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February 2, 2024

Department of Commerce
National Institute of Standards and Technology
100 Bureau Drive
Gaithersburg, MD 20899

Via electronic submission on www.regulations.gov

Re: NIST-2023-0009, Request for Information (RFI) Related to NIST's Assignments under Sections 4.1, 4.5 and 11 of Executive Order 14110 Assignment (Sections 4.1, 4.5, and 11)

Dear Secretary Raimondo and Director Locascio:

Consumers' Research, Inc. ("Consumers Research") submits this response to the RFI to urge the Department of Commerce and NIST not to use the fig leaf of AI regulation to further implement the Biden Administration's unpopular whole-of-government equity agenda, and instead to focus any AI-related efforts on working through Congress and the democratic process to address AI risks and promote competition and innovation in this new industry. While there are risks to AI that should be considered, that should be done through the democratic process. In addition, there are officials who currently do have authority that could be applied to AI (e.g., state Attorneys General who enforce UDAP laws). In contrast, the Biden Administration's "equity" agenda is contrary to civil rights laws and will harm consumers by using government regulation in the name of "safety" to achieve political objectives unrelated to the safe development and deployment of AI for consumers.

Consumers' Research represents the interests of household consumers in all areas of consumer spending. It is an independent educational 501(c)(3) nonprofit organization whose mission is to increase the knowledge and understanding of issues, policies, products, and services of concern to consumers and to promote the freedom to act on that knowledge and understanding.¹ Since 1929, Consumers' Research has been asking the foundational question: Who — or what — best serves consumer wellbeing?² In their book 100,000,000 Guinea Pigs, founders Frederick J. Schlink and Arthur Kallet wrote about a need to provide "the consumer some manner of defense against" the shortcomings of the 1930s-era consumer education. In 1981, newly-appointed editor M. Stanton Evans helped guide Consumers' Research through its expansion from a product-focused organization to one that also considers the effects that laws, regulations, and government programs have on consumers. Today, Consumers' Research leadership continues that legacy.

¹ <https://consumersresearch.org/>

² <https://consumersresearch.org/history/>

AI regulations clearly have the potential to impact consumers directly, as this new technology is incorporated into products and services that consumers will use and come to rely on. In fact, consumers will likely interact more and more with generative AI in the coming years. There are undoubtedly risks that need to be considered as AI is widely adopted and used, but it is also critical that companies compete over price and quality and respond to consumer demand as they develop new products, rather than use regulatory barriers to hamper competition or to pursue unpopular agendas. This comment further explains why NIST must forcefully reject the Biden Administration's attempt to inject "equity" into AI regulation.

A. The Department and NIST Should Not Use Government Regulation of AI to Advance the Biden Administration's "Whole-of-Government Equity Agenda"

Consumes Research urges you not to follow the Biden Administration's AI Executive Order down the path of pushing a racial "equity agenda" on U.S. businesses and consumers.³ In Executive Order 14110 (the "AI Executive Order"), the Biden Administration used the excuse of rapid advances in AI to further implement its "whole-of-government" approach to push an unlawful, undemocratic, and unpopular "equity" agenda.⁴ The AI Executive Order suggests that company testing of AI must eliminate "harmful or discriminatory outputs," and the Biden Administration has previously made clear (including in its "AI Bill of Rights") that it believes "discrimination" includes failures to "ensure equity" for certain politically-connected groups.

Both the AI Executive Order and NIST's RFI pursuant to that Order use terminology that could well include advancing the Biden Administration's "equity" agenda. The AI Executive Order states that companies must report on "AI red-team testing based on guidance developed by NIST."⁵ Such testing is an "effort to find flaws and vulnerabilities in an AI system ... such as harmful or discriminatory outputs from an AI system."⁶ The RFI implements this order by seeking methods for measuring AI systems' "impacts on equity."⁷ The RFI also seeks information regarding "[c]urrent red-teaming best practices for AI safety, including identifying threat models and associated limitations or harmful or dangerous

³ The White House, *Meeting a Milestone of President Biden's Whole-of-Government Equity Agenda* (2021), <https://www.whitehouse.gov/omb/briefing-room/2021/08/06/meeting-a-milestone-of-president-bidens-whole-of-government-equity-agenda/>; see The White House, *Remarks by President Biden at Signing of an Executive Order on Racial Equity* (2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/26/remarks-by-president-biden-at-signing-of-an-executive-order-on-racial-equity/> (Statement by President Biden that "we need to make the issue of racial equity not just an issue for any one department of government; it has to be the business of the whole of government" and that he issued a "whole-of-government executive order that will, for the first time, advance equity for all throughout our federal policies and institutions.").

⁴ Executive Order 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, 88 Fed. Reg. 75191 (Nov. 1, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-11-01/pdf/2023-24283.pdf>.

⁵ AI Executive Order, § 4.2(i)(C).

⁶ AI Executive Order, § 3(d).

⁷ *RFI related to NIST's Assignments Under Sections 4.1, 4.5 and 11 of the Executive Order Concerning Artificial Intelligence (Sections 4.1, 4.5, and 11)*, 88 Fed. Reg. 88368, 88369 (December 21, 2023).

capabilities.”⁸

B. “Equity” As Used By the Biden Administration Actually *Promotes* Unlawful Discrimination and Restricts Outcomes

“Equity” is a vague, ill-defined political term subject to abuse, because it advocates for giving predetermined outcomes to certain groups. Near the end of the 2020 presidential race, the Biden-Harris campaign released a video to demonstrate the “big difference between equality and equity.”⁹ The narrator, Vice President Harris, states that equitable treatment means “we all end up *at the same place*.”¹⁰ On another occasion, Vice President Harris also clearly stated that equity was not about equal opportunity, but equal *outcomes*, stating that “we must understand what are disparities and then accommodate and adjust for those disparities if we want equal outcomes.”¹¹ Simply put, the federal government does not have the authority to use AI supervision to impose its view of everyone ending up “at the same place.” Nothing in the AI Executive Order or the RFI suggests that Congress has ever acted to confer such a controversial and economically significant power on the Department of Commerce.

The Administration’s continuing emphasis on “equity” rather than “equality” also flies in the face of Supreme Court precedent. Earlier this year, the Supreme Court re-emphasized that the government cannot engage in racial discrimination and that “[e]liminating racial discrimination means eliminating all of it.”¹² The Court also has cautioned that racial classifications are too often “overbroad,” “arbitrary,” and “imprecise,” yet the Biden Administration bases its AI policy on such classifications.¹³

C. To the Extent NIST Addresses Discrimination In Its Forthcoming AI Standards, It Should Adhere to the Protections of the Civil Rights Laws

If NIST’s forthcoming standards address discrimination at all, they should solely reference conduct covered by civil rights statutes, which prohibit unlawful discrimination across the board.¹⁴ Such an

⁸ *Ibid.*

⁹ Kamala Harris, Twitter (Nov. 1, 2020), <https://twitter.com/kamalaharris/status/1322963321994289154?lang=en>.

¹⁰ *Ibid.* (emphasis added).

¹¹ The White House, *Remarks by Vice President Harris in a Moderated Conversation with Terrence J Kicking off the National “Fight for Our Freedoms” College Tour*, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/09/14/remarks-by-vice-president-harris-in-a-moderated-conversation-with-terrence-j-kicking-off-the-national-fight-for-our-freedoms-college-tour/>.

¹² *Students for Fair Admissions v. Harvard*, 600 U.S. ____ (slip op., at 15) (June 29, 2023).

¹³ *Compare Students for Fair Admissions v. Harvard*, 600 U.S. ____ (slip op., at 25) (June 29, 2023) (noting that the term “Asian” is overbroad, that “Hispanic” or “Latino” is undefined, and that Harvard had no classification for Middle Eastern individuals), with EO 13985, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/> (referring to “Asian Americans” and “Latino” individuals and not mentioning individuals from the Middle East).

¹⁴ This subsection should not be interpreted as conceding that the Department of Commerce or NIST presently has such authority.



approach must conclusively reject the contrary approach in the Administration's Blueprint for an AI Bill of Rights, which defines preventing discrimination as "designing [AI] to ensure equity, broadly construed" and lists specific groups of people AI developers should protect.¹⁵ The Biden Administration's Blueprint repeatedly stresses that AI developers should focus on "*the underserved communities mentioned in the equity definition*,"¹⁶ and the "identified groups,"¹⁷ stating that a "disparity against *an assessed group*" is identified, it must be "mitigated" or the entire system "should be reconsidered."¹⁸

NIST must firmly reject this approach because it is arbitrary and can lead to absurd results. For example, the Biden Administration singles out a half-dozen categories of sexual orientation for specific protection, such as the "intersex."¹⁹ But those same definitions do not mention any specific religious minorities, such as Jews. Such political bias demonstrates why our laws protect *everyone* against discrimination based on protected criteria, and not just specific groups.

* * *

Artificial intelligence regulation should be based on laws enacted by Congress, not the Biden Administration's present political agenda. In particular, NIST should not follow the same path as the AI Executive Order and use AI Regulation for the purpose of embedding a misguided and illegal concept of "equity" into products and services that consumers will use and rely on in the coming years. If discrimination is referenced at all in NIST's standards, such reference should be based solely on conduct covered by civil rights statutes, which prohibit unlawful discrimination across the board.

Sincerely,

Will Hild

Will Hild
Executive Director

¹⁵ The White House, *Algorithmic Discrimination Protections*, <https://www.whitehouse.gov/ostp/ai-bill-of-rights/algorithmic-discrimination-protections-2/>.

¹⁶ *Ibid.*

¹⁷ *Ibid.* (emphasis added).

¹⁸ *Ibid.* (emphasis added).

¹⁹ *Ibid.*