October 17, 2024

California Civil Rights Department – Oakland Office
555 12th Street, Suite 2050
Oakland, California
Lake Merritt Conference Room

Re: Consideration of First Modified Text of Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems

Dear Chair David Garcia and Members of the Civil Rights Council:

On behalf of the Computer & Communications Industry Association (CCIA), I am writing in response to the Civil Rights Council's efforts to revise employment regulations concerning automated decision-making systems. We appreciate the opportunity to engage with the first set of proposed modifications and provide feedback, as we believe these revisions represent a significant improvement over the previous version.

CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms.[1] We commend the Council's efforts to develop regulations that prevent automated decision-making systems (ADSes) from being used in discriminatory or biased ways during the employment process. As a representative of many of the leading AI model developers, our members conduct significant testing aimed at avoiding bias and discrimination in AI systems. However, they also typically develop what are known as 'foundation models', models that are generally applicable rather than domain-specific. Such general-purpose models are neither designed for nor intended for use in employment decision-making.

As the Council advances its efforts to update regulations related to employment and automated decision-making systems, we would like to provide our feedback on the initial modifications to the proposed text. CCIA welcomes the opportunity to elaborate on our perspectives and looks forward to the Council's upcoming meeting on October 17.

Clarification is need for the definition of the term *"agent."*

The definition of an agent, in the proposed regulation, *"may include, in appropriate circumstances, a third party that creates an automated-decision system used by or for an employer..."* The phrase *"may include, in appropriate circumstances"* introduces considerable

[1] For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at https://www.ccianet.org/members.

uncertainty about what specific actions by a foundation model developer could fall under this definition.

When a foundation AI model is used for employment-related purposes without any specific adaptation to that purpose, the foundation model developer should not be treated as an agent of the employer using their tool. They have no control over the employment decision-making process or the decision to use their tool in an employment context. Under the common law of agency, these facts would never qualify the AI developer as an agent of the employer, nor should they. However, this statutory definition creates the potential for developers of foundation models to be held liable if their model is used by others to make employment-related decisions, or if a fine-tuned version of the model, created by a third party, is applied in such contexts.

This doesn't mean that the developer of an AI model should never be liable for violating this portion of the law. When a foundation AI model is fine-tuned for use specifically in making employment-related decisions, treating the entity that engaged in fine-tuning or further training as an agent may well make sense depending on circumstances. Specifically, if the fine-tuner has modified the baseline model for employment decision-making and/or restricts employers from conducting bias testing on the model, it may be reasonable to hold them accountable as a liable party.

However, the proposed definition lacks clarity on whether it applies to foundation models and other broadly applicable models not specifically designed for employment decision-making. We recommend that the department revise the definition of *"agent"* to include an explicit exclusion that reads: *"This provision shall not apply to the developer of foundation models or other general purpose models that are not developed or marketed for use in the employment context if they are not also the employer in question."* This addition provides greater definitional precision for models not specifically designed for employment decision-making while ensuring accountability for those who intentionally misuse such models.

The definition of "automated-decision system" (ADS) remains overbroad.

The current definition still encompasses systems *"derived from artificial intelligence, machine-learning, algorithms, statistics, and/or other data processing techniques."* Notably, it now includes the analysis of *"employee or applicant data"* conducted by third parties. As written, even static, computer-based questionnaires would fall under the ADS umbrella, despite being largely unrelated to the AI bias concerns driving these revisions.

We recommend removing the phrase *"any other term, condition, or privilege of employment"* from the definition of automated decision systems. This language is vague and lacks clear boundaries. To be within scope, an automated decision system should play a substantial role in human decision-making, not just facilitate it. As an alternative, the data retention requirements

should apply only to data from automated decision systems that were a significant factor in decision-making. Otherwise, employers will be forced to store large volumes of unrelated data that do not materially impact human decisions.

CCIA recommends clarifying ambiguous standards for effective compliance.

As highlighted in earlier sections of these comments, some standards introduced in this round of revisions lack clarity and remain undefined. Specifically, the terms *"appropriate circumstances," "substantial disparity,"* and *"closely correlated"* are ambiguous. For our members to achieve compliance, it is essential to have a clear and specific roadmap defining each of these terms. Without this clarity, businesses will struggle to develop their products in a way that avoids noncompliance. For example, what one company considers a *"substantial disparity"* may be perceived differently by another. To address this variability, CCIA recommends providing clear guidance on compliance and defining these terms.

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We appreciate your consideration of these comments. We look forward to continuing to participate in the Council's ongoing regulatory process including reviewing and providing feedback on the series of proposed drafts. We hope the Council will consider CCIA a resource as these discussions progress.

Sincerely,

Jordan Rodell
State Policy Manager
Computer & Communications Industry Association