



Consumer Data Industry Association  
1090 Vermont Ave., NW, Suite 200  
Washington, D.C. 20005-4905

P 202 371 0910

Writer's direct dial: +1 (202) 408-7407

[CDIAONLINE.ORG](http://CDIAONLINE.ORG)

October 24, 2022

The Honorable Vilda Vera Mayuga  
Commissioner, New York City Department of Consumer and Worker Protection  
Consumer Services Division  
42 Broadway, 9th Floor  
New York, NY 10004

Via Email: [Rulecomments@dcwp.nyc.gov](mailto:Rulecomments@dcwp.nyc.gov)

Re: Proposed rules relating to the use of automated employment decision tools

Dear Commissioner Maygua:

I write on behalf of the Consumer Data Industry Association (CDIA) to offer our comments to the Department of Consumer and Worker Protection ("DCWP" or "Department") on [proposed rules](#) relating to the use of automated employment decision tools. The proposed rules are being issued under [Local Law 144 \(2021\)](#) ("LL 144").<sup>1</sup>

An employer's use of augmented intelligence is rarely a binary decision. When used appropriately by employers, a combination of human and technology tools can help reduce bias and get people to work more quickly in ways that are fair, legal, and replete with second chances. Technology in hiring can reduce unintentional discrimination in employment and reduce the chances that human error can create a barrier to employment. Technology in hiring meets the urgent need to hire quickly, hire smartly, and hire remotely. Any rule from DCWP must be carefully balanced to meet the needs of consumers as asserted in the passage of LL 144, with the needs of employers and employees to higher quickly. The proposed rule has the potential to slow down the hiring process across the City.

People should be able to have confidence that automated decision tool are lawfully compliant, and are used responsibly in their development, deployment, and use. Given the speed of technology, trust in automated decision tools is a shared responsibility of government and the private sector. Governance frameworks should be flexible and driven by a voluntary, and multi-stakeholder process. With those considerations in mind, CDIA offers comments on the proposed rule.

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<sup>1</sup> The Consumer Data Industry Association ("CDIA") is the voice of the consumer reporting industry, representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity all over the world, helping ensure fair and safe transactions for consumers, facilitating competition and expanding consumers' access to financial and other products suited to their unique needs

### **1. Definition of an automated decision tool (§ 5-300)**

CDIA respectfully requests three changes to this definition. First, we request that the Department strike “or to use a simplified output to overrule or modify conclusions derived from other factors including human decision making” and substitute in its place the following “‘Automated employment decision tool,’ or ‘AEDT,’ does not include (a) the automated searching of resumes to identify candidate qualifications, including relevant skills or experience, or (b) tools that merely covert a manual process to an automated process without the introduction of machine learning or artificial intelligence, and does not include tools that do not result in a final employment decision.”

Most employers do not use AEDT as the only factor in determining who to employ. Employers take a more holistic approach. For example, just because an employer may use an algorithm on every potential candidate, it does not mean that that tool is *always* used. While an AEDT may review each candidate, the discretion may still rest with a hiring manager to determine whom to interview, as well as the potential reliance and weight placed on the use of the tool.

### **2. Bias audit (§ 5-301)**

We respectfully request that the examples offered in the proposed rule clarified so that, among other things, they should not necessarily represent an exhaustive list of all the possible scenarios that might be available to employers. We ask the Department to remove the specificity of responsibility in each of the two examples of a bias audit to bring flexibility to account for a myriad of employment scenarios.

The examples provided in Subsections (a) and (b) are prescriptive in noting who bears responsibility for the bias audit (i.e., the employer/deployer or the vendor/developer). Yet, the examples fail to cover a range of possible hiring scenarios. For this reason, the examples fall short of guidance for employers.

We request a change to section (a): “Where an AEDT is used to *Screen a candidate or employee for an employment decision*, a bias audit required by § 20-871 of the Code must, at a minimum:” We also request that the Department change Subsection (a) in the example, strike “historical data” and replace it with “test data.” In Subsection (b) we ask that the Department strike “historical data” and replace it with “test data.” In the model we request that the Department strike “planned.”

### **3. Published results (§ 5-302)**

We respectfully ask for two changes. First, an addition of the following in section (a) “Prior to the use of an AEDT to screen a candidate or employee for an employment decision, employers and employment agencies in the city must make the following publicly available on the careers or

jobs section of their website in a clear and conspicuous manner.” Second, we request that the Department strike “the selection rates and impact ratios for all categories” and replace with “a statement on adverse impact.”

#### **4. Definition of screen in relation to employment decisions (§ 5-300)**

Local Law 144 defines an “employment decision” as a “screen [of] candidates for employment or employees for promotion within the city.” § 20-870. We request clarity on how the use of some A.I. tools would fit within this definition. For example, we do not believe that if a tool makes a recommendation about an individual, but that recommendation is subject to human review, that that recommendation qualifies as a “determination.” Further, since LL 144 does not extend beyond the limits of New York City, we encourage the Department to clarify the proposed rule to state that “within the city” means positions located in the City of New York, regardless of where the employee resides.

#### **5. Independent auditor (§ 5-301)**

The proposed rule defines an independent auditor as “a person or group that is not involved in using or developing an AEDT.” We request that the proposed rule confirm the implication that an employer or vendor can conduct a bias audit with internal employees, provided that the group conducting the audit is not involved in using or developing the specific tool.

#### **6. Obligation to provide an alternative selection method (§ 5-303)**

Local Law 144 says that required notices to candidates must allow them “to request an alternative selection process or accommodation.” § 20-871.b.1. But, the proposed rule states that nothing in the rules “requires an employer or employment agency to provide an alternative selection process.” We read that as saying employers must provide *an opportunity* to request an alternative selection process in their notices. This requirement is a challenge because employers are never obligated to provide the alternative. The rule should confirm this logical interpretation.

#### **7. Frequency of audits**

Local Law 144 says that an AEDT cannot be used unless a bias audit was “conducted no more than one year prior to the use of such tool.” § 20-871.b.1. It is not clear whether that language requires yearly bias audits of the tool or if conducting one audit on a tool is sufficient unless or until the tool is replaced or materially modified. The Statement of Basis and Purpose of the Proposed Rule states that a bias audit is required “within one year of use of the tool.” This clause implies that the audit may take place within the 12 months which follow implementation of the tool. Since this requirement was not the intent of the proposal, it should be clarified.

## 8. Grace period

While we understand the legislation requires the rules and regulations to go into effect by January 2023. We strongly encourage the Department to provide a grace period to businesses and organizations as they look to implement the final rule.

### Summary

CDIA appreciates the opportunity to comment on the implementing rules. An employer's use of augmented intelligence is rarely a binary decision. When used appropriately by employers, a combination of human and technology tools can help reduce bias and get people to work more quickly in ways that are fair, legal, and replete with second chances. Any rule from DCWP must be carefully balanced to meet the needs of consumers as asserted in the passage of LL 144, with the needs of employers and employees to higher quickly. The proposed rule has the potential to slow down the hiring process across the City.

Sincerely,

A handwritten signature in blue ink, appearing to read "E. Ellman", is positioned below the word "Sincerely,".

Eric J. Ellman  
Senior Vice President, Public Policy & Legal Affairs