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Equal Employment Opportunity Commission  
131 M Street, NE  
Suite 4NW08R  
Washington, DC 20507

Re: EEOC's Draft Strategic Enforcement SEP, (EEOC-2022-0006-0001)

Dear Commissioners:

I write on behalf of the Consumer Data Industry Association ("CDIA") to offer our comments to the U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") on its Draft Strategic Enforcement SEP for 2023 – 2027 ("SEP") relating to the use and consideration of automated employment decision tools and similar technologies.<sup>1</sup>

The use and expansion of technology and technology assisted tools, systems, and intelligence by employers rarely, if at all, results in a binary or arbitrary decision – let alone employment decisions that offend the personal or legal interests of individuals or groups of people. While CDIA generally appreciates the EEOC's SEP to recognize the increased use of automated systems, including artificial intelligence ("AI") or machine learning, it is imperative that the Commission also recognize the benefits these technologies and systems have, and the public interest in the growing use of same.

When used appropriately by employers, a combination of human and technology-assisted tools helps reduce biases, expands access to job opportunities, and gets people to work in ways that are fair, legal, and replete with safeguards and second chances that would not otherwise be available. Indeed, technology in hiring, job advertisements, recruiting, and position advancement can reduce unintentional discrimination or biases in employment, as well as reduce the chances that human error can create – especially with respect to barriers to employment. Technology in hiring meets, and furthers, the public's interest to hire quickly, hire intelligently, and hire remotely<sup>2</sup> –

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<sup>1</sup> The Consumer Data Industry Association 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.

<sup>2</sup> The COVID-19 pandemic and its corresponding stay-at-home orders and public health measures caused an in unprecedented shift in how businesses and employers operated, including how – and where – employees performed their work, and how and where job candidates sought and pursued work opportunities.

significantly increasing employment opportunities to entire populations that may have been historically disenfranchised by actual or perceived discriminatory systems.

For example, machine learning algorithms can be trained to identify and eliminate biased language in job postings and resumes, such as language that may be unconsciously biased towards a particular group of people. This can help to ensure that all qualified candidates have an equal opportunity to apply for the position and be considered for the role. Additionally, these algorithms can also assist in identifying and eliminating bias in resumes by analyzing resumes in a way that is not influenced by a human's unconscious biases, such as name, location, and education.

Similarly, augmented decision-making tools can provide an unbiased and objective analysis of job candidates by using a combination of human and machine intelligence to assess a candidate's qualifications, skills, and experience. These tools can help to eliminate the potential for human bias in the hiring process and ensure that all qualified candidates are given equal consideration for the role.

The use and expanding adaptation of technology, including automated tools, AI, machine learning, and algorithmic-assisted processes not only provided access and opportunities during a time where traditional employment models were no longer available, but their demonstrated success and benefits for individuals and employers has made them essential tools of the U.S. economy. To disregard or diminish the inherent value and benefits of these technologies, let alone punish those who use or decide to implement them in the future based solely on suspicions, simply does not align with the interests of modern human relations. The diminution of new technologies in hiring also contravenes the Commission's initiative on artificial intelligence and algorithmic fairness announced by Chairperson Charlotte A. Burrows in October 2021, as well as its repeatedly stated efforts to become a "21<sup>st</sup> century data analytics agency." Chair Burrows' remark. *See e.g.*, <https://www.eeoc.gov/ai> (last accessed Jan. 23, 2023).

Any rule, regulation, legal enforcement, guidelines, training, education, policy, or practice of the Commission as reflected in its SEP should be carefully considered and balanced to meet the needs and interests of consumers with the needs of employers and employees to hire quickly, efficiently, and with full and equal opportunity. The concern with the current draft of the SEP is that it perceives that automated or technology-assisted employment or hiring tools, and/or the use of such tools by employers, is inherently or likely to result in exclusion or have adverse effects on protected groups. By fairly and objectively researching and understanding these technologies, the EEOC will undoubtedly realize the opportunities for inclusivity and fairness created by the use of automated systems, AI, or machine learning, and ensure that its consideration and regulatory endeavors do not unfairly or prejudicially impact employers that appropriately utilize these technologies with respect to employment-related decisions.

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As a matter of necessity, the use of, and reliance on technology became the primary means of communication and work for virtually every employer, employee, and candidate throughout the country; things that would not have been otherwise possible to do.

All affected should have confidence that automated decision tools are lawfully compliant, and are used responsibly in terms of development, deployment, and use. Given the speed of these technologies, trust in automated decision tools is a shared responsibility of the government and private sector. Collaboration and communication are key. Government and enforcement frameworks should be flexible and driven by a voluntary, multi-stakeholder process and dialogue. With these considerations in mind, CDIA offers the following initial comments on the proposed SEP.

## **1. Executive Summary and SEP Descriptions**

CDIA respectfully requests that the description and references to automated systems in the SEP's Executive Summary, including the third bullet point of the SEP's implementation changes,<sup>3</sup> be revised. First, we request that the Commission strike and replace the bullet point summary of changes in the SEP regarding automated systems to: *“Recognizes employers’ increasing use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, and make or assist in hiring decisions, and the benefits and opportunities the use of such systems may have in promoting inclusive workplaces, combating employment discrimination, and serving the public interest for racial and economic justice”*.

Second, we request that the terms or phrase “automated systems” be defined or more accurately described such that it does not include (a) the automated searching of resumes to identify candidate qualifications, including relevant skills or experience, or (b) tools that merely convert or modify a manual process to an automated process without the introduction of machine learning or artificial intelligence, and (c) does not include systems or tools that do not result in a final employment decision.

Importantly, most employers do not use automated systems or employment decision tools as the only factor in determining who to employ or in resolving employment related decisions. Rather, employers take a more holistic approach. For example, just because an employer may use an algorithm, software, or code-based process with respect to potential candidates does not mean that the tool, system, or process is *always* used, or is used in isolation or independently. Human or other automated oversight or compliance mechanisms may also be deployed by employers, and the discretion may still rest with a hiring manager or committee when determining whom to interview or hire.

While the potential reliance and weight placed on the use of such tools often varies, augmented decision-making tools can provide an unbiased and objective analysis of job candidates by using a combination of human and machine intelligence to assess a candidate's qualifications, skills, and experience. These tools can help to eliminate the potential for human bias in the hiring process and ensure that all qualified candidates are given equal consideration for the role.

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<sup>3</sup> Specifically, portion of the Executive Summary stating, in relevant part: “Among other changes, this SEP: ... Recognizes employers’ increasing use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, and make or assist in hiring decisions...”.

In addition to reducing bias, the use of these technologies can also increase efficiency in the hiring process. Automated systems can sift through resumes and job applications at a much faster rate than humans, allowing employers to identify the most qualified candidates more quickly. This can help to reduce the time and resources required to fill open positions, which can ultimately benefit both the employer and the candidate.

The complexities, variances, and considerable benefits at issue underscore the importance that the Commission's "recognition" of the use of automated tools/systems take the same holistic approach as the employers who use them. Rather than viewing the use of these technologies with suspicion or only as potential causes of unlawful discrimination, the Commission and its SEP should focus on understanding these technologies and their potential benefits in furtherance of providing guidance and resources to employers on how to effectively and ethically implement these technologies in the hiring process and other employment decisions. This could include best practices for training and using these technologies, as well as guidelines for ensuring that they are used in a way that complies with equal employment laws.

## **2. Clarity Regarding the Use of "Automated Systems"**

CDIA further requests that the Commission's SEP clearly articulate that the use of "automated systems" and other sophisticated tools, technologies, software, or processes, including AI and machine learning, is not a violation of Equal Employment Opportunity ("EEO") laws and related regulations. While CDIA understands and appreciates that the draft SEP is not binding agency regulation of federal laws within its statutory jurisdiction or enforcement mandate, the current description and references to such systems and tools may be interpreted by certain members of the public as an implication by the Commission that the mere use of AI, machine learning, and similar technological tools are, or may be, viewed as problematic or as potential violations of EEO laws. Of course, any such interpretation is incorrect and, in good faith, presumed as unintended by the Commission. To effectively eliminate the potential suggestion of impropriety regarding the use of these systems or technologies, CDIA and its members respectfully request that affirmative language be incorporated to the SEP that clearly and definitively provides that the mere use of "automated systems," including AI and machine learning, do not violate EEO laws or related regulatory frameworks.

## **3. Enforcement and Investigatory Guidance and Policies**

With regard to the Commission's subject matter priorities for Fiscal Years 2023-2027, CDIA respectfully requests that the SEP be amended to confirm that in fulfilling its subject matter priorities the Commission's investigatory and enforcement-related guidance and policies will expressly provide that the use of automated systems, AI, machine learning, and other sophisticated tools does not, in any way, permit or result in any potentially adverse presumptions against employers. To this end, the Commission should strike Section II(C)(3)(e) of the draft SEP together with any statements that may reflect an intent, goal, or objective to "focus" on matters "in which covered entities use of technology may contribute to unlawful discrimination or adverse effects based on protected characteristics."

For example, rather than focusing on “the use of software that incorporates algorithmic decision-making or machine learning, including artificial intelligence; use of automated recruitment, selection, or production and performance management tools; or other existing or emerging technological tools used in employment decisions” the Commission should focus its efforts on real-world instances and evidence, if any should exist, that actually result in unlawful discrimination based on protected characteristics, the number of people that are adversely affected, and the severity of the impact. Moreover, the Commission’s focus, and goal, regarding the use of such technologies should be tailored towards identifying and promoting the use of technology as a means of furthering equal employment opportunity as well as the needs and interests of employees, job candidates, employers, and the public, alike.

### **Summary**

CDIA appreciates the opportunity to comment on the Commission’s SEP for Fiscal Years 2023-2027. An employer’s use of augmented intelligence is rarely a binary decision. When used appropriately by employers, a combination of human and technological tools can, and commonly do, help reduce bias and further the public interest by getting people to work more quickly and in ways that are fair, legal, and replete with second chances and compliance oversight. The role and focus of the Commission should be carefully balanced to meet the needs of consumers, employees, job candidates, employers, and the public at-large to hire and fulfill workforce demands quickly and effectively. As currently described, the subject matter priorities and general ethos of the Commission’s draft SEP has the potential to contravene and diminish the overarching benefits the use of sophisticated technologies and tools have, and instead should reflect a commitment to ensuring their continuing appropriate and compliant use by employers throughout the United States.

Respectfully Submitted,



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

Effective January 23, 2023, the new phone number for the Help Desk is 1-866-498-2945



Comment Period Ends: **13 Days**

You are commenting on a Notice by the **Equal Employment Opportunity Commission**  
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