

Ambassador Susan Rice, Director, Domestic Policy Council

The Honorable Shalanda Young, Acting Director, Office of Management and Budget

Tarun Chhabra, Special Assistant to the President, Senior Director for Technology and National Security

Erika Moritsugu, Deputy Assistant to the President and Asian American and Pacific Islander Senior Liaison

Sincerely,

American Civil Liberties Union

The Leadership Conference on Civil and Human Rights

Upturn

Anti-Defamation League

Asian Americans Advancing Justice | AAJC

Center for Democracy & Technology

Center on Privacy & Technology at Georgetown Law  
Color Of Change  
Data & Society Research Institute  
Demand Progress  
Electronic Frontier Foundation  
Filipina Women's Network  
Free Press Action  
Lawyers' Committee for Civil Rights Under Law  
MediaJustice  
Movement Alliance Project  
National Association of Criminal Defense Lawyers  
National Council of Asian Pacific Americans  
National Fair Housing Alliance  
New America's Open Technology Institute  
OCA-Asian Pacific American Advocates  
Open MIC (Open Media and Information Companies Initiative)  
Public Knowledge  
Ranking Digital Rights  
UnidosUS  
United Church of Christ, OC Inc.  
Working Families Party

**Date:** July 13, 2021

**To:** Chair Charlotte A. Burrows  
Equal Employment Opportunity Commission (EEOC)

Secretary Marty J. Walsh  
U.S. Department of Labor (DOL)

Director Jenny R. Yang  
Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor

Assistant Attorney General Kristen Clarke  
Civil Rights Division, Department of Justice (DOJ)

**From:** American Association of People with Disabilities  
American Civil Liberties Union  
Bazelon Center for Mental Health Law  
Center for Democracy & Technology  
Center on Privacy & Technology at Georgetown Law  
Lawyers' Committee for Civil Rights Under Law  
The Leadership Conference on Civil and Human Rights  
Upturn

*Via email*

**RE: Addressing Technology's Role in Hiring Discrimination**

Too often, technology amplifies and exacerbates racial, gender, disability, economic, and intersectional inequity in our society. Governments and corporations, at the national, state, and local level, are using computer software, statistical models, assessment instruments, and other tools to make important decisions in areas such as employment, health, credit, housing, immigration, and the criminal legal system. In light of these developments, policymakers must take steps to clarify and strengthen guardrails to ensure non-discriminatory and equitable outcomes for all people seeking employment.

We offer the following proposals for the Biden-Harris administration for addressing discrimination arising from the use of new technologies in the hiring process. We urge all agencies to engage with a diverse range of stakeholders, including civil rights organizations, labor and workers' rights organizations, and impacted communities, in order to receive ongoing input and feedback on these important issues. We also encourage agencies to prioritize transparency, both by sharing their data, models, decisions, and proposed solutions so that all stakeholders can stay apprised of and comment on the

potential impact of proposed actions, and by encouraging employers and employment technology vendors to share with the public as much information as possible regarding their hiring technologies and assessments of those technologies. We would be pleased to discuss the ideas in this memo in more detail in the weeks and months ahead.

## **1. Gather information about employers' use of hiring technologies, and proactively investigate discriminatory practices.**

### **A. All agencies and departments should use their authority to collect information about the adoption, design, and impact of hiring technologies.**

The EEOC has acknowledged that it needs information beyond individual complaints to direct its enforcement activities.<sup>1</sup> Non-governmental researchers have stressed there are strict limits to non-privileged investigatory efforts.<sup>2</sup> Fortunately, the Commission has the authority to “make such technical studies as are appropriate to effectuate the purposes and policies of [Title VII] and to make the results of such studies available to the public.”<sup>3</sup>

However, to date, the Commission has not used these powers to gather information about employers' adoption of hiring technologies.<sup>4</sup> The Commission should use its research and data gathering authority to help guide enforcement efforts at all levels of government and spur the development of new industry standards. When appropriate, these studies could be conducted collaboratively with large employers or technology vendors and in consultation with the Equitable Data Working Group established under Executive Order 13985.<sup>5</sup>

Other agencies and offices, such as the Bureau of Labor Statistics, the Women's Bureau, and the Office of the Secretary of Labor, have broad statutory grants of authority to gather

---

<sup>1</sup> EEOC, *Advancing Opportunity: A Review of the Systemic Program of the U.S. EEOC* (July 7, 2016), <https://www.eeoc.gov/advancing-opportunity-review-systemic-program-us-equal-employment-opportunity-commission> (“[I]t is important for EEOC to consider additional sources of information in identifying issues where government enforcement is most needed . . . For example, EEOC’s Research and Data Plan identifies the need for research on screening devices, tests, and other practices to identify barriers to opportunity as well as promising selection practices that rely on job-related criteria.”).

<sup>2</sup> *See, e.g.*, Upturn, *Essential Work: Analyzing the Hiring Technologies of Large Hourly Employers*, May 2021, <https://www.upturn.org/reports/2021/essential-work/>.

<sup>3</sup> Section 705(g)(5) of Title VII. Similar authority is granted by the ADA. (42 U.S.C. § 12117(a)).

<sup>4</sup> EEOC Letter to Senator Bennet, January 15, 2021, *available at* <https://www.upturn.org/static/files/2021-01-15-EEOC-Bennet-Response.pdf>.

<sup>5</sup> Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, January 20, 2021, *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

data and conduct investigations relating to the workings of the labor market.<sup>6</sup> In some instances, these grants of authority are not being utilized, or at least not being utilized to the degree they could be. Given the degree to which employers and vendors have an information advantage in this space, agencies should be proactive and creative in their strategies to collect data and gain glimpses into the nature and extent of employers' use of hiring technologies.

## **B. The Office of Federal Contract Compliance Programs (OFCCP) should strengthen its audits and rules.**

The OFCCP has a unique and important role to play in guarding against discrimination. Federal contractors must take affirmative action to “ensure that applicants are employed . . . without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin,”<sup>7</sup> and to “employ and advance in employment qualified individuals with disabilities.”<sup>8</sup>

To help ensure employers are meeting these obligations, the OFCCP selects several thousand employers for a routine audit each year.<sup>9</sup> However, historically, desk audits have been somewhat coarse, and there is evidence that employers' compliance with recordkeeping requirements could be more robust. For example, the supporting documentation required for a desk audit does not include any information about the selection procedures, technologies, or criteria employers use.<sup>10</sup> Moreover, according to a 2020 report, the OFCCP observed that many employers failed to document the number of applicants and hires identifying as people with disabilities.<sup>11</sup>

The OFCCP should consider expanding and strengthening its auditing regime, particularly in light of the fact that large employers can easily collect and evaluate detailed records.<sup>12</sup> To

---

<sup>6</sup> See, e.g., 29 U.S.C. § 2 (charging Bureau of Labor Statistics with the duty to “investigate the causes of, and facts relating to, all controversies and disputes between employers and employees as they may occur, and which may tend to interfere with the welfare of the people of the different States”); 29 U.S.C. § 13 (granting Women’s Bureau “authority to investigate and report to the Department of Labor upon all matters pertaining to the welfare of women in industry”); 29 U.S.C. § 9 (granting the Secretary of Labor authority “to make special statistical studies relating to employment, hours of work, wages, and other conditions of employment”).

<sup>7</sup> EO 11246 § 202.

<sup>8</sup> 29 U.S.C. § 793.

<sup>9</sup> OFCCP, Corporate Scheduling Announcement List (CSAL) Frequently Asked Questions, *available at* <https://www.dol.gov/agencies/ofccp/faqs/scheduling-lists>.

<sup>10</sup> OFCCP, Federal Contract Compliance Manual, Chapter 1 Desk Audit, *available at* <https://www.dol.gov/agencies/ofccp/manual/fccm/chapter-1-desk-audit>.

<sup>11</sup> OFCCP, Section 503 Focused Reviews, Fiscal Year 2020 Annual Report, *available at* [https://www.dol.gov/sites/dolgov/files/OFCCP/Section503-FocusedReviews/files/508\\_Section-503-2020-Annual\\_Report\\_01282021.pdf](https://www.dol.gov/sites/dolgov/files/OFCCP/Section503-FocusedReviews/files/508_Section-503-2020-Annual_Report_01282021.pdf).

<sup>12</sup> A robust auditing regime would align with the goals of Executive Order 13985 to promote equitable delivery of benefits and equitable opportunities.



this end, the OFCCP could expand the supporting documentation required for a routine desk audit to include the specific selection procedures the employer uses for each job or job group, the employers' processes or methodologies for evaluating the selection procedures' adverse impacts, and any alternative selection procedures the employer has designed or provided for applicants with disabilities.

Moreover, the OFCCP should leverage its access to employer data to help the public better understand the hiring technologies used by federal contractors. Federal contractors hold extensive records in modern applicant tracking systems regarding their hiring practices and outcomes, including progress toward affirmative action goals and the impacts of hiring tests and technologies. But the scheduling letter that OFCCP sends to thousands of employers each year does not request any specific information about employee selection devices.<sup>13</sup> The OFCCP should strengthen employers' reporting requirements and, to the extent permitted by law, make more information public regarding the nature, frequency, and legality of hiring practices that it encounters during the course of its enforcement activity.

Finally, the rapid adoption of new hiring technologies adds urgency to federal contractors' obligation to identify opportunities in agency policies, regulations, and guidance to address systemic inequities for people with disabilities. Beyond enhanced auditing and data requirements, the OFCCP should revisit its regulations under Section 503 of the Rehabilitation Act of 1973, and align them with EEOC's Section 501 regulations. Today, Section 503 rules provide lower expectations for federal contractors' affirmative action efforts to employ people with disabilities than parallel rules under Section 501, which require the same of federal agencies. The more ambitious goals of Section 501, including a subgoal for people with targeted disabilities, should be imposed for Section 503 as well.

### **C. The EEOC should consider using Commissioner charges and directed investigations to address discrimination related to hiring technologies.**

Job applicants "typically lack information about a discriminatory hiring policy or practice," making it difficult for them to file complaints.<sup>14</sup> Hiring is only becoming more

---

<sup>13</sup> OFCCP, Compliance Check Scheduling Letter, *available at* <https://www.dol.gov/agencies/ofccp/compliance-checks/scheduling-letter>.

<sup>14</sup> EEOC, Advancing Opportunity A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission, July 7, 2016, <https://www.eeoc.gov/advancing-opportunity-review-systemic-program-us-equal-employment-opportunity-commission>.

opaque as employers rapidly adopt new hiring technologies.<sup>15</sup> As of January 2021, the Commission reported that it had not acted upon a single complaint involving the use of new hiring technologies.<sup>16</sup> It is clear a more proactive approach is needed.

When supported by its research and information gathering, the EEOC should consider use of Commissioner charges under Title VII and the Americans with Disabilities Act (ADA), and directed investigations under the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act, to investigate discrimination in the absence of individual complaints. Tackling systemic discrimination is “central to the mission of the EEOC,”<sup>17</sup> and new technologies at all stages of the hiring process raise systemic concerns.<sup>18</sup>

## **2. Modernize guidance for selection procedures and expand recordkeeping requirements.**

### **A. The DOL, DOJ, and EEOC should begin a process to update the Uniform Guidelines on Employee Selection Procedures (UGESP).**

For many employers and technology vendors, the Uniform Guidelines on Employee Selection Procedures (UGESP) are a key source of guidance for assessing the fairness and validity of hiring selection procedures. Unfortunately, the UGESP, which were adopted in 1978, are showing their age. They were adopted before Congress passed the Americans with Disabilities Act, and they do not address discrimination against people with disabilities, age discrimination, the full scope of sex discrimination, or intersectional discrimination. They lag far behind modern scientific standards, such as the American Psychological Association’s Principles for the Validation and Use of Personnel Selection Procedures (which acknowledges that fairness is an integral part of the validity analysis).<sup>19</sup> And there is a risk that they could be interpreted to allow employers to establish that a

---

<sup>15</sup> Mercer, *Global Talent Trends 2020*,

<https://www.mercer.com/content/dam/mercer/attachments/private/global-talent-trends-2020-report.pdf>.

<sup>16</sup> EEOC Letter to Senator Bennet, January 15, 2021, *available at*

<https://www.upturn.org/static/files/2021-01-15-EEOC-Bennet-Response.pdf>.

<sup>17</sup> EEOC, *Advancing Opportunity A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*, July 7, 2016,

<https://www.eeoc.gov/advancing-opportunity-review-systemic-program-us-equal-employment-opportunity-commission>.

<sup>18</sup> *See, e.g.*, Upturn, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, December 2018,

<https://www.upturn.org/reports/2018/hiring-algorithms/>; Cener for Democracy & Technology, *Algorithm-driven Hiring Tools: Innovative Recruitment or Expedited Disability Discrimination?*, December 2020,

<https://cdt.org/insights/report-algorithm-driven-hiring-tools-innovative-recruitment-or-expedited-disability-discrimination/>.

<sup>19</sup> American Psychological Association, *Principles for the Validation and Use of Personnel Selection Procedures*, August 2018, *available at* <https://www.apa.org/ed/accreditation/about/policies/personnel-selection-procedures.pdf>.

hiring procedure with a disparate impact is “valid” based on correlational evidence alone — even if the correlation is based on factors clearly unrelated to job performance.

In the short term, the EEOC should emphasize the UGESP’s limited application as a standard for anti-discriminatory hiring practices, including through a revised and updated “Question and Answers” resources. The EEOC should also publish informal guidance encouraging hiring technology vendors and employers to design, test, and audit their technologies to prevent discriminatory effects.<sup>20</sup> Such guidance would not only provide more clarity for employers as to the kind of information that they should be seeking from vendors when procuring hiring technologies and the testing they themselves need to conduct while using them, but also would encourage the creation of third-party auditing standards. Ultimately, however, formal updates to the UGESP are needed to cover recruitment and sourcing practices, create standards for non-statistical auditing, address disability discrimination, and further elevate the importance of job-relatedness. Federal agencies should begin a multistakeholder process to update the UGESP for the modern era.

**B. All agencies responsible for enforcement of employment discrimination laws should adopt OFCCP’s Internet Applicant Rule (IAR), and clarify that it applies to all persons assessed and screened by hiring technologies.**

The OFCCP’s IAR has long been the most influential standard for determining when an individual becomes an “applicant” for purposes of recordkeeping and compliance with antidiscrimination laws. But several factors have limited the IAR’s practical reach in recent years. First, the IAR only considers someone an “applicant” if they make “an expression of interest in employment” that “indicate[s] the individual possesses the basic qualifications for the position.”<sup>21</sup> But companies’ sourcing efforts have increasingly relied on web-based advertising and searches of databases containing “passive” candidates who never expressed interest in a particular job or employer, and whose profiles may not indicate their qualifications. It is not clear whether such passive candidates are “applicants” under the IAR.

---

<sup>20</sup> In developing guidance, EEOC should review existing literature and frameworks such as Dillon Reisman et al., *AI Now, Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability* (Apr. 2018), <https://ainowinstitute.org/aiareport2018.pdf>; Brookings Institute, *Auditing employment algorithms for discrimination*, <https://www.brookings.edu/research/auditing-employment-algorithms-for-discrimination/>; Inioluwa Deborah Raji, et al., *Closing the AI Accountability Gap: Defining an End-to-End Framework for Internal Algorithmic Auditing* (2020); Timnit Gebru and Jamie Morgenstern, et al., *Datasheets for Datasets* (March 19, 2020); Margaret Mitchell and Simone Wu, et al., *Model Cards for Model Reporting* (Jan. 2019) Office of the Comptroller of the Currency, *Supervisory Guidance on Model Risk Management*, Apr. 2011, <https://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-12a.pdf>.

<sup>21</sup> 41 CFR § 60-1.3.

Second, a candidate is no longer considered an applicant under the IAR if the candidate removes themselves from consideration for any reason, or if they are screened out by automated processes without even having an opportunity to “apply.” This places a burden on disabled workers, many of whom may be unable to continue with Internet-based application processes that are inaccessible to them if the employer does not offer an accommodation that would allow them to continue to pursue an employment opportunity further. Finally, no agency other than OFCCP has formally endorsed or adopted the IAR, which reduces the rule’s effective scope as the use of such sourcing methods spreads across the labor market.

To ensure that recordkeeping obligations and compliance efforts track the reality of modern sourcing and recruitment methods, OFCCP should clarify that the IAR applies to every person screened by hiring technologies — even if they never formally applied for a specific position. The IAR should further specify that if a person removes themselves from consideration due to inaccessibility or lack of accommodation, that person should still be considered an applicant. The EEOC, DOJ, and all other agencies responsible for investigating and enforcing employment discrimination laws should then formally adopt the updated rule.

**C. All agencies with responsibilities under the ADA and Section 504 of the Rehabilitation Act should endorse new guidance for diversity and inclusion efforts for people with disabilities.**

The Office of Disability Employment Policy (ODEP) is crucial for shaping how procurement and development processes for hiring technologies will impact jobseekers with disabilities. In July 2020, EARN and PEAT developed the *Checklist for Employers: Facilitating the Hiring of People with Disabilities Through the Use of eRecruiting Screening Systems, Including AI* through an ODEP grant.<sup>22</sup> This checklist poses very useful questions for a range of stakeholders involved in the procurement and development process, but they should be expanded to explain these best practices in greater detail to facilitate their adoption by employers. Federal disability law protects job applicants from being forced to disclose disability prior to a conditional job offer in order to fairly participate in the hiring process. This might require making alternative evaluation methods readily available to all applicants at the outset rather than only by request, and proactively addressing ways in which the technologies increase the likelihood of disclosure. All federal agencies responsible for enforcement and/or implementation of the ADA or Section 504 should

---

<sup>22</sup> Employer Assistance and Resource Network on Disability Inclusion, Checklist for Employers: Facilitating the Hiring of People with Disabilities Through the Use of eRecruiting Screening Systems, Including AI, [https://askearn.org/wp-content/uploads/2020/07/EARN\\_PEAT\\_eRecruiting\\_Checklist.pdf](https://askearn.org/wp-content/uploads/2020/07/EARN_PEAT_eRecruiting_Checklist.pdf).

endorse the checklist's open-ended questions about diversity and inclusion efforts, assessment design, testing, and auditing.

**D. The EEOC should require employers to retain records about reasonable accommodations and applicants with disabilities.**

The EEOC should require employers to maintain records about the types of reasonable accommodations offered when hiring technologies are used. Records should indicate when and how reasonable accommodations are offered, requested, and denied, as well as the incidence of job rejections under each situation. They should also confirm a robust and transparent process was utilized. Employers should proactively provide for a range of reasonable accommodations, even without request, so as to expand the field of people with disabilities who can access employment opportunities. Guidance should acknowledge that tools such as resume mining software will likely require human review to ensure that candidates are being fairly assessed based on job-related skills and qualifications. The EEOC should establish a process for periodically collecting this information from employers.

The EEOC and the Office of Management and Budget (OMB) should also consider measures to include the collection of data on disability status and targeted disability status in the EEO-1 data collection process. This data is essential to fully assessing employers' compliance with relevant civil rights laws.

**3. Hold workshops and convenings on hiring technologies, and make more information available to the public.**

All relevant agencies should hold workshops and convenings to gather more information about industry practices. The EEOC held a meeting in 2016 on the implications of big data for equal employment opportunity.<sup>23</sup> However, it did not release a report or public guidance to share any lessons or outcomes of the meeting. All agencies should use their convening authority to gather industry, academics, advocates, impacted communities and other experts to share more information with the public about best practices and enforcement activity.

---

<sup>23</sup> EEOC, Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law, October 13, 2016, <https://www.eeoc.gov/meetings/meeting-october-13-2016-big-data-workplace-examining-implications-equal-employment>.

Thank you for your attention to these matters. For any questions or further discussion, please contact Aaron Rieke, Managing Director, Upturn, at 202-677-2359 or [aaron@upturn.org](mailto:aaron@upturn.org).

**Date:** July 13, 2021

**To:** Secretary Marcia L. Fudge  
U.S. Department of Housing and Urban Development (HUD)

Acting Director Dave Uejio  
Consumer Financial Protection Bureau (CFPB)

Chair Lina Khan  
Federal Trade Commission (FTC)

Assistant Attorney General Kristen Clarke  
Civil Rights Division, U.S. Department of Justice (DOJ)

Chief Sameena Shina Majeed  
Housing & Civil Enforcement Section, U.S. Department of Justice

**From:** American Civil Liberties Union  
Center for Democracy & Technology  
Center on Privacy & Technology at Georgetown Law  
Lawyers' Committee for Civil Rights Under Law  
National Consumer Law Center (on behalf of its low-income clients)  
National Fair Housing Alliance  
Upturn

*Via email*

**RE: Addressing Technology's Role in Housing Discrimination**

Too often, technology amplifies and exacerbates racial, gender, disability, economic, and intersectional inequity in our society. Governments and corporations, at the national, state, and local level, are using computer software, statistical models, assessment instruments, and other tools to make important decisions in areas such as employment, health, credit, housing, immigration, and the criminal legal system. In light of these developments, policymakers must take steps to ensure non-discriminatory and equitable outcomes in housing.

We offer the following proposals for the Biden-Harris administration for addressing the role of technology in perpetuating discrimination in housing. We urge all agencies to engage with a diverse range of stakeholders, including impacted communities, tenant organizers and housing advocates, reentry advocates, direct services providers (including housing court advocates and those assisting with finding housing and housing subsidies),

and civil rights organizations, in order to receive ongoing input and feedback on these important issues. We also encourage agencies to prioritize transparency, both by sharing their data, models, decisions, and proposed solutions so that all of the stakeholders can stay apprised of and comment on the potential impact of proposed actions, and by encouraging users of housing-related technologies to share with the public as much information as possible regarding their technologies and assessments of those technologies. Additionally, we encourage agencies to actively monitor and audit the use of housing-related technologies, and to take investigation and enforcement actions to ensure compliance with the Fair Housing Act and civil rights laws. We'd be pleased to discuss these ideas further in the weeks and months ahead.

## **1. Address disparate impacts in housing-related technologies.**

### **A. HUD and its partner agencies should proactively monitor and investigate housing technologies for discriminatory effects.**

Housing discrimination has evolved along with new and expanding uses of technology, such as machine learning-based lending models,<sup>1</sup> algorithms for determining eligibility for and allocating housing services,<sup>2</sup> online advertising,<sup>3</sup> and tenant screening scores.<sup>4</sup> It is often difficult or impossible for impacted people to learn about housing discrimination in these systems, and HUD cannot rely on individual complaints alone for its fair housing enforcement.<sup>5</sup> HUD should work with its partner organizations and other stakeholders to develop new testing methods to uncover discrimination in digital systems.<sup>6</sup> HUD and its partners and funding recipients should publicly report the methodologies, including the specific types of data used in testing, and results of their testing.

---

<sup>1</sup> See, e.g., Jennifer Miller, *Is an Algorithm Less Racist than a Loan Officer?*, N.Y. Times, Sept. 18, 2020, <https://www.nytimes.com/2020/09/18/business/digital-mortgages.html?searchResultPosition=1>.

<sup>2</sup> See, e.g., Catriona Wilkey et al., *Coordinated Entry Systems: Racial Equity Analysis of Assessment Data*, Oct. 2019, [https://c4innovates.com/wp-content/uploads/2019/10/CES\\_Racial\\_Equity-Analysis\\_Oct112019.pdf](https://c4innovates.com/wp-content/uploads/2019/10/CES_Racial_Equity-Analysis_Oct112019.pdf).

<sup>3</sup> See, e.g., *Charge of Discrimination, HUD v. Facebook*, [https://www.hud.gov/sites/dfiles/Main/documents/HUD\\_v\\_Facebook.pdf](https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf); Muhammad Ali et al., *Discrimination Through Optimization: How Facebook's Ad Delivery Can Lead to Skewed Outcomes*, 2019, <https://arxiv.org/abs/1904.02095>.

<sup>4</sup> See, e.g., Kaveh Waddell, *How Tenant Screening Reports Make it Hard for People to Bounce Back from Tough Times*, Consumer Reports, March 11, 2021, <https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times/>.

<sup>5</sup> See, e.g., Claudia Aranda, Urban Institute, *Fighting Housing Discrimination in 2019*, <https://www.urban.org/urban-wire/fighting-housing-discrimination-2019>.

<sup>6</sup> See, e.g., Claudia L. Aranda, Urban Institute, *Statement Before the Subcomm. on Transportation, Housing & Urban Development of the H. Comm. on Appropriations*, Feb. 27, 2019, [https://www.urban.org/sites/default/files/publication/99836/housing\\_discrimination\\_in\\_america\\_-\\_claudia\\_aranda.pdf](https://www.urban.org/sites/default/files/publication/99836/housing_discrimination_in_america_-_claudia_aranda.pdf).



HUD should also issue guidance recommending that covered entities design, test, and audit their models to prevent discriminatory effects and affirmatively further fair housing. These practices should include regularly auditing models for discriminatory effects throughout their conception, design, implementation, and use; proactively looking for and adopting less discriminatory alternatives; assessing whether data used in training technologies is representative and accurate, and that the technologies measure lawful and meaningful attributes and seek to predict valid target outcomes; retaining and documenting in-depth information about the technology, its development and internal auditing sufficient to allow for third party auditing; and publicly releasing internal and external audit reports.<sup>7</sup> Audits should be designed to assess impacts on all protected classes — including disability, which is the basis for the largest percentage of fair housing complaints — as well as intersectional discrimination.<sup>8</sup>

**B. HUD should update its Fair Housing Advertising Guidelines to provide examples of online advertising practices that can violate the Fair Housing Act.**

Advertising platforms conduct ad auctions that determine the actual audience to which an ad will be delivered.<sup>9</sup> These auctions can result in advertisements for economic opportunities being systematically delivered to audiences with significant skews on the basis of race, gender, or other protected group.<sup>10</sup> This can happen even when the advertiser intentionally targets its ad toward a broad audience, such as an entire geographic region.<sup>11</sup> HUD should clarify that advertising platforms can face liability for violating the Fair Housing Act when their conduct in delivering advertisements — including the design and function of their ad delivery algorithms — disproportionately steers housing opportunities away from protected groups.

---

<sup>7</sup> In developing guidance, HUD should review existing literature and frameworks such as Dillon Reisman et al., *AI Now, Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability*, Apr. 2018, <https://ainowinstitute.org/aiareport2018.pdf>; Wilkey et al., *supra* note 2; Inioluwa Deborah Raji, et al., *Closing the AI Accountability Gap: Defining an End-to-End Framework for Internal Algorithmic Auditing*, 2020, <https://arxiv.org/abs/2001.00973>; Timnit Gebru et al., *Datasheets for Datasets*, 2020, <https://arxiv.org/abs/1803.09010>; Margaret Mitchell et al., *Model Cards for Model Reporting*, 2019, <https://arxiv.org/abs/1810.03993>; Office of the Comptroller of the Currency, *Supervisory Guidance on Model Risk Management*, Apr. 2011, <https://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-12a.pdf>.

<sup>8</sup> See Congressional Research Service, *The Fair Housing Act: HUD Oversight, Programs, and Activities 10*, Apr. 7, 2021, <https://fas.org/sgp/crs/misc/R44557.pdf>.

<sup>9</sup> See, e.g., *Brief for Upturn, Inc. as Amicus Curiae 2, Opiotennione v. Facebook*, 3:19-cv-07185, June 26, 2020, <https://www.courtlistener.com/recap/gov.uscourts.cand.350804/gov.uscourts.cand.350804.44.1.pdf>; Facebook, *Business Help Center, About Optimization for Ad Delivery*, <https://www.facebook.com/business/help/355670007911605?id=561906377587030>.

<sup>10</sup> See Muhammad Ali et al., *supra* note 3; Basileal Imana, Aleksandra Korolova & John Heidemann, *Auditing for Discrimination in Job Ad Delivery*, *Proceedings of the Web Conference 2021*, <https://ant.isi.edu/datasets/addelivery/>.

<sup>11</sup> See Muhammad Ali et al., *supra* note 3.

## 2. Help local jurisdictions evaluate and affirmatively further fair housing.

### A. When reinstating the Affirmatively Furthering Fair Housing (AFFH) Rule, HUD should provide guidance to program participants on addressing the impacts of technology on fair housing.

Examining the design, use, and outcomes of housing-related technologies must be part of a holistic assessment of fair housing.<sup>12</sup> These technologies include tenant screening systems, risk assessment models, and housing services allocation models, which embed criteria for determining who has access to housing, as well as surveillance technologies used to monitor tenants, often in low-income housing.<sup>13</sup>

HUD should promulgate AFFH guidance clarifying steps local jurisdictions should take to address the fair housing impacts of systems such as tenant screening, surveillance of tenants, and assessments for determining risk or distributing housing and homeless services. These systems fall under the “contributing factors” that HUD identified in its 2015 AFFH guidance.<sup>14</sup> For example, HUD should advise jurisdictions to affirmatively further fair housing by strictly limiting the criteria and information housing providers can use to screen tenants, shielding court records that housing providers unjustifiably use to deny housing (including criminal, landlord-tenant, and other civil court records), and eliminating digital surveillance of tenants.

---

<sup>12</sup> See generally, e.g., Valerie Schneider, Locked Out by Big Data: How Algorithms and Machine Learning May Undermine Housing Justice, 52 Columbia Human Rts. L. Rev. 251, 2020, [http://hrlr.law.columbia.edu/files/2020/11/251\\_Schneider.pdf](http://hrlr.law.columbia.edu/files/2020/11/251_Schneider.pdf).

<sup>13</sup> For example, some housing providers use background check services, cameras, and other devices to monitor their tenants’ conduct, which can result in eviction or law enforcement intervention for lawful conduct, such as having non-resident visitors. See, e.g., HUD, Office of the General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services, Sept. 13, 2016, <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>; Samantha Michaels, Hundreds of Cities Have Adopted a New Strategy for Reducing Crime in Housing. Is it Making Neighborhoods Safer—or Whiter?, Mother Jones, 2019, <https://www.motherjones.com/crime-justice/2019/10/crime-free-housing-making-neighborhoods-safer-or-whiter/>; Ginia Bellafante, The Landlord Wants Facial Recognition in Its Rent-Stabilized Buildings. Why?, N.Y. Times, Mar. 28, 2019, <https://www.nytimes.com/2019/03/28/nyregion/rent-stabilized-buildings-facial-recognition.html>.

<sup>14</sup> HUD’s previous guidance has acknowledged that contributing factors can include “admissions and occupancy policies and procedures, including preferences in publicly supported housing;” lending discrimination; source of income discrimination; “displacement of residents due to economic pressures;” and “barriers faced by individuals and families when attempting to move to a neighborhood or area of their choice.” Dep’t of Housing & Urban Development, AFFH Rule Guidebook 206–19, 2015, <https://www.nhlp.org/wp-content/uploads/2017/09/AFFH-Rule-Guidebook-2015.pdf>. Tenant screening, underwriting, and surveillance technologies can contribute to these factors, for example, by keeping previously evicted tenants from being able to stay in their neighborhoods or cities. The guidance also states that “relevant local data and local knowledge that may assist a regional analysis include: demographic data from neighboring PHAs and policies and procedures concerning admissions and residency preferences for PHAs in the area.” *Id.* at 91.

**B. HUD should continue to update and expand its AFFH datasets to help program participants evaluate access and barriers to fair housing.**

To supplement the data HUD already provides for fair housing assessments,<sup>15</sup> HUD should partner with local organizations and agencies to make more local data available to its program participants. This data should include demographics and patterns of segregation; housing data such as property characteristics and affordability; zoning and other land use data; environmental burdens and hazards; disability access and services; and data on access to services and opportunities such as education, employment, social services, childcare, transportation, and healthcare.<sup>16</sup> HUD should broadly share datasets provided by local jurisdictions.

**3. End discriminatory background screening as a barrier to housing.**

**A. HUD should expand its 2016 guidance on the use of criminal records in tenant screening under the Fair Housing Act.**

HUD's 2016 guidance acknowledged that criminal record screening tends to have a disparate impact on Black and Latinx renters, and clarified that blanket rejections of potential tenants based on the existence of a criminal record are not justifiable under the Fair Housing Act.<sup>17</sup> HUD's guidance states that "[a] housing provider must [] be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property," and that a tenant screening policy that fails to consider the nature, severity, and recency of the alleged conduct is unlikely to satisfy this standard.<sup>18</sup> However, criminal records remain a formidable barrier to housing, and several jurisdictions have "crime-free housing" ordinances requiring housing providers to conduct criminal background checks and reject or evict tenants for alleged criminal conduct.<sup>19</sup>

---

<sup>15</sup> See, e.g., Urban Institute, Data and Tools of Fair Housing Planning, <https://datacatalog.urban.org/dataset/data-and-tools-fair-housing-planning>.

<sup>16</sup> See Leah Hendey & Mychal Cohen, Urban Institute, Using Data to Assess Fair Housing and Improve Access to Opportunity: A Guidebook for Community Organizations, Aug. 3, 2017, [https://www.urban.org/research/publication/using-data-assess-fair-housing-and-improve-access-opportunity/view/full\\_report](https://www.urban.org/research/publication/using-data-assess-fair-housing-and-improve-access-opportunity/view/full_report).

<sup>17</sup> HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, Apr. 4, 2016, [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF).

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., Housing Equality Ctr. of Penn., Nuisance and Crime-Free Housing Ordinances, [5](https://www.equalhousing.org/fair-housing-topics/nuisance-and-crime-free-housing-ordinances/#:~:text=Crime%2Dfree%20ordinances%20may%20define,Housing%20Act%20in%20several%20circumstances; Am. Civ. Liberties Union, I Am Not a Nuisance: Local Ordinances Punish Victims of Crime, https://www.aclu.org/other/i-am-not-nuisance-local-ordinances-punish-victims-crime; Michaels, <i>supra</i> note 12.</a></p></div><div data-bbox=)

HUD should revise its 2016 guidance to further clarify the steps housing providers must take to ensure that any criminal record screening is necessary and narrowly tailored to serve a substantial, legitimate, nondiscriminatory interest. In revising its guidance, HUD should look to the growing number of states and cities that have adopted fair chance housing policies limiting housing providers' ability to request and consider criminal records.<sup>20</sup> Fair chance housing laws often prohibit housing providers from inquiring into an applicant's criminal history before extending a conditional offer of housing, limit the types of conviction records housing providers can consider, and require the housing provider to consider several factors in evaluating the applicant's record, such as the applicant's age at the time of the alleged offense, whether the alleged offense arose from an applicant's disability, and the degree to which the alleged offense, if it re-occurred, would impact the safety of other tenants. These laws also require housing providers to consider other mitigating factors, such as recommendations from community members or participation in education, employment, or other programming.

**B. HUD should extend its 2016 guidance to cover the use of eviction records, credit reports, and other unjustifiably discriminatory records to screen applicants for rental housing.**

Landlord-tenant court records and credit reports also represent pervasive barriers to housing and reflect systemic patterns of discrimination. For example, housing providers evict Black tenants, and Black women in particular, at staggeringly disproportionate rates.<sup>21</sup> The vast majority of eviction records do not represent a proven allegation of failure to pay rent or other lease violation. About three million evictions are filed in the U.S. each year, but few end in a judgment in favor of the landlord at trial. Cases often end in dismissals for lack of good cause to evict the tenant, or agreements in which the tenant

---

<sup>20</sup> See, e.g., Fair Chance in Housing Act, S.B. 250, 219th Leg. (N.J. 2021), <https://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=S250>; Fair Criminal Record Screening for Housing, D.C. Code § 42-3541, <https://code.dccouncil.us/dc/council/code/titles/42/chapters/35B/>; Seattle Mun. Code § 14.09, [https://library.municode.com/wa/seattle/codes/municipal\\_code?nodeId=TIT14HURI\\_CH14.09USSCREHO](https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.09USSCREHO); Ronald V. Dellums & Simbarashe Sherry Fair Chance Access to Housing Ordinance, Oakland Mun. Code § 8.25, [https://library.municode.com/ca/oakland/codes/code\\_of\\_ordinances?nodeId=TIT8HESA\\_CH8.25ROV.DESISHFACHA](https://library.municode.com/ca/oakland/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.25ROV.DESISHFACHA) CHOOOR; Bill no. 210330-A (Philadelphia 2021), <https://phila.legistar.com/LegislationDetail.aspx?ID=4915398&GUID=EBAAF6DA-BB11-4ED4-8BD9-6A5224A55347>.

<sup>21</sup> See, e.g., Peter Hepburn, Renee Louis & Matthew Desmond, Racial and Gender Disparities Among Evicted Americans, Dec. 16, 2020, <https://evictionlab.org/demographics-of-eviction/>; Community Legal Services of Philadelphia, Breaking the Record: Dismantling the Barriers Eviction Records Place on Housing Opportunities, Nov. 2020, [https://clsphila.org/wp-content/uploads/2020/12/Breaking-the-Record-Report\\_Nov2020.pdf](https://clsphila.org/wp-content/uploads/2020/12/Breaking-the-Record-Report_Nov2020.pdf); Sophie Beiers, Sandra Park & Linda Morris, Am. Civ. Liberties Union, Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color, Jan. 10, 2020, <https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color/>.

stays and continues paying rent.<sup>22</sup> Eviction filings also commonly result in default judgments because tenants lack the notice and/or resources to defend themselves.<sup>23</sup> Thus, much like arrest records, the vast majority of eviction records are not reliable indicators of tenant suitability or risk.<sup>24</sup> Yet, landlords often use the existence of any eviction record, including simple filings, as a reason to disqualify potential tenants.

HUD should clarify that any screening policy or practice based on eviction records, other civil court records, or credit reports must be demonstrably necessary and narrowly tailored to achieve a substantial, legitimate, nondiscriminatory interest. In revising its guidance, HUD should consider the growing number of jurisdictions that have adopted limits on the consideration of eviction records and credit reports in tenant screening.<sup>25</sup> For example, some policies prohibit housing providers from taking adverse action based on an eviction record that did not result in a judgment in favor of the plaintiff at trial; prohibit the denial of housing based on a credit score; and/or prohibit the consideration of credit history for applicants using rental assistance, such as vouchers.<sup>26</sup>

### **C. The FTC and CFPB should publish updated guidance for tenant screening companies on complying with the Fair Credit Reporting Act (FCRA).**

The guidance<sup>27</sup> should elaborate on practices that constitute failure to reasonably assure accuracy under the FCRA, including but not limited to:

---

<sup>22</sup> See, e.g., Brian J. McCabe & Eva Rosen, Eviction in Washington, D.C.: Racial and Geographic Disparities in Housing Instability 8–14, Fall 2020, <https://georgetown.app.box.com/s/8cq4p8ap4nq5xm75b5mct0nz5002z3ap>.

<sup>23</sup> See, e.g., Josh Kaplan, Thousands of D.C. Renters are Evicted Every Year. Do They All Know to Show Up to Court?, *dcist*, 2020,

<https://dcist.com/story/20/10/05/thousands-of-d-c-renters-are-evicted-every-year-do-they-all-know-to-show-up-to-court/>. Research shows that providing a right to counsel in housing court in New York City has led to large drops in the rates of eviction filings, default judgments, and executed evictions. See Nat'l Coalition for a Civil Right to Counsel, All About the Right to Counsel for Evictions in NYC, Dec. 14, 2020,

[http://civilrighttocounsel.org/major\\_developments/894](http://civilrighttocounsel.org/major_developments/894). In Washington, D.C., twenty landlords filed nearly half of all evictions in 2018, often “serially” filing multiple evictions against the same tenants. Brian J. McCabe & Eva Rosen, Eviction in Washington, D.C.: Racial and Geographic Disparities in Housing Instability 6, Fall 2020, <https://georgetown.app.box.com/s/8cq4p8ap4nq5xm75b5mct0nz5002z3ap>.

<sup>24</sup> See Kathryn A. Sabbath, Erasing the “Scarlet E” of Eviction Records, *The Appeal*, Apr. 12, 2021, <https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records/>.

<sup>25</sup> See, e.g., Bill no. 210330–A (Philadelphia 2021),

<https://phila.legistar.com/LegislationDetail.aspx?ID=4915398&GUID=EBAAF6DA-BB11-4ED4-8BD9-6A5224A55347>; Housing Stability & Tenant Protection Act of 2019, S.B. 6458, 2019–2020 Assemb. (N.Y. 2019), <https://www.nysenate.gov/legislation/bills/2019/s6458>; Minneapolis Mun. Code § 244.2030, [https://library.municode.com/mn/minneapolis/codes/code\\_of\\_ordinances?nodeId=COOR\\_TIT12HO\\_CH244MACO\\_AR\\_TXVIREDWL1\\_244.2030APSCCRPRTE](https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT12HO_CH244MACO_AR_TXVIREDWL1_244.2030APSCCRPRTE).

<sup>26</sup> See *supra* note 25.

<sup>27</sup> For existing guidance, see FTC, What Tenant Background Screening Companies Need to Know About The Fair Credit Reporting Act, Oct. 2016,

<https://www.ftc.gov/tips-advice/business-center/guidance/what-tenant-background-screening-companies-need-know-about-fair>.

- Failing to verify the accuracy of public records matched to an applicant;<sup>28</sup>
- Using unreliable or overly loose matching criteria, such as name-only searches, to match applicants with public records;
- Furnishing court records that do not include an accurate date and disposition (or incorporating such records into a score or recommendation); and
- Reporting sealed or expunged records.

**D. The FTC should conduct a 6(b) investigation into the tenant screening industry to study how companies obtain, match, and report on information such as criminal records, eviction and other civil court records, and credit and financial information.**

The study should also investigate how companies compile tenant screening reports and scores.<sup>29</sup> The Commission should seek to provide guidance on tenant screening practices that may be unfair or deceptive under Section 5 or that constitute unlawful discrimination. HUD, the FTC, and the CFPB should collaborate to ensure that the findings of this study support and are incorporated into HUD’s guidance and enforcement activities.

**4. Proactively enforce against discriminatory uses of technology and records in housing decisions.**

**A. HUD should use its authority to file formal complaints and initiate investigations and/or compliance actions where evidence of discrimination resulting from use of housing-related technologies is uncovered. This should include situations where there is evidence of unjustifiable use of criminal records, eviction filings and other civil court records, credit reports and other criteria that may have a discriminatory impact.**

HUD should develop systems to ensure full and consistent compliance with, and implementation of, the recommendations set forth in this memorandum by its nationally administered programs in the Office of Housing (including the Federal Housing Administration), the Office of Public and Indian Housing, and other programs under

---

<sup>28</sup> See generally, e.g., Ariel Nelson, Nat’l Consumer Law Ctr., Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing, Dec. 2019, <https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf>.

<sup>29</sup> Section 6(b) of the Federal Trade Commission Act empowers the Commission to require an entity to file “annual or special . . . reports or answers in writing to specific questions” to provide information about the entity’s “organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals.” 15 U.S.C. § 46(b).

HUD's authority. HUD should review guidance and other rules and policies issued by these offices and programs to ensure that they reflect a meaningful commitment to protecting against discrimination through background screening, online advertising practices, and other housing-related technologies.

The DOJ Housing and Enforcement Section should also use its authority to initiate investigations and file suit where evidence of discrimination resulting from use of housing-related technologies is uncovered. Similarly, this should include situations where there is evidence of unjustifiable use of criminal records, eviction filings and other civil court records, credit reports and other criteria that may have a discriminatory impact.

Thank you for your attention to these matters. For any questions or further discussion, please contact Natasha Duarte, Senior Policy Analyst, Upturn, at 202-677-2359 or [natasha@upturn.org](mailto:natasha@upturn.org).

**Date:** July 13, 2021

**To:** Acting Director Dave Uejio  
Consumer Financial Protection Bureau (CFPB)

Chair Jerome H. Powell  
Board of Governors of the Federal Reserve System

Chair Jelena McWilliams  
Federal Deposit Insurance Corporation

Chair Todd M. Harper  
Board of Directors, National Credit Union Administration

Acting Comptroller of the Currency Michael J. Hsu  
Office of the Comptroller of the Currency, U.S. Department of the Treasury

Acting Director Sandra L. Thompson  
Federal Housing Finance Agency

Secretary Marcia L. Fudge  
U.S. Department of Housing and Urban Development

Chair Lina Khan  
Federal Trade Commission

Assistant Attorney General Kristen Clarke  
Civil Rights Division, U.S. Department of Justice

**From:** American Civil Liberties Union  
Center for Democracy & Technology  
Center on Privacy & Technology at Georgetown Law  
Lawyers' Committee for Civil Rights Under Law  
National Consumer Law Center (on behalf of its low-income clients)  
National Fair Housing Alliance  
Upturn

*Via email*

**RE: Addressing Technology's Role in Financial Services Discrimination**

Too often, technology amplifies and exacerbates racial, gender, disability, economic, and intersectional inequity in our society. Governments and corporations, at the national, state, and local level, are using computer software, statistical models, assessment



instruments, and other tools to make important decisions in areas such as employment, health, credit, housing, immigration, and the criminal legal system. In light of these developments, policymakers must take steps to ensure non-discriminatory and equitable outcomes for all who participate in the financial services market.

We offer the following proposals for the Biden-Harris administration and federal financial regulators for addressing the ways that technology and data can lead to discrimination in consumer credit. We urge all agencies to engage with a diverse range of stakeholders, including civil rights organizations, consumer advocates, and impacted communities, in order to receive ongoing input and feedback on these important issues. We also encourage agencies to prioritize transparency, by sharing their data, models, decisions, and proposed solutions so that all of the stakeholders can stay apprised of and comment on the potential impact of proposed actions, and by requiring financial institutions to share with the public as much information as possible regarding their systems and assessments of those systems. We would be pleased to discuss the ideas in this memo in more detail in the weeks and months ahead.

## **1. The CFPB and other agencies should ensure robust measurement and remediation of discrimination.**

Existing civil rights laws allow agencies to analyze fair lending risk and to engage in supervisory or enforcement actions concerning the use of new technologies. For example, the Equal Credit Opportunity Act (ECOA), as implemented by Regulation B, prohibits creditor practices that have discriminatory effects unless they meet a “legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.”<sup>1</sup> However, agencies must set clearer and more robust expectations concerning fair lending risk assessments as they pertain to technologies, and conduct in-depth reviews of financial institutions’ use of these technologies in order to more effectively supervise institutions and enforce civil rights laws.<sup>2</sup>

More specifically, agencies should develop policies that:

- Set updated standards for fair lending assessments, including discrimination testing and evaluation in the conception, design, implementation, and use of models; and for what information must be detailed in documentation of fair

---

<sup>1</sup> 12 C.F.R. pt. 1002, Supp. I, § 1002.6(a)-2.

<sup>2</sup> Some of the undersigned have submitted a detailed response to the Request for Information and Comment on Financial Institutions’ Use of Artificial Intelligence, including Machine Learning issued by the financial regulatory institutions, which provides more detailed recommendations.

lending risk assessments, including what testing has been conducted, in-depth information regarding training data, and documentation of adverse action notices;

- Clarify that financial institutions' fair lending assessments should be conducted by independent actors within the institution or a third party;
- State that the agencies will conduct their own fair lending risk assessments, including a review of disparate impact, business justifications, and less discriminatory alternatives;
- Define "model risk" to include the risk of discriminatory or inequitable outcomes for consumers, rather than just the risk of financial loss to a financial institution; and
- Establish documentation and archiving requirements sufficient to ensure that financial institutions maintain the data, code, and information necessary for agencies to review their systems.

It is critical that all credit processes undergo scrutiny that includes analysis of actual outcome data, not just a model's inputs, training, or validation data. This is particularly important as lenders turn to more complex models that exhibit "black box" qualities — *i.e.*, where the relationship between the model's inputs and outputs are opaque or not easily understood.<sup>3</sup> This requires access to demographic data about protected groups, whether inferred indirectly or collected directly by the creditor.<sup>4</sup> The Bureau should consider creating new datasets or methodologies for measuring disparate impact.<sup>5</sup> This might include, for example, improving on the BISG methodology.<sup>6</sup> The CFPB should consider new supervisory guidance for models, revisions to exam manuals, and commentary to Regulation B to achieve these goals.<sup>7</sup>

Agencies should also help develop industry practices for identifying and adopting underwriting processes with minimal adverse impact. This is an area of great potential, but with few established standards or practices. For example, using new modeling techniques, creditors can sometimes discover more equitable models without significant loss of overall model quality.<sup>8</sup> Creditors should proactively explore these tradeoffs, and

---

<sup>3</sup> See, e.g., Nicholas Schmidt and Bryce Stephens, An Introduction to Artificial Intelligence and Solutions to the Problems of Algorithmic Discrimination, November 2019, *available at* <https://arxiv.org/ftp/arxiv/papers/1911/1911.05755.pdf>.

<sup>4</sup> See Miranda Bogen, Aaron Rieke, and Shazeda Ahmed, Awareness in Practice: Tensions in Access to Sensitive Attribute Data for Antidiscrimination, December 2019, <https://arxiv.org/abs/1912.06171>.

<sup>5</sup> See, e.g., CFPB, Using publicly available information to proxy for unidentified race and ethnicity, 2014, <https://www.consumerfinance.gov/data-research/research-reports/using-publicly-available-information-to-proxy-for-unidentified-race-and-ethnicity/>.

<sup>6</sup> *Id.*

<sup>7</sup> 12 CFR Part 1002.

<sup>8</sup> See, e.g., National Community Reinvestment Coalition, Response to Request for Information on the Equal Credit Opportunity Act; Docket No. CFPB-2020-0026, December 2020, *available at* <https://ncrc.org/download/85646/>.

adopt alternative models to reduce adverse impact where feasible. The CFPB can lead the way on this issue by offering new guidance, leading workshops, encouraging the development of methodologies and techniques, and offering new policy guidance.

## **2. Agencies should encourage the use of alternative data for underwriting that is voluntarily provided by consumers and has a clear relationship to their ability to repay a loan.**

All agencies should encourage the use of alternative data for credit underwriting where such data are voluntarily provided by consumers and have a clear relationship with those consumers' ability to repay. This might involve new research about the suitability of different kinds of alternative data, regulatory guidance, policy statements, or rulemakings.

Traditional credit history scores reflect immense racial disparities due to extensive historical and ongoing discrimination.<sup>9</sup> Black and Latinx consumers are less likely to have credit scores in the first place, limiting their access to financial services.<sup>10</sup> There is an obvious need for better, fairer, and more inclusive measures of creditworthiness.<sup>11</sup>

New data sources can help. But caution is in order: Not all kinds of data will lead to more equitable outcomes, and some can even introduce their own new harms.<sup>12</sup> Fringe alternative data such as online searches, social media history, and colleges attended can easily become proxies for protected characteristics, may be prone to inaccuracies that are difficult or impossible for impacted people to fix, and may reflect long standing inequities. On the other hand, recent research indicates that more traditional alternative data such as cash flow data holds promise for helping borrowers who might otherwise face constraints on their ability to access credit.<sup>13</sup> For example, a recent Interagency Statement observed that “[c]ash flow data are specific to the borrower and generally derived from reliable sources, such as bank account records, which may help ensure the data’s accuracy.

---

<sup>9</sup> See, e.g., National Consumer Law Center, Past Imperfect: How Credit Scores and Other Analytics “Bake In” and Perpetuate Past Discrimination, May 2016, [https://www.nclc.org/images/pdf/credit\\_discrimination/Past\\_Imperfect050616.pdf](https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf).

<sup>10</sup> CFPB Office of Research, Data Point: Credit Invisibles, May 2015, [https://files.consumerfinance.gov/f/201505\\_cfpb\\_data-point-credit-invisibles.pdf](https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf).

<sup>11</sup> Chi Chi Wu, Reparations, Race, and Reputation in Credit: Rethinking the Relationship Between Credit Scores and Reports with Black Communities, August 7, 2020, [https://medium.com/@cwu\\_84767/reparations-race-and-reputation-in-credit-rethinking-the-relationship-between-credit-scores-and-852f70149877](https://medium.com/@cwu_84767/reparations-race-and-reputation-in-credit-rethinking-the-relationship-between-credit-scores-and-852f70149877).

<sup>12</sup> See Testimony of Aaron Rieke Before the Task Force on Financial Technology United States House Committee on Financial Services, July 25, 2019, *available at* <https://www.congress.gov/116/meeting/house/109867/witnesses/HHRG-116-BA00-Wstate-RiekeA-20190725.pdf>.

<sup>13</sup> See, e.g., FinRegLab, The Use of Cash-Flow Data in Underwriting Credit: Empirical Research Findings, July 2019, <https://finreglab.org/cash-flow-data-in-underwriting-credit-empirical-research-findings>.

Consumers can expressly permit access to their cash flow data, which enhances transparency and consumers' control over the data."<sup>14</sup>

### **3. Agencies should clarify standards for Special Purpose Credit programs, which could help address legacies of discrimination and encourage creation of less discriminatory credit models.**

Congress has provided for a range of credit programs that are “specifically designed to prefer members of economically disadvantaged classes” and “to increase access to the credit market by persons previously foreclosed from it.”<sup>15</sup> These “Special Purpose Credit Programs” (SPCPs) allow the consideration of a prohibited basis such as race, national origin, or sex under particular circumstances, without violating ECOA’s general anti-discrimination mandates.<sup>16</sup> SPCPs have the potential to help address legacies of discrimination, and can aid in the development of fairer financial technologies that explicitly consider protected class status.

We urge relevant federal agencies and departments to encourage use of SPCPs by clarifying standards and reducing risk of liability for lenders.<sup>17</sup> The CFPB should take the lead in ensuring that its SPCP guidance under ECOA is consistent with the approach that other federal regulators, the Department of Justice, and the state attorneys general are taking in enforcing other fair lending laws.

### **4. The CFPB should issue new modernized guidance for financial services advertising.**

For years, creditors have known that new digital advertising technologies, including a vast array of targeting techniques, might result in illegal discrimination.<sup>18</sup> Moreover, recent empirical research has shown that advertising platforms themselves can introduce significant skews on the basis of race, gender, or other protected group status through the

---

<sup>14</sup> Interagency Statement on the Use of Alternative Data in Credit Underwriting, [https://files.consumerfinance.gov/f/documents/cfpb\\_interagency-statement\\_alternative-data.pdf](https://files.consumerfinance.gov/f/documents/cfpb_interagency-statement_alternative-data.pdf).

<sup>15</sup> S. Rept. 94-589, 94th Cong., 2nd Sess., at 7, reprinted in 1976 U.S.C.C.A.N. 403, 409.

<sup>16</sup> CFPB, Advisory Opinion on Special Purpose Credit Programs, December 12, 2020, <https://www.consumerfinance.gov/rules-policy/final-rules/advisory-opinion-on-special-purpose-credit-programs/>.

<sup>17</sup> See NCLC, Doing Special Purpose Credit Programs Right: Why Programs to Assist Black Communities Should Avoid Conventional Use of Traditional Credit Scores, February 2021, [https://www.nclc.org/images/pdf/credit\\_reports/IB\\_SPCP\\_Credit\\_Scores.pdf](https://www.nclc.org/images/pdf/credit_reports/IB_SPCP_Credit_Scores.pdf); Stephen Hayes, Special Purpose Credit Programs, February 2021, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3749610](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3749610).

<sup>18</sup> See, e.g., Penny Crosman, ‘Black box’ problem hampers banks’ online marketing, American Banker, January 21, 2018, <https://www.americanbanker.com/payments/payments/news/the-black-box-problem-should-financial-institutions-steer-clear-of-tools-like-facebooks-lookalike-audiences>.

algorithms they use to determine delivery of advertisements — even when advertisers target their advertisements broadly.<sup>19</sup> The Department of Housing and Urban Development has alleged such practices violate the Fair Housing Act.<sup>20</sup>

The CFPB should issue new guidance on advertising and discrimination for creditors under Regulation B. Even as the Bureau clarifies what kinds of modern marketing practices might violate the ECOA, it should also expand on ways that creditors can affirmatively reach out to underserved populations.

## **5. The CFPB should revise and reincorporate the underwriting provisions of its 2017 payday lending rule.**

Predatory lenders thrive online, targeting poor and vulnerable consumers — and especially people of color — wherever they live.<sup>21</sup> In July of 2020, the CFPB rescinded the mandatory underwriting provisions of its payday lending rule, removing critical requirements that payday lenders verify borrowers' ability to repay. The CFPB should work quickly to reverse these misguided policy changes.

Thank you for your attention to these matters. For any questions or further discussion, please contact Aaron Rieke, Managing Director, Upturn, at 202-677-2359 or [aaron@upturn.org](mailto:aaron@upturn.org).

---

<sup>19</sup> *See Id.*; Ali et. al., Discrimination through Optimization: How Facebook's Ad Delivery Can Lead to Biased Outcomes, November 2019, <https://dl.acm.org/doi/10.1145/3359301>.

<sup>20</sup> Department of Housing and Urban Development, Charge of Discrimination, March 2019, [https://www.hud.gov/sites/dfiles/Main/documents/HUD\\_v\\_Facebook.pdf](https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf).

<sup>21</sup> *See, e.g.*, Upturn, Led Astray: Online Lead Generation and Payday Loans, October 2015, *available at* <https://www.upturn.org/reports/2015/led-astray/>.