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Travis Hall
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U.S. Department of Commerce
1401 Constitution Avenue NW, Room 4725
Washington, DC 20230

Subject: AI Accountability Policy Request for Comment

My comment addresses only question 19, "As governments at all levels increase their use of AI systems, what should the public expect in terms of audits and assessments of AI systems deployed as part of public programs? Should the accountability practices for AI systems deployed in the public sector differ from those used for private sector AI? How can government procurement practices help create a productive AI accountability ecosystem?"

The basic background of rulemaking is representation in democratic government. Congress is elected, so is accountable to the people at election time. Administrative agencies are operated by employees who are hired. Accountability does not come from elections. The rulemaking process provides accountability. Agency statements to implement or interpret law are subject to public notice and comment, and the public notice and comment provides accountability to the public. Accountability to the public is central to democracy. Regardless of what agencies have done in the past, or how they have deviated from that, accountability to the public is a requirement of democracy and should be the central focus for what should be done. The federal government and all 50 states have a rulemaking process and they have it because accountability to the public is fundamental to democracy.

Software implementing government law or policy is a rule and should go through the rulemaking process. It is a current cultural norm to bypass rulemaking when taking a process from paper to electronic, for example, when computerizing paper forms or a rubric, the paper form might go through notice and comment, while a computerized version of that form does not, even when on the computerized version answers to an earlier question might result in skipping to a later question and hiding the questions in between in a way that isn't possible on a paper form. That's a violation of the rulemaking process, and existing accountability through rulemaking should be recognized and required for software used by agencies to implement, interpret, or prescribe law or policy. A piece of software which makes decisions about individual people is not an adjudicator, but rather is a rule, because the logic encoded in that program gets applied to many people over and again in a consistent way. Additionally, the Administrative Procedure Act allows for adjudication with an "employee" presiding. 5 USC 554(d). When an automated process rather than an employee presides, that's within the Administrative Procedure Act's provisions on rulemaking rather than adjudication.

A rule is, “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”. 5 USC 551(4).

Rulemaking requirements do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice". 5 USC 553(b)(3)(A). What distinguishes a rule from a policy statement is whether the agency intends to be bound. If an agency actually applies the results of a calculation or decisionmaking system in most cases, then that’s a rule and should go through mandatory rulemaking. See U.S. Telephone Ass’n v. F.C.C., 28 F.3d 1232, 1234 (1994) noting that a schedule of fines was a rule rather than a policy statement because in over 300 applications of the rubric, the agency deviated from the fine calculated under that schedule in only 8 cases. Similar to a schedule, code has embedded calculations in it. When the code is a decision tree or mathematical calculation which is hard coded, that code is applying a calculation. When the code is a trained algorithm which has processed training data and is now trained in a specific was, that code is applying a calculation. The difference between a hard coded mathematical calculation and a trained algorithm is transparency and how easy it is to look at the code and extract what schedule or rubric it is applying. It’s still applying a rubric. If a trained algorithm were not consistent in how it processes things, that would be arbitrary and capricious government action. 5 USC 706(2)(A). If it is consistent, it’s a rule or policy statement. And the dividing line between rule and policy statement is whether or not the agency tends to rely on it, versus independently reassessing most individual cases. U.S. Telephone Ass’n v. F.C.C., 28 F.3d 1232, 1234 (1994). If an agency usually tends to follow a recommendation from a piece of code in most cases before it, then that’s a rule.

Rules are subject to rulemaking and “shall” go through a public notice and comment process. 5 USC 553(b). Putting rubrics, schedules, and decision making rationales into code makes them less transparent and doesn’t remove that requirement to go through rulemaking. It being software, rather than a paper rubric / schedule / decision tree doesn’t remove this requirement. The software being more complex and applying more factors than a traditional decision tree doesn’t remove this requirement. Using a contractor to maintain or supply the software as opposed to maintaining the software in-house doesn’t remove this requirement. If it’s a rule (5 USC 551(4)), then it must go through the rulemaking process (5 USC 553(b)).

Rulemaking is a clearly defined and structured process. That’s described simply and concisely in A Guide to the Rulemaking Process, Office of the Fed. Register, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf . There are instructions about how to do this. All 50 states have some version of rulemaking which parallels the federal process. Government operates with this process, and balances of fairness and efficiency come up all the time in rulemaking and are addressed. If it needs to be fast, there is direct final rule or emergency rulemaking. We already have models for matching the pace of natural disasters For example, Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3476 (Jan. 21, 2010) regarding immigration status of citizens of Haiti put through less than 3 weeks after an earthquake in response to the earthquake. For example, Notification of Arrival

Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the People's Republic of China, 85 Fed. Reg. 6044 (Feb. 4, 2020) regarding travel restrictions in response to COVID 19. The rulemaking process is well established, and can accommodate speedy action when needed.

It's important for all federal agencies to send through the existing and mandatory rulemaking process all decision making software used by government, which acts as a rubric or schedule, and hence is a rule. The rulemaking process would provide transparency and up front quality control, and allow public comment or challenges before an algorithm does harm. When an algorithm implements, interprets, or prescribes law or policy, rulemaking is mandatory. See 5 USC 551(4) and 5 USC 553(b). This is how our country implements public participation in agency action, in light of agency heads and employees being hired or appointed but not elected. Without rulemaking, government would not be accountable to the people. Rulemaking is central to democracy. It's important for all agencies to recognize that when rules are written into computer code, and computer code makes decisions to implement law and policy, that that is subject to rulemaking and that the rulemaking process is already mandatory.

Sincerely,
Wilhelmina Randtke