Pre-Rulemaking Considerations for Colorado's Anti-Discrimination in AI Act

I.   **Introduction**

In May of 2024, Colorado enacted SB24-205, "concerning consumer protections in interactions with artificial intelligence systems," becoming the first U.S. state to adopt a law for the purpose of protecting consumers from algorithmic discrimination in consequential decisions made by high-risk artificial intelligence systems. Specifically, SB24-205 (the Anti-Discrimination in AI Law, or the "ADAI"), requires developers and deployers of high-risk artificial intelligence systems to use reasonable care to protect consumers from discrimination arising from use of those high-risk systems, obligates deployers and developers to disclose the use of AI systems that interact with consumers, and gives exclusive ADAI enforcement authority to the Colorado Attorney General. The ADAI also gives the Colorado Attorney General authority to "promulgate rules as necessary for the purpose of implementing and enforcing [the ADAI]."

The Colorado Department of Law ("Department") seeks input from interested persons to inform the drafting of effective rules that are consistent with the statute's intent. The Department has developed a public input and outreach strategy to provide a means to contribute feedback, perspective, and expertise in connection with the ADAI. We recognize that, during the upcoming legislative session, leaders of the bill have committed to consider revisions to the law. To that extent that commenters have suggestions along those lines, they are also welcome, and we are interested to know which aspects of the law commenters feel would be best addressed by regulations, and which changes would be more appropriately achieved through amendments to the ADAI itself.

In this first phase of the strategy, we welcome informal input from all members of the public about any aspect of the Department's rulemaking. Feedback is currently being collected through a publicly available comment form[1] and we may consider additional opportunities for informal input in the future.

Once the Department publishes a proposed draft set of ADAI rules, the Department will begin the formal notice-and-comment rulemaking phase, publishing a notice of rulemaking and the accompanying draft regulations on the Colorado Secretary of State website.[2] The notice-and-comment phase will include at least one formal hearing as well as a continued opportunity to submit comments. Formal rulemaking will be governed by the Colorado Administrative Procedures Act (APA)[3] and comments received during the formal rulemaking process will be automatically included in the rulemaking record.

We encourage consumers, stakeholder organizations, regulated entities, and other interested parties to participate in each phase of this process by providing comments and input relevant to any area of the ADAI. Comments may address, but are not limited to, areas that require clarification, consumer concerns, anticipated compliance challenges, unintended consequences of the law, barriers presented to new entrants, impacts of the ADAI on business or other operations, cost concerns, and any underlying

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[1] Online comment form available at: https://coag.gov/colorado-anti-discrimination-in-ai-law-2024-pre-rulemaking-comments/
[2] When published, the rules will be available at sos.state.co.us. To receive updates from the Secretary of State, please sign up at https://www.coloradosos.gov/CCR/EmailSubscription.do.
[3] COLO. REV. STAT. § 24-4-103.

or related research or analyses. In addition, we provide a list of topics and questions below for which we welcome specific feedback. Please note that these topics and questions are not intended to limit input or indicate that the Attorney General is predisposed to any position or action.

II.   Principle-guided rulemaking

To enhance the public's understanding of how the Department of Law will approach this rulemaking, the Department offers five principles to help implement the ADAI. In the Department's rules, the Department seeks to:

- **Protect consumers from algorithmic discrimination by high-risk systems**. The rules should help to effectively protect consumers from algorithmic discrimination – and reasonably likely harms - caused by the use of high-risk AI systems, and ensure that any disclosures required to consumers are appropriate and readily understandable.
- **Encourage innovation**. The rules should not unduly burden the development of creative, adaptive solutions and positive technological advances. It is clear that there are a range of benefits promised by the use of artificial intelligence and Colorado, as a technology hub, is interested in supporting companies who develop and deploy such new technologies.
- **Harmonize**. The rules should facilitate interoperability and help situate the ADAI alongside existing and forthcoming protections and obligations created by other state, national, and international frameworks.
- **Clarify ambiguities**. The rules should clarify the law where necessary to promote compliance and minimize unnecessary disputes.
- **Facilitate efficient and expeditious compliance**. The rules should help developers and deployers understand how to comply with the law by describing simple and straightforward processes to comply with ADAI requirements.

As the Department considers public input, it will examine how any recommendations and concerns address and advance these key principles.

III.   Targeted questions for informal input

Below are topics and questions for which the Department believes informal, pre-rulemaking feedback will be particularly beneficial. The Department hopes to hear from a diverse group of stakeholders to guide the drafting of balanced and impactful regulations.

1. Overarching questions

As the Department considers drafting rules for the purpose of implementing and enforcing the ADAI, the Department is mindful of the role that regulations and enforcement may play, and the need for a targeted, effective, and efficient regulatory approach, and the need to avoid unintended consequences. Comments in response to the following questions will assist the Department in considering overarching concerns in ADAI rulemaking.

- What aspects of the law would be best addressed or clarified by regulations versus by re-drafting the legislation? What is the best role for regulations that the Department can create?

- What are the most important elements of regulations that the Department can create to effectively protect consumers from discrimination, while welcoming innovation and ensuring that early-stage companies have the opportunity to develop and deploy AI systems?
- Are there ways that regulatory guidance can help to ensure the ADAI is sufficiently tailored to prevent the harms contemplated and is not overbroad so as to impose burdens that don't address any reasonably likely harms?
- What are potential unintended consequences of the ADAI? Is there a way that regulatory guidance and enforcement guidance can minimize those unintended consequences?
- What role do transparency and testing requirements play in preventing high-risk artificial intelligence systems from contributing to illegal or harmful discrimination? How can regulatory guidance support the important elements of transparency and testing requirements?

2. Definitions

The ADAI defines "Artificial Intelligence System" as "any machine-based system that, for any explicit or implicit objective, infers from the inputs the system receives how to generate outputs, including content, decisions, predictions, or recommendations, that can influence physical or virtual environments."[4] When an Artificial Intelligence System is deployed and "makes, or is a substantial factor in making, a consequential decision," it is considered a "High-Risk Artificial Intelligence System."[5] A "Consequential Decision" is a decision that has a "material legal or similarly significant effect" related to "education enrollment or an education opportunity; employment or an employment opportunity; a financial or lending service; an essential government service; health-care services; housing; insurance; or a legal service."[6] Comments in response to the following questions will assist the Department in considering the concerns relating to the definitions under the ADAI.

- How could regulations clarify the current definitions of "Artificial Intelligence System" or "High-Risk Artificial Intelligence System"? How can they provide guidance to ensure that these definitions are not interpreted too broadly or narrowly? What are concerns if the definition is interpreted too broadly or too narrowly?
- Are there frameworks or other laws that the Department can look to in drafting regulations related to the definitions of "Artificial Intelligence System" and "High-Risk Artificial Intelligence System"?
- Is the definition of "substantial factor" sufficiently clear? Would additional guidance be helpful in enabling companies to determine whether an AI system is a substantial factor in making consequential decision?
- Are the definitions of "developer" and "deployer" sufficient? Is there any guidance that would help to determine whether a company is a "developer" or "deployer"? Are there other roles that should be accounted for?
- Are there any definitions missing from the ADAI or issues with other definitions contained in the ADAI that could be further refined or clarified through regulations?

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[4] COLO. REV. STAT. § 6-1-1701(2).

[5] *Id.* § 1702(9)(a).

[6] *Id.* § 1702(3).

3. Developer Documentation and Requirements

The ADAI creates a developer duty to avoid algorithmic discrimination, which requires developers to "use reasonable care to protect consumers from any known or reasonably foreseeable risks of algorithmic discrimination arising from the intended and contracted fuses of the high-risk artificial intelligence system."[7] It also creates a rebuttable presumption of reasonable care if the developer complies with that section, "and any additional requirements or obligations as set forth in rules promulgated by the Attorney General pursuant to Section 6-1-1707."[8] The ADAI then sets forth those statutory developer requirements. Comments in response to the following questions will assist the Department of Law as it considers regulations regarding developer requirements and obligations.

- What additional requirements or obligations should entitle a developer to a rebuttable presumption that the developer used reasonable care to protect consumers from discrimination?
- What are the essential proactive measures that developers can take to effectively prevent high-risk AI systems from contributing to harmful discrimination? What are some of the other most effective proactive measures that developers can take?
- What methods are currently used most often by developers to prevent high-risk AI systems from contributing to harmful discrimination?
- What are the associated costs, burdens, and barriers with different proactive measures? Which measures are most and least impracticable for new entrant developers?
- Which AI systems are most high-risk and why? Are there some AI systems that present such high-risk that the benefits of proactive disclosures and measures outweigh the burdens?
- What are some effective existing frameworks, requirements, guidelines, or policies that the Department can look to in drafting regulations regarding measures that developers can take to effectively prevent high-risk AI systems from contributing to harmful discrimination?
- What are the roles of downstream developers? How, if at all, should the obligations of downstream developers compare to or vary from the obligations of primary developers?
- What responsibilities should rest with developers versus deployers? What is the rationale for imposing any obligations on deployers and what best justifies obligations imposed on developers?
- Is the trade secret/security exception sufficient to protect such concerns?

4. Deployer Requirements

The ADAI creates a duty for deployers of high-risk artificial intelligence systems to "use reasonable care to protect consumers from any known or reasonably foreseeable risks of algorithmic discrimination."[9] It also creates a rebuttable presumption of reasonable care if the developer complies with specific requirements, including that deployers of high-risk artificial intelligence systems implement a risk

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[7] *Id.* § 1702(1).
[8] *Id.*
[9] *Id.* § 1703(1).

management program and policy[10] and complete an impact assessments related to the deployment of such systems[11], make specific disclosures to consumers regarding the use of high-risk artificial intelligence systems[12], make specific disclosures to the Attorney General upon discovering that a high-risk algorithmic intelligence system has caused discrimination[13], allow for an appeal when a high-risk artificial intelligence system is used to make an adverse consequential decision about a consumer[14], and "any additional requirements or obligations as set forth in rules promulgated by the Attorney General pursuant to Section 6-1-1707."[15] Comments in response to the following questions will assist the Department of Law as we consider regulations regarding deployer requirements and obligations.

- What additional requirements or obligations should entitle a deployer to a rebuttable presumption that the deployer used reasonable care to protect consumers from discrimination?
- What types of disclosures are most beneficial to consumers concerning the use of high-risk artificial intelligence systems?
- What are the benefits associated with proactive disclosures regarding instances of algorithmic discrimination to state officials? What are the burdens?
- How often and in what circumstances do companies purchase and deploy third-party artificial intelligence systems without further modification or customization?
- In what circumstances would a company customize, modify, or use proprietary data to refine a third-party artificial intelligence system prior to use?
- What internal documentation or impact assessments do deployers of artificial intelligence systems currently use to mitigate against the risk of bias or discrimination in their use of artificial intelligence before deploying third-party artificial intelligence systems? Are these different than when a company customizes or modifies a third-party artificial intelligence system? What elements are commonly included? How often are they revised? How are they typically maintained?
- Are there artificial intelligence risk management frameworks currently available that accurately and appropriately account for the risks associated with bias and discrimination?
- What current methods do deployers use to vet or conduct due diligence on artificial intelligence systems acquired from third parties for potential bias or discrimination prior to use? To what extent and when should deployers be able to rely on the assessment efforts and due diligence of deployers of artificial intelligence systems without any additional assessment or evaluation?
- What current methods do deployers use for internal testing of artificial intelligence systems acquired from third parties for potential bias or discrimination prior to use? How often is this testing done?
- How and when do deployers currently communicate with developers of the artificial intelligence systems used when their use results in discrimination or a discriminatory impact?
- What are the benefits associated with allowing consumers to appeal an adverse decision made by a high-risk artificial intelligence system? What are the burdens?

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[10] *Id.* § 1703(2).
[11] *Id.* § 1703(3).
[12] *Id.* § 1703(4).
[13] *Id*. § 1703(7).
[14] *Id.* § 1703(4)(b)(III).
[15] *Id.* § 1703(1).

- What are the benefits associated with allowing consumers to appeal an adverse decision made by an artificial intelligence system directly to a business or deployer? What are the burdens?
- How are deployers currently complying with requirements to allow consumers to opt-out of the use of artificial intelligence when used for profiling under the Colorado Privacy Act (6-1-13-6(1)(a)(I)(C)) and similar laws?
- How could regulations help clarify the trade secret exception (6-1-1703(8))?

5. Impact Assessments

Under Section 6-1-1703(3), the ADAI requires a deployer to "complete an impact statement for the high-risk artificial intelligence system"[16] and update it annually or after substantial modification of the high-risk artificial intelligence system. The ADAI then sets forth the statutory requirements the impact assessment must include. Comments in response to the following questions will assist the Department of Law as we consider regulations regarding impact assessment requirements and obligations.

- What are the benefits of a deployer risk assessment? What are the burdens or costs of creating a risk assessment? What barriers are more easily overcome by incumbent deployers than new entrant deployers?
- Can regulations help ensure that risk assessments are useful and contain the most effective elements?
- Are there standardized risk assessment models or frameworks that the Department should review or consider in drafting regulations relating to risk assessments? Would standardized model cards be useful for a risk assessment?
- How often should the risk assessment be made available to the Attorney General under 6-1-1703(9)?

6. Consumer Disclosures

When a developer or deployer makes available an artificial intelligence system that is intended to interact directly with consumers, the ADAI in Section 6-1-1705 requires the developer or deployer to disclose to consumers that they are interacting with an AI system. This disclosure requirement does not apply where it would be obvious to a reasonable person that they are interacting with an AI system. Comments in response to the following questions will assist the Department in considering regulations relating to consumer disclosures under the ADAI.

- In what circumstances is it "obvious to a reasonable person that the person is interacting with an Artificial Intelligence System"? Would clarification of the parameters of these circumstances be helpful?
- What methods work best for ensuring disclosure to consumers that they are interacting with AI systems?
- Do you have any concerns with the mechanics of the disclosure requirement?

7. Enforcement

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[16] *Id.* § 1703(3).

The ADAI gives the Attorney General exclusive enforcement authority[17], and violations of the requirements of the ADAI also constitute an unfair trade practice under the Colorado Consumer Protection Act.[18] For enforcement actions by the Attorney General, Section 6-1-1706(3) of the ADAI provides an affirmative defense for developers or deployers that (i) discover and cure a violation as a result of feedback from others, adversarial testing or red teaming, or an internal review process, and (ii) are otherwise in compliance with the "Artificial Intelligence Risk Management Framework" published by the National Institute of Standards and Technology, another nationally or internationally recognized risk management framework for AI systems with requirements that are substantially equivalent to or more stringent than the ADAI, or any risk management framework for AI systems that the Attorney General designates. Comments in response to the following questions will assist the Department in considering regulations relating to enforcement.

- What clarifications, if any, are needed with respect to the requirements for the affirmative defense as laid out in Section 6-1-1706(3)?
- Are there other risk management frameworks for artificial intelligence systems (other than the Artificial Intelligence Management Framework published by the National Institute of Standards and Technology) that you would encourage the Department to consider designating for purposes of the affirmative defense?
- Are there examples of enforcement frameworks that work well in the context of artificial intelligence?

8. Interoperability

The Department undertakes this rulemaking as an official of the State of Colorado entrusted with protecting the people of this state. At the same time, the ADAI and the rules protect Coloradans participating in national and global markets and networks. Similarly, the ADAI and the rules coexist with similar laws in other local, state, national, foreign, and international jurisdictions. The Department invites feedback and information to assist in rulemaking in these complex contexts, such as:

- What does the ADAI do differently from laws in other jurisdictions?
- What does the ADAI do the same as laws in other jurisdictions?
- Where does the ADAI overlap with laws of other jurisdictions in ways that should be considered in the ADAI rulemaking? How can the rules address these overlaps in a way that would best avoid confusion and compliance conflicts?
- What laws or regulations related to high-risk artificial intelligence are developers and deployers in Colorado already complying with?

9. Additional Topics

The Department invites any additional input relating to the ADAI that should be considered during the rulemaking process. This may include, but is not limited to, areas that may need further guidance or clarity, areas that may be confusing to consumers, consumer rights request or compliance obstacles, the

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[17] *Id.* § 1706(1).
[18] *Id.* § 1706(2).

impact of the law on business operations, and any information, analysis, or examples that can further illustrate or support any comments or positions.

IV.   Further information

To submit a comment on these considerations, the ADAI comment portal is available at https://coag.gov/colorado-anti-discrimination-in-ai-law-2024-pre-rulemaking-comments/. The Department further encourages members of the public to visit coag.gov/ai to view submitted comments, join the ADAI mailing list, and to find additional information about the ADAI.