

**COMMENTS ON PROPOSED ATTORNEY GENERAL GUIDELINES TO PREVENT
DECEPTIVE TRADE PRACTICES IN THE USE OF ARTIFICIAL INTELLIGENCE
DECISION-MAKING THAT IMPACTS RIGHTS, OPPORTUNITIES, OR ACCESS TO
RESOURCES OR SERVICES [110-RICR-40-00-5]
JULY 23, 2025**

The ACLU of Rhode Island appreciates the opportunity to offer comments on this advance notice of proposed rulemaking (ANPR) on a very important and timely topic. Our organization shares the Attorney General’s concern with the increasing use of artificial intelligence (AI) algorithms in decision-making, and the potential for discrimination in their application.

Algorithmic discrimination in the use of AI is a very real problem. AI outputs are only as good as the data and algorithm inputs going in, data that often reflects pre-existing societal biases or is under-representative of people of color, women, people with disabilities, or other vulnerable groups. AI systems and their outputs are also shaped by human choices at every step of the development process – choices that often reflect existing biases of the contexts in which the systems are developed. As such, bias is often inherent in the decisions made by AI systems, leading to worse outcomes for the vulnerable groups cited above in areas like healthcare, housing, employment, and education.

As we later explain, it is important that any potential regulation includes a specific definition of what constitutes “artificial intelligence” that will appropriately cover modern AI systems, including less sophisticated algorithmic systems that nonetheless significantly impact lives, while excluding common, benign computing technology.

With that introduction, we offer the following comments related to some of the specific requests for information that are laid out in the ANPR.

1. Nature, prevalence, and examples of products incorporating these technologies:

AI is already being deployed in sectors that have long been protected by privacy and civil rights law, but its use often leads to a disproportionate impact on marginalized groups without recourse:

- **Healthcare**— A 2023 class-action lawsuit filed against the insurance company Cigna alleged that the company used an AI algorithm to evaluate and ultimately systematically deny claims. The suit alleged that over a period of two months in 2022, Cigna denied over 300,000 requests for payment after a review time of approximately 1.2 seconds per

request.¹ Additionally, an algorithm widely used in hospitals is less likely to refer Black patients for care than equally ill white patients, resulting in 28.8% of Black patients being incorrectly deemed ineligible for additional care.² These are just a few examples: there are many additional documented instances of AI's potential to worsen medical racism.³

- **Housing**— The use of tenant screening algorithms have often amplified and exacerbated existing racial, gender, disability, and economic inequities in accessing housing by making predictions about who will be a successful tenant by analyzing credit scores, legal records, previous housing history, and information from data brokers and other sources.⁴ These systems are prone to algorithmic errors and discrimination, resulting in limited access to housing for many individuals. The algorithms will often incorrectly include criminal or eviction records tied to people with similar names. Given the secretive nature of this decision-making process, it is often impossible for people to learn about housing discrimination caused by these algorithms.⁵
- **Employment**—The vast majority of employers use automated systems that often leverage AI in the hiring process, and there are many documented instances of these tools enabling or exacerbating discrimination.⁶ For instance, algorithmic resume scanners have been shown to preference male candidates;⁷ chatbots and video interviewing systems that are widely used in the application and interview stages are often inaccessible to applicants with disabilities;⁸ and many types of AI systems used in hiring may exacerbate racial discrimination.⁹ Despite these problems, 99% of Fortune 500 companies use applicant tracking systems powered by AI for screening, advancing, and hiring candidates.¹⁰ The vast majority of these positions are lower-wage jobs in the retail, logistics, or food services sectors.¹¹
- **Education**— Algorithmic proctoring tools often fail to recognize students of color and flag “atypical” eye and body movements of students with disabilities as “cheating behaviors.”¹²

¹ <https://apnews.com/article/cigna-california-health-coverage-lawsuit-4543b47cd6057519a7e8dc6d90a61866>

² <https://www.statnews.com/2019/10/24/widely-used-algorithm-hospitals-racial-bias/>

³ <https://www.aclu.org/news/privacy-technology/algorithms-in-health-care-may-worsen-medical-racism>

⁴ <https://www.consumerreports.org/electronics/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times-a2331058426/>

⁵ <https://www.urban.org/sites/default/files/2025-03/Opening-the-Black-Box-of-Tenant-Screening.pdf>

⁶ <https://www.aclu.org/news/racial-justice/how-artificial-intelligence-might-prevent-you-from-getting-hired>

⁷ <https://qz.com/1427621/companies-are-on-the-hook-if-their-hiring-algorithms-are-biased> and <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G/>

⁸ <https://cdt.org/wp-content/uploads/2020/12/Full-Text-Algorithm-driven-Hiring-Tools-Innovative-Recruitment-or-Expedited-Disability-Discrimination.pdf> ; <https://www.aclu.org/press-releases/complaint-filed-against-intuit-and-hirevue-over-biased-ai-hiring-technology-that-works-worse-for-deaf-and-non-white-applicants>

⁹ <https://www.aclu.org/press-releases/aclu-files-ftc-complaint-against-major-hiring-technology-vendor-for-deceptively-marketing-online-hiring-tests-as-bias-free>; <https://www.aclu.org/know-your-rights/know-your-digital-rights-digital-discrimination-in-hiring>

¹⁰ <https://www.hbs.edu/managing-the-future-of-work/Documents/research/hiddenworkers09032021.pdf>

¹¹ <https://www.techtarget.com/searchhrsoftware/news/252481461/Food-industry-turns-to-AI-hiring-platform-to-fill-1M-jobs>

¹² <https://cdt.org/insights/how-automated-test-proctoring-software-discriminates-against-disabled-students/>

Additionally, algorithms are used to determine other metrics for schools, like probability students will graduate on time, as well as for university admissions.¹³

2. How, if at all, the Attorney General should regulate these products:

The Attorney General should explore instances when the Deceptive Trade Practices Act may be applicable to regulate AI use in decision-making. Discriminatory AI often shares many of the elements that traditionally define deceptive or unfair practices: consumer harm that cannot be reasonably avoided with no offsetting public benefit. Similarly, consumer harm may be actionable under the Act where a business has misrepresented the AI's efficacy, safety, or testing.

However, not all the instances of potential algorithmic discrimination we have cited will necessarily fit within the four corners of the Deceptive Trade Practices Act. Instead, some of the questionable decision-making contexts in which AI is being used are ones that other state agencies might be in a better position to handle in accordance with their mission. For example, algorithmic discrimination in employment clearly falls within the purview of the state Commission for Human Rights. Such agencies should be involved in any efforts to rein in algorithmic discrimination in the areas they cover.

In addition, at least in some instances, legislation, rather than regulation, would appear to be the necessary avenue to address certain concerns, with the creation of a private cause of action to address misuses of AI being an obvious and essential example, and one that we would encourage the Attorney General's office to champion. Notably, several bills that were introduced this past legislative session directly targeted a number of issues raised by this notice. In drafting regulations, therefore, it is important to consider jurisdictional limits and possible legislative solutions to complement the adoption of regulations.

3. If any regulations should specifically address the following topics:

- **Automated decision-making systems:**

Use of artificial intelligence to make or influence decisions regarding access to housing, education, employment, credit, and more raises significant concerns about fair access to critical life opportunities. Consequently, the regulations should ensure they are scoped to cover this type of decision-making technology, within the jurisdictional limitations noted above.

Scoping is crucial. The regulations' definition of AI should avoid being either over- or underinclusive. Overinclusive definitions will reach technology used in benign ways, while underinclusive definitions will exclude less-sophisticated algorithmic decision-making that

¹³ <https://law.stanford.edu/2024/06/29/how-will-ai-impact-racial-disparities-in-education/>

substantially contributes to discriminatory outcomes.¹⁴ In particular, the regulations’ definition should avoid defining “automated decision-making systems” or related terms as focused *solely* on machine learning, large language models, or natural language processing. Limiting it to sophisticated technologies such as those will exclude computerized decision-making algorithms that are already affecting people’s lives.

We suggest modeling the definition of automated decision-making systems on the definition proposed in the “Civil Rights Standards for the 21 Century”¹⁵ for algorithmic decision-making, which appropriately captures both AI and more rudimentary (but still critical) algorithms:

An “automated selection procedure” means a selection procedure that is based in whole or in significant part on machine learning, artificial intelligence, computerized algorithms, automated statistical or probabilistic modeling, or similar techniques.

This language strives to avoid both over- and under-inclusiveness, while also trying to future-proof the definition as algorithmic technology continues to evolve. Further, this definition accounts for algorithmic systems that are increasingly being integrated with more mundane software.

- **Discrimination based on protected categories:**

As mentioned prior, AI has the potential to greatly impact the vulnerable groups protected by civil rights law. While we recognize that AI may have the potential to improve efficiency and reduce costs in these realms (and is often advertised as such), we caution against its unfettered use in decision-making and its ability to make discriminatory choices. Any regulation should broadly preclude algorithmic discrimination against protected classes in, at a minimum, critical areas of life that have traditionally been protected by civil rights laws.

- **Validating claims regarding use and efficacy of AI:**

AI systems are often marketed as accurate, unbiased tools that organizations can use in a variety of ways to improve their work. However, the reality of how AI systems work (and sometimes don’t work) often diverges substantially from the advertised effects of these

¹⁴ For example, the proposed federal Algorithmic Accountability Act would reach “any system, software or process” that “serves as a basis for a decision,” which could scoop up word processing software that is used to draft a memo explaining a hiring decision. <https://www.congress.gov/bill/116th-congress/house-bill/2231>

¹⁵ <https://cdt.org/wp-content/uploads/2022/12/updated-2022-12-05-Civil-Rights-Standards-for-21st-Century-Employment-Selection-Procedures.pdf>

systems.¹⁶ There are now numerous examples of AI systems used in high stakes areas that have failed altogether or been largely dysfunctional, ranging from algorithmic systems that falsely flag thousands of individuals for benefits fraud, to facial recognition systems with reported 100% error rates.¹⁷ Though these systems are sometimes marketed as tools to “improve diversity,” they can do the opposite – worsening existing biases and enabling new kinds of discrimination.¹⁸

Vendors or developers of AI systems may make misleading claims about how the system performs, and false or misleading claims about an AI system’s capabilities can contribute to or create serious harm for consumers. As a result, it is critical that regulations address this issue to ensure users of AI systems are provided accurate information about how they work and don’t work.

The Federal Trade Commission has similarly described how developers’ statements about their AI systems may be deceptive, including, for example, exaggerated claims that AI-driven technology could test DNA or detect symptoms of melanoma.¹⁹ Similarly, the FTC has stated regarding AI-driven biometric technologies, “businesses must not make false or unsubstantiated claims about real-world validity, accuracy, or performance of biometric information technologies when the claims are based on tests or audits that do not replicate real-world conditions or how the technology will be operationalized by its intended users.”²⁰

- **Whether safe harbors can adequately protect people from risk of harm:**

Some AI development companies and model providers already have varying levels of safe harbors that monitor unforeseen vulnerabilities in the AI systems. Specifically, current safe harbors provide legal protections for researchers covering security issues like unauthorized account access, and not broader safety research like discriminatory impact of decision-making.²¹ We believe that protecting the ability to test for vulnerabilities in these systems is vital.

¹⁶ See, e.g., The Fallacy of AI Functionality, <https://dl.acm.org/doi/fullHtml/10.1145/3531146.3533158>; also see the AI, Algorithmic and Automation Incident and Controversy Repository (AAIRC) for numerous examples of AI failures.

¹⁷ <https://dl.acm.org/doi/fullHtml/10.1145/3531146.3533158>

¹⁸ <https://www.aclu.org/press-releases/aclu-files-ftc-complaint-against-major-hiring-technology-vendor-for-deceptively-marketing-online-hiring-tests-as-bias-free#:~:text=The%20ACLU%20also%20filed%20EEOC,Aon%20assessments%20as%20part%20of>

¹⁹ <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2025/01/ai-risk-consumer-harm>

²⁰ <https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-biometric-information-section-5-federal-trade-commission>

²¹ <https://knightcolumbia.org/blog/a-safe-harbor-for-ai-evaluation-and-red-teaming>

- **What types of review policies or other practices might adequately constitute safe harbors that are sufficiently protective:**

- **Sandbox Testing:** During development, manufacturers must implement a sandbox testing environment, which is a controlled, real-world simulation. This is necessary to test decision-making functions without actually impacting individuals and allows for early detection of discriminatory behavior.
- **Pre- and Post-Deployment Audits:** AI systems must undergo rigorous audits for discrimination, safety, and effectiveness before and after deployment. These audits should be independent, transparent, easily and publicly accessible, and conducted throughout the system's lifecycle.
- **Ongoing Monitoring and Mitigation:** Continuous post-deployment monitoring should assess real-world impacts, identify unintended consequences, and guide the development of new mitigation strategies. Systems should only be deployed if their benefits outweigh their harms, and all significant risks have been mitigated.
- **Decommissioning When Necessary:** If an AI system is proven to pose unacceptable risks or exhibits unmitigable discriminatory behavior, it should be decommissioned or prevented from use.

- **Notice, transparency, and disclosure:**

To further ensure transparency in the use of these systems, any regulations should ensure that the individual is granted meaningful notice that an AI-system is being used in the decision-making process, both before and after the decision has been made. An individual cannot object to the use of these models if they do not know they are being used. Notice prior to the use of an algorithmic system should describe, in plain language, the data the system relies on, what it purports to measure and how, and provide an opportunity to seek accommodations for disabilities or an alternative procedure. Notice following the use of an algorithmic system should explain the decision made, including the factors and data it relied on, and provide instructions on seeking recourse.

In the same vein, there should be a robust appeals process for any aggrieved individual to challenge a decision made by an AI system. Individuals should be allowed to submit corrections, provide supplementary information, seek human review of the determination, or opt for a human alternative to the algorithmic system. Developers and/or deployers of algorithmic systems should additionally make a version of their pre- and post-deployment audits and assessments publicly available.

- **Potential penalties or remedies if these products are regulated and those regulations, or other applicable laws, are violated:**

The regulations that are created will not be as strong as possible without a private cause of action for aggrieved individuals. We encourage the Attorney General to work to get this remedy added to the underlying statute. We believe that a private cause of action serves as a strong incentive to encourage compliance with the regulations. Individuals should have the ability to seek injunctive relief and damages in court for harms caused by discriminatory algorithmic systems.

Additionally, individuals should be provided with a meaningful opportunity to submit corrections, otherwise provide supplementary information, or challenge the algorithmic decision's validity, including seeking recourse to human review.

Thank you for the opportunity to submit these comments, and we hope they will be given careful consideration.

Submitted by:
Madalyn McGunagle, Policy Associate
American Civil Liberties Union of Rhode Island